



DISCUSSION NOTE

IN DEFENSE OF DISCRETIONARY ASSOCIATION THEORIES OF POLITICAL LEGITIMACY: REPLY TO BUCHANAN

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In Defense of Discretionary Association Theories of Political Legitimacy: Reply to Buchanan*

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ALLEN BUCHANAN HAS ARGUED THAT a widely defended view of the nature of the state – the view that “the state is a discretionary association for the mutual advantage of its members”¹ – must be rejected because it cannot adequately account for moral requirements of humanitarian intervention.² Buchanan’s argument is this:

- (1) If any discretionary association theory of political legitimacy is true, then states must aim only to advance their own citizens’ interests.
- (2) Humanitarian intervention is sometimes morally required of states.
- (3) If humanitarian intervention is sometimes morally required of states, then states must sometimes aim to advance *non-citizens’* interests.
- (4) So, (from 2 and 3 by *modus ponens*), states must sometimes aim to advance non-citizens’ interests.
- (5) So, (from 1 and 4 by *modus tollens*), no discretionary association theory of political legitimacy is true.

This paper argues that Buchanan’s objection is unsuccessful and, moreover, that discretionary association theories can preserve an important distinction that Buchanan’s alternative approach to political legitimacy cannot.³ §1 argues that premise (1) of Buchanan’s argument is false. I show, in particular, that the two discretionary association theories that Buchanan mentions – Locke’s and Rawls’ theories – both (coherently) require states to be concerned with the interests of non-citizens. §2 then argues that discretionary association theories can account for an important distinction that Buchanan’s approach cannot: the distinction between “internal” legitimacy (a state’s ability to morally justify itself to its own members) and “external” legitimacy (a state’s ability to morally justify itself to humanity more broadly).

1. The Humanitarian Foundations of Discretionary Association Theory

Buchanan’s argument against discretionary association theories is straightforward. He assumes that humanitarian intervention is sometimes

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¹ Buchanan (1999): 74.

² Buchanan (1999) and (2004): 98-109.

³ See Buchanan (2004).

morally required of states.⁴ This premise is hard to quarrel with. It is widely agreed that states are morally obligated to intervene in cases of genocide, for example.⁵ Buchanan's argument then is that discretionary association theories cannot make sense of these requirements. Buchanan points out, first, that there are at least two possible types of discretionary association theory: the "simpler" view, which says that the state must always act in the best interest of its own citizens, and the "democratic" view, which says that the state must aim to realize the democratically expressed will of its citizens.⁶ Buchanan then argues that because (i) the simple variant permits humanitarian intervention only insofar as intervention is judged to be in the best interest of the state's citizens, and (ii) the democratic variant permits intervention only insofar as intervention is judged to satisfy the democratic will of the state's citizens, both variants entail that there would be *nothing morally illegitimate* about a world in which every state adopted a consistent policy of avoiding humanitarian intervention (intervention where the sole or primary goal is to protect non-citizens' interests).⁷ This is inconsistent with the assumption that humanitarian intervention is sometimes required of states, however. Thus, Buchanan concludes, no discretionary association theory of legitimacy is true.

Buchanan has, however, misrepresented discretionary association theory. For, consider the two discretionary association theorists that Buchanan discusses: Locke and Rawls. Begin with Locke's theory. According to Locke, we all have a moral duty under the "law of nature" to protect and preserve the natural rights of *humankind*.⁸ Now, Locke argues that we can better protect and preserve *our own* rights by entering into a state (for the state can resolve three "inconveniences" we face in a state of nature: the absence of known and settled laws, the absence of impartial judges, and problems concerning the enforcement of our rights).⁹ This is only one part of Locke's theory, however. Locke is clear we have a common duty under the law of nature to protect and preserve the rights of *all* of humankind. Locke is clear, moreover, that these rights include *positive rights* to material aid, and to reparation in the case of injury (i.e. rights violations). Libertarian interpreters of Locke often disregard Locke's discussion of these rights.¹⁰ Still, as A. John Simmons argues, Locke clearly endorses them.¹¹ Locke writes, for example, "Charity gives every man a *title* to so much of another's plenty as will keep him from

⁴ Buchanan (1999): 77.

⁵ The United Nations Convention on the Prevention and Punishment of the Crime of Genocide has been ratified by 140 nations.

⁶ Buchanan (1999): 75-6.

⁷ Buchanan (1999): 77.

⁸ Locke (1689): Second Treatise, Ch. II, §6.

⁹ *Ibid.*, Chapter IX.

¹⁰ For libertarian interpretations see, for example, Mack (1980): 58, 60 and Nozick (1974): 10. Also see Cohen (1985): 383, a non-libertarian who adopts a similar interpretation.

