



All Foundings Are Forced

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All Foundings Are Forced

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All Foundings Are Forced

Arthur Isak Applbaum¹

1. On March 5, 2011, after its first meeting in Benghazi, the newly formed and self-appointed “Transitional National Council of the Republic of Libya” proclaimed itself “the only legitimate body representing the people of Libya and the Libyan state.”² Five days later, after consultations with a couple of defected Libyan diplomats who may have been freelancing, the French Foreign Ministry announced that France recognized the Transitional National Council as “the legitimate representative of the Libyan people.”³ The council was led by a man who, before the uprising, was Qaddafi’s minister of justice, and comprised an assortment of lawyers, businessmen, professors, and other defectors from the Libyan government. Unlike its neighbor Egypt, Libya lacked much of an organized opposition before the seemingly spontaneous uprising of February 15. The mostly young protesters transformed themselves into loose bands of fighters without plan. Their early successes in the eastern cities from Benghazi to Tobruk and in the towns surrounding Tripoli should be attributed to the early panic and disarray of Muammar Qaddafi’s loyalists as much as to the rebels’ unquestioned courage. Three squabbling ex-generals claimed to command a few thousand

¹ Adams Professor of Democratic Values, Harvard Kennedy School of Government. Prepared for a conference at the University of Graz, Austria in May 2011. I am grateful to Pranay Sanklecha for comments. Portions of this paper borrow, with modifications, from Arthur Isak Applbaum, “Forcing a People to Be Free,” *Philosophy & Public Affairs* 35 (2007), pp. 359-400.

² Transitional National Council of Libya, <<http://ntclibya.org/english/about/>>.

³ France Diplomatie, <http://www.diplomatie.gouv.fr/en/country-files_156/libya_283/libya-national-transitional-council-10.03.11_15202.html>.

untrained, ill-equipped, ragtag fighters, along with perhaps one thousand army defectors, all the while disputing each other's authority.

The *de facto* success of any popular uprising or coup d'état depends on the probability of reaching a self-fulfilling equilibrium: will enough actors judge quickly enough that the rebellion will succeed for them to risk joining in, thereby collectively assuring the success that each predicted? The strategy of every rational revolutionary or junta therefore is to assemble, before reaching the fatal point of no return, as much of a winning coalition as possible without detection by the regime in power. History perhaps will show this to be an overstatement, but the Libyan revolution at its start was no one's rational strategy, much less the strategy of the worthy members-to-be of the Transitional National Council. They did not plan the uprising, they did not trigger it, and – on the day that they announced themselves to be the only legitimate body representing the Libyan people – they did not control it. On no plausible account of how a people or a state come to be represented could the council claim to have represented the Libyan people or state on the 5th of March: they were not rightful successors to authority on any account of pedigreed succession; they were not chosen in any procedure, either customary or newly invented, by the people they claimed to represent; they did not secure the basic rights and liberties of the people they claimed to represent; they were not better guides to the practical reasons that applied to individual Libyans than were those individuals themselves; they did not even control the territory of most of the people they claimed to represent.

All this is so, not because the tyrant had some superior claim to pedigree, consent, rights protection, or normative guidance. Had Qaddafi set sail to his Elba early in the uprising, leaving factional chaos behind, the council would have faced no lower hurdle of justification. No Law of the Conservation of the General Will exists, such that legitimacy may neither be created nor destroyed,

only changed from form to form. So suppose that, whatever is the correct view of justified revolution against a tyrannical regime, Libya on March 5 was a legitimacy-free zone: a Hobbesian condition of nature, a Lockean state of war, a Kantian barbarism. The claim to title of the Transitional National Council still appears to be unmoored.

Yet there was strategic logic in France's early recognition of the council as the legitimate representative of the Libyan people: saying so might make it so. Under the right conditions, recognition of legitimacy also is self-fulfilling. Despite the rather vaporous existence of the Transitional National Council, its claim to speak for the revolution was widely accepted both at home and abroad. No other group arose to question its leadership. Alas, France made its declaration just as the Qaddafi regime was regaining its footing, on the day that would turn out to be the rebels' most extensive advance for quite some time. Qaddafi's forces pushed the rebels back to the outskirts of Benghazi, triggering the UN Security Council's authorization of a no-fly zone on March 17. NATO airstrikes thwarted his advance on Benghazi but could not, from the air, turn the rebels into an effective fighting force. On the factual ground, the conflict stalemated for quite some time. Not until October 20, 2011, with the killing of Colonel Muamar Qaddafi, did Libya's revolutionaries achieve their long-anticipated military victory.

On normative grounds, despite our deep admiration and empathy for those who rise up against tyranny, we must fret about how the normative power to govern Libya is created and conferred on this or any other ruling body or its successors. The source of this anxiety is easily placed. We hold two intuitions about legitimacy rather deeply, though not literally. The first is that political legitimacy requires, in some sense, the consent of the governed. The second is that political legitimacy is acquired only through proper pedigree or procedure.

Together, we might call these intuitions the *consensual pedigree folk theory*. Theory of course is too strong. Few upon reflection still hold to John Locke's idea that political societies are founded only upon the explicit consent of individuals who unanimously contract to institute procedures of governance by majority rule, but the twin intuitions still exert pull. Hence the worry, for the Transitional Council of the Republic of Libya did not and could not rule with the consent of those it purported to govern, and did not and could not have acquired its powers through proper pedigree.

2. Beginning with Kant, social contract accounts of political legitimacy have changed in two complementary but distinguishable ways: first, the *ab ovo* question of how a legitimate political order is founded has been replaced by the *in medias res* question of what makes an ongoing political order legitimate. Second, the condition of actual consent, and the consequent specification of a contractual primal scene, has been replaced by conditions of possible or hypothetical consent, and the consequent specification of a philosophically convincing model of idealized agreement. The two developments are complementary, for once actual consent is seen as unnecessary (and perhaps insufficient) to ground political legitimacy, the search for both the normative specification of a legitimate founding and its historical moment may be called off. Says Rawls, "Political society is not, and cannot be, an association. We do not enter it voluntarily. Rather we simply find ourselves in a particular political society at a particular moment in time."⁴ Indeed, for Kant, the search must be

⁴ John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001), p. 4.

called off. "A people should not *inquire* with any practical aim in view into the origin of the supreme authority to which it is subject."⁵

For both Kant and Rawls, the double move away from actual consent at some historical founding moment is no concession to realist politics. Since almost all of the earth's inhabitants already live in ongoing political societies, the *in medias res* question is our question, and since almost all of the earth's inhabitants have no real alternative to living out their lives within the political society in which they are born, let alone the alternative of living outside of any political society, voluntary actual consent is not an option. The claim is not that most inhabitants do not consent, or will not consent. To have the conditions of legitimacy influenced by such facts indeed would be a concession, and therefore be political in the wrong way. But if consent is a transaction between independent persons, rather than simply an approving mental state, inhabitants *cannot* give genuine consent: the background conditions make unforced consent impossible for most of us.

3. This paper takes political legitimacy to be the moral power to govern—a power that, correlatively, incurs some sort of moral liability upon those properly subject to it. To govern, to have a moral power, and to be subject to a moral liability hardly are transparent ideas, but it is not my purpose to explicate them fully here. Elsewhere, I have argued that the moral liability generated by legitimate governance need not always be moral obligation, but could sometimes be a less demanding change in the subject's normative situation such as a change

⁵ *The Metaphysics of Morals* (1797), Ak. 6: 318, in Immanuel Kant, *Practical Philosophy*, ed. Mary J. Gregor (Cambridge University Press, 1996).

in the moral rights, immunities, and social facts affecting the subject.⁶ But the argument here does not turn on the correctness of that claim. All that I need to say here is that the moral power to govern is something more than merely the moral permission to coerce.⁷

Political legitimacy is a three-place relation: A legitimately governs B in context C, where C specifies the domain and scope of A's jurisdiction with respect to B. An account of political legitimacy needs to explain how an agent's moral power to govern attaches to a particular subject in a particular context. The folk theory's answer is that each individual subject consents (in some way) to be governed by those agents who have the proper pedigree (in some way), where properness traces back to some earlier collective agreements among some predecessors. The two prongs, consent and pedigree, need each other: consent unbounded by pedigree is unstable; pedigree free of consent is oppressive.

