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Introduction

I THE BASIC THEMES

Reclaiming the Public develops a political theory of the public. The theory defends the noninstrumental value of the notion of "the public" that resides in our public institutions and the officials that run them. Public institutions, we argue, are not simply entities which act *for us* as many institutions, private and public, can and often do. Instead, they are public by virtue of being able to speak and act *in our name*. No other arrangement can establish such a link between institutions and the people whom they govern. The linking mechanism, we argue, is performed by a certain conception of representation, according to which the decisions made by public officials must reflect the preferences or judgments and/or essential features of the people they represent. The conception of representation at issue concerns two basic elements: perspectivism and attributability. Perspectivism requires that decisions that are being made by public institutions or public officials reflect, or at least are consistent with, the perspectives of citizens. Attributability means that these decisions can, in some sense, be attributed to us, that is, we can be held responsible for them. The two elements provide the foundations not only for understanding the grounds for political authority and the normativity of law but also can account for major features of the legal system, such as the noninstrumental value of different lawmaking institutions, such as a constitutional assembly, legislature, and judge-made law, the limits of privatization, the nature and value of public property, and the permissibility of using artificial intelligence (AI) in setting policies and making laws.

To assert that an institution or an official is public implies that, in an important respect, the institution or the official speaks and acts in the name of their subjects, which means that they represent them. Their decisions are, therefore, ones that can be attributed to them. Consequently, the people represented can regard themselves as the authors of the rules; they recognize that (at least generally) those rules accommodate their concerns and reflect their worldview. As a result, those represented can truthfully assert that the rules are *theirs*, namely, rules which they have authored. There is, thus, a link between political authority and those represented, according

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to which the latter see to it that the political authority endorses the worldview of its subjects. Note that our account can accommodate different understandings of representation. Representation could be attentive to the preferences, judgments, features, or characteristics of those represented, or other aspects which are essential to the represented.

This characterization of the public uncovers the distinctive value of public institutions. Public institutions, we argue, facilitate the exercise of a certain dimension of agency that no individual can independently exercise. The agency dimension at issue consists of the normative power of members of the political community to make binding decisions in matters that concern the general interest. It also gives rise to holding the decision-makers – namely, members of the political community – responsible for the ways they exercise this power.

There are different kinds of decisions that involve public institutions in the construction of members' agency. Some decisions purport to create or change the rights and duties of some or all members of the society, as in the case of imposing new legal directives concerning safe driving or tax liability. Other binding decisions do not affect the normative situation of citizens but, nonetheless, shape material and expressive aspects of our collective lives, such as designations of national holidays, affirming certain cultures and traditions, conveying public condemnation of criminal behavior, and communicating public recognition of widely shared commitments (as in the case of affirming the principle of free speech).

Extending the power of individual agency in these ways is valuable because it gives effect to the public autonomy of individual members, taken severally. Public autonomy adds another, necessary, layer to people's overall autonomy: Whereas private autonomy entitles people to decide what form of individual life to pursue, public autonomy concerns people's controlling influence over the norms, policies, and agendas that govern their political community.[1] Public autonomy matters because private autonomy alone cannot secure our status as free and equal agents in society. Thus, although we can interact with other private persons as free and equal agents, say in commercial and employment settings, we remain unfree if the laws and policies of our political community are made for us, rather than by us. Hence, for us to be free, our interactions with institutions and with our co-citizens in matters concerning the political community must reflect our status as (equal) agents, rather than merely beneficiaries, of binding decisions. This link is what makes these institutions genuinely public.

[1] We borrow, and substantively modify, the idea of public autonomy as has been developed in Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 110 (William Rehg trans., 1996). According to Habermas, public autonomy is identified with democratic legitimacy: "only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted." By contrast, we defend public autonomy on the basis of a certain idea of representation. On our account, public autonomy makes no essential reference to assent (actual or hypothetical).

