CHAPTER 11

What Is External Freedom?

Japa Pallikkathayil

The foundational claim of Kant's political philosophy is that we each have an innate right to external freedom: '*Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other person in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.'[1] I take external freedom to involve already a normative component: one is free insofar as one has effective rights against others. The innate right to freedom is thus essentially a right to have a secure place in a system of universal rights. My aim in this chapter is to defend this normative understanding of external freedom as the basis of a compelling argument justifying the state. This will not be primarily an interpretative project and my argument will explicitly differ from Kant's own at points. But I aim to display the virtues of some of the insights that I take to be at the heart of his political philosophy.

In what follows, I begin by considering Arthur Ripstein's prominent reconstruction and development of Kant's argument for the state.[2] Ripstein employs a normative conception of external freedom very similar to the one that I propose. I then survey powerful objections that Kyla Ebels-Duggan presses against Ripstein's view.[3] I take these objections to tell decisively against Ripstein's argument for the state, whatever the merits of that argument as a reconstruction of Kant's own. While Ebels-Duggan takes the problems with Ripstein's argument to provide support for relying on a descriptive rather than a normative conception of external freedom, I think these problems turn on other features of his argument. After showing that the descriptive conception of external freedom preferred by

[1] Kant, RL 6:237.
[2] Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy,* Cambridge, MA: Harvard University Press, 2009.
[3] Kyla Ebels-Duggan, 'Critical Notice', *Canadian Journal of Philosophy* 41(2011), 549–74.

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Ebels-Duggan faces problems of its own, I give an argument for the state that is inspired by but distinct from Kant's argument. My argument employs a normative conception of external freedom and yet avoids Ebels-Duggan's objections.

11.1 Ripstein's Normative Conception of External Freedom

In this section, I describe Ripstein's reconstruction and development of Kant's argument for the state and highlight the ways in which that argument incorporates a normative conception of external freedom. In the course of this discussion, I introduce Ebels-Duggan's objections to Ripstein's view.

Ripstein claims that '[y]ou are independent if you are the one who decides what ends you will use your means to pursue, as opposed to having someone else decide for you.'[4] This is a normative conception of external freedom in that its content depends on a determination of what constitutes one's means. And the distinction between what is mine and what is yours is itself a normative matter. There are some subtle differences between this characterization of external freedom and the one I gave above in terms of having effective rights against others. I will return to these differences in Section 11.3. But for now, let us proceed with Ripstein's characterization in mind.

Ripstein takes Kant's argument for the state to proceed as follows. One innately possesses one's own body – it is one's basic means. This innate right to one's own body gives one a derivative right to whatever one physically possesses. But if I put down the apple I have just picked, my innate right to my own body does not prohibit you from taking it. We move beyond the rights secured by mere empirical possession with Kant's Postulate of Practical Reason with Regard to Right, which holds that it must be possible to have objects external to oneself as property. Ripstein's defence of the Postulate relies on his normative conception of external freedom. As he puts it:

> No other person is wronged by another's having an object subject to his or her choice. The freedom of others would only be compromised if one person's having a proprietary or contractual right deprived some other person of something he or she already had. From the standpoint of each person's right of humanity in his or her own person, the acquired rights of others are just parts of the context within which they choose.[5]

[4] Ripstein, *Force and Freedom*, 33. [5] Ripstein, *Force and Freedom*, 63–4.

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In other words, given that freedom consists in choosing what to do with what is yours, others having rights over objects to which you do not have a right does not deprive you of freedom.

Ebels-Duggan argues that relying on a normative conception of freedom causes trouble for Ripstein's defence of the Postulate.[6] It may be true that having rights to external objects does not deprive anyone of anything that is theirs. But a system of rights in which nothing external is owned also does not deprive anyone of anything that is theirs. A conception of freedom as control over one's own means lacks the resources to adjudicate between different specifications of one's means.

Ripstein claims that

> any restrictions on the possibility of a person having objects as her own would restrict one person's purposiveness for the sake of something other than freedom, and so interfere with each person's right to be *sui juris*, her own master. That is, they would limit freedom on the basis of something other than its own conditions.[7]

But recall that on the normative conception of freedom, freedom is limited only if others take control of one's means. Since precisely what is at issue in the Postulate is what can potentially be part of one's means, talk of freedom being limited is out of place. The normative conception of freedom does not support the claim that a system of rights in which external objects of choice may not be owned has any less freedom than a system of rights in which they may be owned.