When left underspecified, the folk theory provides some sorry comfort *in medias res*. We consent to pedigreed procedures to which our predecessors consented, subject to pedigreed procedures to which their predecessors consented. It is consent to pedigreed procedures all the way down. The folk theory, however, faces a sharp problem *ab ovo*: which came first, the consensual chicken or the procedural egg? Despite the three great social contractarians who precede Kant, the procedure of majority rule is not self-justifying (though Hobbes is more alert to the problem than Locke or Rousseau). There was no

⁶ Arthur Isak Applbaum, "Legitimacy without the Duty to Obey," *Philosophy & Public Affairs* 38 (2010), pp. 215-239.

⁷ So I agree with Joseph Raz, against Robert Ladenson, that legitimate authority is not merely a permission, and accept John Simmons's distinction between justification and legitimacy (though I draw that distinction differently).

proper procedure by which the Continental Congress assembled in Philadelphia in 1776 could agree on a proper procedure for declaring independence.

Why, after Kant and Rawls, do we need to answer the question of *ab ovo* legitimacy at all? One reason is pragmatic: Libyas happen. Of the 193 current members of the United Nations, only two existed as independent states before the publication of Kant's *Metaphysics of Morals* in 1797 and have not since had ruptures in governance caused by revolution, coup, or occupation. The more important reason is philosophical: as Kant understood well, thinking about the contradictions of legitimacy *ab ovo* in abstraction from existing political institutions is one way to construct an account of legitimacy *in medias res*.

4. I wish to present an alternative to the folk theory of political legitimacy that acknowledges the tug of our intuitions about consent and pedigreed procedure, but avoids at least some of the puzzles that arise when one tries to get specific about what is meant by consent and pedigree. To develop the view, I will begin by offering a merely suggestive formulation, and then tighten it up a bit as I go along. My claim is that an account of political legitimacy must solve the puzzle of how free moral agents can remain free even when subjected to coercive governance. The solution, roughly, is that free moral agents remain free only when they are governed by a free group agent of which they are constituent members. A legitimately governs B only when A governs B in such a way that both A and B remain free moral agents over time. This is so only when A's governance of B realizes and protects B's freedom over time, and this in turn is so only when A is a free group agent that counts a free B as a member. Overgrownups of sound mind, the only legitimate governance is collective self-governance. My task is to specify this old commonplace in an illuminating way.

5. What is a moral agent? On this account, a moral agent is an entity that is the proximate locus of respect and responsibility: an agent can make genuine moral claims on others and others can make genuine moral claims on an agent. I take it to be a conceptual truth that anything that can be held to be properly responsible is (or at one time was) capable of action. To count as an action (and not merely an event or a behavior), the agent who performed it must have three capacities or their functional equivalent: (1) considering: the capacity to respond to considerations for action, endorsing some and rejecting others; (2) willing: the capacity to choose to act (or not act); and (3) doing: the capacity to behave in ways guided by these considerations and choices.⁸ Only entities that have these three capacities of considering, willing, and doing, and whose behaviors follow from the exercise of these capacities, can be said to have the unity required to be agents capable of action.

6. What is a *free* moral agent? For our purposes, agents must be sufficiently free in both internal and external senses of freedom. The conception of internal freedom put to use here is freedom as competence. Competence simply is a degree of autonomy, but to avoid confusion with thicker and more demanding accounts of autonomy, such as Kant's, I shall use a less lofty term. To be a competent agent is to have the three capacities of action to some adequate

⁸ Considering requires more than simply responding to stimuli or desires. It demands a degree of reflection that Harry Frankfurt captures with his account of second order volitions, or at least what Agnieszka Jaworska captures with her account of valuing. See Harry G. Frankfurt, "Freedom of the Will and the Concept of a Person" (1971), in *The Importance of What We Care About* (Cambridge University Press, 1988), pp. 11-25, and Agnieszka Jaworska, "Respecting the Margins of Agency: Alzheimer's Patients and the Capacity to Value," *Philosophy & Public Affairs* 28 (1999), pp. 105-138.

degree. Note that room is left over for an impaired agent: one who has enough minimal capacity for considering, willing, and doing to count as some sort of agent, rather than merely an event-generator like the wind or a lower animal, but not enough capacity to count as a competent agent. So an internally free agent is a competent agent.

Although Kant's conception of inner freedom is too demanding to follow here, his conception of external freedom is especially fitting. Agents have external freedom when they are independent of the domination of others.⁹ External freedom, on this view, is not a matter of being unconstrained by circumstances, so that the fewer options one has the less freedom one has, whatever the source of constraint. Rather, the conception of external freedom used here considers a person to be free if his choices are not subject to the control of another person. External freedom is violated when one person's innate powers or acquired means are destroyed or unilaterally appropriated by another person's choices.

On these conceptions of internal and external freedom, we now say that A legitimately governs B only when A governs B in such a way that both A and B remain *competent and independent* moral agents over time. This is so only when A's governance of B realizes and protects B's competence and independence over time, and this in turn is so only when A is a competent and independent group agent that counts a competent and independent B as a member.

7. What is a group agent? Note that the account of agency above made no reference to mental states, so need not be restricted to a natural person with a

⁹ Kant, *The Metaphysics of Morals* (Ak 6: 237). Here I follow the interpretation of Arthur Ripstein, *Force and Freedom* (Harvard University Press, 2009).

wet brain between her ears. A group is capable of unified action if, together, it possesses in requisite measure the three capacities of considering, willing, and doing. I want nothing to do with spooky accounts of the general will here. A group agent is not a metaphysical entity, and collective willing is not a psychological state in some group mind. Yet neither is a group agent a simple aggregation of the preferences of individuals. To be fully capable of competent shared agency, individuals have to be properly constituted, incorporated, represented, or personated. A natural individual is capable of agency, of willing ends, when there is a unity of the self, the capacity for reflecting on desires and for endorsing some and not others, for making choices, and for engaging in behaviors that are guided by one's considerations and choices. When a collection of individuals has this unity of will and capacity for second-order reflection, it is capable of group action and what comes along with action: the group itself is a proper subject for moral evaluation. (The conditions under which such evaluation properly distributes to the individual constituent actors is a further question.) Without a shared will, there are only the individual wills of individual persons, which may show statistical regularities, may be coordinated in various ways, and which always result in some vector that is the consequence of individual actions, but none of this makes for shared agency. To use Christine Korsgaard's image, a bag filled with mice will move, but it will not act. This is the difference between the results of a public opinion poll and the results of an election: a public opinion poll is a mere aggregation of individual preferences. An election (when the conditions for its legitimacy are met) is a performative, the action of a shared agent.

8. Can there be *normative* groups, understood as groups that are bearers of respect and responsibility, and if so, what properties must they have? First, if the

idea of a normative group is to be taken seriously, then all of the moral claims a normative group can make and all of the moral claims that can be made against it cannot merely be direct pass-throughs for the separate and several moral claims by and on the natural individual persons who make up the normative group. If that were so, talk of a normative group would simply be a convenient shorthand, a manner of speaking.

