The Power of Public Positions:
Official roles in Kantian legitimacy

Thomas Sinclair

ABSTRACT The Kantian account of political authority holds that the state is a necessary and sufficient condition of our freedom. We cannot be free outside the state, Kantians argue, because any attempt to have the 'acquired rights' necessary for our freedom implicates us in relations of dependence on private judgment. Only in the state can this problem be overcome. But is not clear how a mere system of institutions could make the necessary difference, and contemporary Kantians have not offered compelling explanations. I offer detailed analysis of the problems that Kantians identify with the state of nature and the objections they face in claiming that the state overcomes them. Then I sketch a response on behalf of Kantians. The key idea is that under appropriate institutions, which are absent in the state of nature, a person can make claims of acquired right without presupposing that she is by nature exceptional in her capacity to bind others.

Introduction

A state is a system of institutional norms. Some of these norms create official roles, purporting to give some people title to tell others what they may and may not do, and to physically compel them to comply. Agents of the state make and apply laws covering just about every aspect of our lives: not only such obvious areas as bodily integrity, but also housing, communications, roads, bequests, professions, pensions, and market exchanges, to name but a few. At some point, if you keep refusing to do as they say, you will be locked up. In this way, agents of the state take themselves to have far-reaching authority, that is, the

moral power to alter people's moral rights, duties, liabilities, and powers by issuing binding directives over a wide range of domains.

How can anyone gain the right to do all this to anyone else? On the face of it, it's a tremendous intrusion. And the state's behavior is often felt that way. Think of the expropriations involved in road-building or nationalization programs, or of recreational drugs laws, or think of government surveillance, or just of tax.

This paper explores the Kantian response to this question, which takes our innate equality and freedom as its starting point. Kantians argue that the state, and hence the official positions that are partly constitutive of it, is in fact a necessary condition of the equal freedom of its members. Such freedom demands that we can have rights in external things—most obviously property rights, but also contractual and some other types of rights. Yet these 'acquired rights' aren't compatible with our innate equal freedom except under the jurisdiction of a (properly constituted) state, in which the agents of the state, occupants of its official positions, really do have the authority they claim. So the state's authority is justified.

This conclusion is supposed to be independent of empirical speculation. If Kantians are right, defending the state's authority calls for no knowledge of natural human dispositions to violence or partial judgment. Even perfect good faith and unanimous agreement in the 'state of nature' would not be enough to render acquired rights compatible with the innate right. Nor do we need to show that we're materially better off in the state. These features make the Kantian account attractive as a response to sceptics about political authority.

But there is a puzzle about just how any concretely existing Kantian state could achieve what it is supposed to achieve. Our innate equal freedom makes the state of nature problematic because in the state of nature, a person's attempt to acquire property involves subjecting everyone else to her will. But, as I explain, citizens of a state appear to be subjected to the will of legislators, judges, and agents of enforcement in a way that looks as if it should be no less troubling from the Kantian point of view. Moreover, anything that might be said of state officials in response seems sayable of individuals in the state of nature too—which would suggest that if the Kantian state is sufficient to solve the state of nature's problems, it's not necessary. The particular forms of rule-following that constitute a state just don't seem to have the power that Kantians attribute to them.

Contemporary Kantians don't do enough to explain how this puzzle is to be solved. But whether the Kantian account can live up to its promise depends on its success here. If it can't solve the puzzle, then the Kantian account offers no answer to skepticism about political authority after all.

In this paper, I sketch a solution to the puzzle. I set out the Kantian account, going into some detail about the problems Kantians identify with the state of nature and explaining the way in which the institutional norms and the coercive power of the state are supposed to address these. I go into detail here to make clear the nature and scale of a challenge to the Kantian account that I go on to describe in section 2. In section 3, I consider the most developed contemporary Kantian explanation of the way in which the state is supposed to meet the challenge. I argue that it leaves important questions unanswered. In

the remaining sections I propose my own explanation. Key to the explanation is a distinction between legislative acts that effectively privilege me as by nature a special source of authority over others, and legislative acts that do not. The former are not compatible with our innate equality, I argue, and only the institutional norms of the state can make possible the latter.

For reasons of space, I focus solely on questions about the power of official roles in the Kantian state. As I argue, it is the official roles that are created by the constitutive norms of the state that are key to solving the puzzle. Accordingly, I don't say much about wider questions concerning the shape that the Kantian state must take. I also say little about the interpretation of Kant. It is not my aim to argue that contemporary Kantians have misread Kant, but to show how the account that they have influentially defended must be understood if it is to fulfil its promise.

