Rough Draft (please do not cite)

The Sovereign and the Republic: A Republican View of Political Obligation
*(forthcoming _ NOMOS _, (2018))*

Ekow N. Yankah‡

Abstract

Philosophically, we live in a liberal age; one that accords individual liberty primacy of place among political values. Accordingly, contemporary conceptions of political and legal obligation treat sovereignty as perplexing, straining to justify how authority can impose on individual freedom and obligate one to obey law. From Hobbes to Kant to Rawls, liberal thinkers have had to stitch together a civic sovereign from the free will of each individual.

As against the machinations required to justify sovereignty beginning from the liberal premise of individual freedom, I suggest a fundamental reexamining of liberal freedom. In its place, I will argue for a return to a classic conception of Athenian or Aristotelian republicanism as the basis of political obligation. Reigning for perhaps millennia, yet strangely absent from contemporary theory, the ancient view argues that political obligation is based on our natural and unavoidable interconnectedness. Aristotle’s persuasive arguments that human beings need political communities to survive and flourish, now fortified by modern social science, illustrates why sovereignty is not a puzzle but rather a natural extension of our civic interconnectedness and gives rise to political obligation.

Once republican obligation is firmly fixed as our new primary value, we can see how many current political mysteries fall into place. Though answers are only broached, republican obligation, for example, clarifies under what conditions a sovereign may claim extraordinary authority against terrorist attacks. Focusing on the reciprocal nature of civic duties also sheds light on the distinction between restrictions on legal treatment of crime and executive power aimed at American citizens engaged in terrorist activities. This piece hints at the answers that may follow once we understand that political obligation, sovereignty and civic virtues are interwoven.

How a sovereign can legitimately impose obligations on individuals seems not only a core question but perhaps the first question of political philosophy. The legitimate authority to govern is naturally prior to inspecting the various goals at which one can aim while governing. The question is all the more pressing given that questions of legal

‡ Professor of Law, Cardozo School of Law
authority do not stay abstract long; legal authorities define rights and duties, imply the obligation to obey the law as well as the power to coerce others into obedience. A political theory without a convincing answer as to how the power of the sovereign can be justified (even if it answers in the negative) hardly seems to qualify as a political theory. In outlining the answer to political questions, whether it be the nature of equality, the justification of property holdings or the justification for punishment, that an answer serves as the basis of legally enforceable rights lends these questions their particularly political nature.

The legitimization of sovereignty is particularly vexing because we live in an avowedly liberal age. Liberalism, in its many forms, is tied together by a core principle that elevates individual autonomy or freedom pride of place. In a very real sense the sovereign casts a shadow over every political question. Because individual autonomy is central to liberal theories there is a natural tension between the liberal starting point and what most take to be the obvious need for a political theory to justify some form of governance. Save the anarchists among us, few can be persuaded by a theory that does not generate some view of justifiable government. Yet the answers at which liberal theories inevitably arrive, I will argue, are either implausible to most or involve a bit of philosophical alchemy in which the distinctly autonomy loving and freedom preserving core of liberalism is substituted for something very different view. This philosophical transformation travels under well-known labels; it hides under the “veils of ignorance,” within hypothetical contracts that have never been made or in the shape of combined wills that spring forth instantaneously.

The reason liberal theories either fail to convince or twist themselves into unrecognizable knots is, I suggest, they start with the wrong view of political obligation. From the point of view of liberalism, human beings are defined first and foremost by their autonomy or freedom preserving nature. Kant, a useful example as the foundational thinker of much of modern liberalism, started with the fact that human beings uniquely have rational wills that can govern their brute desires in complex ways as the premise of his legal
philosophy. If each person possesses a rational will that cried out for respect, no one person can unilaterally justify interfering with another person’s freedom. In words of Arthur Ripstein, the core Kantian impulse is that one be the master of you own life and slave to none. On this view, the human condition, at least in terms of political obligation, consists of independent rational beings (wills) focused foremost on jealously guarding their boundaries against encroachment. From this view, the anxiety of policing the justification of the state’s intrusive use of power makes perfect sense.

It is only deep familiarity that has led to such widespread acceptance of what is actually a very strange picture as a plausible basis of political justification. Nowhere in social science, much less our everyday lives, does this image accord with our most natural intuitions. Human beings, to foreshadow the argument, do not guard their independence before all. Rather, human beings are deeply social creature; not only do people seek to live together but for most, deprivation of other persons constitutes tragic deformation in their development or a form of near torture. That this is true in our social lives, I will argue, has important implications in our political lives.

In what follows, I wish to argue for an ironically radical view of political sovereignty. The proposed view is radical because it displaces the liberal independence that is nearly hegemonic in political theory today. It is ironic because it is based on a most natural and intuitive picture of human relationships. Indeed, the republican justification of political sovereignty is so natural that I will point out that many opposing (liberal) views, either explicitly or implicitly, rely on republican intuitions to legitimize sovereignty. Rather than start with liberal independence followed by some fancy footwork to arrive at thinly disguised republican theories, we should start with a full-blooded republican theory that highlight the civic bonds and duties that constitute political obligation and illustrate most clearly that sovereignty is only justified when it is mutually constituted by our shared civic bonds, rights and duties.

1 Kant, XXX.
2 ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY (2009)
One last bit of throat clearing. The limitation of state power is of such particular importance to the modern mind that even political theories which have their roots in very different soil have slowly evolved to center on individual liberty. Indeed, to nominate a republican theory of criminal punishment in the modern philosophical landscape risks misunderstanding from some and causes others to question whether one is offering a genuine alternative. Republicanism has come to be associated with the “civic republicanism” of Quinton Skinner, which made central the freedom of the individual from arbitrary state interference. Its most powerful modern proponent, Philip Pettit, has come to champion a republicanism based on the value of “non-domination,” that is the right to be free of the threat of arbitrary interference. For Pettit, what is crucial is that legal interference under roughly just conditions does not constitute arbitrary inference and thus is not illegitimate. Though both theories share commonalities, Skinner and Pettit’s Machiavellian or “Roman” republicanism not only secures but makes central the individual’s freedom from government action, downplaying the civic bonds that I wish to highlight. Ultimately, Skinner’s view has more in common with modern liberal theory than the theory I wish to forward.

In seeking a political theory premised on the more accurate and intuitive view of human interdependence rather than independence, a natural place to look is to classical republican views of political obligation and civic bonds. In particular, the republican view I will propose is explicitly premised on an Aristotelian or Athenian theory of civic duty that makes central to political justification the fact that human beings are interconnected. In fact, there is something like a paradox in examining Aristotelian republicanism to build a theory of sovereignty. Despite the fact that our shared civic duty is the basis for a republican theory of sovereignty, Aristotle’s work does not explicitly address the question of the state’s power over the individual, at least not as it is expressed on modern terms. As we shall see, for Aristotle the idea of people being bound in a

---


4 PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1999)

5 KRAUT, ARISTOTLE, 380-381; Barnes, Aristotle and Political Liberty, at 187.
political community – an idea that reigned in political philosophy for perhaps millennia - was so natural that there was no need to take up the question in it contemporary form. Thus, constructing a full model of Aristotelian sovereignty will require inspecting the underlying premises of ancient Greek political philosophy as well as inspecting his views on how civic bonds bind and particularly where they fail.

**Part I: Social and Civic Beginnings**

The question of sovereignty appears vexing to modern liberal political theories because they are fundamentally premised the image of atomistic individuals who, afraid of crashing into each other, jealously guard their independence from invasion. Making one’s freedom from another the central justification of political theory means that when the time comes to propose some form of justified government, such theories must somehow transform the right to coercively impose legal duties into a species of individual freedom, for example through hypothetical consent.