¹¹ See Simmons (1992): 60, as well as Chapter 6.

extreme want, where he has no means to subsist otherwise”¹² Locke also states explicitly that we entrust the federative power of the state to punish *non*-citizens who transgress natural law.¹³ The picture we get from Locke, then, is this: legitimate states are discretionary associations for mutual advantage *against the background constraint that we are all under a common duty to preserve and protect the natural rights of all humankind, including rights to humanitarian assistance*. Locke’s theory is therefore not only consistent with humanitarian intervention; it also seems clearly to require intervention under some conditions.¹⁴

Now turn to Rawls. Rawls’ theory, like Locke’s, is more complex than Buchanan treats it. According to Rawls, a state is *internally* legitimate (i.e. morally justifiable to its own members) just insofar as, roughly speaking, its basic structure (i.e. its laws and major institutions) conforms to principles of justice that free and equal persons would agree to from an “original position” of fairness.¹⁵ A state is *externally* legitimate for Rawls, on the other hand (i.e. it is justifiable to non-members), just insofar as (again, at least roughly speaking) it promotes respect for basic human rights *everywhere*.¹⁶ This distinction – the distinction between internal and external legitimacy – enables Rawls, like Locke, to affirm humanitarian obligations while at the same time recognizing the state as a discretionary association for mutual advantage. Rawls’ theory of internal legitimacy is situated within his theory of external legitimacy – the latter of which says that states have humanitarian obligations to *non*-citizens.¹⁷

I submit, as such, that Buchanan mischaracterizes discretionary association theory. Locke and Rawls both affirm that legitimate states must (1) protect some universal interests (i.e. natural or human rights), and (2) *in addition*, protect and promote certain interests of their own members. Now, Buchanan actually alludes to this at one point, when he notes that Locke and Rawls ultimately justify the state by appeal to universal human interests.¹⁸ Buchanan mistakenly thinks that this makes their theories incoherent, however. Buchanan claims that it is impossible to justify a state by reference to universal human interests while at the same time requiring the state to focus exclusively on advancing its own citizens’ interests – and of course this is probably

¹² Locke (1689): First Treatise, 42 (emphasis added).

¹³ Locke (1689): Second Treatise, 145-8.

¹⁴ For further discussion, see Simmons (1992): Chapter 6.

¹⁵ Rawls’ official definition of internal legitimacy is somewhat more subtle than this (see Rawls 1993: 136). I lack the space to discuss its finer details here, however, and this is close enough for our purposes. It is also worth noting that Rawls actually denies that the state is a fully voluntary (or discretionary) association for mutual advantage. Because people are born into particular positions in society, Rawls claims that his theory only *approximates* the idea of the state as a discretionary association (see Rawls 1999a: 12). This seems enough, however, to locate Rawls in the discretionary association theory tradition.

¹⁶ See Rawls (1999b): 27, 37, 42, 65, 78-81. Here again, Rawls’ official definition (of external legitimacy) is more subtle than this, but this is close enough for our purposes.

¹⁷ *Ibid.*, Part III.

¹⁸ *Ibid.*, 79.

right.¹⁹ Yet, this is not what either Locke or Rawls proposes. Locke and Rawls never argue that states must focus exclusively on their own citizens' interests. Their theories say that states must pursue certain universal human interests, *and then, in addition*, pursue particular interests of their own citizens.

2. Considerations in Favor of Discretionary Association Theory

Let us now compare discretionary association theories to Buchanan's alternative view that we should understand political legitimacy in terms of human rights. According to Buchanan, a wielder of political power is morally legitimate, "if and only if it (1) does a credible job of protecting at least the most basic human rights of all those over whom it wields power and (2) provides this protection through processes, policies, and actions that themselves respect the most basic human rights."²⁰ Now, this idea – the idea that the function of the state is to promote and protect human rights – might seem plausible, at least at first glance. There is, however, a problem. For, consider Buchanan's broadest definition of political legitimacy: "An entity has political legitimacy if and only if it is morally justified in exercising political power."²¹ This principle would appear to entail, not implausibly, that political legitimacy can come in degrees. If my state protects my human right to life, then in that respect its political power is legitimate. If, on the other hand, the state violates my right to free speech, that does not mean that *all* of the state's power is illegitimate (as though I could simply disobey the law at will); it is simply my state's failing to respect my right to free speech that is illegitimate.

The problem for Buchanan's theory then is this: Buchanan's theory seems plausible enough as a theory of *external* legitimacy – as a theory of how states can morally justify their political power to humanity at large. Most of us agree, after all, that states have obligations to promote and protect human rights everywhere. But what about *internal* legitimacy – the ability of a state to justify its political power to its own members? Here, Buchanan's focus on human rights is clearly too narrow. Almost every liberal theory of justice affirms that citizens have a moral right to demand *more* from their state than respect for their human rights. Consider, once again, Rawls' theory. According to Rawls, a state's exercise of political power is internally legitimate just in case (again, roughly) the state conforms to his two principles of domestic justice. These principles, however, include far more than basic human rights: they distribute domestic political rights (e.g. voting rights), opportunities, and finally, wealth and income.²² The basic idea here – that there is more to internal legitimacy than there is to external legitimacy – is highly plausible. Most of us think there are things that citizens can morally demand of their own

¹⁹ Ibid., 79-80.

²⁰ Buchanan (2004): 247.

²¹ Buchanan (2004): 233.

²² For Rawls' principles of domestic justice, see Rawls (1999a): 266 and Rawls (1993): 5-6.

states that the international community or humanity more broadly has no right to demand. Whether or not our society conforms to Rawls' difference principle, for instance, is (or so many of us want say) *our* business, not the international community's (or humanity's). At any rate, this distinction – the distinction between internal and external legitimacy – seems important to preserve. We should be able to distinguish between what citizens can morally demand of their own state from what *humanity* can demand of their state. We should be able to say, in particular, that citizens can demand *more* of their state than humanity can. Discretionary association theories can account for this distinction. Buchanan's alternative approach cannot.

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