I take this to be a deep problem with Ripstein's defence of the Postulate. Perhaps the Postulate can yet be rescued. I am sceptical though, and my own argument for the state will not rely on the Postulate. For now, however, let us set aside these concerns and consider the next step in Ripstein's reconstruction of Kant's argument for the state. While the Postulate tells us that it must be possible to have external objects as one's own, it does not tell us how to acquire rights to such objects. And it turns out that in the state of nature we are unable to acquire property in external objects for three reasons, which Ripstein glosses as follows. First, individuals cannot unilaterally choose to put others under obligation by acquiring property. Second, property rights in the state of nature would be indeterminate, and no individual could unilaterally resolve this indeterminacy. Third, one is not required to respect others' property rights in the absence of assurance that they will do likewise, assurance that no individual can

[6] Ebels-Duggan, 'Critical Notice', 569–70. [7] Ripstein, *Force and Freedom*, 64.

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unilaterally provide. Since we cannot unilaterally solve these problems, their resolution requires an omnilateral will. And this is precisely what the establishment of the state makes possible.[8]

Ripstein also goes beyond reconstructing Kant's view by providing a novel argument for why the state must establish and regulate public roads. This argument begins by considering what would happen if all the land around you was privately owned. In that case, '[p]rivate ownership of land does not simply foreclose some particular purpose that you might happen to have, but also forecloses the entire formal class of purposes involving voluntary interactions with others'.[9] But as Ebels-Duggan correctly points out, being boxed in by one's own neighbours would not prevent all voluntary interactions with others – one could still enter into voluntary agreements with one's immediate neighbours.[10] Why then think that there is something problematic about having the possibility of voluntary interactions with one's mediate neighbours depend on the permission of one's immediate neighbours to cross their land?

It seems that any answer to this question that is consistent with the normative conception of external freedom has to identify a way in which such a scheme would deprive one of something that was already among one's means. In the circumstance we are imagining you are not being deprived of any external object of choice to which you already have a right. That leaves innate right as the only potential ground for objection. And sometimes Ripstein seems to gesture in this direction, suggesting that being blocked in by one's neighbours 'is in conflict with each person's right to associate with others as those others see fit, which [. . .] is simply an aspect of "a human being's quality of being *his own master*" [. . .] A neighbor who is entitled to decide who you can associate with would be your master.'[11]

Kant takes each human being's status as his own master to be an aspect of innate right. As an interpretative matter, Ripstein may well be right to hold that the freedom to associate with others on mutually agreeable terms is part of this aspect of innate right. As Ripstein puts it, 'Part of your entitlement to set and pursue your own purposes is the entitlement to choose those with whom you will make arrangements, subject only to their entitlement to decline to enter into arrangements with you.'[12] But we are not imagining a situation analogous to a parent who forbids her child from

[8] Ripstein, *Force and Freedom*, 183.
[9] Ripstein, *Force and Freedom*, 247.
[10] Ebels-Duggan, 'Critical Notice', 566.
[11] Ripstein, *Force and Freedom*, 247–8.
[12] Ripstein, *Force and Freedom*, 210.

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associating with what she takes to be a bad crowd – that really is a case in which one person restricts with whom another may associate. In contrast, the neighbours who block you in exercise no authority over your choice of with whom to associate. They simply decline to provide you with the means needed to make your overtures audible or visible to those with whom you wish to associate. As Ebels-Duggan points out, this seems very like the situation in which you need milk to make pancakes, but I have purchased the last carton.[13] And that is Ripstein's paradigmatic example of a case in which I do not deprive you of anything to which you have a right. Thus, the normative conception of external freedom makes it difficult to see how the neighbours who block you in infringe your freedom – you are still free to control the means that are yours.

Ebels-Duggan takes this to be a symptom of a larger problem with reliance on a normative conception of freedom.[14] Since the Kantian argument takes the state to be needed to give determinate content to what is mine and yours, and thus to what our respective freedom consists in, 'it looks like no matter how the state assigns acquired rights, it will count as securing the freedom of all, so long as it enforces those very rights'.[15] I take this to be a serious challenge for relying on a normative conception of freedom in the Kantian argument for the state. How can a concern for freedom constrain the legitimate activities of the state if the state itself is what makes freedom determinate? In Section 11.3, I will try to answer this question. But at this point one might instead be tempted to jettison the normative conception of freedom. In the next section, I argue that the most obvious alternative to the normative conception of freedom faces serious problems. This is why I take the best hope for something in the spirit of the Kantian argument for the state still to lie in the normative conception of freedom.

