

# Institutional Legitimacy\*

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Our current understanding of the idea of legitimacy is deeply connected to the peculiarly modern political institution of the nation-state.<sup>1</sup> But questions of legitimacy have moved beyond the state. It is now common to examine the legitimacy of institutions such as the European Union, international courts, international human rights institutions, or those focused on specific issues, like the World Trade Organization or particular transnational non-governmental organizations.<sup>2</sup> As our traditional state-centric understanding of legitimacy is applied to these new modes of governance and new varieties of institutions, however, it is becoming increasingly strained. The concepts and standards developed in response to the problems of a much less globalized, much more Westphalian world may be inadequate for the contemporary context.

Theorists have responded to this tension in two general ways.<sup>3</sup> One strategy is to take a traditional state-centric understanding of political legitimacy and modify it as

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\* My thanks to Merten Reglitz, Antoinette Scherz, and Cord Schmelzle for their feedback on this paper and for many incisive conversations on this topic. An early version of this argument was presented at the workshop "International Legitimacy and Law" at Goethe University Frankfurt in July 2015; thanks to the organizer and audience for the discussion. In addition, thanks also to three anonymous reviewers of this journal for their helpful comments and suggestions.

<sup>1</sup> The term 'legitimate' gets used in a huge variety of ways, often simply to mean "justified." My account is not meant to capture all of the many ways the language of legitimacy is applied. Section one outlines the sense of the term that I am interested in; as will be clear, my concern is with the normative sense of legitimacy, not the dependent descriptive or sociological sense.

<sup>2</sup> Here is an extremely incomplete but somewhat representative sampling to illustrate the variety of international legitimacy claims that are being made in an increasingly large literature. On the EU: Andreas Føllesdal, "The Legitimacy Deficits of the European Union," *Journal of Political Philosophy*, 14 (2006), 441-468; Jürgen Neyer, "Europe's Justice Deficit: Justification and Legitimacy in the European Union," *Political Theory of the European Union*, ed. by Jürgen Neyer and Antje Wiener (Oxford: Oxford University Press, 2011), pp. 169-186; on international law: John Tasioulas, "The Legitimacy of International Law," *The Philosophy of International Law*, ed. by Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), pp. 97-116; Thomas Christiano, "Democratic Legitimacy and International Institutions," in Besson and Tasioulas, *The Philosophy of International Law*, pp. 119-137; Allen Buchanan, "The Legitimacy of International Law," in Besson and Tasioulas, *The Philosophy of International Law*, pp. 79-96; Christopher A. Thomas, "The Uses and Abuses of Legitimacy in International Law," *Oxford Journal of Legal Studies*, 34 (2014), 729-758; Daniel Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" *The American Journal of International Law*, 93 (1999), 596-624; on human rights: *The Legitimacy of International Human Rights Regimes*, ed. by Andreas Føllesdal, Johan Karlsson Schaffer, and Geir Ulfstein (Cambridge: Cambridge University Press, 2014); Allen Buchanan, *The Heart of Human Rights* (Oxford: Oxford University Press, 2013); on more specific institutions: Richard Higgott and Eva Erman, "Deliberative global governance and the question of legitimacy: what can we learn from the WTO?" *Review of International Studies*, 36 (2010), 449-470; Vivien Collingwood, "Non-governmental organisations, power, and legitimacy in international society," *Review of International Studies*, 32 (2006), 439-454; finally, on the entire global system, see Allen Buchanan and Robert O. Keohane, "The Legitimacy of Global Governance Institutions," *Ethics and International Affairs*, 20 (2006), 405-437; Ian Clark, "Legitimacy in a Global Order," *Review of International Studies*, 29 (2003), 75-95.

<sup>3</sup> Cf. Samantha Besson, "The Authority of International Law – Lifting the State Veil," *Sydney Law Review*, 31 (2009), 343-380 at p. 349. I ignore the more radically skeptical option of rejecting the notion of legitimacy altogether.

little as possible when applying it to the wide variety of international institutions.<sup>4</sup> The other strategy is to posit a novel notion of political legitimacy that is distinct from state legitimacy and applies to some set of international institutions.<sup>5</sup>

The point of this paper is to suggest that a third, more revisionary strategy should be pursued: begin at a higher level of generality with the question of *institutional legitimacy*. I argue for an underlying notion of legitimacy that applies to all institutions, political or otherwise. Understanding this underlying notion will illuminate the more particular case of political institutions in all their variety.

My aims here are primarily exploratory; I intend to open up new avenues for theorizing without claiming to have fully stepped down those paths. My hope is that a new approach to the question of legitimacy will not only be useful for the burgeoning concern with international institutions but will also force us to revise our understanding of what it means for states to be legitimate. Whether that hope will be realized is a question for further down the line.

In section one I argue for a practical approach to legitimacy, showing that it captures a type of moral standing that allows people to coordinate their practical responses to institutions and institutional demands. I conclude that legitimacy must capture an institution's right to function without coercive interference. This leads me to analyze legitimacy by analogy to individuals' rights to non-interference in section two, focusing on the idea of rights forfeiture. In section three I consider the implications of my general approach for questions of political legitimacy. Finally, in section four I apply this approach to the particular case of the state and show how a minimalist understanding of state legitimacy is both plausible and opens up new possibilities for understanding our relation to the state.

## I. A New Concept of Legitimacy

As standardly conceived, legitimacy is the right to rule: a legitimate state has the right to rule and an illegitimate state does not. The nature of this right is widely contested, variously taking the form of a claim-right,<sup>6</sup> a power-right,<sup>7</sup> or a liberty-right.<sup>8</sup> Theorists disagree about what sort of standing legitimacy constitutes (e.g. claim, power, or liberty) as well as what sort of "uptake" legitimacy demands of others (e.g. a duty of obedience

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<sup>4</sup> For example, Tasioulas, "The Legitimacy of International Law" and Christiano, "Democratic Legitimacy and International Institutions" both follow this strategy by directly applying frameworks developed for states (a Razian approach and democratic theory, respectively) to questions about non-state institutions. Also see Ronald Dworkin, "A New Philosophy for International Law," *Philosophy & Public Affairs*, 41 (2013), 2-30.