1. The Kantian account

a. Trouble in the state of nature

The recent revival of Kant's political philosophy has made the outlines of the Kantian account familiar.[1] Kantians argue that a properly constituted state is a necessary and sufficient condition for its members' claims of property right, contract right, and 'rights to [other] persons akin to rights to things' to be morally unproblematic (Kant 1996: 61). (These are a central class of claims purporting to configure the appropriate distribution of individuals' external freedom—roughly, freedom over the physical.) In the absence of a properly

constituted state (i.e. in the state of nature) making such claims of acquired right inevitably puts claimants in morally objectionable relations with others.[2]

The problem is that in the state of nature, acquired rights cannot be compatible with our innate equality, which is manifested in an innate right of equal 'freedom as independence from being constrained by another's choice' more than one can in turn constrain the other (Kant 1996: 30). Suppose that we're in the state of nature, and I find a clamshell, which I claim as mine. In doing that, I take there to be a law or rule (e.g. 'finders keepers!') that assigns me rights in the clamshell and you (and everyone else) correlative duties to respect those rights. I presume myself authorized by this law to take the clamshell out of your reach and in that sense hinder your attempts to take possession of it, and so in that way authorized to physically constrain your choices in accordance with the law I (perhaps only implicitly) invoke. Now, since we are in the state of nature, there has been no authoritative promulgation of the law in question: I simply judge it to exist and apply here. But then to suppose that this law and its application are authoritative, that it gives moral reality to my claim and your correlative duties, is to suppose that my will can be 'unilaterally lawgiving' for you—that it binds you more than yours binds me. Yet that is inconsistent with our equal innate freedom as independence. So my claim cannot be authoritative. Thus the innate right of freedom as independence is revealed to be a right of equal authority in the specification of the distribution of external freedom (Kant 1996: 30).

Stated in this general way, the argument looks vulnerable to the objection that what I suppose is not that *my will* (in the form of my judgment about

applicable law) is lawgiving for you, but that the *truth* is, so to speak.[3] However, in *acting* on my judgment about the truth about applicable law in the state of nature—by pressing claims and constraining others on the basis of those claims—I effectively privilege my judgment in the determination of what each of us owes and is owed, and thereby take my will to be unilaterally lawgiving.[4]

Of course, if someone's judgment *were* accurate (not only about the laws of external freedom but about her own accuracy in judging them), then it wouldn't be obvious why she couldn't authoritatively make claims of acquired right. Suppose that Lockean labor-mixing principles of first appropriation are true. Why couldn't someone accurately judge that they were and authoritatively make a claim to some land in accordance with them? After all, it's not as if Kantians deny the applicability of moral principles to questions of external freedom, even without authoritative promulgation, as their commitment to the principle specifying the innate right of equal freedom shows.

However, Kantians do deny the possibility of accuracy in the requisite sense here. Though *a priori* principles governing acquired rights prescribe equal freedom, they are not specific enough to determine a uniquely morally permissible concrete distribution of external freedom. As Anna Stilz notes, there are many possible systems of property that are potentially consistent with the principle of equal freedom, and under each of these there will also be many possible particular rules about precisely which bundle of Hohfeldian incidents property consists in, how to get it, who gets which things, and so on (Stilz 2009:

40). The principle of equal freedom doesn't even determine a unique procedure for resolving the indeterminacies (Pallikathayil 2010: 137).[5]

Contemporary Kantians distinguish three distinct aspects of the general problem of acquired rights in the state of nature. The first is the problem of unilateral choice, which concerns arrogation of authority. It is the problem most naturally suggested by the outline I gave above. The problem is that if I could make acts of appropriation in the state of nature, then I would have to be able to confer authority on my acts so that they generated new rights for myself and duties for everyone else, rights and duties that reconfigure the enforceable distribution of each person's external freedom. But my being a source of the requisite sort of authority implies the capacity unilaterally to bind others through my acts. And this is inconsistent with the innate right of equal freedom.

Again, it might be protested that I am not claiming to be the *source* of any authority: I am only channeling the authority of general principles of equal entitlement to freedom whose applicability and bindingness Kantians are happy to concede. But even if that's true, I nevertheless assume special authority to resolve the legislative indeterminacies that the general principles leave open. And that privileges me and my judgment about the matter over everyone else—it makes my judgment distinctively instrumental in the configuration of constraints on equal freedom. So I cannot effect an authoritative appropriation.

The problem of unilateral interpretation is a problem concerning the application to particulars of the laws invoked by any claim of acquired right in

the state of nature. This problem persists even if we set aside the problem of unilateral choice. The problem is that the laws' application to particulars would still involve privileging of individuals' judgments about it. For instance, you and I might agree on the authoritativeness of a law that says clamshells on the beach are mine and clamshells in the sea are yours, and yet disagree about this clamshell, which is being moved back and forth by waves on the beach. Once again, if my claim were authoritative, then you (and everyone else) would be subject to constraints privileging my judgment, but I would not be subject to constraints privileging yours. But that wouldn't be consistent with our innate equality. So my claim can't be authoritative.