11.2 The Descriptive Conception of Freedom

Ebels-Duggan proposes a descriptive conception of external freedom according to which a person is externally free 'just in case she can move her body around in space to pursue her ends unfettered by others'.[16] This conception is descriptive in that it does not take the content of freedom to depend on the application of any other normative concepts. I take it there may be other descriptive conceptions of freedom. But the one to which

[13] Ebels-Duggan, 'Critical Notice', 567.
[14] Ebels-Duggan, 'Critical Notice', 563.
[15] Ebels-Duggan, 'Critical Notice', 563.
[16] Ebels-Duggan, 'Critical Notice', 563.

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Ebels-Duggan gestures is one on which Kantians often implicitly or explicitly rely.[17] I therefore take this descriptive conception of freedom to be worth singling out for attention.

Ebels-Duggan argues that this descriptive conception of freedom can better defend the Postulate. Let us briefly take a look at that argument. With regard to the Postulate, Ebels-Duggan notes that many of our ends require using more objects than we can physically possess at one time and using those objects for longer than we hold them. If I may snatch whatever you put down, my choices will frustrate your pursuit of your ends. For this reason, she takes it that a system of rights without private ownership of external objects of choice severely limits external freedom. She acknowledges that private ownership also restricts people's freedom in certain ways – now I may not snatch an object you have put down if you own it. But she argues 'this restriction is much less serious than the restriction that I would face if I couldn't establish property rights. In the former case, I may be coerced not to interfere with what you own. But in the latter case, all of my ends could be severely curtailed.'[18]

The problem with this argument is that whether property rights enhance or limit our freedom to pursue our ends unfettered by others depends on what our ends happen to be. If I want to live the life of nomadic hunter-gatherer, I may be able to pursue more of my ends without interference if no one including me has property rights. To determine whether property rights enhance or limit freedom understood as the absence of interference we need to settle which ends we are trying to secure against interference. But doing that requires going beyond the idea of freedom.

This is a familiar problem for the conception of freedom as the absence of interference, or as it is often called, negative liberty. H. L. A. Hart suggests a similar objection to Rawls's original formulation of his first principle of justice, which holds that 'each person is to have a right to the most extensive basic liberty compatible with a similar liberty for others'.[19] Hart asks what it is to limit liberty for the sake of liberty and takes up

[17] For example: '[T]he freedom that is to be preserved and promoted by right action, whether it is motivated by virtue or not, is in all cases freedom not only of choice but also of action in the world, the freedom of human beings to move their own bodies and to exercise them upon other objects in nature in accord with their own choices to the extent compatible with a like freedom for all other human beings' (Paul Guyer, *Kant on Freedom, Law, and Happiness*, Cambridge: Cambridge University Press, 2012, 237).

[18] Kyla Ebels-Duggan, 'Moral Community: Escaping the Ethical State of Nature', *Philosophers' Imprint* 9 (2009), 1–19, at 3.

[19] John Rawls, *A Theory of Justice*, Cambridge, MA: Harvard University Press, 1971, 60.

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Rawls's example of 'the introduction of rules of order in a debate, which restrict the liberty to speak when we please'.[20] As Hart observes, 'what such rules of debate help to secure is not a greater or more extensive liberty, but a liberty to do something which is more valuable for any rational person than the activities forbidden by the rules, or, as Rawls himself says, something more "profitable."'[21] What I have suggested about attempting to use the conception of freedom as non-interference to justify the Postulate comes to the same thing. That defence of the Postulate requires us to specify some ends relative to which schemes of freedom as non-interference may be judged.

Rawls went on to modify his first principle in response to Hart's objection. Instead of focusing on the extent of liberty, he moved to focusing on a scheme of liberty 'fully adequate' for the development and full and informed exercise of the capacity for a sense of justice and the capacity for a conception of the good.[22] In terms of Rawls's project, singling out these capacities is well motivated. He presupposes that society is 'a cooperative venture for mutual advantage' and seeks to identify principles that would fairly distribute the benefits and burdens of such cooperation.[23] The idea of fair cooperation for mutual advantage requires that individuals have both a sense of justice and a conception of the good. Thus, ensuring that people can adequately realize their capacities for a sense of justice and a conception of the good is required for Rawls's principles of justice to have application. But the Kantian project seeks to answer a prior question, namely, why are we required to cooperate with anyone at all? From the point of view of that prior question, there is no particular reason to assume that people must be able to develop the aforementioned capacities.