Twisting oneself into knots is the inevitable end of a theory that starts from an unnatural beginning. Rather than begin from the antiseptic liberal starting point, let us begin, with Aristotle, by examining human beings as they actually are. Aristotle, like Kant, describes humans as unique in that they show a highly developed rational capacity. But rather than join Kant in viewing our rational capacities as an austere will, best characterized as freedom-seeking, Aristotle starts with the perfectly natural notion that human beings are deeply social animals.\(^6\) In the normal and overwhelming set of cases, we seek each other out. This perfectly obvious observation is in stark contrast with the “state of nature” from which liberal theories often must expend great energy to escape.\(^7\) Aristotle explicitly eschews any suggestion of the state of nature, hypothetical or otherwise, a theoretical commitment which turns out to be meaningful. Aristotle instead argues that even pre-political man was driven to find a mate, couple and form a family.\(^8\)

---

\(^6\) Aristotle, *Política*: bk. I, ch.2


\(^8\) *Id.* at XX; *Kraut, Aristotle*, 240-243 (2002)
Forming a family is only the earliest manifestation of man’s social instinct. Small families are naturally drawn to live together, Aristotle argues. In the first place, this is because living together is a matter of material necessity. Households bound together in small villages can more easily secure the necessities of human life; food, protection from enemies and the natural elements and so on. As such communities develop another natural element of human nature pronounces itself. Human beings are not simply satisfied to live or even to live comfortably. Once the material necessities of life are secure, our rational nature is driven to find ways of living well.

Again, this observation is so simple as to hide its import. Lions, fed after a hunt on the Serengeti, strike a beautiful pose of power and contentment. They will remain so until their hunger moves them again. While people may replicate this life for stretches at a time, enjoying a beach vacation, human lives do not resemble that of a lion. Secure against hunger and pain, human beings begin to pursue and construct more complex visions of lives worth living.

Even when we are tempted to scoff at the inveterate television watcher, a moment’s reflection reveals the truth of this proposition. One need not pursue the life of the proverbial Oxford don to demonstrate the natural inclination to build a life that reflects values. The job one chooses, the hobbies and friends, the vacation for which one saves, the city to which you move for its action and noise or the city to which you refuse to move because of its action and noise; these and a thousand other decisions, so subtle we hardly notice them, are the stuff through which we pursue a vision of good life.

Our ability to pursue a good live is so dependent on our living together that Aristotle argues that there is a real sense in which reaching our full humanity turns on our bonding. The claim is not a metaphysical one, of the nature that can be read into Rousseau. It is rather a simple observation that many of our most elevated capacities cannot be developed in the absence of a flourishing community that has secured the necessary material benefits for its

---

9 *Id.* at XX; KRAUT, supra note 8, at 242-243.
10 *Id.* at XX.
11 *Id.*
members. If one were only to encounter a single person or a small band struggling daily to survive—think of the heartbreaking pictures of war torn or drought ridden nations—one could hardly imagine the heights to which human beings can develop.\textsuperscript{12} Our museums, jazz clubs, chess tournaments and haute cuisine are all possible just because we bond together to not only live but to live well.

Having highlighted that part of the natural expression of human rationality is to seek out an intelligible version of the good life another feature becomes clear. Human beings seek out the good life together. In Aristotle’s words, we are not only social animals in that we seek each other out but we are political animals in that we largely define a good life in common.\textsuperscript{13} We do not merely live beside each other, we live together. To return to the animal analogy, human beings do not simply seek to live around each other, as cows do, but find the good life in shared and interwoven projects.\textsuperscript{14} In noticing this we realize that our deep desire to live together is not based simply on maximizing food, shelter, protection, utility or any other such good.\textsuperscript{15} We rely on each other for not just material well-being but for social and emotional support.\textsuperscript{16} Shifting one’s attention from the merely instrumental benefits of shared living to the richer goods it provides highlights another compelling truth about human beings. Human beings are not simply rational agents, they are moral agents with thick and rich ends, both individual and shared, which extend beyond a crass view of singular interests.\textsuperscript{17}

Unlike the atomistic view that undergirds modern liberalism, Aristotelian republicanism makes central that we are interconnected in complex ways that ground our communal and political identities.\textsuperscript{18} Put so plainly, this claim seems a bit of abstract armchair sociology.

\textsuperscript{12} \textit{Kraut, supra note 8}, at 241-242.
\textsuperscript{13} \textit{Id. at XX. Kraut, supra note 8, 245, 249-250.}
\textsuperscript{14} \textit{Id. at Nicomachean Ethics: bk. VIII, ch. 12; Politica: bk. I, ch. 2, 1252b29–30; Kraut, supra note 7, 249-250.}
\textsuperscript{15} \textit{Kraut, supra note 7, 243, 247-248.}
\textsuperscript{18} Aristotle, Nicomachean Ethics: bk. VIII, ch. 12, 1162a16–19; Politica: bk. I, ch. 2, 1252b29–30; \textit{Kraut, supra note 7, at 257.}
It is worth noting, however, that this view is truer to our life experiences and accords with the social science literature as it turns its attention to our natural interconnectedness. Our social and civic interconnectedness dissolves problems of legitimacy that are baffling from the point of view of the committed liberal.

Take the stock liberal argument, perhaps made most famous by H.L.A. Hart but presaged by Locke and endorsed by Rawls, that justification for coercive imposition of laws in liberal state can be premised on a certain sense of “fair play.”\(^\text{19}\) On this view, the benefits each individual gains because others submit to a system of laws justifies coercive enforcement of those laws (and presumably promotion through taxation) in order to prevent the dangers of free riders. As Nozick rightfully points out however, the mere fact that one’s neighbors begin a volunteer system of free public radio broadcasts does not obligate you to participate in the scheme even if you enjoy the music very much.\(^\text{20}\) Put more accurately, no system that elevates autonomy or freedom as a singular political justification can adequately justify forcing one to participate based simply on an argument from fair play.\(^\text{21}\)

But a step back from Nozick’s example allows us to ask how convincingly it captures our purported natural freedom. Were everyone in a neighborhood to spruce up one’s home, the natural reaction in most would not be to wonder if neighbors would be justified in forcing one to do so as well. Rather, the natural inclination would be to do so as well; to avoid the embarrassment of being the “run down” house on the block.\(^\text{22}\) Indeed, I suspect that for most people embedded in a community bonded enough to organize Nozick’s public music organization, one would be much more likely to feel pain or anxiety in not being included than fear of being forced to participate. Obviously, such charming hypotheticals do not resolve the question of whether it is justified to pressure the holdout or the recalcitrant but noticing how different our natural reaction would be to those prized by those who imagine

---


\(^\text{20}\) NOZICK, ANARCHY, STATE, AND UTOPIA 93-94 (1974)

\(^\text{21}\) RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY, supra note 2, 187-190.

autonomy is our primary motivating impulse begins to reorient our view of the shape such justification should take.

The liberal and the libertarian are, to be sure, different political theories. Nonetheless, because individual freedom is the central human characteristic to be preserved both will render fair play an implausible ground for political obligation. Shifting our eyes from the preservation of freedom highlights that the impulse is to join with one’s community to pursue goods that are jointly defined as valuable is entirely natural. Social scientist are increasingly focusing on the ways people are naturally driven to pursue various goods when they are informed that others within their community value and pursue those same goods. Robert Cialdini has noted that merely informing people that the majority of people in their community do not litter or take wood from national parks or recycle resulted in people conforming their behavior to their community norm. This effect holds true even in case important and otherwise recalcitrant problems. So merely informing college students that the majority of their peer-group do not engage in binge drinking reduced binge drinking among those who do. Remarkably, informing people of the percentage of fellow citizens that pay their full taxes on time increases compliance with tax laws. Whereas Nozick’s example misleads one’s intuitions by choosing a charming but innocuous hypothetical, what our experiences and social science reveal is that in matters small and large, we are naturally driven to define and pursue our values in common.