Yet the idea of a normative group should not be taken seriously in the wrong way, and be given moral standing unconnected to the moral standing of the natural persons that constitute it.¹⁰ In ways that are often complex, claims against a normative group distribute into claims of some sort against at least some of its members; claims against one set of individual members sometimes generate claims against the normative group as a whole, and these in turn may distribute onto a different set of individual members; at least some claims by individual members generate claims by the normative group; and at least some of the claims of individuals can be discharged by satisfying claims made by normative group (even though the substance of the claim of the natural person may fail to have been met).

In short, if normative groups are possible, any normative status they have must be in virtue of the normative status of natural persons. If groups in some measure are owed respect and can be held responsible in some ways, this is because they are made up of natural persons who are owed respect and can be

¹⁰ So, although a normative group is not merely valued instrumentally, the source of its value is extrinsic. Think, for example, of a family heirloom or historical artifact that is neither beautiful nor expensive. On this distinction between the source of value and ways of valuing, see Christine M. Korsgaard, "Two Distinctions in Goodness," in *Creating the Kingdom of Ends* (Cambridge University Press, 1996), pp. 249–74.

held responsible. But there is no simple reduction or one-to-one correspondence from the claims attached to persons and the claims attached to groups.

9. A complete account of group agency would show how individual capacities for and instances of considering, willing, and doing can combine to constitute an entity with sufficient unity of the right sort to count as an agent that itself considers, wills, and acts. I do not have a complete account of agency, individual or collective, but I have already offered one necessary condition: agents must be sufficiently free in both the internal and external senses of freedom. They must be competent enough and independent enough. A natural agent must have an adequate set of freedoms necessary to have the three capacities of considering, willing, and doing, and a collective agent must be made up of sufficiently free natural agents whose individual capacities for considering, willing, and doing mesh in a way that renders the collectivity sufficiently free to have the capacities of considering, willing, and doing. Similarly, a free natural agent must be independent – that is, not dominated by the choices of others – and a free group agent must be made up of undominated natural agents whose individual choices and actions mesh in a way that renders the collectivity independent. Internal and external freedom are connected in the following way: at least some of the rights and liberties that are necessary for freedom as independence also are constitutive or instrumental preconditions for freedom as competence.

A natural individual can fail to be a moral agent in degree, hence the notion of an impaired or incompetent person. Children and those who are demented, mentally ill, or mentally retarded are still persons. Similarly, shared agency can fail in degree. So the account of normative groups would also specify the minimal capacities for considering, willing, and doing that make a collectivity an agent at all, and, as with individual natural agents, specify the

thresholds that distinguish competent from incompetent collective agency. An aggregation of individuals that does not meet even minimal threshold conditions does not count as a shared agent at all, and so does not count as a normative group at all. A collective agent can fail the test of sufficient freedom, either because the natural persons that make it up are not sufficiently free, or because their individual capacities for considering, willing, and doing have not combined in the ways needed to form a collective agent that is sufficiently free. Something similar goes for external freedom: natural agents can be independent – that is, undominated by the unilateral choice of others – in both degree and in kind, in some contexts but not in others. So too for the group agents they constitute. So not all normative groups are already free.

10. So far, I have said little about what the conditions for shared agency are. How does an aggregation of individual “I”s somehow go *POOF!* and become “We,” a unified moral agent capable of shared action and that is the proper proximate subject of moral appraisal? Two sorts of answers are needed. One answer should be sufficiently general so that, when we look at aggregations as diverse as marriages, string ensembles, baseball teams, street demonstrations, universities, hospitals, business enterprises, professions, organized crime families, ethnic groups, political societies, and governments, we are able to say which have the capacity for shared agency and which do not. Then we need an answer that is sufficiently specific to the kind of aggregation in question, so that we can specify the necessary and sufficient conditions for success as a shared agent of that kind. Conditions for succeeding at “playing the Mendelssohn octet” may be different than conditions for succeeding at “amending the Constitution.”

For A to be a group agent that counts B as a member, two sorts of conditions need to be satisfied. First, we need *constitutive* conditions: in what way is A formed to possess the capacities for moral agency? Second, we need *conscriptive* conditions: why and how does A's power to govern come to apply to B? One might have thought that, if the answer to the question of legitimate governance is collective self-governance, constitution and conscription are not separate ideas: a group agent simply is constituted by its members. Not so. Though constitution and conscription are simultaneous, at least initially, they are conceptually distinct achievements that have conceptually distinct success conditions. To see this, think of how a new member joins an existing group. Even if one says that a group agent is reconstituted each time a new member joins, different members can attach to the group differently.

How are group agents *constituted*? Unified, shared agency can come about in at least three general ways. Every plausible account of which I know follows these three routes, either singly or in combination.

11. *Meshed Aims and Plans*. The structurally simplest route to the constitution of a group agent is through the intermeshing of aims and plans.¹¹ Very roughly, a "we" is formed that plays Mendelssohn when each of us aims to play the piece

¹¹ Michael E. Bratman has what I think is the most plausible account in *Faces of Intention* (Cambridge University Press, 1999), chaps. 5–8. I loosely follow his view. Margaret Gilbert has written the seminal works on this topic, but I am not persuaded by her holism or by her views about how involuntary commitments are formed. See *Living Together* (Rowman & Littlefield, 1996), and *Sociality and Responsibility* (Rowman & Littlefield, 2000).

together, knowing that each of us has that aim, and with each of us planning to (and knowing that each plans to) adjust our actions (tempo, pitch, dynamics, phrasing) to mesh with the actions of others as necessary to support each other to achieve our shared aim. Because no organizational or procedural structure needs to be relied upon for the intermeshing of aims and plans, the paradigm cases are face-to-face, small scale, and synchronic (although more complicated collective agency is not precluded). Note how this simple collective agent succeeds at being the proximate locus of responsibility. The octet itself is a proper subject of evaluation, to be praised or criticized, and this praise and criticism to some extent distributes onto the individual players in a way that is not simply an evaluation of the individual contribution of each. This is captured by locutions such as "We did it!" after a good performance: "we," all together, the weakest player and the strongest, did one thing, "it." But note too that, if the intermeshing of aims and plans is the only route to shared agency relied upon here, if the eight string players are a subset of a larger chamber orchestra, the woodwinds and horns who stayed home did not "play the Mendelssohn octet." For the stay-at-home players to be authors of this action in any way, so that some sort of responsibility for the performance could distribute on to them, recourse to one of the other two routes to shared agency is needed.

12. *Representation.* The second route to the constitution of a group agent relies upon representation and impersonation. Hobbes of course is the great propounder of the view that unity of agency is achieved only through the unity

of the representative.¹² A shared agent is formed and can act as one only if each of many individuals severally authorizes a person to represent each, or, in Hobbes's phrase, to impersonate each.¹³ The core idea here is that, under certain conditions, A can act for B in a way that makes B the author of the action, and so the proper locus of responsibility for the action. Via this route, collective agency comes about when one agent is authorized to act in the same way on behalf of each of many. There need not be coordination or intermeshing of the plans of the many, or even common knowledge of the multiple representation (although one might make authorization contingent on the authorization of others, in which case common knowledge would be necessary). Notice how the route of intermeshing plans and the route of representation can combine. A multitude of unmeshed individuals can be represented by a team with intermeshed plans; or

¹² "A Multitude of men, are made *One* Person, when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the *Unity* of the Representer, not the *Unity* of the Represented, that maketh the Person *One*. And it is the Representer that beareth the Person, and but one Person: And *Unity*, cannot otherwise be understood, in Multitude." Thomas Hobbes, *Leviathan* (1651), ed. Richard Tuck (Cambridge University Press, 1996), chap. 16, "Of Persons, Authors, and Things Personated."