Of course, concern for agency is a recognizably Kantian concern. And we may well have duties of virtue that orient us towards ensuring that others are able to develop their agential capacities adequately. But that does not yet indicate why we may be *compelled* to ensure that others are able to develop their agency. And, indeed, there are many duties of virtue that Kantians deny may be coercively enforced. For this reason, assessing the extent of freedom in terms of any particular end, even one required by

[20] H. L. A. Hart, 'Rawls on Liberty and Its Priority', *The University of Chicago Law Review* 40 (1973), 534–55, at 543.
[21] Hart, 'Rawls on Liberty and Its Priority', 543.
[22] John Rawls, *Political Liberalism: Expanded Edition*, New York: Columbia University Press, 2005, 331–2.
[23] Rawls, *A Theory of Justice*, 4.

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virtue, fails to engage with the main question of the Doctrine of Right. Since the extent of freedom as non-interference cannot be assessed without reference to some privileged end or another, I take this to be a decisive reason to set this conception of freedom aside here.

11.3 The Normative Conception of Freedom Revisited

In Section 11.1, I noted three problems facing Ripstein's use of a normative conception of external freedom: (1) the Postulate seems undermotivated; (2) the aim of securing external freedom seems to provide no constraints on the state; (3) Ripstein's argument for public roads is unsuccessful. In this section, I consider how a normative conception of freedom might be employed in ways that overcome these three problems. Before doing so, I will briefly comment on the differences between Ripstein's conception of freedom and my own. As I noted at the outset, these differences are subtle. And I do not think that the differences matter much for what follows. It is Ripstein's particular use of the normative conception of freedom rather than the conception itself that is problematic. But since I will often frame the discussion that follows using my preferred articulation, it may be helpful to draw out the differences between these views.

Recall that Ripstein claims that '[y]ou are independent if you are the one who decides what ends you will use your means to pursue, as opposed to having someone else decide for you'.[24] The gloss strikes me as misleading. No one can decide what ends you will use your means to pursue. Choosing ends is something one can do only for oneself. What matters is instead simply that others leave our means available for our use. I suspect this is actually closer to what Ripstein himself has in mind even though references to setting ends is sprinkled throughout his text. With this correction in view, we might then gloss external freedom as having effective control over one's means.

My preferred conception of external freedom, however, makes no explicit reference to one's means. Instead, I take external freedom to consist in having effective rights against others. But in my view having effective control over one's means and having effective rights against others comes to the same thing. What it is for something to be among my means rather than among yours is for me to have rights against you with respect to it. I prefer to gloss external freedom as consisting in effective rights

[24] Ripstein, *Force and Freedom*, 33.

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against others because doing so makes salient a question about what rights against others I must have, a question I take Ripstein to fail to appreciate fully because he considers the idea of having control over one's means to have more determinate content than it does.[25] Be that as it may, I treat these ways of talking about the subject matter of external freedom as interchangeable in the discussion that follows.

11.3.1 The Argument for the State without the Postulate

With this in mind, we can turn to the first of the three problems that Ripstein's use of the normative conception of freedom faces. Recall that the normative conception of freedom does not support the claim that a system of rights in which external objects of choice may not be owned has any less freedom than a system of rights in which they may be owned. Neither system denies anyone anything that is theirs. Since, in Kant's view, securing the possibility of property rights provides the reason for establishing the state, this is a serious problem for that argument. I believe, however, that the basic structure of Kant's argument for the state can be successfully repurposed by focusing on bodily rights rather than property rights. I have developed this argument at length elsewhere.[26] Here I briefly rehearse this argument, which has two steps. Kant seems to assume implicitly that one has a right to one's body. The first step in my argument involves motivating this claim. Next, I show that bodily rights are subject to problems that largely parallel the problems faced by property rights in the state of nature. They can thus be used to justify establishing the state without relying on the Postulate.