Even this underestimates the claim. It is not simply that humans are susceptible to being persuaded by others to pursue certain goods. It is that people define that which is good by reference to each other. In the most intimate of situations, this is perfectly obvious; it is perfectly natural for a father to respond to the question of how he is doing by launching into a story about the latest triumph or mishap that has befallen his daughter. The well-constructed person experiences the well-being of those near and dear to her as part and

---

23 CITES
24 Perceiving the community norms of alcohol use among students: some research implications for campus alcohol education programming, H.W. Perkins, A.D. Berkowitz.
26 John Cooper, Political Animals and Civic Friendship, supra note 16, at 75-76.
parcel of her well-being. Though not as intimate this feeling extends itself to those with who we share a civic community. How well our world is going turns in part on how well our world is going for our fellow citizens. Seeing crippling poverty anywhere is distressing but seeing it in one’s community touches one in a different way. Visiting another country that seems to have scored better in taking care of its poor fills one with the sense, “why can’t we do this back home?” And this is true even if one’s wealth and gated community means poverty does not affect one directly. In fact, what one notices is that even if you are wealthy, the poverty or suffering of one’s fellow citizens does affect you directly.

The good for our polity is part and parcel of the good for us; we share in its faults and its excellences. We cheer for our teams during the Olympics and are saddened and angered when we learn of some injustice done by our government in a way that is different than if the same tragic event was committed in someone else’s name. One need only think of the many ways in which our projects are only recognizable insofar as they are part of ongoing projects that will benefit our community long after ourselves. Sam Scheffler illustrates this elegantly in a series of articles demonstrating the ways in which we naturally make sense of our lives by orientating ourselves around traditions, both individual and communal and pursuing projects that extend beyond our own futures by benefiting our communities. Scheffler calls to mind the scientist working on a cure to cancer. That she cannot hope to cure cancer in her lifetime would not undermine the value of her research. Her project is valuable as a contribution to curing cancer even in the case where no benefits will be fall to her during her life. Learning that her community will disappear 25 years after her death, however, would drain the her life’s work of value, again, despite that in either case, she will have died.

One need only imagine that the scientist is working on a disease that particularly affects her community or is a caretaker of some important cultural marker and the intuition grows stronger. The conclusion elegantly draws attention to the fact that much of what gives

27 Id. at 72-76.
28 Aristotle, NE 1.7 1097b11; Politics I.2 1253a2-3
29 John Cooper, Political Animals and Civic Friendship, supra note 16, 73-73, 79-80.
30 SAM SCHEFFLER, EQUALITY AND TRADITION, AT XX (2010)
31 SAM SCHEFFLER, DEATH AND THE AFTERLIFE, (forthcoming)
our lives value is the way in which our projects contribute to others generally and our community particularly, regardless of whether we will be otherwise affected or even be alive to realize the benefits.\textsuperscript{33} But here again, we begin to see the distinctiveness of the Aristotelian political view (and its interconnection with views of human nature). Remember that the view is that one’s wellbeing is not just effected by the well-being of one’s community but in many ways constituted by the wellbeing of one’s community, that is obvious enough. Thus it is important to note one’s wellbeing is in turn often constituted by a particular political community with particular views of what constitutes a good life. Morality, on this view, loses at least an important form of liberal neutrality; that is the content of morality, in some large range of questions, will not be independent of from where and when I learned morality.\textsuperscript{34} This is not to acquiesce to radical relativism; Aristotle reminds that both ethical obligations must be justified by their role in promoting human flourishing and political obligations by their securing political equality in service of the common good. Our worst worries about community dependent morality come from moral codes that are impossible to describe as meeting either requirement.

All of this is simply a way of elaborating what we already know. But it is important to reconnect these ideas to their distinctive political picture. An important part of how we define what is valuable is defined together as a community. Further, important parts of what we define as valuable is intertwined with the good of others, those near and dear to us first but including our wider community. We deliberately seek to share our lives and grow together as communities to pursue a more robust vision of the good life, form friendships and partnerships and care for emotional and social needs. It is this interconnectedness that gives sense to Ross’ colorful translation of Aristotle, “Man is born for citizenship.”\textsuperscript{35} Of course there are some rare individuals who wish to spend the vast majority of their lives in complete solitude. But these individuals attract our attention precisely because they are rare and when taken to its limits such behavior can be evidence of deep emotional trauma or mental illness.

\textsuperscript{33} SAM SCHEFFLER, DEATH AND THE AFTERLIFE, supra note 31, at XX.
\textsuperscript{34} MacIntyre, Is Patriotism a Virtue?, 7-9.
\textsuperscript{35} Aristotle, Politica, XX.
These observations do not pretend that there are no holdouts in important social situations. Clearly, there are those who hold out from neighborhood projects and much more serious civic projects besides. In particular, as demands become increasingly suffocating and visions of the good life become increasingly pluralistic, it will be less likely one can assume the kind of compliance indicated, a point to which we will return. Still, it is obvious that on the whole human beings seek out and flourish as part of social and political communities.36

Of course, there is nothing in the Kantian or liberal picture that need deny that one would feel some amount of social anxiety if excluded from neighborhood organizations. That is because, at least on the Kantian view, liberal autonomy does not state a thesis about human nature or psychology. Rather, it makes a claim about moral ontology; that is that human beings are morally self-sufficient. Because persons have innate freedom or independent moral worth, their rights do not derive from others or their community. This view allows that social interdependencies being driven by rational self-interest just so long as interactions are on terms consistent with equal moral worth.37

But the Aristotelian picture on offer not only shifts our attention but invites us to question why one ought accept the Kantian picture. If the Kantian or liberal story does not exclude noticing human sociability, its focus on innate right naturally leads to an insistence on our rights as against each other and the state. Highlighting the enduring feature of human nature that we not only seek to work together for our material well-being but to both define and pursue a vision of the good in common, notices not only a psychological feature about persons but places it as a foundation of political justification. Reorienting ourselves to this more natural view of sociability as politics allows us to understand the much broader goals that may justify state (coercive) organization. Nor does doing so surrender the important Kantian claims that we must interact on conditions of equal moral worth. Rather, this view highlights that there are ways of securing and interacting as moral equals, even in public, that do not depend on solicitous focus on our rights as against each other.

36 John Cooper, Political Animals and Civic Friendship, supra note 16, 65-70, 74-75.
37 I am grateful to Alan Brudner for incisive critique here and in many other places.
That human beings pursue lives in common is the trait that leads Aristotle to describe human beings as a “political animal.” It is man’s political nature, our natural need and deep desire to live together in pursuit of a shared common good that replaces liberal independence as the primary political justification in a republican theory of political obligation.\(^\text{38}\) Political obligation and in turn legal justification are embedded in the social project of living together as a civic community. Indeed, even the idea that one can determine the shape of rights, beyond perhaps the most basic rights to bodily integrity, outside human communities is rather speculative and abstract.\(^\text{39}\) A well formed individual will understand that laws are one of the most significant ways in which we organize our joint pursuits, including the basic pursuit of living peacefully and flourishing as a community; that laws represent the agreed upon boundaries of acceptable behavior.\(^\text{40}\) Law provides normative guidance not only in the particular actions but in “setting parameters within which individuals carry on together their social interactions, pursue their individual and common projects, and the means for repairing the relationships when things go wrong.”\(^\text{41}\) Thus, republican political obligation is largely defined in establishing the respect that is owed to each individual as a citizen of their polity as well as the duties each in turn owes to their polity in light of our shared civic project.

**Part II: The Natural Republic and the Common Good**

We have gone a long way to discover what I hope are fairly intuitive conclusions. In this case, however, I hope the protracted explication to arrive at intuitive conclusions can be viewed as a strength of a republican theory. Seeing that freedom and independence is implausible as a primarily or uniquely justifying political justification, as is asserted by

\(^{38}\) Philip Pettit, Freedom of the City, 163.

\(^{39}\) *Lacey, State Punishment*, 171 (1994). As Nicola Lacey astutely notes: “. . .the conception of an a- or pre-social human being makes no sense. What individual human beings perceive as the proper bounds of autonomy around themselves, what they regard as just distributions, how they regard their relations with each other and a thousand other questions central to political philosophy, are ones which we simply cannot imagine being answered outside of some specific social and institutional context.