<sup>5</sup> See Buchanan, *The Heart of Human Rights*; Higgott and Erman, "Deliberative global governance and the question of legitimacy: what can we learn from the WTO?"; Collingwood, "Non-governmental organisations, power, and legitimacy in international society," p. 452. Distinguishing between the strategies is often difficult, in part because of disagreement about what is central to the concept of legitimacy and what instead falls under particular conceptions.

<sup>6</sup> See, e.g., A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton, University Press 1979); Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009); Christopher W. Morris, *An Essay on the Modern State* (Cambridge: Cambridge University Press, 1998).

<sup>7</sup> See, e.g., Joseph Raz, *The Authority of Law* 2nd ed. (Oxford: Oxford University Press, 2009) and *The Morality of Justice* (Oxford: Oxford University Press, 1986); Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1988); Arthur Isak Applbaum, "Legitimacy without the Duty to Obey," *Philosophy & Public Affairs*, 38 (2010), 215-239; Merten Reglitz, "Political Legitimacy Without a (Claim-) Right to Rule," *Res Publica*, 21 (2015), 291-307.

<sup>8</sup> Robert Ladenson, "In Defense of a Hobbesian Conception of Law," *Philosophy & Public Affairs*, 9 (1980), 134-159. Ladenson uses 'justification-right'.

or deference, a liability, or the lack of a claim).<sup>9</sup> Despite these differences, theorists following the traditional approach all focus on ruling because their object of analysis is the state. Whatever else it does, the state issues rules in the form of laws and coercively enforces those rules. The question of whether the state is legitimate becomes the question of whether it has the standing to issue and enforce rules in the ways that it does.

It is clear why it is difficult to apply considerations of legitimacy to international institutions on the standard approach. The territorially-bound, force-monopolizing, sovereignty-claiming state is very different from the international political institutions that increasingly characterize our world.<sup>10</sup> These institutions rule in a very different way from the state, if they rule at all.<sup>11</sup> The rules of international law are very different from the rules of domestic law; the methods of enforcement, insofar as they exist, are very different as well. The conceptions and standards of legitimacy that were developed to answer the question of whether a state has the right to rule do not seem applicable to institutions that do not rule in the way states rule.

The revisionary strategy I am pursuing here asks us to reject the very starting point of the traditional approach, namely the focus on ruling.<sup>12</sup> But if we do not start with rule, where do we begin? Here I follow (and modify) Allen Buchanan's general strategy, which takes a practical approach to legitimacy by asking what we use evaluations of legitimacy for. We evaluate institutions in a huge variety of ways, asking whether they are just, or fair, or respectful, and so on. Among this variety the distinct role of legitimacy is to solve what Buchanan calls *the metacoordination problem*.<sup>13</sup>

Institutions solve first order coordination problems by providing shared signals and norms that coordinate individuals' behavior and thereby enable us to attain a wide variety of goods that would otherwise be unavailable. Buchanan is focused on political goods like providing for basic needs or protection from standard threats. However, institutions are also indispensable for the attainment of non-political goods, most obviously the goods of free association that arise when people exercise their autonomous choices about whom to associate with and how to associate with them.

But institutions can only function, and so these goods can only be attained, under certain conditions. The main problem is disagreement. We disagree about what sorts of goods should actually be pursued; among the goods we agree about, we disagree about their prioritization; we disagree about what sorts of institutions will be best at achieving those goods. We disagree about when we should abandon an institution as too flawed and when we need to begin anew; we disagree about what sorts of aims and what sorts of institutional methods should actively be suppressed. Due to all these disagreements,

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<sup>9</sup> These classifications follow Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied to Judicial Reasoning* (New Haven: Yale University Press, 1919).

<sup>10</sup> For insightful discussion on defining the state and accompanying challenges, see Morris, *An Essay on the Modern State*.

<sup>11</sup> See Buchanan, "The Legitimacy of International Law," pp. 81ff; Christiano, "Democratic Legitimacy and International Institutions." It is worth noting that the simplifying assumption that states rule in a distinctive and unified manner makes a contested empirical claim and may indeed be false; my purpose is not to uphold this assumption but to describe the literature as it exists. As will become clear in section three, my account is in fact quite amenable to the idea that there is no unifying, formal understanding of state rule. While this could be devastating for some theories of legitimacy, particularly those that claim legitimacy is the right to rule in some particularly technical way, it works well with my general approach that focuses on rights violations.

<sup>12</sup> I am not going to examine the prospects for other strategies; my claim is not that there are no such prospects, just that there may well be good prospects for a new, revisionary strategy.

<sup>13</sup> For the fullest and most recent presentation of this, see Buchanan, *The Heart of Human Rights*, especially chapter five.

institutions would be unable to function if we were to each follow our own understanding of the good. We would support only those institutions that pursue the good as we understand it, in the order we prefer, and we would interfere according to our own lights. Under the constant threat of interference and the uncertainty of conflict, institutions would be unable to establish the sort of sustained, predictable coordination that they require to function effectively and produce goods over time.

This is the metacoordination problem. Institutions enable us to solve first order coordination problems, but institutions can only function if we solve the higher order coordination problem of how to unify our practical stances towards institutions themselves. What we require is a normative standard that grants institutions the space they need to function under conditions of pervasive, reasonable disagreement. Comprehensive doctrines of the good will not work (and, for the same reason, neither will conceptions of justice). We need a less demanding and less controversial alternative normative standard. Legitimacy is distinctive because it is able to play this role.

Legitimacy solves the metacoordination problem by identifying which institutions have *the right to function*. On the traditional approach, legitimate states have the right to rule and illegitimate states do not. On the more general approach that I am following, legitimate institutions have the right to function and illegitimate institutions do not. This right entitles legitimate institutions to make demands on individuals that illegitimate institutions are not entitled to make: specifically, the demands that must be met for legitimate institutions to function.

We should take care that legitimacy captures only what institutions need and nothing more (especially not what they simply claim they need). The more we build into legitimacy, the more controversial it becomes and so the less able it is to play its distinctive role. Legitimacy needs to be as minimalist as possible in order solve the metacoordination problem under conditions of deep disagreement.