¹³ Unity in the representative is readily understood when the representative is a natural moral agent with one wet brain. Had Hobbes insisted that any other unity is impossible, his argument for monarchy would have been conceptual. Instead, Hobbes allows that the representative can be an assembly of men, whose unity is achieved by majority rule: there are more than enough majority votes to "destroy" all the minority votes, so the excess speaks with one voice. Hobbes will need this account of majority rule later to make his initial covenant work, but it comes at the price of weakening the contrast between unity and multitude.

we can together, through an intermeshed plan, appoint a single natural representative to act for us.

13. *Procedure.* The third route to the constitution of a group agent relies on procedures, practices, or organizational structures. The various capacities of considering, willing, and doing are functionally accomplished by the combined efforts of many, though perhaps no one natural person has considered, willed, or acted in a way that matches the shared action. Indeed, one tempting test of whether a procedure constitutes a shared agent is that the outcomes of the procedure meet some appealing standards of rationality even when the collective choice is at odds with the individual choices appealingly aggregated.¹⁴ A mechanism that produced an authoritative decision or action out of (and sensitive to) practical inputs of individual agents would be such a procedure. A shared action produced by a procedure could be relatively simple, such as friends choosing a movie by majority vote, or as complex as the rendering of law in a legal system in which the admission of evidence, factual determinations given the evidence, legal rulings given the factual findings, and appellate review

¹⁴ Philip Pettit has fruitfully pursued this line of argument. See especially "Responsibility Incorporated," *Ethics*, 117 (2007), pp. 171–201; "Groups with Minds of Their Own," in *Socializing Metaphysics*, ed. Frederick Schmitt (Rowman & Littlefield, 2004), pp. 167–93; and Christian List and Philip Pettit, "Aggregating Sets of Judgments: An Impossibility Result," *Economics and Philosophy*, 18 (2002), 89–110. For a precursor, see Howard Raiffa, *Decision Analysis* (Addison-Wesley, 1968), who relies on a result later published in Aanund Hylland and Richard Zeckhauser, "The Impossibility of Bayesian Group Decisionmaking with Separate Aggregation of Beliefs and Values," *Econometrica*, 47 (1979), 1321–36.

given this and other precedential legal rulings are produced by many actors, not one of whom may will the outcome for a consistent set of factual and legal reasons.

14. To illustrate how a procedure can constitute a group agent that rationally makes choices that no natural member would make, consider a hypothetical. Suppose the Transitional National Council is considering, before he is captured and killed, whether to put Colonel Qaddafi on trial *in absentia* for war crimes, and suppose the decision depends on three considerations: Does the Council have lawful jurisdiction? Will international allies support a trial? Will remaining Qaddafi loyalists in the rebel-controlled territories remain peaceful, or turn violent? A trial will proceed only if all three questions are answered in the affirmative. Three council members are to make this decision: the justice minister, the foreign minister, and the defense minister. For each of the three questions, one of the ministers answers no, but the other two answer yes, as presented in Table 1.

TABLE 1. GROUP AGENCY CONSTITUTED BY PROCEDURE: MAJORITY RULE

TRY QADDAFI?	Lawful Jurisdiction?	International Support?	Loyalists Peaceful?	Individual Judgment: Try?
Justice Minister	NO	YES	YES	NO
Foreign Minister	YES	NO	YES	NO
Defense Minister	YES	YES	NO	NO
Group Judgment by Criterion	YES	YES	YES	Group Decision?

On the individual judgment of each minister, Qaddafi should not be tried, so if the decision procedure were to aggregate individual conclusions, the judgment would be unanimous: no trial. Instead, the decision procedure is to render a collective judgment on each of the three considerations by majority rule. Since two of the three answer yes to each question, the group renders a judgment that Qaddafi should be tried. Some may think this conclusion paradoxical or even irrational, but there is another interpretation: the result confirms the existence of group agency, for here is a rational decisionmaking procedure demonstrating the capacity for considering and willing that produces a judgment of the group that does not match the judgment of any single natural agent.

Group agency constituted by procedure does not depend on majority rule for the choice of procedure. Suppose instead that the procedure followed by the Council is a division of labor, so that each minister determines the answer to the question under his area of expertise. Change as well the answers the ministers

give to the three questions, so that each minister answers yes to the question in his area of expertise, but no to the other two questions, as presented in Table 2.

TABLE 2. GROUP AGENCY CONSTITUTED BY PROCEDURE: DIVISION OF LABOR

TRY QADDAFI?	Lawful Jurisdiction?	International Support?	Loyalists Peaceful?	Individual Judgment: Try?
Justice Minister	YES	NO	NO	NO
Foreign Minister	NO	YES	NO	NO
Defense Minister	NO	NO	YES	NO
Group Judgment by Criterion	YES	YES	YES	Group Decision?

Again, the group judgment is to proceed with the trial, since each minister answers the question in his area of expertise in the affirmative, even though the individual judgment of each minister is not to proceed.

Complex instances of shared agency typically will rely on all three routes of constitution. A corporation or association might form through the intermeshing of the aims and plans of its founders, appoint representatives to make decisions through procedures, and then delegate the implementation of plans to intermeshed teams of workers. To make sense of “amending the Constitution” as an act of a shared agent, the web of intermeshed aims, representations, and procedures would have to be even more elaborate.

15. What are the conditions for *conscriptio*? For each of these routes to the constitution of a group agent, we must ask what gives it its authority in Hobbes's sense: what makes any particular natural agent an author of the group agent's actions, and so a candidate for distributed responsibility? The mere existence of a procedure is not sufficient to create a shared agent out of those natural agents whose practical capacities and functionings are taken to be inputs. Your neighbors may, to your surprise, announce a procedure whereby each house on the block is to be painted the color preferred by the majority, and under that procedure, after duly taking your fondness for blue into account, the color of your house is to be changed from blue to yellow. Yet surely something more than the counting of your preference as an input must tie you to this procedure before you assume any authorship in or responsibility for the alleged shared agent that has arrived on your doorstep with cans of yellow paint. If instead of employing a procedure, your neighbors appointed as representative a natural agent to make the neighborhood painting decisions, what is she to you? Or if a neighbor appears with a couple of yellow paintbrushes in one hand and a shotgun in the other, you may find it prudent to join him in painting your house yellow and – one eye on the gun – take pains to do it right, meshing your plans with his. Although you would be taking the action of painting your house yellow, you would not, in any normatively important sense, have formed a shared agent to paint your house yellow.¹⁵

¹⁵ What are we to say about string players in a concentration camp ordered to play Mendelssohn for the guards? Autonomous individual action can be nested inside a generally coercive background. An individual cellist ordered to play the Bach solo suites for the guards may be forced to do something she would not voluntarily choose to do, but, against that forced background, she may out of defiant pride or simple pleasure

A natural agent can be conscripted into constituting a shared agent, and so share authorship in a shared agent's actions, in three ways. The first is if the natural agent, under uncoerced and informed circumstances, *consents* to constitute a group agent in this way for this purpose. Second, voluntary action short of consent could constitute participation in a collective agent if a version of the *fair play* principle applies, in which the natural agent voluntarily accepts the benefits of a mutually advantageous and fair cooperative venture under

amid misery decide to exercise the discretion that remains hers to play her best, and then, again within limits, she is a responsible competent agent. So too, eight prison musicians may form a locally autonomous group agent whose purpose is instrumental survival, or defiant pride, or a bit of happiness amid the misery. They do not form a collective agent, however, *with the guards*. Is a collective agent formed with a guard who also is a good violinist and orders that the prisoners play *with him*? Under some circumstances and for some circumscribed purposes, yes. If, nested inside the larger coercive background, the prisoners have and exercise local autonomy in performance with the guard, then for purposes of aesthetic praise and criticism, they are acting collectively with him. If the guard also is a musical bully who demands obedience note by note under threat of punishment, then no. Either way, the prisoners do not form an all-purpose group agent with the guard that is responsible, as a group agent, for all of the consequences of the forced performance. Suppose the performance also served as the signal to commence atrocities elsewhere in the camp. Performing under those circumstances may or may not be excusable, but this is a direct assessment of responsibility to be made of each musician taken as an individual natural agent, rather than an assessment of distributed responsibility for the action of a group agent. Group agency is a normative ascription that supervenes on some descriptive facts, but is not itself a descriptive fact of the matter.