\(^{40}\) David Keyt, Aristotle and Anarchism, 207.

liberal theories, we can start again by building a more organic theory that makes front and center our civic nature. Once we see that we are compelled by nature to live together and that being part of a civic society is good for persons then it is easy to see that participating fully in that society must be part of that good.42

One important note bears immediate addressing before we embark fully on describing republican citizenship. Though I largely follow the shape of Aristotle’s, it is clear that important updates are necessary. In particular, Aristotle held deeply unattractive views on who could qualify as a citizen, excluding women, barbarians, “natural slaves” and the vast majority of workers.43 Aristotle’s stated reason is that, for one reason or another, such persons did not share fully in the rational capacities required for citizenship.44 In the case of workers, Aristotle is unclear whether their rational capacity is entirely absent or if the nature of manual labor in ancient Greece, which certainly would have meant nearly unceasing toil and little chance for education, would prevent one from being prepared to participate in the duties of an engaged citizen.45 In the case of women and slaves, the ostensible reason was that both constitutively lacked such capacity in full.46 Even here, Aristotle hesitates. Well aware of the debate even in his day of the evils of slavery, Aristotle admits a distinction between those who are slaves by nature and those who are unjustly enslaved as a consequence of poor circumstances, such as a military defeat.47 Such hedging and a justification that ranks among Aristotle’s worst passages in the Politics may reveal his fundamental dislike of slavery and point to his begrudgingly accepting the institution as an economic and political necessity of his time.48 In any case, here is not the place to be an Aristotle apologist and I hope to take on these faults more fully in future work. Rather, we can state the obvious; we can set aside Aristotle’s ugly omissions of these groups rather easily as we have no reason to believe that there are groups that systematically lack the rational capacity to participate in citizenship.49 What matters then,

42 Yankah, Legal Vices and Civic Virtue, 7 CRIM. LAW AND PHIL. 61, 71 (2012).
43 Aristotle, Politica, supra note 6 at XX.
44 Id. at XX.
45 KRAUT, supra note 7 at XX; Frede, Citizenship in Aristotle’s Politics, at 177-178.
46 Aristotle, Politica at XX; KRAUT, supra note 7, 249.
47 Id. at XX; David Keyt, Aristotle and Anarchism, 208-209, 212.
48 Frede, Citizenship in Aristotle’s Politics, supra note 45, 177-78; David Keyt, Aristotle and Anarchism, 216.
49 Frede, Citizenship in Aristotle’s Politics, supra note 45, 172,176-178.
is inspecting the vision Aristotle has for those considered citizens for its attractiveness.

Realizing that we are political animals – that we wish to live together and pursue a common civic project – puts the question of political sovereignty in a dramatically different light than modern liberal conversation. It is no longer a question of how to justify the right of a person or group imposing their coercive will on another; the common political philosophy 101 question, “how are the orders of the state different than those of a gunman,” is shown to be a false analogy. State power is no longer viewed as either a necessary evil or as an imposition on liberty that can only be justified by the greater liberty it secures in exchange, as proposed by Hobbes and Locke. Liberal theories ask how state power can be justified given that persons cannot avoid crashing into each other. Any coercive force must be justified because one imposes on another and the state is reduced to just another somebody, albeit a powerful someone. A republican justification takes a dramatically different view. Rather, we discover that sovereignty is fundamentally a question of how we are to govern ourselves.

Both because we must and we wish to live together in various common pursuits, freedom must be found not in justifying state power as though each individual had a right as against all the world to be left alone. Rather, freedom is justified within a conception that takes into account that we live together in an ongoing common pursuit. To use Pettit’s words in earlier work, republican freedom is the freedom of the city, not the freedom of the heath.50 Ensuring one’s freedom if one is committed to living with others means being able to live openly among others without fear; that the laws protect the basic goods of bodily integrity and other minimal goods without which living together is impossible.51

Seeing that our political bonds are social in nature highlights that one can only experience themselves as free to the extent one is assured that you are living on equal terms with every other person, accorded the same respect by your community as each.52 One’s sense of

50 Pettit, Freedom of the City, at XX; Pettit, Republicanism at 66-67.
52 Pettit, Freedom of the City, at 149-150.
freedom is ultimately social and turns on your knowing you have a certain standing relative to others. To not be treated as an equal is to know that one is not fully sharing in the same civic project. Thus, equality before the law is essential the justification of republican political obligation. But even so put would understate the matter; unlike many liberal theories that can only view law as an ever-present danger that need be justified, a republican theory understands that as much as equality before the law is essential to legal justification, law can reciprocally be constitutive of equality. In ancient Athens, *isonomia* represented the idea that in a well-ordered society, by requiring all to be subject to and restrained by the same law, legal equality secured political equality, allowing the poor and powerless to hold the rich and powerful accountable on the same terms.

The combination of these two features, living freely and without fear among your fellows and the widespread knowledge that the law both treats and establishes equality in civic matters, leads naturally to a third feature. If our rational nature is expressed in our coming together to live as a community as equals, then part of that rational nature must be in having a voice in the affairs, structuring and governance of one’s community. This idea comes naturally enough when we consider why having the right to vote is important for reasons far beyond its instrumental benefits. The right to vote is an important constituent of political membership because it is a way of conveying equal respect for the views and goals of each.

Nowadays, the term franchise is used solely to invoke the right to vote but the republican view I am suggesting harkens back to the original and much richer meaning of the word franchise. Democratic voting procedures are one but only one way of reflecting shared voice that is critical to a just polity. Franchise is the sense that one is a complete and equal member of the polity with all its attendant rights and responsibilities, to use the modern

---

54 *Id.* at 14-15. Vlastos, G. (1953), Isonomia; 74 *Amer. J. of Phil.* 337
58 Pettit, Freedom of the City, 141-142.
idiom.\textsuperscript{59} For Aristotle, a critical part of participating in one’s community was sharing in governance, particularly taking a turn as a public official.\textsuperscript{60} Again, notice the distinctly different tenor the republican view brings to the question of governance than the contemporary debate on legitimation of political power. From the republican view, a state must work to promote franchise, \textit{i.e.} the active participation of all in sharing the benefits and burdens of governance.\textsuperscript{61} Of course, in the vast majority of unglamorous offices, these benefits and burdens will be nearly identical; serving in them will both be a way to make one’s voice in your polity heard as well as contribute to your share of its upkeep. Even today, in a very different world of professionalized public administration and a population too large to make each taking a turn in public office practicable, we recognize the importance of having access to run for office as an important constituent of both our social basis for self-respect and our place in our political community.\textsuperscript{62} Thus, the republican view of governance is not one that first asks of the justification for the state ruling over the populous but a view of “the free ruling over the free.”\textsuperscript{63}

The conditions necessary to promote republican view of political participation are no less than the conditions of citizenship in a polity. It is under these conditions that one can both express and fulfill our drive to pursue a life in common while being assured that our voice will be recognized in our civic community. The republican view of political obligation, however, is not merely procedural. While striving to make sure all have a voice in the polity will go a long ways to promoting just laws, a republican polity does not blithely assume that any particular procedure, democratic or otherwise, can by itself guarantee a just legal system. And a republican view certainly does not assume, as does Rawls, that any laws that are the product of a procedural will for that reason be just. The conditions of civic excellence are constitutive of republican citizenship because they are critical in fostering civic virtue.\textsuperscript{64} Still, they are not in and of themselves the source of political justification.