The first step in understanding what institutions need to function is to consider how they function in general. Institutions are inherently normative, primarily constituted by people taking on institutional roles and thereby coordinating their behavior.<sup>14</sup> Call those people whom accept their institutional roles and so act according to the institutional norms that define their role “institutional insiders.”<sup>15</sup> For an institution to function it must have sufficiently many insiders filling a sufficient variety of roles; a university, for example, only functions when there are sufficient numbers of both professors and students. It is only when enough people accept a variety of institutional roles that their actions become sufficiently coordinated for institutions to function and thereby enable us to attain various goods.

This (notably non-technical) understanding of institutions leads us to the view that legitimacy correlates, at minimum, to a duty not to coercively interfere with people accepting institutional roles and being guided by institutional norms, i.e. a duty not to coercively prevent people from being insiders to that institution.<sup>16</sup> Such interference would prevent the institution from functioning, so would violate a legitimate

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<sup>14</sup> John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), pp. 47-48.

<sup>15</sup> By acceptance, I mean something like adopting the internal point of view from H. L. A. Hart, *The Concept of Law* 3rd ed. (Oxford: Oxford University Press, 2012), p. 89. Someone who accepts a system of norms takes valid norms of that system to have force in her practical deliberations. I set aside the precise nature of that force or the psychological basis of acceptance.

<sup>16</sup> The “coercively” qualifier is necessary because some forms of interference will not be ruled out, even for legitimate institutions, depending on how we understand interference. One firm can cause a rival firm to close through justified market competition without violating the rival firm’s right to function. For ease of use, I often refer to an institution’s right to function without interference, where the “coercively” qualifier is implicit.

institution's right to function.

When legitimacy is understood to include the right to non-interference, it can play the role that we identified for it on the practical approach. There are many different institutions, all of which make the minimal demand that we not interfere with their constitutive functioning. Those institutions allow a wide range of people to pursue a wide range of goods. In order to enable that pursuit, legitimacy has a dual purpose. Positively, evaluations of legitimacy protect institutions and allow them to achieve their aims without the threat of destructive interference. Negatively, evaluations of (il)legitimacy identify which institutions may be interfered with; this negative role is especially important because some institutions are intent on domination, preventing others from living together and pursuing their understanding of the good.

On my approach, legitimacy answers a very specific fundamental question: *must we allow this institution to carry on, or may we coercively interfere with it?* This question lies at the core of every theory of legitimacy; a right to rule would be practically meaningless if the institution did not have the right to function without interference. But I am making a stronger claim: legitimacy is *only* the right to function without interference. (This right may well entail further Hohfeldian advantages when applied to particular cases due to the details of how a particular institution functions. The important point is that any further advantages follow only from the right to function without interference.)

Legitimacy is only the right to function without interference because that is all legitimacy needs to be to play the practical role we identified for it in solving the metacoordination problem. It enables us to coordinate our responses and allow institutions the space to function; it does not guarantee their individual success. But this is sufficient because people are motivated for a wide variety of reasons to contribute to institutions and secure the goods that institutional coordination enables.

Understanding legitimacy in such a minimalist manner is, of course, quite controversial. The rest of the paper explores the prospects of such an approach by applying it to a variety of problems that the traditional, more robust approach that focuses on state legitimacy is ill-suited to solve. I put off application to the state, where the minimalist understanding is most strained, until the final section.

To be clear, this novel understanding of legitimacy does not on its own result in concrete standards of legitimacy for particular institutions. It must be combined with a robust understanding of the institutional context, importantly including how the institution relates to the end it is structured to produce. I say more about this below, but for example: the state is often thought to be uniquely necessary for the achievement of morally mandatory aims like exiting the state of nature, whereas the Loyal Order of the Moose is only one among many institutional possibilities that enable us to achieve the voluntary goods of socializing and networking. How an institution functions dramatically impacts how we understand its right to function and what standards it needs to meet to have that right. We need standards of legitimacy for both kinds of institution (some social clubs are illegitimate, like the Ku Klux Klan, and so lack a right to non-interference), but those standards will be radically different due to the important differences in the institutions themselves.

## II. Evaluating Institutional Legitimacy

Understanding legitimacy as the right to function leads us to a general strategy for considering questions of institutional legitimacy. The important difference between this strategy and the traditional approach is that I put aside (for now) many of the distinctive

features of the state that make state legitimacy such a difficult problem. The state, for example, holds territory over which it claims universal jurisdiction and in which it monopolizes coercive force. These features of the state are very relevant for the question of state legitimacy but using them as a template for thinking about legitimacy in general is misleading.

If legitimate institutions have the right to function without coercive interference and institutions function via institutional insiders taking up their roles and acting on institutional norms, then we can analyze legitimacy by examining the conditions under which insiders have the right to act as insiders without coercive interference. Considered in the abstract, accepting the norms of an institutional role and abiding by them is not at all objectionable. (I consider the complicating issue of involuntary institutional participants below.) Because insiders are simply individuals, they have a standing moral right to non-interference based on their capacity to freely exercise their autonomy and choose the life they wish to live without coercive interference. Voluntarily accepting and abiding by norms is a common, indeed central, part of all of our lives. Thus institutions have a *prima facie* case for legitimacy simply because insiders' voluntary acceptance of collective norms is a permissible act that falls under their individual rights of autonomy and free association.

This insight suggests a strategy for evaluating legitimacy by drawing a parallel between individuals and institutions. Individuals generally have rights against coercive interference in their actions due to their autonomy and self-determination. However, in some circumstances they can forfeit those rights. For example, if an individual attempts to wrongfully harm someone, they forfeit the right against coercive interference, thereby becoming liable to defensive interference and correlatively rendering acts in defense of the victim permissible.<sup>17</sup>

Institutions are made up of individuals exercising their right to free association and acting on the basis of norms they freely accept. Just as in the case of individuals, this means that institutions generally have the right to pursue their activities without interference. An institution's right against coercive interference is a function of the individual rights against coercive interference that its insiders have.<sup>18</sup> However, just as in the case of individuals, the institution can forfeit these rights. When it forfeits these rights, the institution is illegitimate. In that case, the institution can permissibly be coercively interfered with and insiders can permissibly be prevented from following institutional norms.<sup>19</sup>

So the question of the legitimacy of an institution becomes the question of under what conditions a group of individuals who have freely joined together and accepted norms to shape their behavior forfeit their rights not to be interfered with as they follow those norms. Generally speaking a necessary condition of rights forfeiture is some kind of culpability or wrongdoing. The question, then, is whether the institution is violating rights or culpably risking violating rights.<sup>20</sup>

The identification of wrongdoing is only the first step, though. As with

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<sup>17</sup> See, e.g., Jonathan Quong, "Killing in Self-Defense," *Ethics*, 119 (2009), 507-537.