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II WHY PUBLIC? SETTING THE STAGE

Before embarking on this project, however, we wish to motivate the case for reclaiming the public by challenging contemporary understandings of this concept. We do so in three principal stages. First, we explain why a normative account of the public matters. We insist that the case for public institutions cannot ultimately rest on history, tradition, or conventions. Second, we present and criticize two influential accounts of public institutions, namely the central planner and the fiduciary theories of the state. Although normative in their aspirations, these accounts develop the wrong kind of normativity, as they appeal to the instrumental value of public institutions. Under these views, public institutions are those institutions that are most likely (as a contingent matter) to promote our interests and/or make right or just decisions. We argue that they fail to meet the challenge posed by the question of why have distinctively public institutions. Three, we take stock of two noninstrumental accounts of public institutions – the democratic and the Kantian accounts of legitimate political authority. We proceed by acknowledging the partial overlap between each one of them and our own account, followed by identifying the substantive, indeed fundamental, differences between the accounts in question. Against the backdrop of this wider theoretical context, we seek to show that *Reclaiming the Public* puts forward a genuine alternative to major tenets of philosophical, legal, and economic thought about the public.

A *Why Giving a Normative Account of the Public Matters? Against Conventionalist, Traditionalist, and Historical Accounts of the Public*

In the liberal doctrine of the social contract, the distinction between public and private has come to structure the way we approach fundamental questions of authority, law, freedom, equality, and responsibility. On this distinction, private persons are free and equal agents. They are, therefore, entitled, within limits, to pursue their goals and aspirations. By contrast, public institutions and officials ought not to have goals and aspirations of their own, that is, ones that do not make reference to those of the private persons whom they govern. Instead, their value lies in securing the conditions for private persons to lead lives as free and equal agents.

A substantial range of goods and services provided by governments around the world these days fits this abstract characterization of the public. In this way, public institutions make binding decisions on most matters of our lives, creating and enforcing laws, adjudicating disputes, formulating policies, and providing major goods such as national security, health, infrastructure, education, and social services. But the connection between public institutions and the provision of these or other goods and services is and has been anything but straightforward, historically and normatively.

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For many centuries, public institutions have occupied a relatively limited role in the lives of their subjects. Goods and services that we often quite instinctively identify as being traditionally (or even necessarily) ones that are publicly provided were subject to private provision. The fantasies of some economists, in particular opponents of public institutions, have been a living reality for centuries. Powerful commercial organizations like the East India Company assumed political authority and sovereignty rights that no business corporation today can possibly claim.[2] Moreover, the practice of adventurers ruling territories, as well as the practice of "privateering," according to which private ships were authorized to capture enemy merchantmen and cargo, proceeded well into the nineteenth century.[3] Private assertion of political authority was not confined to colonialism and transnational affairs more generally. Indeed, private persons and entities were front and center in the provision of domestic "public" goods and services, at least until the latter half of the nineteenth century. For instance, tax collecting, and even tax assessing, were managed almost exclusively by private persons, firefighting in the United States was administered by for-profit firms and private clubs, and policing was often administered by private initiatives and private organizations.[4] Resorting to the private sector may reflect a lack of resources and competency on the part of governments. This conjecture is supported by the fact that the federal civilian workforce in the United States circa 1800 did not exceed 4,000 persons whereas nowadays it is nearing 2 million (excluding postal workers).[5] It may also reflect the political sensibilities and ideologies of the time.[6] Be that as it may, one thing is clear: The historical case for the provision of "public" goods and services with government institutions is rather tenuous. More generally, history does not support the conventional view that political authority can only be exercised by public institutions.

Normatively, the assumption that only public institutions can and should be in charge of supporting private persons in their pursuit of aspirations and goals has come under pressure. Isn't it a matter of how competent, effective, and fair

[2] *See, e.g.*, William Dalrymple, The Anarchy: The Relentless Rise of the East India Company (2019).