\textsuperscript{59} Vlastos, G. (1953), Isonomia at 354-357.  
\textsuperscript{60} Aristotle, Politica: bk. III, ch. 4, 1276b36–1277b34.  
\textsuperscript{61} Pettit, Freedom of the City, 145; Yankah, Legal Vices and Civic Virtues, 70-74.  
\textsuperscript{62} Barnes, Aristotle and Political Liberty, 190; Frede, Citizenship in Aristotle’s Politics, \textit{supra} note 45, XX.  
\textsuperscript{63} Barnes, Aristotle and Political Liberty, at 189-190.  
\textsuperscript{64} Yankah, Legal Vices and Civic Virtue, 72-74.
We noted that the willingness to share in the burdens of communal governing is a critical feature of civic virtue. Aristotle described the unjust person as grasping, motivated by wanting more than their fair share of benefits and less than their fair share of burdens.\(^\text{65}\) Thus, when the polity is successful in cultivating civic virtue, citizens will internalize the need to care and contribute to the public and common good ahead of the interests of the individual or their own small interest group.\(^\text{66}\) The well-constructed citizen realizes that kin, tribe, race, political party and lobby group are owed a share of political concern but no more than a share. Thus, the polity, its laws and political institutions are justified to the extent it promotes the good of the entire political community ahead of the interests of any particular person or interest group.\(^\text{67}\) “[T]rue forms of government [] are those in which the one, or the few, or the many, govern with a view to the common interest; but governments which rule with a view to the private interest, whether of the one, or of the few, or of the many are perversions.”\(^\text{68}\)

This picture does not rest on some naïve or utopian view of citizens who lack recognizably human goals and ambitions for their own projects. It is all too easy to dismiss such republican ambitions as belonging to a romanticized past, whether it be a Rockwellian America or the near mythic time of the American founding; sometime, it is imagined when, people of political virtue were in abundance. Likewise, the danger in invoking Athenian political thought is its easy dismissal as applicable only in an ancient and unrecognizable world. It is too easy to imagine an idealized Athens, a small, homogeneous City-State where familiarity and consensus about the common good made possible Aristotle’s ideal of ruling and being ruled in turn. This view leaves few lessons for our contemporary diverse and cacophonous political world, with its sharp disagreement about the common good.

But such easy dismissal depends on both unsupportable romanticization of the past and

\(^{65}\) KRAUT, ARISTOTLE, 102, 265–2; Edmundson, 275.
\(^{67}\) Aristotle, Politica: bk. III, ch. 6, 1279a17–21, 1284b4–19
\(^{68}\) Aristotle, Politica: bk. III, ch. 7, 1279b28–32
unnecessary pessimism about our political future. I do not hold any idealized view that past Americans were by natural constitution selfless and more reliably orientated towards the shared common good. The long and continuing fights, from the beginning of our nation’s history, through an almost unimaginably bloody civil war, generations of racial oppression, the studied subjugation of women and the current fight for equal rights by gay Americans and others should quickly disabuse us of such fantasy.

Nor should we imagine that either the people or political challenges testing the civic commitments of ancient Athens were unrecognizable to our modern mind. Ancient Athens was a large, thriving and most importantly, diverse political culture, hosting persons unknown to each other from disparate homes and backgrounds, speaking different languages, advocating and contesting the vision of the common good.69 No less than today, there were political battles over who truly counted as part of the polity, truly held Athenian values and truly cared for the common good.70

The point, for our purposes, is that the success of this republican theory does not rely on an unrealistic view of selfless citizens who ignore their every need to pursue the good of their fellow citizens.71 As historian Josiah Ober puts it

…The “standard Greek polis” is often taken, by liberals and communitarians alike, as a very thick community, deeply grounded in tradition and situated commitments… Athens [was] actually considerably less tradition-bound than is often supposed [. ] Athens allowed, I will argue, many (though not all) of its people to authorize their own histories, define for themselves a variety of goods, and it provided many of them with resources adequate to pursuing a variety of diverse ends. And so Athenian political coherence remained thin enough to be consistent with the demands of political theorizing that must engage with the real condition of multicultural modernity.72

Indeed, a republican view turns on the explicit recognition that people are status oriented animals and thus makes critical space in securing their status as civic equals. No polity could remain healthy if the civic duties it imposes are so suffocating they leave no space

70 Id. at 11-15.
71 Id. at 24-25.
72 Id.
for the individual projects of their citizens, including the ability to prefer those near and
dear.73 Thus, the Aristotelian vision rejects Plato’s arguments that the personal projects of
individual citizens ought to be subsumed by that of the polity.74 After all, the ability to
favor those dear to you, to pursue personal projects and to give time and energy to those
projects most meaningful to each individual are important parts of civic flourishing.
Aristotle’s famous example invokes sailors on a ship. Though each has his own project
and duties, they cumulatively contribute to the wellbeing of the ship.

It does seem perfectly natural, however, that the well-composed citizen will frame her
projects in a way that is at least compatible with and more often supports some portion of
the good of her civic community.75 Indeed, because our concepts of justice are themselves
deply influenced by the standards of our political community, a citizen will often not be
even able to formulate visions of success or claims of justice without incorporating a shared
concept of the common good.76 Whether one counts their career as truly a success, for
most, turns on their civic community’s judgment on whether one was a pharmaceutical
titan or a black market drug dealer. The information I feel you must fairly disclose to me
upon the sale of a house and thus the complaints I can level at you, for example, will be
partly constituted by where our society has drawn the line between required disclosure and
buyer beware.77 The intuitive analogy is of a group of roommates. In a basically
functioning home, even the way one makes demands seeks to be plausibly compatible with
the common good of the house.78 The announcement that you do not want to do the dishes
when it is your turn because you do not like doing dishes will be met with confusion and
puzzlement; ultimately it will be rejected as an argument at all.

Just as individual citizens will frame their projects to be compatible with the common good,
so to must laws, taken individually, and political and legal institutions taken collectively.
This is particularly clear when civic agents, e.g. office holders, seek personal gain for

73 Yankah, Legal Vices and Civic Virtues, 73-74; Aristotle, Nicomachean Ethics: bk. VIII, ch. 9.
74 Aristotle, Politics: bk. II, ch. 2–5
75 KRAUT, ARISTOTLE, 271-275.
76 Yankah, Republican Responsibility in Criminal Law, (forthcoming _ Crim. Law & Phil._)
78 _Id._ at 275.
themselves, their friends and family or special interest groups. Just as individuals are unjustified in twisting civic power for their own benefit, Aristotle saw that factions doing so were equally unjustified. This danger could exist in virtue of unchecked populism, where the poor seek only to siphon money from the rich. More likely, of course, is a world in which the rich and powerful use the law to exploit the poor. In either case, our civic bonds are ruptured when law no longer aims at the common good.79

In justifying law by pursuit of the common good, the republican view of political justification frees itself from being entirely cabined by much contemporary political thought where law is only justified by some catalog of rights or hypothetically consented to liberties. As we shall see, the republican view presents a distinct picture from modern liberal views, whether it be based on Kantian freedom, Nozickian libertarianism or Rawlsian liberalism. But the republican view expressed here stands in sharpest contrast with what passes as the modern enlightened view that all politics is interest group warfare and rent seeking. It remains equally dangerous when we collectively acquiesce to “enlightened politics,” harnessing crass interest group politics to counteract the same even with the best of intentions.80 In dire situations, this post- modern Machiavellian view of balancing interest groups may well be the best that can be done to secure the common good but it is a shadow of institutions (and a public ethos) that are constructed, in the main, to focus on the common good.81 It is not surprising that even the most disingenuous attempts to serve special interests are so often veneered with arguments of how they will in fact serve the common good. However we may rationalize the politics as power-play view, those who must sell us these ideas know that something inside us deeply understands that the institutions of our civic polity can only be justified when they seek the common good.

Part III: Republican Sovereignty and Citizenship

79 Aristotle, Politica: bk. IV, ch. 1, 1295b2–1296b2; Yankah, Legal Vices and Civic Virtue, 75-76
81 MACHIAVELLI, THE DISCOURSES, XX; Maurizio Viroli, “Machiavelli and the Republican Idea of Politics”
Since an Aristotelian republicanism is premised on our political nature, described as our drive to live in common as active participants in our civic governance, and is justified by political and legal institutions that aim at the common good, its treatment of the justification of political sovereignty is dramatically different than much contemporary treatment. Fundamentally, republicans are committed to building a civic polity in which the most natural view of the state is not of something outside of ourselves, requiring justification that is analogous to the gunman. The change of tone can feel so dramatic that it is as though the question of the political sovereign has disappeared. The feeling that a political theory assumes away one of the central questions of contemporary political theory raises the suspicion that the theory is fundamentally flawed.