conditions where the benefit could have been refused.¹⁶ The third way to conscript a natural agent is if commitment to constitute a shared agent in something like this way for this purpose is a *practical necessity*, in that it is either constitutive of or a precondition for acting upon the natural agent's prior uncoerced and informed commitments, and the natural agent, knowing that this is so, either cannot or will not give up these prior commitments. These are demanding conditions for authorship, but such demandingness is needed to attach a natural agent to an entity with the moral standing and powers of a group agent. Recall that a group agent is a proximate locus of respect and responsibility that both bears in some ways the moral claims made by and against its constituent members and distributes in some ways over its constituent members the moral claims made by and against it.

16. Three conditions for constitution and three conditions for conscription give nine ways of attaching a natural agent to a group agent, as shown on the grid in Table 3. I have suggestively filled each cell with a collectivity that arguably is a normative group that arguably is constituted and conscripted in one of the nine

¹⁶ John Rawls presents the principle of fairness, called in an earlier article the principle of fair play, in *Theory of Justice* (Harvard University Press, 1971), pp. 108–14, 342–50, where he credits H.L.A. Hart. Rawls originally proposed the fair play principle as a way to ground political obligation in voluntary action other than consent, and succeeds in this task better than Locke's tacit consent. Still, Rawls later conceded that ordinary citizens do not accept benefits voluntarily. I use a modification of the fair play principle to establish moral permissions, rather than obligations, in *Ethics for Adversaries* (Princeton University Press, 1999), pp. 113-135. Here, the fair play idea is used to ground normative powers rather than permissions.

ways. I invite you to disagree with me. You may not be convinced that all of these nine groups are normative groups, bearers of respect and responsibility in virtue of their capacities for competent and independent shared agency. Or you may disagree that they constitute shared agents by the route I suggest, or conscript members as authors in the way that I say. You might be correct on all counts. I have not given precise criteria for distinguishing free normative groups from impaired normative groups from groups that are not agents at all. Also, complex group agents may be constituted in nested levels, so that the unity of agency is built up out of a combination of meshed aims and plans, representation, and procedure. So too, conscription of members can occur by either consent, fair play, or practical necessity for different members, and for some members conscription may be overdetermined. So I invite you to fill out the grid your way.

TABLE 3. CONSTITUTION AND CONSCRIPTION

	Meshed Aims and Plans	Representation	Procedure
Consent	string quartet	symphony orchestra	legislature
Fair Play	ocean fishery	labor union	jury
Practical Necessity	lifeboat	army	electorate

17. The kind of shared agency that is of greatest interest to us, of course, is political agency. Political action has profound effects on the freedom and interests of those subject to it because it nearly always involves coercion, and seeks to change the normative status of its subjects by imposing duties or liabilities. Because of these high moral stakes, the conditions for successfully constituting a political “We” from a multitude of “I”s are going to have more moral content than what it takes to constitute a string ensemble. For how can a political people be *my* people unless, in some way, whoever speaks and acts for the people speaks and acts for me, representing in a morally adequate way both my will and my basic interests across the broad range of freedoms and interests that governments claim the right to regulate?

When the collective agent in question claims the normative power to coerce its constituent natural agents, the criterion that these natural agents be sufficiently free is threatened. Governments, by imposing and enforcing laws, appear to restrict the freedoms of the governed. So governments must either

show that these restrictions on freedom nonetheless leave the governed sufficiently free, or show that the enactment and enforcement of law does not, despite appearances, actually restrict freedom. One strategy for showing that restrictions on freedom leave natural agents sufficiently free is to show that restrictions are for the sake of realizing and protecting these same freedoms, for there is no condition of anarchy or other scheme of government under which these freedoms would be more inviolable or less violated, and so no other condition under which natural agents in general would have greater capacities for agency. One strategy for showing that apparently coercive law does not restrict freedom is to show how the subject of law can also be, from some normatively appropriate point of view, its willing author who therefore is not coerced. These are not two separable strategies, however, but two turns of the same justificatory argument. One of the central questions of modern political philosophy is how, if at all, collective self-governance is compatible with individual freedom. The correct answer, I believe, has both a substantive and a procedural component, because it needs to address agents both from their perspectives as subjects of law and their perspectives as authors of law. The agent viewed as the subject of coercive law must be given adequate justification, and the most promising strategy of justification is to show that equal and fully adequate freedom for all requires such limits on the freedom of each. The agent viewed as the author of coercive law must be free enough in the relevant ways to count as an author. Only if individuals are free enough to count as authors can the collective body constitute a shared agent. How free is free enough? No more constrained than is necessary to guarantee other constituent members of the collective body the freedoms they need to have the capacity to be authors. To establish that subjects also are authors, we do not look for free founding moments; even if such foundings were not myths, they would not by themselves

do the job needed. Rather, we look for virtuous circles in which subjects are free enough to have the capacity to be authors of collective acts, procedures, and institutions that realize and protect the freedoms that make them free enough to have the capacity to be authors.

18. I have been offering necessary conditions for collective political agency, but notice that these conditions do double duty as criteria for a normative conception of political legitimacy. This should come as no surprise. If the concept of political legitimacy is, roughly, the normative power to govern, then one plausible account of the criteria for the legitimacy of a government is that only governments constituted as shared agents authored by their subjects have the right to rule those subjects, because only then is the puzzle of how we can remain self-governing when governed by others solved. Yet note that, if the account of shared agency above is correct, then the correct account of political legitimacy has substantive as well as procedural requirements. Only free enough natural agents can constitute a shared agent, and no procedure can make a natural agent free enough who is not free enough already. This is why, to be legitimate, procedures of governance must be constrained by substantive preconditions (for example, constitutional rights that limit majority rule).

On the conception of political legitimacy that I believe is correct, the test of legitimate government is two-pronged, just as the test of shared political agency is two-pronged. There needs to be an adequate connection between the governors and the governed (the procedural prong), and there needs to be adequate protection of at least basic human rights (the substantive prong). At a minimum, legitimacy requires the political freedom and basic protection that are constitutive of or instrumentally necessary for the individual moral agency of the members. Hence, the criterion offered earlier, applied to political society: A

necessary condition for a free (enough) people is that it be made up of free (enough) persons. We do not have to be too precise about the thresholds here. Perhaps something less than democracy will satisfy the political freedom prong, and perhaps something less than the full complement of liberal rights will satisfy the human rights prong. But on no plausible normative account of group agency and therefore of legitimacy does a tyrannical regime that recognizes no constraints on the arbitrary will of the tyrant and that systematically violates basic human rights personify the people it rules.

19. Social contract theory advanced under Kant and then Rawls when it let go of just-so stories about *ab ovo* foundings. Nonetheless, the world presents us with the chickens and eggs of legitimate governance. Was France (that normative group represented by Nicholas Sarkozy) to send the rebel diplomats home empty-handed or with the prize of recognition? We could say that, on March 10, it is too early for the question of legitimacy to arise. Libya either has returned to a state of nature or has never left it, there is no way to legitimately bootstrap oneself to legitimate governance, and all now is domination. We may predict whether a faction of dominators will triumph, we may predict whether a faction, once in empirical power, will treat the residents of Libya harshly or leniently, and so we may have reason to back one faction over another on humanitarian grounds. We may even predict which faction is more likely to satisfy the conditions of free group agency, and so legitimacy, in the future, and that gives us further reason to support its struggle. But being the best candidate for legitimate governance no more makes one legitimate than being the best candidate for president makes one president.