<sup>18</sup> I say "a function of" in order to remain agnostic about whether the institutional right is simply an agglomeration of individual rights or if there is an emergent collective right that is distinct. I want to avoid the difficult questions of collective agency and rights as much as possible. That said, I am a value individualist so I reject the position that an institution or collective of any kind can be an independent source of intrinsic value and have rights that are not "a function of" the rights of individuals.

<sup>19</sup> Just as in the case of individuals, the in-principle permissibility of interference does not entail that any kind of interference whatsoever is justified.

<sup>20</sup> The distinction between wrongdoing and culpability will not matter for our purposes here, so I will simplify the discussion by considering only wrongdoing.

individuals, the mere presence of wrongdoing does not automatically forfeit a right against coercive interference. Individuals often have the right to do wrong, meaning they have a moral right against the coercive interference of others even in some cases when they are acting morally impermissibly.<sup>21</sup> The individual right to do wrong is grounded in a variety of concerns, including respect for autonomy and enabling moral maturation.

Institutions also have a right to do wrong in precisely the sense that a single act of wrongdoing does not necessarily forfeit their right against coercive interference: an institution might be acting wrongfully and yet still be legitimate. Similar concerns ground the institutional right to do wrong as ground the individual right to do wrong. First, the individual right to do wrong of institutional insiders and the respect due their autonomous choices surely secures, to some degree, the right to do wrong in concert with others. Second, and related to moral maturation, institutions need space to make mistakes and reform as they attempt to tackle difficult problems; the costs of allowing coercive interference in any institution that made a mistake are prohibitive under conditions of fallibility and would make achieving any complex and important aim impossible.<sup>22</sup> Finally, it is worth noting that there are different kinds of coercive interference. Wrongdoing might result in an institution forfeiting rights against punitive interference without also forfeiting its right to function more generally.

To sum up: legitimate institutions have a right to function that correlates to a duty of non-interference. As with individuals, this right to non-interference can be forfeit if the institution commits sufficiently egregious wrongs (although not any wrong will do, given the right to do wrong). If we apply this to some particular cases, we see that this notion of institutional legitimacy is both plausible and informative.

An opening caveat: you may well disagree with my evaluations of these particular cases. I motivate my claims to some degree, but the overall point of considering cases is to confirm that we require assessments of legitimacy for all sorts of institutions and that in making such assessments it is useful to think about how and to what extent institutions act wrongfully and so potentially forfeit rights. Claiming, for example, that one of the institutions I cast as legitimate is in fact illegitimate already accepts the underlying purpose of the examples.

To begin, institutions that do not violate rights are obviously legitimate. These are just groups of people voluntarily associating without harming anyone, so interfering with them would be wrong. Examples would include a private social club, a local grocery co-op, the temple on the corner, and so on. We may disagree with how they operate and we may engage them in dialog or even protest, but they have a right not to be coercively interfered with. We cannot physically bar members from meeting together or from carrying out their institutional roles, we cannot threaten violence to deter them, and so on.

These institutions are so anodyne that the question of legitimacy may seem misplaced, supporting the traditional approach of restricting judgments of legitimacy to political institutions. My interpretation is that these institutions are so obviously legitimate in the sense we are pursuing that we (almost) never explicitly entertain the question of their legitimacy. If we move our attention to institutions that are *prima facie* morally suspect, it becomes clear why concerns of legitimacy are appropriately applied to non-political institutions. Consider four such institutions: a criminal organization like the mob, a maker of ultraviolent films, the Ku Klux Klan, and a golf club with racist

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<sup>21</sup> Jeremy Waldron, "A Right to Do Wrong," *Ethics*, 92 (1981), 21-39; David Enoch, "A Right to Violate One's Duty," *Law and Philosophy*, 21 (2002), 355-384.

<sup>22</sup> Buchanan, *The Heart of Human Rights*, p. 182. Compare John Rawls, *Political Liberalism* (New York; Columbia University Press, 1993), pp. 427-428.

membership policies. All four are morally condemnable in a variety of ways, but are they illegitimate?

The point at which wrongdoing results in the forfeiture of the right to non-interference is not the same for all institutions or in all contexts. Most importantly, it has to be balanced against the institution's goal. An institution that is uniquely necessary for a morally mandatory goal will have more leeway than an institution pursuing a purely elective goal. There is not much room for rights violations when pursuing elective ends.

For all four institutions under consideration, the institutional goal is elective. But I think there is an important difference between the mob and KKK on one hand and the film maker and golf club on the other. While the latter institutions are morally condemnable in important ways, neither directly uses violence to harm others, unlike the former institutions: the mob and the KKK use violence, including murder, to achieve their institutional goals. Just as people who use violence of this sort to achieve their private aims forfeit their rights against interference, these institutions forfeit their rights. Both the mob and the KKK are clearly illegitimate.

To emphasize, on my approach this means the mob and the KKK 1) lack rights to function and to pursue their institutional goals, so 2) others correlatively lack a duty of non-interference, meaning that 3) it is permissible to coercively interfere with these institutions and their members, thereby preventing the members from coordinating their action by following institutional norms, ultimately resulting in the dismantling of the institutions such that they no longer exist.<sup>23</sup>

These implications speak in favor of understanding legitimacy in the general way we are pursuing. By identifying the mob and the KKK as illegitimate, we easily and accurately characterize the appropriate relationship between these institutions and outsiders by unifying an important set of practical stances we can take towards them. We are doing more than condemning individuals; we are identifying a relevant feature of the institution as a whole and coordinating our responses around that institutional status.