[3] *See, e.g.*, Steven Press, Rogue Empires: Contracts and Conmen in Europe's Scramble for Africa (2017); Francis Raymond Stark, The Abolition of Privateering and the Declaration of Paris (1897), respectively.

[4] *See* Nicholas Parrillo, *Testing Weber: Compensation for Public Services, Bureaucratization, and the Development of Positive Law in the United States*, Comparative Administrative Law 47 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010); Scott Gabriel Knowles, The Disaster Experts: Mastering Risk in Modern America (2011); Clifford D. Shearing, *The Relation between Public and Private Policing*, 15 Crime & Justice 399 (1992), respectively. To be sure, the rise of the modern state has not eliminated the market for private policing and firefighting.

[5] *Compare* Peter Kastor, The Early Federal Workforce (2018), https://tinyurl.com/yt95snyc, *with* U.S. Office of Personnel Management, Federal Civilian Employment (2017), www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/federal-civilian-employment/.

[6] *See* Parrillo, *supra* note 4, at 52.

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the institutions in question are, irrespective of their being identified as public or private? Why care about the identity of an entity or its label if competency and fairness are our ultimate concerns? More generally, is it really the case that public institutions will best secure the conditions necessary for private persons to thrive? The increasing resort to privatization since at least the Reagan–Thatcher era, on the one hand, and the emergence of god-like systems of AI, on the other, further complicate singling out public institutions and understanding why they are necessary.

B *Why Public? Against Instrumentalist Accounts of the Public: Efficiency and Loyalty*

What is most striking in this line of thinking is not that there are no reasons for preferring public institutions over private and AI-based ones. Instead, it is the *comparative* nature of these reasons. On this approach, the value of public institutions lies in the assumption that they outperform whatever it is that private institutions can also do. The former are presumed to be better motivated, more competent, and impartial (*et alia*) than the latter. Thus, the value of public institutions of lawmaking is said to lie in their greater ability (greater than nonpublic institutions) to identify the demands of reason, incorporate considerations of fairness to decision-making processes, and exhibit greater fidelity to the general interest.

The comparative nature of the contemporary defense of public institutions becomes clear when two prominent accounts of the presumed value of these institutions are considered: efficiency and loyalty, respectively. In terms of efficiency, public institutions are central planners whose value is to provide goods and services that cannot be provided by the market due to one or another market failure. A central planner is valuable because, and insofar as, its decisions are superior to market actors. For instance, national security may likely be underproduced if left to the choice of market actors. By contrast, the state may be better motivated to invest adequate resources in the production of this public good. Efficiency-oriented central planners are supposed to simulate the results of a perfectly competitive market where decisions about the provision of goods and services would be settled by costless bargaining.

In terms of loyalty, public institutions are fiduciaries, or like fiduciaries. Their value lies in their superior ability to be entrusted with managing the affairs of the political community. Their superiority is given by the special commitment built into the role of a fiduciary, namely, to act in the best interest of its beneficiary.[7]

[7] Leading scholars of fiduciary law disagree over the question of what loyalty requires. We set it aside as our argument here does not turn on how it is resolved. *Compare* Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 Yale L.J. 1820 (2016) *with* Evan J. Criddle & Evan Fox-Decent, *Keeping the Promise of Public Fiduciary Theory: A Reply to Lieb and Galoob*, 126 Yale L.J. F. 192 (2016).

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Contrary to market actors who pursue their self-interest, and unlike sectarian groups devoted to doing good according to their conception of the general interest, fiduciaries act impartially for the interests of their beneficiaries. In the case of public institutions, the fiduciary role they occupy compels them to display loyalty and care for the interests of those subject to their rule, namely, members of the political community. To this extent, public institutions' authority over their subjects is not corrupted by market pressures nor exercised on the basis of a sectarian view of the general interest.