We might, however, be able to do more than just predict the outcome of a struggle over governance. We may be able to predict the course through the

routes of constitution and conscription that the likely winner is likely to take. And perhaps there are conditions under which a possible course that cascades through the routes of constitution and conscription is self-enacting: early successes do not merely predict later successes, but make it the case that later success has already happened. In Table 4, consider again our nine-cell grid, this time filled in with potential group agents in the Libyan rebellion.

TABLE 4. CONSTITUTION AND CONSCRIPTION IN LIBYA

	Meshed Aims and Plans	Representation	Procedure
Consent	prominent rebels	Benghazi civil servants	Transitional Council
Fair Play	demonstrators	rebel army units	rebel army officers
Practical Necessity	besieged towns	all Libyans as subjects	all Libyans as citizens

20. Begin with the structurally simplest route to group agency, constitution via meshed aims and plans. The surprising success of street demonstrations prompted a number of high level defections from Qaddafi's government, the return of some exiles, and the emboldening of some dissident voices. These prominent, would-be leaders of the rebellion gathered in Benghazi, where demonstrators had forced out Qaddafi loyalists. We do not know exactly how these prominent Libyans jockeyed with each other to be heard and to gain a following in the crucial first days, but some subset does appear to have reached

an agreement among themselves to claim leadership of the rebellion. The initial core may have recruited allies and elbowed out adversaries, but at some point a relatively stable coterie was speaking with one voice. By meshing their aims and plans, they constituted the shared group of prominent rebels; the participants who constituted this group were conscripted by consent. Though the stakes were enormously higher, the process of group formation was probably no more complex than face-to-face schoolyard coalition-building and snubbing. Their shared aim was to lead the rebellion. That, of course, did not make them the rebellion's leaders, or give them one shred of normative control over anyone but each other. But, like a string quartet, they did constitute a normative group capable of responsible action.

What of the demonstrators themselves? Those who took to the streets ought to have quickly recognized that they were engaging in a mutually advantageous cooperative venture whose aim was the reform or overthrow of Qaddafi's regime. Because the venture met with partial success, we can suppose that rules of coordination emerged among the crowd: when and how to communicate with each other, when and how to stand firm, when and how to retreat. So those who shared in these ends and shared in these means constituted a limited purpose group agent who performed the shared action of demonstrating. It is unlikely that they formed a *competent* agent with adequate capacities for unified, reason-guided action – surely they were unable to mesh their aims and plans with the unity of a string quartet – but nor did they simply remain a crowd. Rather, they formed a normative group, albeit an impaired one.

Who was conscripted into this shared agent? It is not necessary to suppose that only those demonstrators who voluntarily agreed that these be the rules of engagement and coordination count as members of the normative group. It is enough that these spontaneous conventions of coordination governed a great

many of the demonstrators, and that the demonstration's success depended on a great many continuing to be governed by these conventions. Fairness would then require that a demonstrator who aimed at the demonstration's success and voluntarily engaged in protest side-by-side with those who were governed by the rules of engagement also be governed by these rules of engagement, and therefore count as a conscript to the group.

To be clear: on this argument, no one was obligated to demonstrate. But those who did demonstrate were conscripted as constitutive members of the group agent of demonstrators in virtue of their voluntarily sharing in the benefits of the coordination of others. I do not need to go so far as to say that the fair play principle obligates the voluntary demonstrator to comply with the cooperative rules. All I need to say is here is that, in virtue of the fair play principle, voluntary demonstrators are normatively governed in some way by those rules, and that makes them participants in a (somewhat impaired) group agent.

What does it mean to be governed without necessarily being obligated? If A has a moral power with respect to B in context C, B correlatively faces a moral liability. What is this liability? B is liable to changes in his normative situation. Such changes could be a duty not to interfere with A (that is, a recognition of A's immunity), liability to A's use of force or coercion, liability to changes in one's rights against third parties, or liability to changes in normatively significant social facts. None of these normative changes are the same as being morally obligated to comply with A's commands.¹⁷

Meanwhile, Misurata and the towns surrounding Tripoli that had initial success in throwing out government forces were under siege, suffering shelling

¹⁷ See Applbaum, "Legitimacy without the Duty to Obey."

and bombing by Qaddafi loyalists. No case of practical necessity is clearer: the physical survival of the residents of these towns was in jeopardy, and each individual had the same compelling aim of staying alive. The means to staying alive almost certainly demanded some level of organization and coordination: barricades needed to be manned, fires extinguished, wounds stanching. Insofar as these residents are guided by reason, if they will to survive, they must will the necessary means to survive. Add the usual universalization requirement that one may not make of oneself a special case, for we are not so foolish as to try to derive morality from rational self-interest alone. Then any modestly effective coordination mechanism that emerged is something the residents of these towns were reasonably compelled to join. This is no factual prediction: some may have cowered in basements or profited on the black market. And the conscription of others may be overdetermined, for they may also have consented, or have voluntarily accepted offices in the resistance. But voluntary acts are not necessary to conscript the residents of a besieged town to its common defense.

21. Consider now, more briefly, group agency in the Libyan rebellion constituted by representation. Following Hobbes, the wills of a multitude of authors can be unified in the person of their representative. Civil servants in Benghazi faced a choice: should they remain loyal to Qaddafi, or show up in the morning to work for the self-appointed rebel leaders? If they showed up to work, then they helped to constitute the emerging rebel institution of governance. Now at a scale larger than the face-to-face sharing of aims, this wider institution was constituted by representation: the individual wills of the rebel civil servants were represented by the rebel leaders, and insofar as civil servants took supervision from the leaders, they were demonstrating the effectiveness of this representation. How were the civil servants conscripted into the rebel

institution? For many, their showing up for work tokened consent, but for all, their continued voluntary acceptance of the benefits of office connect them as participants in group agency by way of fair play, whether or not they consented.

A similar story can be told about rebel army units. Most were comprised of enthusiastic, untrained, poorly equipped young men. Some were defectors from Qaddafi's forces. For the uprising to have succeeded beyond a few days, they needed to have been organized under some command. Somehow, local commanders emerged. We know that, at the top, military command of the rebels was less than perfectly unified because generals were squabbling over the top post. But that did not prevent local units from constituting local group agents, unified by a commanding officer by way of representation. How are individual soldiers conscripted into the normative group of a fighting unit? All showed up to fight by consent. They need not, however, have consented to the command structure that emerged. Some may have shown up at the front having only the vaguest notions of military command and control. But a military venture cannot succeed unless it is organized as a rule-governed cooperative scheme, and the more disciplined among them did just that, subjecting themselves to the command of those who had the experience or nerve to put themselves forth as officers, thereby constituting a group agent via representation. At that point, a fighter who is voluntarily at the front can no longer go it alone. Consenting or not, he is conscripted into the shared agent through the fair play principle, and is normatively governed by the local commanding officer who represents the will of the group. In the heat of an existential battle, he is conscripted by practical necessity as well.