What of the maker of ultraviolent films and the racist golf club? I think both are legitimate. Again, to be absolutely clear, this does not mean they are morally praiseworthy, or that we should not organize and protest against them, or that they should not reform, or even that they are not violating some rights and acting wrongfully (given the right to do wrong). Members of the golf club and employees of the film company may be morally condemnable, but we cannot use coercion to stop them from carrying out their role in their institutions. Legitimacy only entails the very minimal claim that the institution has a right to function and so others have a duty not to

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<sup>23</sup> In the case of domestic institutions like these, the question of legitimacy most often gets subsumed under (although is not identical to) their legality. A major function of domestic legal systems is to establish shared and settled standards for legitimate domestic institutions like businesses or clubs, which then allows us to coordinate our behavior around those standards and gain the goods of stable coordination over time. This is all perfectly consistent with applying legitimacy standards to such institutions. One way of thinking about the issue is that from the perspective of legislators, we need to consider what standards institutions need to meet to have rights to non-interference. But the issues are still distinct; the KKK was morally illegitimate even when it was legal. This highlights a major reason why questions of state legitimacy and the legitimacy of supranational institutions are distinctly difficult: our usual solution to the metacoordination problem, namely the settled standards of a particular legal regime, is problematic outside the domestic context. We need ways of assessing the legitimacy of the multitude of institutions beyond the state even in the face of fundamental questions about the status, normative grounding, scope, and enforcement of international law. This is further complicated by my focus on rights violations, as some rights depend on political institutions to give them determinate content, so in some contexts aspects of moral legitimacy cannot be assessed independently of positive law. Thanks to Antoinette Scherz for helping me clarify my thinking on this issue.

coercively interfere with it. Legitimacy is a relatively low bar, as it needs to be to serve its practical function under conditions of disagreement.

This is not to say these institutions would be legitimate in all circumstances. I follow Buchanan in holding that the details of how institutions work in their actual context matters for their legitimacy (his “ecological” approach to legitimacy). But with the background conditions of a modern, relatively just state, institutions and institutional insiders have the right to act in some morally pernicious ways without coercive interference, just like individuals have a right against coercive interference in their private lives even when they are misogynist and racist. It is only when those views cross a line into sufficiently egregious rights violations that the right to non-interference is forfeit.

Even if you disagree with my conclusions in a particular case, the examples demonstrate the plausibility of the approach. It makes sense both to evaluate the legitimacy of institutions that are not political and to think about legitimacy in terms of a right to non-interference that can be forfeit by wrongdoing. Legitimacy identifies an important way that we coordinate our practical stances to such institutions and their actions.

### III. Political Legitimacy

This understanding of legitimacy has three important implications for questions of political legitimacy. The first implication is that the idea of political legitimacy as a single standard should be abandoned. Second, my focus on rights violations avoids some problems that have plagued normative evaluations of political institutions, especially international institutions. Third, the main issue for the legitimacy of many political institutions is their use of coercion because coercion *prima facie* violates rights.

First, focusing on the goals of an institution and whether it violates rights immediately reveals that the category of “political” is too diverse for political legitimacy to be usefully evaluated in any unified manner. The goals of political institutions vary widely, from the broad and morally mandatory goals of the state to the narrow and elective goals of institutions like the International Standards Organization. Some political institutions issue rules, use coercion to back those rules up, and wield the power to kill literally all human life, but most do not. Accordingly, the potential and actual impact of these institutions varies widely as well. No single standard could appropriately evaluate institutions that differ so substantially across the features relevant for institutional legitimacy.

Of course, there is still room on my account for standards of legitimacy that apply to types of institutions. But the types will be fine-grained, focused on the goals and functions of institutions. Plausibly, one of these types would be the state, given states’ common goals and shared ways of functioning. Many theorists are already proceeding in this more fine-grained manner by looking at the details of particular institutions or institutional types and developing novel standards for them. My approach unifies these various projects by giving them a single focus in the form of a common understanding of legitimacy: these different standards all aim to show under what conditions the institution has the right to function without coercive interference. But we should abandon the idea of a single standard of political legitimacy.

A second important implication of my approach to institutional legitimacy is that a focus on rights helps us avoid certain conceptual and definitional morasses. Most relevantly, there is the question of what it means to rule (or, what is often identified

with rule, what it means to be political).<sup>24</sup> Some international political institutions do something that looks like ruling because they issue statements or decisions that prescribe actions for agents, like the United Nations. But these institutions do not coercively impose their decisions in the way that states do. Do these international institutions rule or not? On some accounts of legitimacy this will matter a great deal, most obviously if legitimacy is conceived of as the right to rule. If these institutions do not rule, then the question of their legitimacy is misplaced.

On my account, on the other hand, we can forego the question of whether these institutions rule. Instead we ask if their activity, whether it counts as ruling in some specific sense or not, is violating rights and how that activity relates to the institution's constitutive goals. The question of rights violations is independent of both the question of ruling and the question of coercive enforcement of decisions.

To see this, consider the case of a massively influential yet purely advisory institution. As an advisory institution it issues recommendations about how everyone ought to live, but it does not take itself to be issuing commands and its recommendations are not coercively enforced.<sup>25</sup> However, almost everyone voluntarily does what the advisory institution recommends that they do. Ultimately this means that the institution's advice drastically shapes society and people's life prospects.

If one of those recommendations is that women should not work outside the home, then most women would choose not to work outside the home. But this also dramatically affects the few women who do not follow the institution's advice. For they find barriers when potential employers discount them, they find cultural stigma against women who do not follow the advice and related resultant stigma about their abilities, they find a lack of educational opportunities, and so on. In this case, the legitimacy of the institution is in question because of the effects it has even though it does not issue rules in the strict sense and even though it does not coercively enforce its advice. The fact that almost everyone follows its advice and so society is structured in a way that systematically violates rights is enough for its legitimacy to be at stake.

My approach, then, appropriately raises the question of legitimacy for such institutions without having to solve, or even consider, a thorny conceptual question that other approaches may struggle to resolve. This point extends to concepts other than ruling, including the particularly relevant concept of law. There has long been debate about whether international law is "really" law.<sup>26</sup> International law lacks some features that are claimed to be constitutive of law on various accounts, such as the lack of a sovereign, the lack of enforcement mechanisms, or the largely voluntary subjection of states. On my approach whether international law is really law does not matter for the question of international law's legitimacy.<sup>27</sup> What matters are the goals of the various institutions of international law and the ways those institutions affect individuals, most

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<sup>24</sup> Many theorists grapple with the notion of ruling as they consider legitimacy in the international context, including Thomas Christiano, "The Legitimacy of International Institutions," *The Routledge Companion to the Philosophy of Law*, ed. by Andrei Marmor, (New York: Taylor and Francis, 2012), pp. 380-393; Tasioulas, "The Legitimacy of International Law;" Buchanan, "The Legitimacy of International Law;" Besson, "The Authority of International Law – Lifting the State Veil."