Let us consider each of these steps in turn. Recall that the basic problem faced by the normative conception of freedom is that a conception of freedom as having effective rights does not tell us what rights people have (or, alternatively, identify the means over which they should have effective control). In one way, the right to one's body is no exception – it would be a mistake to say that we would be less free without rights to our bodies. In another way, however, the right to one's body occupies a special place in a scheme of rights. We must attribute bodily rights to people in order for the idea of external freedom to have application. You cannot have effective control over anything if you do not have effective control over yourself.

[25] Japa Pallikkathayil, 'Persons and Bodies', in Sari Kisilevsky and Martin Stone (eds.), *Freedom and Force: Essays on Kant's Legal Philosophy*, Oxford: Hart Publishing, 2017, 35–54, at 38.
[26] Pallikkathayil, 'Persons and Bodies'.

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And since we are embodied beings that requires effective control over your body.

Notice that this is not just the claim that your body is your most basic means, though that is true. The important point is rather that in order for you to show up in my practical reasoning as the kind of being to whom things can belong, you must belong to yourself. If you are simply among my potential means, anything that is 'yours' is really mine. In order to not simply be among my potential means, you must have rights against my use.

I take the foregoing to establish that we must have bodily rights if we are to have any rights at all. But this does not yet settle what bodily rights we must have. There are differing views about how indeterminate bodily rights are in the state of nature. Ripstein often seems to take them to be all but settled. But there are some aspects of bodily rights that are undoubtedly indeterminate in the state of nature. One of Ripstein's own examples suggests this:

> If I shout loud enough to startle you when you stand on the edge of a cliff, but do not touch you, do I wrong you? This seems to be a question about our respective rights, which is not resolved by some factual consideration about the number of molecules that my shout displaced toward you.[27]

Does shouting in this context constitute a violation of one's bodily rights? How loud is too loud? What circumstances are too dangerous for shouting? Reason alone does not settle precise answers to these questions. This suggests that bodily rights are at least in some respects indeterminate. Moreover, for the purposes of the argument that follows, it would be fine if bodily rights were completely indeterminate in the state of nature. For this reason, I am largely going to set aside the question of how indeterminate bodily rights are, though I will return briefly to this issue in Section 11.3.2 after the argument for the state has been laid out.

I take indeterminacy to be the basic problem in the state of nature. This contrasts with Ripstein's position, which begins with the problem of unilateralism.[28] Ripstein takes it that the basic problem with property rights in the state of nature is that we cannot unilaterally impose duties on others and hence cannot unilaterally claim property rights. I, however, argue that the reason we cannot unilaterally impose duties on others in the state of nature is that the indeterminacy in the rights correlative to those

[27] Ripstein, *Force and Freedom*, 176–7.
[28] For a discussion of the problem with this position, see Pallikkathayil, 'Persons and Bodies', 45–6.

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duties is not something we are unilaterally entitled to settle. Why not? A unilateral right to settle indeterminacy would be in tension with the innate right to freedom's requirement that rights be *universal*. I take this requirement to imply that we must all have the same rights prior to any exercise of those rights. This is the truth in Kant's claim that the innate right to freedom involves a conception of innate equality, that is, 'independence from being bound by others to more than one can in turn bind them'.[29] For this reason, the right to settle the indeterminacy of bodily rights is not one any individual can claim for him- or herself alone.[30] This means that this right is one that we must all share. And that is something we can only do via a decision-making procedure that unites us.

Bodily rights also give rise to problems of adjudication and assurance. Consider first the problem of adjudication. Even if we settle principles determining the content of bodily rights, no one can have a unilateral right to settle disputes over the application of those principles. Likewise, unilateral assurance that others will respect our bodily rights falls short of the kind of security that innate right demands that we have.[31] With this brief characterization of how bodily rights give rise to problems that parallel the problems Kant attributes to property rights in the state of nature in view, we can construct an argument for the state that takes bodily rights rather than property rights as its starting point:

(1) The innate right to freedom requires bodily rights.

(2) Bodily rights are subject to indeterminacy, adjudication, and assurance problems in the state of nature.

(3) These problems can be resolved in a way that is consistent with the innate right to freedom only in a properly constituted state.

(4) Therefore, the innate right to freedom requires the establishment of a properly constituted state.

We have already seen that premise (1) requires care in its interpretation. The innate right to freedom requires bodily rights not because we would

[29] Kant, RL 6:237–8.