22. As the institutional structures of the rebellion expanded, solidified and matured, constitution by procedure took hold. When the self-appointed informal

rebel leaders announced that they had become the self-appointed Transitional National Council, they were not simply giving themselves a fancy title. They were, as well, adopting procedures of decisionmaking for themselves and for those civil servants and fighters who took them as their representative. So meshed aims and plans as a route to constitute group agency among the rebel leaders was partly supplemented and partly replaced by a set of procedures to unify their capacities of considering, willing, and doing. How competent these procedures were is uncertain. But it is clear that, if the normative group that was the rebellion was to expand to cover cooperating civil servants and army units in the field, formality and complexity of constitution would be needed. The members of the Transitional National Council conscripted themselves to their own enterprise by consent. Once a large scale mutually advantageous cooperative venture of rebellion and governance is up and running, consent is not the only route of conscription. Imagine the situation of rebel army officers. Having volunteered for their positions and opportunities, it does not matter whether they have consented to join a normative group led by the Transitional National Council. The procedures of the council speak for them because they would be taking unfair advantage of the cooperative efforts of others if the council did not speak for them.

23. Consider an objection to employing the principle of fair play to conscript membership in normative groups.¹⁸ The fair play argument, as developed by Rawls, shows how one can acquire an obligation through the voluntary acceptance of the benefits of a cooperative scheme even if one has not consented

¹⁸ I am grateful to Frances Kamm for raising this question.

to be obligated. Rawls himself retreated from the claim that fair play creates obligation to obey the law because most of us are not free to voluntarily accept or reject the benefits of political society. Do the actors that I imagine could be conscripted through fair play – demonstrators, Benghazi civil servants, rebel army soldiers and officers – voluntarily accept the benefits created by the group agent to which they are supposedly conscripted? But some cannot avoid the benefits the group agent confers: a demonstrator may have done nothing to seek safety in numbers, though the crowd makes him safer. Others have no acceptable alternative to accepting the benefits: a soldier who rejects coordination on the battlefield puts his life in danger. Worse still, some are coerced by the group agent into accepting benefits because the group agent itself has rendered the actor's alternatives unacceptable: a civil servant may show up to work for the rebels because the rebels have made his preferred alternative, working for the Qaddafi regime, fatal.

The answer to this objection is built of several steps. First, note that I have been employing conceptions of freedom, consent, voluntariness, and coercion that are practical, not metaphysical, and partly normative, not purely descriptive or psychological. Consider the paradigmatic example of fair play: neighbors who form a cooperative venture to dig a new community well. If Adilah draws water from the well, the principle of fair play obligates her to do her fair share in the well's upkeep according to the rules of the cooperative venture, even if she has not consented to do so. But suppose that the neighbors who dug the new well wrongfully dumped the waste rock down Adilah's own well, blocking it. If Adilah has been deprived by her neighbors of a source of water to which she is entitled, then drawing water from the new well does not satisfy the criterion of voluntary acceptance of benefit under the fair play principle. The neighbors violate Adilah's moral baseline by destroying her well. On a normative

conception of coercion, if she then consents to join the new cooperative, such consent is coerced. Similarly, if she does not consent but merely draws the water, her acceptance of benefit is not voluntary on a normative conception of voluntariness. To assess whether the neighbors present Adilah with a coercive threat or a voluntary offer, we do not compare the benefit of proposed membership in the cooperative scheme to Adilah's descriptive alternative, which is to go thirsty, but to the alternative morally owed to her by the neighbors, which not to damage her well.¹⁹ Similarly, in asking if Libyan demonstrators, civil servants, and soldiers voluntarily accept the benefits of a cooperative scheme, whether they have benefited and whether the benefit has been voluntarily accepted is assessed in comparison with their normative baselines — how they ought to be treated — not their descriptive baselines — how they will be treated. Unlike Adilah, who has a prior entitlement to the water of her own well, Qaddafi's civil servants have no prior entitlement to a comfortable job in a tyrannical regime. So, though the rebellion worsens the civil servants' descriptive alternative to accepting the benefits of working for the rebels by eliminating the option of working for Qaddafi in safety, this worsening need not violate the civil servants' normative baseline. On a moralized conception of coercion, coming to work for the rebels in the morning is indeed the voluntary acceptance of benefit on a normative conception of voluntariness.

How far does this appeal to moralized baselines go? If, as Kant holds, in a lawless condition every individual is subject to unilateral domination by every other, one might think that all of our interactions in a state of nature are mutually coercive, and so incapable of being genuinely consensual or voluntary in a

¹⁹ See Alan Wertheimer, *Coercion* (Princeton University Press, 1987), for the normative conception of coercion that I follow here.

normative sense. We are capable of psychological voluntariness, of course, in that it is possible to intentionally and successfully act on our desires. We can also be held responsible for our actions, in the sense that we can act in ways that are morally appraisable as blameworthy or praiseworthy (on those moral reasons, perhaps attenuated, that apply to us in a state of nature). But one might think that we cannot consensually obligate ourselves in a state of nature, and that wherever obligation via consent is impossible, obligation via fair play also is impossible, on the same ground. This, however, is an extravagant conclusion: normatively voluntary action is possible in a lawless condition. The normative upshot of mutual domination is not so drastic.

Outside of a civil condition, our rights are insecure in three ways: they cannot be legislated, they cannot be adjudicated, and there is no assurance that they will be enforced.²⁰ Because of these three defects, all agreements in a lawless condition are inherently unstable, and some may be so unstable that some offers will never be made, and if made, never accepted. But it does not follow that the genuine acceptance of an offer or of a benefit is conceptually or practically impossible. If someone has trusted you and performed first on an agreement, you cannot ordinarily claim lack of assurance or of adjudication as a justification for not performing second, at least on your unilateral interpretation of what performance requires. Yes, there is a sense in which we all wrong each other all of the time in a state of nature because we are failing in our duty to force each other into a civil condition. But I have not put you in this lawless condition and I cannot, on my own, remove you from it. Our situation is more like two would-be contractors who face an unjust background that neither has created. If

²⁰ See Ripstein, *Force and Freedom*.

A steals B's bicycle, that wrongful act does not disable B from contracting to buy C's bicycle. In the "smaller moral world" that exists between potential cooperators in a state of nature, the background condition of enduring coercion may be bracketed for many purposes.²¹

In one respect, establishing voluntariness in a lawless condition may be easier, rather than harder, than in a lawful condition. Without lawgiving and adjudication, what one is entitled to in a state of nature is underdetermined and therefore one's normative baseline is underdetermined. In a lawful condition, the moral baseline is shaped by what is allowed by actual legitimate law. In a lawless condition, what counts as a coercive threat rather than merely sharp bargaining is, in part, underdetermined. One should not exaggerate: the state of nature is not a morality-free zone. But unlike in a lawful condition, where there is a presumption, rebuttable to be sure, of a rough correspondence between ex ante empirical baselines and normative baselines, there is no such presumption in a lawless condition.

Finally, recall that to conscript an actor into membership in a group agent, we do not need to establish that the actor is morally obligated to obey the directives of the group agent. Rather, all we need to establish is the weaker claim that the actor is liable to the normative power of the group agent – that the group agent legitimately governs the actor over some scope and in some jurisdiction of action. Recall again the constitutive properties of a normative group: an entity that is the proximate locus of respect and responsibility in virtue of its capacity for unified considering, deciding, and doing. An agent does not need to be

²¹ The notion of a smaller moral world comes from Christine M. Korsgaard, "The Reasons We Can Share," in *Creating the Kingdom of Ends* (Cambridge University Press, 1996), p. 296.

morally obligated to obey group decisions in order for her individual actions to function as contributions to unified considering, deciding, and willing. Nor does an agent need to be morally obligated to obey in order to share, in some way, in the rights and responsibilities of the group that are distributed over its natural members. For those who still are repelled by the idea that one can be conscripted, without consent, into membership in a group, observe that membership entails, not moral obligation, but moral liability. A normative group, to be a normative group, need only claim the normative power to create and change the normative situation of its members in some ways, not in all ways. A group creates and changes institutional rights and duties in ways that change its members' moral liabilities. But this is just to say that the moral rights and responsibilities of normative groups are distributed over the natural actors that are members of the group.