<sup>25</sup> As described, this institution does not command in the tradition of Hart and Raz, according to which commands necessarily include the intention that subjects do as commanded because they were commanded to. Thus it cannot be described as ruling in the sense that this strain of the literature understands it.

<sup>26</sup> See, e.g., Hart, *The Concept of Law*, ch. 10; Joshua Kleinfeld, "Skeptical Internationalism: A Study of Whether International Law is Law," *Fordham Law Review*, 78 (2010), 2451-2530; Tasioulas, "The Legitimacy of International Law;" Dworkin, "A New Philosophy for International Law."

<sup>27</sup> The question of rights violations intersects with some of the same issues like the lack of enforcement, but it can be evaluated without answering the conceptual question.

especially whether they commit or enable rights violations.<sup>28</sup>

Of course evaluating the effects of these institutions is incredibly difficult, as is bringing those effects into relation with the various institutional goals and determining what sort of right to do wrong those goals should support.<sup>29</sup> The point is not that my approach easily gives concrete answers. The point is that it avoids some difficult questions that other accounts struggle to resolve and that, in my view, distract us from more important issues.

A third implication of my approach for political legitimacy is that much of our focus should be on how institutions use their power. The use of power in its many forms is how political institutions are most likely to violate rights and the most egregious and widespread violations of rights are a result of the abuse of coercive force. This is not a particularly surprising or novel position. I highlight it here for two reasons.

First, this puts my approach in the camp that includes John Rawls, who notes that political power “is always coercive power” and takes his liberal principle of legitimacy to be setting the conditions under which such coercive power is justifiably exercised.<sup>30</sup> The other camp takes the main problem for political legitimacy to be whether institutions have justified moral authority, i.e. the moral power to change others’ moral standing simply by stating an intention to do so. The authority camp includes Joseph Raz, who frames the problem as the question of “legitimate authority.”<sup>31</sup>

My approach focuses on coercion because it is primarily through the use of coercion that institutions violate and threaten to violate people’s rights, so it is the use of coercion that primarily delegitimizes. In contrast, claiming to exercise authority while not having that authority does not violate anyone’s rights. It is only when that authority is coercively enforced that rights violations are possible (or when it is widely accepted so the coercion is structural rather than interactional, as in the above example). It seems to me that focusing on an institution’s claim to authority leads us to misunderstand the relationship between authority and legitimacy.<sup>32</sup>

Consider the many religious groups that claim moral authority over all humans. They claim to issue rules (and interpretations of rules) that bind all people, such that not following those rules is morally wrongful. Is every religious leader (that makes this kind of universal claim) violating the rights of those around them? I think not. They may be criticizable on areteic grounds like respect. But they are not violating rights simply by asserting authority over others, given that they do not force people to follow them. If they cross the line from exhortation and condemnation to coercion, they violate rights. Analogously, the main problem for the legitimacy of an institution like the state is not

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<sup>28</sup> Cf. Besson, “The Authority of International Law – Lifting the State Veil.”

<sup>29</sup> Note that the question of whether international law is really law may well be relevant for a host of other interesting, important questions, perhaps even some questions of moral evaluation.

<sup>30</sup> Rawls, *Political Liberalism*, p. 136. This camp also includes Altman and Wellman, *A Liberal Theory of International Justice*; Ladenson, “In Defense of a Hobbesian Conception of Law;” Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. xi; Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Belknap Press, 1986), pp. 190-191; Thomas Nagel, “Moral Conflict and Political Legitimacy,” *Philosophy & Public Affairs*, 16 (1987), 215-240 at p. 218; Niko Kolodny, “Rule Over None I: What Justifies Democracy?” *Philosophy & Public Affairs*, 42 (2014), 195-229 at p. 197.

<sup>31</sup> The main locus of Raz’s thought on this is *The Morality of Freedom*. Others who follow the authority approach include Green, *The Authority of the State*; Tasioulas, “The Legitimacy of International Law;” Higgott and Erman, “Deliberative global governance and the question of legitimacy: what can we learn from the WTO?”; Besson, “The Authority of International Law – Lifting the State Veil;” Christiano, “Democratic Legitimacy and International Institutions.”

<sup>32</sup> For more on why legitimacy and (justified) authority are not identical, see Morris, *An Essay on the Modern State*, ch. 4 and Bas van der Vossen, “On Legitimacy and Authority: A Response to Krehoff,” *Res Publica*, 14 (2008), 299-302.

that it claims authority. The main problem is that it backs up its claims with coercive force.

There are further important and interesting questions to ask about both states and religious institutions, including whether they have the authority they claim. Indeed, that question is one of the most important practical questions people face. My claim is not that other questions are unimportant; my claim is that they are distinct from the question of the institution's legitimacy. It is both consistent and useful to think that whether some religious institution has the right to function is distinct from whether the religion it promulgates is true.

The second reason that I am highlighting the important role of coercion in considering political legitimacy on my approach is that so far I have been treating institutions of all kinds as if they were purely voluntary. Institutional insiders, as I define them, are people who voluntarily accept institutional norms. This may have struck you as odd since many political institutions demand that people follow institutional norms even if they do not accept those norms. When those institutions use coercion to force compliance with institutional norms, we have a very different situation.

The voluntary case is the baseline from which we come to understand the nature of institutions and the core of institutional legitimacy. But as I am now emphasizing, this does not mean that coercion and non-voluntariness are irrelevant for institutional legitimacy—quite the opposite. Institutions that coerce compliance with their norms need to meet considerably more stringent standards for legitimacy because coercing people is *prima facie* rights-violating.<sup>33</sup> At the very least such institutions will be legitimate only if they are necessary to achieve a morally mandatory goal. No purely elective goals could justify coercion of this sort.