[30] Although 'settlement by me' is certainly not a universalizable principle, one might think that 'settlement by the first to do so' is. We could each have a right to settle the indeterminacy problem conditional on being the first to do so. But precisely because bodily rights involve no original act of acquisition, it is unclear what sense we could make of being first in this context. We each are already enacting our own interpretation of our bodily rights simply by conducting ourselves in a world that we share with others.

[31] Proper specification of the assurance problem is controversial. I treat this matter at length in Pallikkathayil, 'Persons and Bodies'.

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be less free without bodily rights but because the idea of freedom would lack application without those rights. And although the indeterminacy problem referenced in premise (2) may be interpreted in more or less expansive ways, any interpretation will suffice for the argument. Finally, the foregoing discussion has brought us most of the way to premise (3). Each of the three problems finds its solution in a branch of the government – the indeterminacy problem in the legislative branch, the adjudication problem in the judicial branch, and the assurance problem in the executive branch. Of course, a full defence of premise (3) would require a much closer examination of each of these three branches of government and the way in which they solve the corresponding problem from the state of nature. Although I cannot undertake that full defence here, I draw out some important features of the legislative branch in the next section. For now, however, this should suffice to show how the normative conception of freedom can support an argument for the state. There are three key moves in this argument. First, this argument bypasses the problematic Postulate and focuses instead on bodily rights. Second, the argument treats bodily rights as a precondition for freedom rather than as increasing freedom. And, finally, the argument treats the problems faced by bodily rights in the state of nature as stemming from the innate right to freedom's demand that rights be universal. Thus, the heavy lifting in the argument is done not by the mere concept of freedom but rather by the innate right to freedom in accordance with a universal law.

11.3.2 *Constraints on the State*

Recall that the second problem faced by Ripstein's use of the normative conception of freedom is that it is unclear how that conception places any constraints on the state. As Ebels-Duggan puts it, 'the notion of freedom receives determinate content only from the very institutions for which it is supposed to provide a normative standard'.[32] One initial reply involves clarifying that the notion of freedom alone is not supposed to provide a normative standard for the state. Rather, as we have just seen, the standard is provided by the *innate right* to freedom and the demand for universalizability which that includes. The general question, however, remains. If freedom just consists in having effective rights, how can a right to freedom in that sense constrain the organization of the state or the laws that it enacts? I am going to begin by considering the organization of the state and that will lead us naturally to a discussion of particular laws.

[32] Ebels-Duggan, 'Critical Notice', 563.

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Ripstein claims: 'All that is required for the legislative will to be omnilateral is for the distinction between public and private purposes to apply to it in the right way . . . the only public purpose that is relevant is the public purpose of creating and sustaining a rightful condition.'[33] He then compares the relationship between public officials and citizens to the relationship between trustees and those with whose affairs they have been entrusted. He indicates that a trustee must act to ensure the ongoing purposiveness of the one for whom arrangements are being made and a trustee is precluded from making those arrangements for his own private purposes. Moreover, '[e]ven the power to ensure the ongoing purposiveness of another person can only be exercised on terms to which that person could consent'.[34] Since people cannot consent to slavery or to forfeiting the innate right to freedom, certain institutions that may superficially resemble states do not qualify as embodying an omnilateral will. Ripstein treats Nazi Germany as an apt example of an entity that fails to embody an omnilateral will in this way.[35]

Ruling out Nazi Germany is not nothing, but it is still less than one might hope for. In particular, nothing in this line of argument requires anything like democratic governance. Readers of Kant will not find this surprising. Kant's discussions of democracy are a bit muddled and sometimes express a somewhat negative attitude towards that organizational form.[36] What is important for both Kant and Ripstein is that the people be represented by the legislative branch of government. But that is consistent with playing no actual role in decision-making.

We should pause here, however, to question why we should accept Ripstein's characterization of an omnilateral will solely in terms of the purposes it pursues. Ripstein suggests that:

> if a group of officials make, apply and enforce law in a given region of the Earth's surface, in so doing they thereby unite the inhabitants of that region into a people. By becoming an agent for the people, the state creates that people as a moral subject to whom its acts can be imputed.[37]

But to begin simply making laws is to claim for oneself a right that all others cannot have. In contrast, if I begin to act as if we all share legislative authority, I claim for myself only the same right that I also attribute to

[33] Ripstein, *Force and Freedom*, 192.
[34] Ripstein, *Force and Freedom*, 192.
[35] Ripstein, *Force and Freedom*, 341.
[36] For a helpful discussion of Kant's writings on democracy and a distinct argument that Kant's view ultimately requires it, see Christoph Hanisch, 'Kant on Democracy', *Kant-Studien* 107 (2016), 64–88.
[37] Ripstein, *Force and Freedom*, 195.