Efficiency and loyalty are comparative evaluative properties in the sense that public institutions make decisions that produce more, or less, efficiency than market actors can or that they are more, or less, loyal to the general interest than private institutions and systems of AI. That said, their comparative nature stands in the way of explaining what might be distinctively valuable in public institutions. Being subject to comparative assessment means that there is no knockdown case for (or against) public institutions. In principle, it is always possible to assess and reassess the institutional arrangement that is more likely to either produce efficient outcomes or exhibit adequate levels of loyalty to the general interest. For instance, public institutions can be subject to strict standards of loyalty and care but, in principle, so too can private institutions and systems of AI. The role of a fiduciary cuts across the distinction between public and private. Market failures can be tackled by central planners but also, as economists and lawyer economists have demonstrated, by creating secondary markets for rectifying externalities through bargained exchanges between private actors.[8]

Some theorists would not regard this as a shortcoming. We resist this temptation and rest our conviction on the deeply held intuition that public institutions and public officials could be per se valuable. Instrumental accounts provide the impetus for an "[a]ccelerated" resort to private institutions in lieu of, or in partnership with, public institutions.[9] In the absence of noncomparative accounts of the value of public institutions, the choice between private, public, or AI-based decision-making lends itself to local, empirical, and contingent considerations of institutional competency. There is no a priori reason to prefer any institutional arrangement. Efficiency and loyalty could lie on either side of the public/private distinction. At times, public institutions might prove more qualified to fairly and effectively advance the general interest. At other times, however, competing institutional arrangements may be no less qualified. Efficiency and loyalty, along with any other comparative account of the value of public institutions, cannot but fail to answer the basic question of why have *public* institutions.

[8] *See especially* Ariel Porat, *Private Production of Public Goods: Liability for Unrequested Benefits*, 108 Mich. L. Rev. 189 (2009).

[9] Martha Minow, *Privatizing Social Services*, *in* The Cambridge Handbook of Privatization 135, 136 (Avihay Dorfman & Alon Harel eds., 2021).

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The source of the failure on the part of efficiency and loyalty accounts lies in the underlying notion of the public. We argue that the "public" is neither merely a central planner nor a fiduciary. Instead, it is us. What public institutions purport to do is to speak and act in our name, rather than merely for us.[10]

C Why Public? Beyond the Conventional Noninstrumentalist Accounts: Democracy and Omnilateral Will

The idea that public institutions are not speaking and acting for us, but rather in our name, resonates with both democratic and Kantian theories of legitimate political authority. That said, there exist substantial differences between our account of the character and the value of public institutions and the account developed in these two theories. We first present how we understand democratic and Kantian theories and then lay out both basic overlaps and substantive divergences.

We begin with democracy. Democracy is a big tent, and there are any number of ways to explicate its value(s) and, ultimately, its claim for legitimate authority. We focus here, and elsewhere in this book, on the views that equate democracy with a certain (intrinsically valuable) process of decision-making, rather than with its epistemic value of generating just or desirable outcomes. In particular, the authority of the democratic process lies in its ability to establish an egalitarian procedure of decision-making. Accordingly, its legitimacy does not necessarily depend on the substance of the decisions made by democratic institutions, but rather on whether citizens are entitled to participate as equals in making such decisions.

There are three differences between various views of the proceduralist approach to democracy's authority and our account of the public. All three can be traced back to the basic distinction between deciding for us and deciding in our name. The first difference concerns the ultimate value of the respective theories. Proceduralist theories of democracy tend to ground its authority in one or another ideal of fair or egalitarian process. Democratic process is valuable in and of itself because it confers on its participants a certain status of equal citizens. By contrast, we argue that the egalitarian ideal of democratic processes of decision-making is, at best, of instrumental value and may even be oppressive. It may sometimes be valuable to implement such processes but only because, and only insofar as, they can bring about adequate convergence between the perspective of the subjects represented by public institutions and the decisions made by these institutions. Such a convergence requires fidelity to fundamental values, and citizens may be mistaken as to the particular decisions that follow from these values or are consistent with them. In other words, what matters in our view is the possibility of attributing binding decisions to

[10] *Contra* Evan J. Criddle & Evan Fox-Decent, Fiduciaries of Humanity: How International Law Constitutes Authority 103 (2016). Criddle and Fox-Decent argue that fiduciary relations "require the power-holder to act with due regard for the best interests of the beneficiary, taking into account his views and opinions."