This reaction is a symptom of well-worn liberal paths of thinking rather than any defect in republicanism. I hope to illustrate that the way a republican theory resolves the related question of what obliges a citizen to obey the law and what permits others to impose legal obligations on the otherwise unwilling presents an attractive picture of sovereignty. Indeed, we shall see that in examining sovereignty republicanism captures much of the intuitive in liberalism while discarding many of the least plausible features. To go further, we eventually notice that liberal theories borrow much of their plausibility by relying on deeply republican intuitions.

A. Law Abidingness
A republican theory makes political and legal obligation internal to the theory itself. Because law is one of the focal ways by which we coordinate our pursuit of the common good and resolve conflicts arising from our individual projects, even when law is imperfect a citizen with civic virtue will adopt a supportive and differential attitude toward much of law. The rule of law, when orientated toward the common good, will secure great communal goods. Those who cast aside the laws of their community, in some sense, reveal an arrogant or oligarchic character. An attitude of law abidingness will be embedded in the same civic virtue that promotes the common good and each

---

citizen’s part within it.\footnote{Kraut, Aristotle, 117–118, 271; W.A. Edmundson, The virtue of law-abidance. 6 Philosopher’s Imprint 1 26-28 (2006).}

Law abidingness is something broader that the well explored question in jurisprudence of whether there is a prima facia obligation to obey the law. Law abidingness describes a dispositional civic virtue, a willingness to generally follow roughly just laws even when they seem to clash with one’s most immediate interests. It is captured in Rawls’ sense of reasonableness, Aristotle’s republicanism and described in his virtue of justice.

Law abidingness does not mean that one believes oneself obligated to follow every law nor is it defeated by a singular instance of law breaking. At the same time, law abidingness should not be understood as a slavish or passive acceptance of any legal standard.\footnote{Yankah, Legal Vices and Civic Virtue, 67.} As we noted, Aristotle is insistent that in a functioning policy each must be rule and be ruled in turn. To this he adds each must be able to rule and be ruled \textit{well}.\footnote{Aristotle, Politica, at XX; \textit{Kraut, Aristotle}, 367-369.} Aristotle makes clear a citizen must be sensitive to the law’s function as supporting a civic project that promotes the flourishing of its members.\footnote{L. Solum, Natural justice. 51 American Journal of Jurisdiction, 104-105 (2006).} Thus, there when the laws become directly hostile to human flourish, as in Nazi Germany or the ante-bellum South, they will be recognized by the well-constructed citizen as impossible to obey or internalize.\footnote{Aristotle Nicomachean Ethics: bk. III, ch. 1, 1110a4–27; bk. III, ch. 4, 1277a27; \textit{Kraut, Aristotle}, 114-118.} So understood, because law abidingness is part and parcel of supporting your civic community, it includes the impulse to not only support your community’s laws but to improve them, particularly in ways that steer them away from instrumental factionalism and aims them towards the common good.\footnote{\textit{Kraut, Aristotle}, 370-371.} Indeed, improving the laws of one’s community while displaying an attitude of respect towards the project of law-making – think of civil rights marchers in the American south, simultaneously breaking unjust laws while showing respect for law itself – is often a way of exhibiting the greatest civic virtue.\footnote{\textit{Id.}; W.A. Edmundson, The virtue of law-abidance. 6 Philosopher’s Imprint 1, 6-7, 13-16.}
At its core, however, republicanism may be said to take a more optimistic view of a citizen’s obligation to follow the law than what is most often communicated by liberal anxiety. In the normal case, a citizen does not take her individual good to be in conflict with the good for the many.91 A republican theory is embedded in the idea that the good for the many is typically part of the good for the individual. Thus, one’s sense of justice will be part of one’s reasoning, guiding consideration about how one’s plans fit into or at least should not come into conflict with the good for one’s civic community.92

B. Political and Legal Obligations

Of course a natural sense of law abidingness will not completely settle the question of sovereignty, for that would be to assume the question away. While the question of sovereignty is related to the obligation to obey the law, it is also fundamentally focuses on the question of the right to rule.93 The republican conception of the power to impose legal and political obligations, as well as to coerce or punish those who resist or break legal norms, I imagine, follows plainly from the discussion above. On a republican view, criminal punishment, for example, is not solely the state’s enforcement of pre-social rights or justified by retributivist imperatives. Rather, legal and political power is embedded in the very social project of our living together as a civic community. Rights and society, it may be said, go together and our rights against one another cannot be abstracted from the civil society we share. Even the definition of the crimes the state may prohibit and punish, in many instances, depends on social decisions about the boundaries of rights and obligations.94

Where as many liberals see sovereignty as stemming, first and foremost, from the ability to enforce pre-existing legal rights, the republican view understands the duties of law as

91 Id. at 271-272.
92 Id. at 270-271, 380.
93 Perry, Political Authority and Political Obligation, XX.
94 As Lacey puts it, ‘…the conception of an a- or pre-social human being makes no sense. What individual human beings perceive as the proper bounds of autonomy around themselves, what they regard as just distributions, how they regard their relations with each other and a thousand other questions central to political philosophy, are ones which we simply cannot imagine being answered outside of some specific social and institutional context.’ LACEY, STATE PUNISHMENT, 171
reciprocally held between citizens and community. This does not mean the republican
denies that persons also possess certain inalienable rights; there are things one cannot
morally do to anyone regardless of whether one shares a civic community. Nor are crimes
outlawed only because they hurt the metaphorical public good. As Duff has persuasively
argued, the visceral and most important wrong we understand when contemplating a crime
is the harm and the violence done to the victim.\(^95\) In the case of the most obvious laws,
both concern for individual rights and our concern for a shared civic project, will produce
the same requirements. In any community that claims to be dedicated to the project of
flourishing as a community, the most basic human interests – protection from murder, rape
or assault, kidnapping and some level of protection of property will require protection for
human beings cannot plausibly flourish in a community without such basic protections.\(^96\)

Outside of core protections of body, however, we begin to see more clearly the
persuasiveness of the republican justification for political and legal power. Regardless of
where one falls, from the largely lonesome frontiers man to the urban bon vivant, we pursue
life in common; none can survive without the ability to coordinate both actions and
expectations with others to define the parameters of acceptable behavior. Freedom
certainly belongs to all but whether I may enter this building, whether this area is a public
park or private property, whether 5 parts per million of this heavy metal is your poisoning
my community or acceptable industrial by-product, these and countless other acts cannot
be determined without reference to socially determined expectations.\(^97\)

Coercive imposition of law in a republican theory then is justified in order to make possible
living together as political equals in pursuit of the common good. In our most basic
criminal law this is easy to see, as being secure against gross violence and, almost certainly,
some measure of security in property is essential for persons to flourish or share the project
of living together.\(^98\) This is equally true in many other fields, from tort liability to repair
the inevitable accidental injury to contract law which allows us to organize our lives and

\(^95\) Duff, Answering for Crime, 141.
\(^96\) Ekow N. Yankah, Republican Responsibility in Criminal Law, _Crim. Law & Phil. _ (forthcoming 2014); JOHN
Braithwaite and Philip Pettit, NOT JUST DESERTS, 63-64, 69.
\(^97\) John Finnis, NATURAL LAW AND NATURAL RIGHTS, 232 (1980)
\(^98\) Yankah, Republican Responsibility in Criminal Law, _Crim. Law & Phil. _ (forthcoming 2014)
commercial pursuits in increasingly complicated ways. Well-constructed zoning laws, to take a particularly unglamorous example, illustrate the core work of the republican sovereign. In some parts of law, there will be no definitive choices that make civic living go better but that there is a choice made will by itself be a great boon. To the extent some parts of law, particularly criminal law and its ability to curtail our liberty, lose touch with their civic justification, a republican theory warns to search for factional abuse and provides an argument for modesty and legal curtailment. Indeed, that legal and political power is only justified where necessary to permit and improve our civic functioning represents an important limiting feature that prevents the state from running wild to coerce any particular image of personal virtue.