Here the question of authority is likely to be relevant. Too briefly: on my approach coercion can only delegitimize if the coercion is wrongful. One way that coercion can be permissible is if a normative authority has changed under what conditions citizens may be coerced. Any institution that uses coercion over as wide a range of activities and on as many occasions as the modern state probably needs some kind of normative authority regarding coercion in order to be legitimate. But that is because authority can be relevant to rights violations and the permissibility of coercion, not because legitimacy simply is legitimate authority.<sup>34</sup>

#### IV. State Legitimacy

Finally, my understanding of legitimacy can be consistently and fruitfully applied to states. This application is complex and I do not have the space to address the many issues it raises. At this point I wish simply to make a preliminary and plausible case. Importantly, my general approach to institutional legitimacy aligns well with the recent turn away from political obligation in theories of state legitimacy.<sup>35</sup>

Understood as the right to function without coercive interference, the question for state legitimacy is how states function and what non-interference in that functioning entails. While the function of states is much contested, most fundamentally states function by issuing and enforcing laws. This is what enables them to establish the basic

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<sup>33</sup> Cf. Dworkin, "A New Philosophy for International Law," p. 14.

<sup>34</sup> This opens the possibility that a state may have the authority it needs to be legitimate yet not have anywhere near the authority it claims, as I believe is often true. Cf. Morris, *An Essay on the Modern State*; William A. Edmundson, "Legitimate Authority without Political Obligation," *Law And Philosophy*, 17 (1998), 43-60, at p. 60.

<sup>35</sup> Examples include Applbaum, "Legitimacy without the Duty to Obey" and Reglitz, "Political Legitimacy Without a (Claim-) Right to Rule."

structure of society, provide public goods, and so on. State legitimacy on my view is thus a right to issue and enforce laws without interference. The important question is what this right further entails given the peculiar nature of state functioning.

I do not need to answer this question here because we can see some plausible possibilities by turning to recent revisionist theories of state legitimacy.<sup>36</sup> For example, William A. Edmundson argues that state legitimacy should be understood as correlating to “a general prima facie duty not to interfere with [laws’] enforcement” and “not to interfere with the bona fide administration of the laws of a just state.”<sup>37</sup> Jiafeng Zhu claims that state legitimacy need only entail a liberty to create and apply law, a liberty to enforce the law, a power to make subjects vulnerable to coercive enforcement of the law, and a claim-right to monopolize the three former Hohfeldian advantages.<sup>38</sup> Christopher W. Morris holds that “for most people, this right to rule will correlate with an obligation to refrain from interfering with the state’s actions.”<sup>39</sup> The important point for these revisionist theories is that state legitimacy need not correlate to a robust duty to obey or even to Buchanan’s weaker “special kind of respect.”<sup>40</sup> They demonstrate that various amenable minimalist approaches to state legitimacy are already extant in the literature. This is sufficient for my purpose of establishing the prima facie plausibility of applying my general account of institutional legitimacy, with its focus on non-interference, to the state.

I cannot consider the many arguments made by Edmundson, Zhu, and others in support of a minimalist understanding of legitimacy and why states do not require more.<sup>41</sup> That said, I will add one: any legitimate state will in fact have all the support it requires without anything more than non-interference because all legitimate states have de facto authority. That is, every theory of state legitimacy requires that the state have the voluntary support of most of the citizenry, such that most citizens voluntarily comply with most laws most of the time.<sup>42</sup> If they did not, the state would have to apply stunningly widespread coercive force in order to function. But wielding such coercive force is both unacceptably risky to citizens’ rights and unlikely to be effective, so any state that needs to wield such force in order to function is ipso facto illegitimate. When states have de facto authority, they will have enough resources to function without making any further demands.

This, of course, dodges the question of whether people *should* accept their state’s broad claims to authority. I purposefully dodge this question precisely because I do not think it is well answered by a theory of legitimacy. This marks one of the distinctive elements of my account. Often the question of legitimacy is bound up with questions of

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<sup>36</sup> I borrow the ‘revisionist’ label from Jiafeng Zhu, “Farewell to Political Obligation: In Defense of a Permissive Conception of Legitimacy,” *Pacific Philosophical Quarterly* (2015), doi: 10.1111/papq.12128, at p. 2.

<sup>37</sup> Edmundson, “Legitimate Authority without Political Obligation,” p. 44.

<sup>38</sup> Zhu, “Farewell to Political Obligation,” pp. 3-4.

<sup>39</sup> Morris, *An Essay on the Modern State*, p. 216.

<sup>40</sup> Buchanan, *The Heart of Human Rights*, p. 184.

<sup>41</sup> These theories, as well as my own, are intended to offer a theory of “internal” legitimacy, as opposed to “external” or recognitional legitimacy, which concerns how outsiders should treat states. It is worth noting that, because I do not start with the state, I use the terms ‘insider’ and ‘outsider’ in a different manner than the state-centric discussion. My distinction is about who willingly joins institutions; the traditional distinction is between addressees of the state and others. I am offering an account of “internal” legitimacy because many addressees of the state are outsiders according to my usage, and it is to them that the problem of legitimacy as I understand it applies. Terminology aside, the important point is that I take non-interference to capture what many citizens of modern states owe to their states.

<sup>42</sup> See Tom R. Tyler, *Why People Obey the Law* (Princeton: Princeton University Press, 2006) for the argument that it is not the threat of coercion that motivates most people’s law-abiding behavior.

good citizenship, identity, loyalty, fairness, respect, and a host of other moral issues.<sup>43</sup> These are important issues and they are extremely relevant for how we relate to the various institutions that make claims on us. My point is simply that they are distinct from the question of legitimacy.

Notice that I am not claiming that the people who support the state, thus establishing its de facto authority, are mistaken. The existence of a traditional general political obligation is only one among many good reasons that people have to support the state. Many people contribute to the state out of a sense of shared history, solidarity, personal loyalty, fairness, and so on. Some states may very well deserve these contributions from some citizens for precisely these reasons. My approach does not in any way exclude those possibilities.

As I noted in section one, on my approach legitimacy picks out a single salient issue: must we allow this institution to continue? By narrowing the question we are able to focus on the relevant concerns more closely and without distraction while also inviting other moral issues to be addressed independently. Of course, we might hope that legitimacy is relevant in some ways to these other discussions, but we should not treat them as if they were identical.