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those who are subject to them so as to ensure that the decisions are truly made in their name. Democracy is not necessarily the one and only system that could bring about such a convergence between the decisions made by representatives and the perspectives of those represented.

A second fundamental difference concerns the nature of the equality that matters for decisions to be binding. The proceduralist approach to democracy's authority singles out the horizontal dimension of equality, namely comparing the power of different citizens or groups of citizens. Although there are different standards of equality in the horizontal dimension, one thing is clear: The argument does not make a claim for equality in the vertical dimension, that is, concerning how things stand between public institutions and their subjects. By contrast, we argue that part of what could render public institutions authoritative is the elimination of inequality that is built into any hierarchical relationship between practical authorities and their subjects. Unlike bosses, parents, and other typical examples of practical authority, public institutions are nonhierarchical. They purport to act in our name, not simply on us (as in the case of a boss) or for us (as parents often do).

Finally, a third fundamental difference concerns the place of majoritarian decision-making. The proceduralist approach to democracy's authority often equates an egalitarian political process with a commitment to majoritarian rule.[11] Departures from majority rule, as in the case of subjecting legislative decisions to judicial review, are permissible and even required, but only insofar as majoritarianism proves deficient, say in the face of persistent minorities or fears of a tyranny of the majority. By contrast, the notion that public institutions speak and act in the name of us all does not ascribe independent moral significance to majority rule. After all, a decision that reflects the support of a slim majority of the constituents can hardly be attributed to the rest of the polity. This is not to say that majority rule is necessarily impermissible or even undesirable. Instead, it means that the case for majority rule is not grounded in, let alone entailed by, a commitment to egalitarian processes. It could, perhaps, at times serve egalitarianism but it does not necessarily do so.

Now consider Kant's appeal to the omnilateral will. Our account of the public endorses Kant's idea that political authority is *sui generis*. Although private persons can wield practical authority over others in some contexts, none can have political authority. By contrast, public institutions are constitutive of political authority, law, and ultimately people's status as free and equal agents. That said, we reject one interpretation of Kant's characterization of public institutions and their underlying value. Kant identifies public institutions with the "omnilateral will," which might mean, very roughly speaking, "the united will of the people."[12] Kant further intimates that

[11] The connection between equality and majority rule is meticulously developed in Bruce A. Ackerman, Social Justice in the Liberal State 277–79 (1980).

[12] It is not clear whether these two characterizations are, strictly speaking, equivalent. The former appears in Immanuel Kant, The Metaphysics of Morals 6:263 (Mary Gregor trans., Lara Denis ed., rev. ed. 2017), and the latter at 6:313.

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the omnilateral will is "united not contingently but a priori and therefore necessarily, and because of this is the only will that is lawgiving."[13] We argue that the omnilateral will cannot truly speak and act in our name. To do so, it must endorse our *actual* worldview, rather than merely endorse a worldview that we could have had.

The wedge between this Kantian theory and ours of the public further widens when it comes to the value of public institutions. The former suggests that the value of political authority lies in overcoming the difficulty of *interpersonal* dependence and inequality.[14] This difficulty arises whenever private persons purport to rule over other private persons. Private rule, on Kantian theory, is illegitimate because it is inconsistent with the status of the rule's subjects as independent and equal persons. We agree with this conviction, to be sure, but insist that the commitment to independence and equality requires more than the elimination of private rule. What is missing is an understanding of public institutions capable of addressing the further difficulty of *vertical* dependence and inequality, namely, between public officials and those subject to their authority. We argue that public institutions are uniquely positioned to speak and act in our name.