Justifying political obligation by premising it on our need to come together to pursue a common good may strike many as banal. First, the common good may be insufficiently fine-grained or simply too empty to a concept to do any work. History is full of those in political power arguing that their abusive and exploitative use of power is in the service of the common good; Aristotle’s thinking on natural slaves is an immediately relevant example. This is unquestionably the case. Yet too often focusing on laws that are the result of interest groups seeking only to capture rents leads us to give up on the idea that the common good can do work. Remember that the republican vision of political obligation focuses on the reciprocal duties between citizens and their state and makes central that all should be active participants, to the extent possible, in the governance of their community. A world in which there are increasing avenues of citizen involvement, from community boards that have actual power in legislating in their neighborhood, police-citizen boards that are structured to and empowered to effect change, changes in campaign finance including public matching funds that open the political process and limits on donations from any one source, perhaps even a legal requirement to vote, gives real teeth to the idea that the common good will not merely be a veneer behind which the powerful use to oppress. It is also true, as Aristotle realized, that building a civic community wherein

---

99 Yankah, Legal Vices and Civic Virtue, at XX.
101 Aristotle, Politica, Bk. I, ch. 6; Bk. III, ch. 6
102 Pettit, Republicanism, 173.
citizens were prepared to contribute and sacrifice for the common good required real investments in the education and support of citizens from an early age; the state’s job would be in a real way to invest in creating citizens.103

These conditions require public investment and a change in the current view of interest group only politics but such changes are not unimaginable. In a state that promoted citizenship, individual members would have a voice in governance such that pursuing the common good would not be an empty promise. The natural compliment to having a voice would be the ability of citizens to contest public policy and legal decisions.104 The republican state would both encourage and be legitimized by the ability of citizens to contest decisions in a wide variety of ways. An example of this lies in our not too distant past in the town hall meetings advocated by champions of participatory democracy and today in the citizen review boards of many major cities that must often approve civic matters ranging from bar licenses to disruptive commercial endeavors (such as filming a movie or granting a bar license). To paraphrase Philip Pettit in describing a different but here sympathetic republican theory, republicanism is not legitimated in light of hypothetical consent, it is legitimated in presence of real contestation.105 Such contestation, while having real cost in the ability to govern cheaply and quickly, has immeasurable benefits in ensuring that the pursuit of the common good is real.

Not only is a republican vision of governing plausible but, as I have argued elsewhere, I suspect much of what makes liberal theories attractive is actually smuggled in republican intuitions.106 Take Kantian forms of liberalism, for example, surely one of the dominate modern strains. Kant premised legal power on the need to guard one’s innate right to freedom from imposition of any one person’s unilateral will onto another.107 In order to do so, Kant points to the need to ensure that all coercive laws are the product of an “omnilateral will.”108 But the mysterious “omnilateral will” turns out to be exactly the

103 Aristotle, Nicomachean Ethics: bk. X, ch. 9, 1179b32–1180a4, XX; KRAUT, ARISTOTLE, 359-361, 365-366
104 PETTIT, REPUBLICANISM, 196-200.
105 Id.
107 KANT, GROUNDWORK TO THE METAPHYSICS OF MORALS, XX; RIPSTEIN, FORCE AND FREEDOM, XX.
108 Id. at XX; RIPSTEIN, FORCE AND FREEDOM, 54-55, 190-195.
submitting of individual decisions about justice to collective political decisions that are taken in the name of all. Indeed, so long as an act is taken for public rather than private purposes, we are told that the act is the product of the omnilateral will and thus legitimately coerced. That is to say, despite the singular focus on innate freedom with which we begin, Kant’s liberalism turns out to be a disguised and much less attractive form of republicanism. It is disguised because it pretends to be justified only by its protection of individual freedom without making explicit that the philosophical alchemy that turns the unilateral will into the omnilateral will is thoroughly republican in nature. It is much less attractive because it is solely justified by the protection of individual freedom. Lacking a fuller republican picture, it must twist itself into knots to justify anything like a state the vast majority of us find attractive. Natural parts of the common good, on Kant’s conception, must be excluded when not justified in the name of freedom alone. It remains unclear how those who support such a thin view of the state can legitimate a state that supports the arts, builds public parks, pursue remediative racial, ethnic and other justice policies or fund a national healthcare system and so on and so on in the name of freedom alone.109 Lastly, lacking the republican highlighting of active civic participation, Kant holds view that once the sovereign has ruled, the citizen has no right to disobey any law or, outside of petition, modify the legal system.110 Modern variations of liberal theories likewise fall short, excluding important civic goals many find naturally encompassed in our civic project. Even the rich resources of Rawlsian liberalism make space for civic goals outside of the (admittedly important) impulse to benefit the poorest among us.

A brief example, to be further explicated in later chapters, may highlight why liberal theories are implausible, or at least incomplete, without republican reinforcements. On the one hand, recall that Kantian liberalism authorizes all laws passed by a legislature (the “omnilateral will”) just insofar as they are justified by protecting freedom.111 Thus, a Kantian legislature, it would seem, is permitted to pursue public health initiatives insofar

109 Yankah, Crime, Freedom and Civic Bonds, XX; Tadros, Independence Without Interests (2011). But See Ripstein, XX. It should be noted that there are competing pictures of Kant’s political project that make much more central Kant’s goal that the law should accord with the laws that would obtain in a Kingdom of Ends. For compelling views, see BARBARA HERMAN, MORAL LITERACY, XX and Seana Shiffren, XXX.
110 Id. at XX; Jeremy Waldron, Kant’s Legal Positivism, 109 Harv. L. Rev. 1535 (1996).
111 RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY at XX.
as public health risks threaten freedom; building sewers and preventing epidemics and the like would be permitted, one might generously include treatment of serious pain and debilitating conditions.\textsuperscript{112} Further efforts, say a concerted government scheme to lower prices and assure better health outcomes to more citizens at lower cost, however, are justified not by defending freedom but rather by aiming at the common good.

Rawlsian liberals, by contrast, have richer resources to meet this challenge. Though great detail will have to await further explication, Rawls is committed to principles of justice that first secure basic primary goods (including basic bodily integrity). Though a stretch, one might think that national healthcare schemes are captured in or at least touched upon by this principle. Moreover, Rawls’ second principle of justice commits one to political institutions that serve the interests of the least advantaged among us before all other. This concern with distributive justice certainly gives political institutions the mandate to pursue cost control measures to ensure better health outcomes. Yet it is not difficult to imagine serious medical and social goods that are not solely captured by our concerns over distributive justice. There are times and places where new but dangerously unhealthy habits are adopted by those not among the poorest. A growing middle class in a developing nation may begin mimicking western fast food habits or recreational drugs. Perhaps it becomes fashionable and status conferring for those who can afford it to adopt baby formula despite the best evidence suggesting breast-feeding. American examples surrounding healthy eating, smoking and the like come immediately to mind. The current debates about the wisdom of government interjection over healthcare and the “nanny state’s” regulation of health incentives, including reduced healthcare costs for gym memberships and limiting the size of movie theater sodas, may be a fair public debate. But that the dominant liberal theories of our time mark such efforts as unjustifiable or prohibited sets a high bar to clear if such liberal theories are to be convincing.

The point, of course, is that at least some important tasks to which we set government

\textsuperscript{112} Though from a purely Kantain perspective, I have my suspicions as to whether debilitating conditions that arise from natural causes can be counted as impositions on ones “freedom.” Remember that Kant believes that freedom is imposed upon by others and is strict in describing one’s needs outside of poverty to be mere wish from the view of others.
cannot be justified solely as protecting our freedom, preserving primary goods or securing distributive justice. The government may seek to reinforce important issues of public health simply because they are in the interest of a flourishing civic polity. I rush to point out that this is worry is not one only of high-minded academic debate. In the past few years as the Untied States has struggled mightily to join the rest of the industrialized world in greatly expanding government guarantees of health insurance. This vast public debate in America has been misshapen to a remarkable extent because the American public has so widely and deeply internalized the language of rights that the entire debate often ran aground on the question, “what gives the government the right to force me to pay for someone else’s illnesses.” Even setting aside obvious prudential arguments about the uncertainty of who gets sick when, it is striking that for many, the only acceptable replies had to take the form of justifying conflicting rights. The obvious justification that some measure of security against illness is fundamental to a flourishing society was nearly stifled as a reply at all. Indeed, current liberal theories struggle to justify something as simple as posters that encourage replacing soda with water. This is not even to mention the intuition that it is non-trivial that we collectively support, at least modestly, excellence in arts, natural beauty and architecture and so on and so on simply because they represent civic excellences. That so much of what we take to be critical to plausible, attractive and justified state cannot be reconciled with liberal freedom or autonomy shows both that republicanism represents a distinct view and that liberalism is often only made plausible by internalizing republican intuitions.