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you. In this way, democratic decision-making procedures alone reflect the kind of formal equality that universalizability demands.

For this reason, I take it that in a legitimate state the ultimate legislative authority must be literally held by the people collectively. This is not merely an idea of reason. Nevertheless, on this view the distinction between public and private purposes remains significant. The people have a collective right to settle the indeterminacy problem. To undertake any other task like, say, maximizing welfare or supporting the development of virtue, would take the legislative body outside its mandate. Thus, just as Ripstein claims, state officials must act for the public purpose of establishing a rightful condition. My claim has simply been that a legitimate state is one in which all citizens hold the office of legislator.

To be clear, the requirement that ultimate legislative authority be held by citizens collectively is still compatible with very different forms of governance. The people might legislate directly or via chosen representatives, who might be numerous or even just a single individual. Although such elected officials would have rights that not all have, these rights would be bestowed on them through the exercise of rights held by everyone and thus in a way that respects the innate equality that is an aspect of the innate right to freedom.

But even if most actual legislating is done by representatives, the fact that the ultimate legislative authority is held by citizens has far-reaching implications for the constitution of a legitimate state. Whatever indeterminacy there is in the state of nature must be settled in a way that enables citizens to satisfy the duties of their offices as legislators. Although a full discussion of what this entails is far beyond the scope of this chapter, I will briefly gesture towards two broad sets of constitutional provisions that are suggested by this requirement. First, the familiar liberties of speech, conscience, and association may each be thought to play an indispensable role in enabling citizens to fulfil their duties as legislators. Without these liberties, citizens would be unable to think for themselves and together in the ways required by their offices. Second, consider the resources needed for decision-making. Human bodies need food, water, and shelter to do anything at all, including legislating. Any settlement of the indeterminacy problem that left citizens without access to these resources would be inconsistent with enabling them to do their jobs as legislators and hence inconsistent with the only organizational form permitted by the innate right to freedom.[38]

[38] For an insightful discussion of this point, see Suzanne M. Love, *The Material Conditions of Freedom*, PhD Dissertation, University of Pittsburgh, 2018. I am indebted to Suzie for many helpful discussions of these issues.

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This brief list of constraints on a legitimate constitution is not meant to be exhaustive. I mean here only to highlight how the innate right to freedom's requirement that citizens hold the ultimate legislative authority may yield such constraints even if the content of freedom is otherwise indeterminate in the state of nature. With this picture in view, we may turn to how these constitutional constraints shape the task of legislators. Legislators are tasked with settling on a specific scheme of rights. The constitutional constraints I have just discussed mean that not just any assignment of rights will do to resolve the indeterminacy problem in a way that is consistent with the innate right to freedom. Legislators must therefore engage in two somewhat different activities when they pass laws: checking potential laws for consistency with the constitutional constraints and choosing among the potential laws that survive this initial scrutiny. For example, the constitutional imperative that citizens qua legislators must have access to food, water, and shelter does not by itself distinguish among subsidizing those who are impoverished, providing a universal basic income, having the state stand as an employer of last resort, or some other organizational scheme directed at the same end. Of course, there may ultimately be public considerations that weigh in favour of one of these rather than another. It may be, for example, that some schemes of rights minimize the chance of misapplication or corruption of the law. Or it may be that some schemes of rights are more conducive to a state's stability over time. These, then, are the challenging issues that legislators are called on to evaluate or to elect representatives to evaluate in their place.

In this section, I have argued (1) that the innate right to freedom requires democratic governance, (2) that that entails certain constitutional requirements, and (3) that those constitutional requirements in turn constrain the laws legislators enact. Before closing this section, it may be helpful to contrast my argumentative strategy on a particular matter of law with Kant's own. He attributes to the state a right to tax citizens to provide sustenance for those who are unable to provide for themselves on the basis of the state's end of maintaining itself perpetually. It is, however, not clear from Kant's text why sustaining those who are impoverished is necessary for the state to maintain itself.[39] Ripstein argues that the state must provide for those who are impoverished in order to prevent them from falling into a condition of dependence that is inconsistent with the idea of sharing in a united will: 'a social world in which one person has the rightful

[39] For a helpful discussion of Kant's argument for poverty relief, see Sarah Williams Holtman, 'Kantian Justice and Poverty Relief', *Kant-Studien* 95 (2004), 86–106.