24. The astute reader will have noted that I left the most difficult cells for last. I have shown how the institutions of rebellion can emerge, constituting, by the various routes of meshed aims, representation, and procedure, a group agent that conscripts rebels as its members. But a similar mechanism can account for the emergence of a Mafia crime family, the Church of Scientology, or Qaddafi's dictatorship. None legitimately govern a political people. What, if anything, connects the willing rebels and their institutions to all Libyans? What, if anything, can make the Transitional National Council's claim to be "the only legitimate body representing the people of Libya and the Libyan state" true?

We can rule out some answers. An entire people cannot constitute a normative group by the route of meshed aims and plans. No multitude at that scale can share the range of aims that must be set by a government, let alone mesh their plans to act as one. Only in a much smaller domain – a more limited

context C – is unity without institutional structure possible. Nor can an entire people be conscripted into a normative group by way of consent. As said earlier, this is not simply an empirical claim, but most often a conceptual one. For almost everyone, consent *in medias res* cannot be genuine, because almost all find themselves without alternatives to life in one coercive regime or another. One can endorse one's political arrangements, and when we endorse morally endorsable political arrangements, we have reached, in Rawls's lovely but obscure phrase, "the outer limit of our freedom."²² But if consent is a transaction between independent wills, endorsement of an unavoidable condition does not count as consent.

Ab ovo, however, attempts at consent occur against the backdrop of natural freedom in a state of nature. Why cannot such attempts conceptually succeed? Over a smaller domain – a smaller context C, not fewer contractors – I have supposed that they can: the rebel leaders are assumed to have conscripted themselves to their joint plans through mutual consent. But, despite the obviously grave and widespread consequences of a rebellion, the joint project of a rebellion's instigators is quite limited, when properly understood. Their joint actions are instrumental and time-bound: to drive out Qaddafi and bring about the conditions under which a much greater process of constitution and conscription can occur. Legitimate collective self-governance is a condition in which three powers that every natural person has – the power to make one's own law, the power to interpret one's own law, and the power to coercively enforce one's own law – are combined in such a way that these powers are exercised together, not unilaterally. Any smaller contract that is executed under

²² John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001), pp. 4, 94.

conditions of legitimate governance is constrained to comply with legitimate law. A smaller contract that is executed outside of conditions of legitimate governance – that is, in a state of nature – takes lawlessness as the background condition of things, but is not itself an attempted solution to lawlessness. The subject matter of smaller contracts is not the replacement of unilateral judgment and coercion by collective self-governance. When the rebel leaders successfully form the Transitional National Council, they are neither constituting collective self-governance for all Libyans (despite their claims), nor constituting a tiny lawful condition among a couple of dozen middle-aged men. They retain whatever natural rights of judgment and coercion they have in a state of nature. So what they consent to is quite shallow. There is no fundamental difference between a dozen persons in a state of nature consenting to start a revolution together and consenting to go to a movie together. Any such group agent is unstable and unenforceable, but factually possible to realize. Just as the movie-goers might find that they have succeeded in acting together to “go to a movie,” so too the rebel leaders might find that they have succeeded in acting together to “overthrow Qaddafi,” or to “set the conditions for the constitution of legitimate government.” But they cannot, on their own, “constitute legitimate government.” That can be the collective achievement of all Libyans only. Now one can see why collective self-governance *ab ovo* cannot be achieved through consent. A state of nature is a state of mutual domination, where each, as a self-legislator and self-judge, is entitled to coerce each. So a choice to replace this coercive lawless condition with a coercive lawful condition is no more consensual than the *in medias res* choice to accept the existing coercive lawful condition that one cannot avoid. Hence the conclusion that one can consent to go to the movies in both a state of nature and in a lawful condition, but one cannot consent to be in a lawful condition in either.

Fair play will not connect all Libyans to the Transitional National Council for much the same reason that consent will not. As Rawls ultimately recognized, ordinary citizens cannot voluntarily accept the benefits of a mutually advantageous scheme of social cooperation when they cannot refuse the benefits. Those who seek offices, positions, and other advantages from institutions and practices constituted by others may thereby count as constituent members themselves, but this condition does not hold for all.

25. On the view proposed here, a government has political legitimacy only when it is a free group agent constituted by the free natural agents whom it governs, where freedom is understood as competence and independence. Two ways remain to achieve legitimate governance: conscripting all of the governed through practical necessity to constitute a group agent by representation, and conscripting all of the governed through practical necessity to constitute a group agent by procedure. Earlier, I invoked practical necessity to conscript survivors of shipwrecks and victims of siege warfare into normative groups constituted for their survival. Is it not extravagant to claim that we are all, always, equally compelled by reason to be citizens? Hobbes may be right about nasty and brutish, but surely he exaggerates with short: anarchy is not invariably fatal.

The demands of practical necessity, however, are not limited to existential threats. Recall the formulation of a practical necessity: something that is constitutive of or a precondition for acting upon a moral agent's prior commitments that the agent either cannot or will not give up. A moral agent cannot possibly give up a commitment to internal freedom, understood as competence in the capacities of considering, willing, and doing, and still count as a moral agent. External freedom, understood as independence from domination, is in some measure at least a precondition for, and arguably constitutive of,

internal freedom, for without bodily integrity and liberty of thought and expression, self-governing action is not possible. So it is not extravagant to conclude that institutions and procedures that guarantee freedom are practical necessities, as shown in the bottom right cell of Table 4. The offer of legitimate government – that is, the offer of institutions in which we are free enough to have the capacity to be authors of procedures and collective actions and that realize and protect the freedoms that make us free enough to have the capacity to be authors – is an offer we cannot refuse.

Is it possible to refuse something less? A benevolent despotism might offer its subjects something short of active citizenship. It might provide the rule of law, realize basic human rights, and promote the wellbeing of all, but be unwilling or unable to make the subjects of its decent-enough rule active authors of their own governance. If we are to consider a society governed by a benevolent despotism as a form of group agency, it can only be conceived as subjects constituted by representation and conscripted by practical necessity. This describes the remaining cell in Table 4, but like hypothesized elements on the bottom row of the Periodic Table, it may not exist in nature. The problem is that, as described, the situation does not call for any action or transaction on the part of subjects at all, so there is nothing about the subject's will that is practically necessary. True, all subjects need the freedom that the despot provides (and more), but there is no need for the joining of wills to realize that freedom. Someone who gives me a gift may gratify my wish, but does not represent my will. The subjects of benevolent despots are, collectively, patients, not agents. Perhaps they form a group patient that bears respect, but not a group agent that bears responsibility. As a normative group they are, at best, seriously impaired.

What then has to be the case for Libya's rebel Transitional National Council to be the only legitimate body representing the people of Libya? They

have to be in a position to make an offer that the people of Libya *cannot* refuse – a self-enacting offer that, once made, makes it the case that all Libyans are collectively self-governing, competent and independent citizens. Nothing is like that *ab ovo*.

This is not, however, a reason to despair. The other eight cells of the table hint at what governance by the Transitional National Council might be like *in medias res*. So, though no assertion of political legitimacy is *self-enacting*, some assertions of political legitimacy can be *self-fulfilling*. Over time, first through small-scale consent and meshed aims and plans, then through fair play and representation, the actions of the rebel leaders conscript more Libyans into normative groups constituted for more encompassing contexts. The day may then arrive, after many tendentious assertions of the legitimating power of impossible consent of the governed through procedures of fantasized pedigree, that the people of Libya are free enough to participate in political institutions that make them free. And that will be enough.