III THE ROAD AHEAD: RECLAIMING THE PUBLIC IN SEVEN STAGES

Reclaiming the Public defends the value of the public in seven chapters. Although they form an articulated unity, each chapter can also be read as a standalone contribution to the study of the character of the public and its value. We outline the main themes of each.

Chapter 1 critically examines the existing theories of the legitimacy of political authority and develops an alternative. We argue that the legitimacy of political authority ultimately rests on a certain theory of representation, according to which public institutions should make decisions by looking at the world from the perspective of the people whom they represent. We further argue that unlike other forms of practical authority, such as an employer or parental authority, the authority of public institutions is nonhierarchical: It speaks in the name of its subject, rather than for them. The answer to the legitimacy question addressed to Moses, "who made thee a prince and a judge over us,"[15] is not that the "thee" is in some sense more qualified or better positioned to make decisions for us, nor is it a consensual submission to the rule of thee; nor, finally, does it turn on egalitarian processes of decision-making. Rather, it is that the "thee" is, in reality, "us." This explains why political authority is necessarily public; it represents those who are subject to it, and, consequently, those who are subject to it are, in principle, accountable for the authority's decisions.

[13] *Id.* at 6:263.

[14] *See* Anna Stilz, Territorial Sovereignty: A Philosophical Exploration 101 (2019); Ernest J. Weinrib, Corrective Justice ch. 8 (2012); Arthur Ripstein, Force and Freedom: Kant's Legal and Political Philosophy 146 (2009).

[15] Exodus 2:14.

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Chapter 2 addresses a basic question in general (analytical) jurisprudence. In this chapter we critically examine traditional theories of the nature of law: legal positivism and natural rights. Both theories rest their account of the normativity of law on the *content* of law. In contrast, we ground our account on the appropriateness of the agent who makes the law, in particular on whether they are a public official or an institution. Our proposal defends the "standing conception of law," according to which law's distinctive contribution is that of establishing a public entity whose normative pronouncements could count as being made in the name of the polity. More specifically, we defend the view that the moral difference law makes is essentially one of standing, agency, identity, or status.

Hence, standing is not a matter of *what* the law is, but of *whose* pronouncements could count as law. Thus, in contrast to the dominant views in jurisprudence, law's moral difference does not rest on telling us what morality or reason might dictate, but rather on establishing a way of attributing decisions to all of us and not to anyone of us in particular. What renders this possible is the emergence of public officials whose value lies in being *public* officials, that is, in creating a persona different from their private persona and hence making decisions that count as being made in our name. It is, therefore, legitimacy understood in terms of the ability to speak in the name of all that can account for the normativity of law.

Chapter 3 moves from the abstract idea of the public analyzed in Chapters 1 and 2 to its institutional manifestations. We argue that there are different meanings of the public, and that their existence and value are partially the product of institutional structure. On this view, public institutions are not mere vessels through which independently fixed norms are conveyed. We further argue that institutions matter not merely because of their competency or democratic feat. Rather, they are noncontingently important because they partially determine the meaning and, ultimately, the nature of the norms they make and the goods that these norms provide. As a result, a semantically identical authoritative pronouncement such as "everyone is equally entitled to X" may carry substantively or even radically different meanings depending on the public institution whose pronouncement it is. Hence, the "good" provided by a legal norm does not only depend on its content, its scope, its justness, or appropriateness; it partially hinges on its institutional maker or the process by which it was made. This also explains the urge to label certain norms as "constitutional" or as super-statutes even when these norms have not been a part of a formal constitution or have been enacted in accordance with distinct procedures. Such designations identify more accurately the kind of good that is being provided by these norms.

We further elaborate on and extend this thesis by considering the distinction between constitutional and statutory rights, on the one hand, and between statutory and common-law rights, on the other. These distinctions suggest that the value of having multiple lawmaking institutions, as opposed to just one institution, does not merely lie in achieving appropriate checks and balances against tyranny, or in

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