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power of life and death over another is inconsistent with those persons sharing a united will, even if the situation came about through a series of private transactions in which neither did the other wrong'.[40] As I indicated above, if there were no constraints on how I interacted with your body, you would be merely a means to me, and I agree that this precludes the possibility of uniting our wills. But the situation Ripstein is envisioning is not one in which individuals lack bodily rights altogether. Those who are rich still may not assault those who are poor. Since freedom just consists in having effective control over one's means and you may be secure in the very limited means you have, for all that has been said this still seems to be a condition in which we are both free.[41] It is therefore unclear what precludes conceiving of our wills as united in a state that allows me to have so much and you to have so little.

The problem here is, as it was before, treating the idea of a united will as a mere idea of reason. In contrast, since I hold that citizens must literally share legislative authority, my view has the resources to explain a very different way in which the requirement that citizens have access to the resources needed to meet their basic needs follows from the state's end of maintaining itself perpetually.[42] I doubt that this is what Kant had in mind himself. My argument also potentially goes further than requiring the kind of poverty relief Kant envisioned as the resources needed to enable citizens to satisfy their duties as legislators may outstrip those needed for sustenance. It may be, for example, that this same style of argument can be used to ground a requirement that citizens have access to the kind of education needed to satisfy these duties. In this way, although my argument begins with Kantian commitments, it has the potential to justify more far-reaching required state action than Kant himself envisioned.

11.3.3 Public Roads

This brings us directly to the final problem facing Ripstein's use of the normative conception of freedom. His attempt to argue that the state is required to establish public roads is unsuccessful. The normative conception of external freedom makes it difficult to see how the neighbours who block you in infringe your freedom. You are still free to control the means

[40] Ripstein, *Force and Freedom*, 278. [41] Ebels-Duggan, 'Critical Notice', 568.

[42] For an argument in broadly the same spirit as my own, see Ariel Zylberman, "Bread as Freedom: Kant on the State's Duties to the Poor', in Dai Heide and Evan Tiffany (eds.), *The Idea of Freedom: New Essays on the Kantian Idea of Freedom*, Oxford: Oxford University Press, 2023, 245–64.

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that are yours and to associate with anyone you choose. Your neighbours simply decline to provide you with the means needed to contact those with whom you wish to associate.

My argument suggests a different basis for a state's duty to provide public roads. Citizens qua legislators must be able to discuss matters of state together in order to satisfy the duties of their office. For example, they must be able to discuss whether various schemes of rights are consistent with ensuring that citizens have access to the resources needed to sustain themselves in a condition that enables them to satisfy the duties of their office. They must be able to disseminate information about the implementation and effects of existing laws. They must be able to exchange information about the conduct of elected representatives. And so on. Democratic governance requires open avenues of communication. And notice that what this requires in practice may depend on the particular society in question. In addition to public roads, the state may need to fund a postal service or public internet connections.

Moreover, citizens have to be able to reach the resources they need to sustain themselves adequately. They do not actually have effective access to food if they cannot get to the grocery store. Likewise, access to education requires effective access to schools and the like. Here again, there are potentially many ways of settling rights that might be compatible with the innate right to freedom. But given certain ways of setting up access to the resources that citizens need, the state may be required to go beyond merely providing public roads and to provide public transportation as well.

This discussion has necessarily been rather schematic. Full consideration of any of the potential state programmes discussed in this section would require detailed consideration of the scheme of rights in which the programme is supposed to be embedded. The demands on the state to provide public services may differ considerably against the backdrop of different economic systems. Here I simply want to draw out the way in which the demand that citizens be equipped to carry out their legislative duties puts pressure on the systems of rights states may enact consistently with the innate right to freedom. This pressure potentially provides the argumentative basis not just for public roads but for much else besides.

11.4 Conclusion

I have argued that conceiving of freedom as consisting in having effective rights against others sets up a powerful argument for the state and one that

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constrains both the organization of legitimate states as well as the legislation those states enact. Although this argument was not Kant's, it relies on his idea of an innate right to freedom and draws on his diagnosis of the problems inherent in the state of nature. I thus hope to have shown how a normative conception of freedom can be used productively by those attracted to some of the core elements of Kant's political philosophy.

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