Here I am following A. John Simmons' general strategy in "Justification and Legitimacy."<sup>44</sup> Simmons argues that Kantian views of legitimacy like Rawls' collapse legitimacy into justification. For Simmons, justification is a consequentialist assessment of the state that asks whether there are strong reasons to prefer the state qua institutional type over anarchy. Legitimacy is a more robust assessment on Simmons' view: it applies to individual state tokens and asks whether they have the rights to direct, to coerce, and to be obeyed.

I accept Simmons' distinction between justification and legitimacy but I go further.<sup>45</sup> Collapsing justification into legitimacy disguises important moral distinctions, as Simmons claims, but so does including everything else in legitimacy. Simmons' notion of legitimacy encompasses a host of different issues that I think are better distinguished and evaluated independently. Simmons' ultimate concern is with political obligation, understood to include a variety of robust requirements like generality and particularity. If we take legitimacy to be answering different concerns, namely about practical coordination and enabling the attainment of various collective goods, not about political obligation per se, then it makes sense to answer Simmons' other pressing questions on their own terms.

Disaggregating the issues is particularly relevant for evaluating the idea of legitimacy as merely entailing a right to non-interference. One concern for my approach is whether a legitimate institution could demand more than non-interference if more was required to function; if, for example, a state needed more insiders to function, could joining the state as an insider be required?<sup>46</sup> My answer is that, yes, an individual could have a moral duty to join or create an institution. However, that duty does not arise from the institution's legitimacy but from an external requirement like justice. That is, one may have a duty of justice to join or create institutions. But what explains why you are bound to join is the duty of justice, not the legitimacy of the institution. We need to

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<sup>43</sup> For example, respect for the law is considered by Buchanan, *The Heart of Human Rights*, p. 184 to be the appropriate response to legitimacy. Raz also considers respect, loyalty, and allegiance with respect to the law in *The Morality of Freedom*, pp. 91-99 and *The Authority of Law*, pp. 250-261.

<sup>44</sup> A. John Simmons, "Justification and Legitimacy," *Ethics*, 109 (1999), 739-771.

<sup>45</sup> In case there is any question, my understanding of legitimacy, while weaker than Simmons', is also not the same as Simmons' justification; my view applies to particular institutions and includes deontological elements.

<sup>46</sup> Thanks to Tamara Jugov and an anonymous referee for raising this concern.

carefully distinguish the various moral demands that are made of us and their sources. I claim that legitimacy plays a narrow role in our moral evaluations of institutions and that restraining legitimacy to such a role is actually a strength of the theory.

To close I highlight two further advantages of a more disaggregated and minimalist approach to state legitimacy. One of the common motivations of revisionist theories of legitimacy is that they may allow us to resist the conclusions of philosophical anarchists like Simmons. Anarchists' arguments focus on how implausible and difficult it is to establish a general obligation to obey. On my approach, however, such a general obligation need not exist for a state to be legitimate. All that needs to be established is that the state is sufficiently non-rights-violating for it to have a right to function without coercive interference.

This is especially important in light of the many piecemeal and individualized considerations that are insufficient on the traditional approach. For example, many people have promised to obey the state, like public officials. This cannot ground a general obligation to obey, but it does explain why such consenters' rights are generally not being violated by imposition and enforcement of the law. Similarly, many people may be subject to the state's Razian, instrumental authority. Such authority is too piecemeal to ground a general obligation to obey.<sup>47</sup> But it could explain why many people are not wronged by the imposition of some laws, thus increasing the chance that the state is legitimate on my view because it is not violating rights as much as it otherwise would be.<sup>48</sup> Once we start to gather all these considerations together, it may well be the case that many actual states are legitimate in the sense I am concerned with (although most states are not owed general obedience, as anarchists correctly claim).

Finally, minimalism about legitimacy results in more useful and plausible evaluations of legitimacy. Political philosophers have a very pessimistic view of state legitimacy. According to a rising philosophical consensus, most or even all actual states are illegitimate, with the possible exception of a few Scandinavian states. This tide of philosophical anarchism has pushed our field far from other discourses of legitimacy, limiting our ability to fruitfully engage.

It is interesting to compare the philosophical convergence on legitimacy with legitimacy as it is understood in international law, for example. Philosophers tend to have very demanding standards for legitimacy combined with a very robust view of what standing legitimacy confers and what demands can be made of citizens by legitimate states. International law, on the other hand, has the pernicious combination of very undemanding standards combined with robust standing and robust demands. According to international law, a state is legitimate and has sovereignty just in case it has effective physical control over a territory, which in turn grants it a wide range of rights.

Many international lawyers, scholars of international relations, and political scientists tend to be very dismissive of philosophical approaches to legitimacy.<sup>49</sup> Philosophers' theories are criticized as unrealistic, utopian, and naive. One response to this is simply to scoff back, to maintain that philosophers' theories articulate apt normative standards regardless of whether those standards are met. This response is foreseeably unproductive.

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<sup>47</sup> See Besson, "The Authority of International Law – Lifting the State Veil," for a valuable discussion of how the coordinative aspect of Razian authority could undergird international law.

<sup>48</sup> On my view legitimacy is binary, not scalar. But there are many ways we could account for scalar assessments of legitimacy, for example in terms of how much leeway in wrongdoing an institution has before it loses its legitimacy.

<sup>49</sup> See Thomas, "The Uses and Abuses of Legitimacy in International Law."

The approach to institutional legitimacy that I am pursuing here allows us to engage more directly, and hopefully more fruitfully, with understandings of legitimacy in international law and elsewhere. My approach combines relatively undemanding standards of legitimacy with a weak standing and weak demands. Instead of imposing severely demanding standards, my approach asks us to weaken our understanding of what legitimacy confers on institutions and demands of individuals. Taking my approach would allow philosophical considerations of legitimacy to return to a more robust conversation with evaluations of legitimacy as they are made elsewhere.

In conclusion, I reiterate that my goals for this paper were mainly exploratory. I have shown that there is promise in approaching legitimacy from a general institutional perspective, especially as we consider the legitimacy of non-state, international institutions. There is a coherent and useful notion of legitimacy that applies to institutions of any kind and asks whether they have the right to function without coercive interference. This approach to legitimacy may not only unify various projects, it may also illuminate some classic questions about the legitimacy of the state and what sorts of demands states can make of us. Part of this is due to the minimalism of my understanding of legitimacy, which opens further moral categories for independent, clear evaluation.