**Part IV: LEGAL CONCLUSIONS**

I have tried to build here a compound picture of sovereignty; political obligation as law abidingness and political authority as civic duty. Combined, the republican picture I presented may be thought of as franchise or citizenship. Republican franchise, I have argued, stems from our most basic nature as social and political beings that both need and desire to live in common. It is an attempt to step back from Rawlsian and Kantian liberalism that has to either imagine that all political institutions come from the imagined

---

113 Pettit, Freedom of the City, 142.
consent of asocial persons or the only justified state is one that extends only so far as necessary to protect individual freedom.

Republicanism is distinct in casting off some of liberalism’s less plausible restrictions. I have already argued that it is only by focusing on the common good rather than Kantian freedom that one can justify funding some form of national healthcare to alleviate ever increasing costs of medical care for the general public. Likewise, funding for public arts and public parks, in correct and modest proportion, are natural parts of the common good that cannot be easily described as freedom enhancing as required by Kantian liberals. Take two further examples. The absolute freedom at the heart of Kantian liberalism now famously justifies the exceptional position in Anglo-American law that one need not rescue another citizen from grave, even fatal harm, even where that rescue can be done with no risk or little cost to oneself.  

This unattractive position is naturally resolved under a republican view of citizenship that prizes the common good and would find it easy to balance the costs to citizens in cases of great danger and costless rescue. Likewise, with Rawls’ difference principle. While the spirit of Rawls difference principle is certainly convenient with the shared concern of republican citizenship, its lexical nature is unnecessarily inflexible for the kind of republicanism seen here. That one could never allow a material benefit to any portion of society if it did not advance the worst off in society would prohibit massive gains to many or even most if wealth could not be reliably transferred to the poorest. A theory that focuses on the common good allows one to prioritize wealth creation that alleviates the burdens of the poorest, pay due regard to inequality as such yet not flatly contributions to a flourishing society even where it may be only partially spread.

Likewise, notice that a republican justification makes sense of why a state may be justified in pursuing ameliorative polices of racial justice. Imagine a City that has decided to rectify

---

115 Yankah, Crime, Freedom and Civic Bonds, XX.
116 RAWLS, THEORY OF JUSTICE, XXX.
racial underrepresentation among its firefighters.\textsuperscript{117} In this city, though a past history of discrimination had rendered the fire department disproportionately hostile to racial minorities, imagine, counter the most similar actual cases, that the current practices evidenced no contemporary discrimination. Nonetheless, the effects of discrimination, generations past meant few minorities joined the fire department. Perhaps citizens are vastly more likely to apply to the fire department if a parent was a firefighter. In any case, notice that a municipality may have reasons to expend energy and resources to diversify its fire department despite the fact that the reasons the disproportionate make-up of the fire department was not the result of any one within two generations having had their freedom curtailed. Certainly a city may think that certain important positions of civic trust, care or enforcement, from fire departments, police officers and even municipal workers generally, ought if possible symbolize civic equality quite apart from important questions of preserving individual freedom.

Still, republican citizenship should not be understood as a hodgepodge of popular left-leaning politics. Indeed, one of the features of republicanism most relevant to questions of sovereignty has unsettling, yet I believe plausible, implications. Because republican citizenship is premised on our civic project, it prizes civic priority. Put another way, it will often be the case that threats that are aimed at the civic polity or betrayals of the civic trust justify responses that are greater than “ordinary crime.” In the ordinary case, this is easy enough to understand. In ancient Athens, civic authorities had to undergo a public hearing before leaving office to ensure they had not abused their office for personal gain.\textsuperscript{118} This ancient ritual echoes in our sensitivities today when we hear of public corruption.

More troubling, given our current struggles, a polity’s right to defend itself has ominous implications for combating terrorism. Terrorism, whether by foreign enemies or home-grown and self-declared enemies of our own government, is distinct precisely because it takes as it aim not personal gain but the weakening or destruction of our ability to govern ourselves and continue our civic project. While I, like many Americans, condemn many

\textsuperscript{117} Ricci v. DeStefano, 557 U.S. 557 (2009).
\textsuperscript{118} Gowder, Equality and the Rule of Law in Ancient Athens, XX (forthcoming).
of the steps taken in the “war against terror,” from acts that must count as torture to the extradition of persons to strip them of American laws, I have also struggled with my belief that the same laws that govern the prosecution of ordinary crime do not necessarily govern the prevention and prosecution of terrorist attacks.119

Most troubling, it seems to me that some of the ordinary rights that a citizen relies upon may be curtailed in the case of imminent danger to the very integrity of our civic union.120 To be sure, I believe such instances to be much rarer than is the habit to claim and even under dire circumstances a polity must be sure not to lose its commitments to the principles by which it defines itself.121 But I cannot shake the idea that under circumstances where the very project of governing is attacked, our notion of individual rights must be thoughtfully balanced.

Part and parcel of citizenship is understanding that there are times when your individual rights are subsumed by the needs of your civic community.122 We understand this intuitively in the case of conscription; where the entire nation’s ability to continue as a civic community is threatened, those able have the obligation to set aside their current projects and indeed risk their very lives to protect their country.123 Thus, I find the recent controversial use of a drone to kill an American citizen actively engaged in violent terrorism to be a complex question of tactical wisdom but philosophically justifiable.

I hasten to add that a philosophy that authorizes exceptional measures, when strictly required to protect the civic polity as a whole, should not be mistaken for a polity that justifies any action under the guise of patriotism. Whether or not some of the less attractive measures in our current “war on terror” are philosophically plausible certainly does not answer whether they are wise. Moreover, the same republican justification that highlights the special duties owed to one’s fellow citizens is premised on sharing a voice in civic

119 Yankah, When Justice Can’t Be Done, 31 Law and Phil. 641 (2012)
120 Id. at XX; François Tanguay-Renaud, Making Sense of ‘Public’ Emergencies, 8 Philosophy of Management 31, 36–41 (2009)
121 Id. at XX.
122 KRAUT, ARISTOTLE, 265-267.
123 Id. at 269-270.
governance. The ongoing political machinations that have occurred outside of public view, with little or no discussion and, just as disturbingly, with little oversight by elected representatives, surely cannot be convenient with a republican justification. That the political procedures that resulted in a variety of repellant legal practices were not subjected to republican scrutiny is no trivial procedural objection; submitting controversial political practices to public scrutiny both importantly alters the practices a nation is willing to employ and simultaneously requires a public to discuss and endorse the set of values for which the polity stands. Still some will rightfully note that a political theory that premises our political rights on our civic bonds rather than individual freedom or autonomy will be more liable to curtail what modern sensibilities view as rights against the government, especially in the extraordinary cases such as terrorism; threats to the polity as a whole.

This is an ultimately troubling conclusion; an awkward result of a theory that has as its first impulse viewing the power of the state as less external and ominous. The natural downside to understanding that we have a special relationship to those within our civic community is to make sense of the natural intuition that we have dramatically different (and fewer) duties to those outside our civic community. Most starkly, this view recognizes that those who attack our civic bonds as such represent a unique danger to the project of our civic governance through which we express our most basic political nature. Making sense of this intuition, one hopes, will ultimately spur us to engage in serious conversation about the appropriate responses to attacks on our ability to govern and police the dangerous excess of its manifestations rather than hide this impulse in the dark.¹²⁴ This troubling but plausible conclusion is the result of seeing the question of state sovereignty as a question not of how to justify the imposition of something alien and threatening but of how we are bonded together.

¹²⁴ Yankah, When Justice Can’t Be Done, 673-XX.