The problem of unilateral interpretation is very similar to the problem of unilateral choice in that both arise as a result of indeterminacy engendered by general principles.[6] But problems are importantly different all the same. The indeterminacy that gives rise to the problem of unilateral choice is an indeterminacy in the specification of the general principles for distributing external freedom that adequately respect innate equal freedom. Such indeterminacy isn't inevitable, conceptually speaking. It might have been that the innate right analytically implied a uniquely applicable principle for the distribution of external freedom. The indeterminacy that gives rise to the problem of unilateral interpretation, by contrast, is an inevitable indeterminacy in the application of *any* general principle to concrete particulars (Ripstein 2009: 168–72). Even if there were a uniquely applicable principle for the distribution of external freedom, its application to concrete particulars would still generate the problem of interpretation.[7]

The problem of assurance is a problem that arises because the laws invoked by a claim of acquired right in the state of nature purport to authorize the imposition by right-holders of physical constraints on what others can do. The problem persists even if we set aside the problems of unilateral choice and interpretation. The problem is that my actions in accordance with my claim in any given case may effectively constrain you in such a way that you are laid open to being taken advantage of by me (whether or not I will in fact take advantage of you). For I may not in turn be subject to effective constraint by you. For example: I may be able to take effective possession of the clamshell that the laws I invoke specify as mine (effective because you can't take it for yourself). But at the same time, it may be that you can't take effective possession of a mussel, say, that the same laws specify as yours (even as I apply them), because you can't stop me taking it. If the laws in question were authoritative, then you would be required to respect my claim to the clamshell even though there was no prospect—you had no assurance—of my respecting your claim to the mussel.[8] So you would be authoritatively constrained to leave yourself open to being taken advantage of in this way—to depend upon me for the fulfilment of your claims even as I did not depend on you. But that would be inconsistent with our innate equality. So my claim can't be authoritative.[9]

b. The Kantian state

The properly constituted state is supposed to solve these problems. In the properly constituted state, property and other forms of acquired right are institutionalized so that the laws under which individuals make their claims are

no longer the expression of anyone's unilateral will. Nor are the application and enforcement of those laws. They are instead the expression of a public, 'omnilateral' will. As a result, individuals can enjoy the advantages of acquired rights without involving themselves in morally objectionable arrangements.

Indeed, there is a general duty to establish the properly constituted state (Kant 1996: 86). It is a requirement of practical reason—which is, for Kant, a requirement of freedom itself—that rights in external things should be rendered possible (Kant 1996: 40–2). Hence, a properly constituted state exercises legitimate authority. There is no moral objection to its power, at least in principle, because its having that power is the only condition under which its members can enjoy the acquired rights that must be possible for them.

How is this supposed to work? The idea is that the institutions of the properly constituted state make the law, its application, and its enforcement the issue of officials whose positions constitute a perspective that is not that of any private actor. At least in its ideal form, this makes the state perfectly representative (because constitutive) of the united will of its members, so that the laws under which individuals make their claims are the expression of that will, and the imposition, interpretation, and enforcement of such laws are morally unproblematic. Claims of acquired right under these laws are therefore compatible with the innate rights of all. As Arthur Ripstein explains:

> Public acts are omnilateral because they are not any particular person's unilateral choice, but instead are exercised on behalf of the citizens considered as a collective body. They are also omnilateral in a further sense:

> a unilateral will always has some particular end, some matter of choice. The omnilateral will is different, because all that it provides is a form of choice, by providing procedures through which laws can be made, applied, and enforced … when the state authorizes the acquisition of private property, it does not make the having of property, or the accumulation of wealth, its purpose. Its purpose is to enable individual human beings to have things as their own as against each other. (Ripstein 2009: 196)

The most important means by which this is achieved is that there exist legislative, judicial, and executive roles in the Kantian state that are defined by obligations to create and sustain through law a rightful condition, so that when officials exercise their powers, they act with the Kantian public purpose alone. Thus, the authority invoked in any individual's claims of acquired right is that of the law as representative of the united will of the people rather than of any particular person's private judgment.

Kant describes the state in which officials are genuinely representative of the united will of the people as a 'true republic' (Kant 1996: 112). There are other substantive institutional requirements for this. Two that will feature in what follows are as follows. First, the laws are substantively just at least in the sense that their content specifies nothing that violates citizens' innate rights—for instance, by classing some as serfs or the slaves of others (Kant 1996: 45). Second, the law is generally promulgated (Kant 1996: 89). But the key element in the Kantian account for our purposes is the official-role constituting institutions of the Kantian state.

Before I turn to the puzzle that the Kantian account generates, let me stress two important points. First: the way in which the Kantian state solves the problems of the state of nature is not supposed to be a matter of degree. It's not merely that the morally problematic character of interpersonal relations in the state of nature is diminished in the Kantian state. When the laws express the public, omnilateral will, as they do in the Kantian state, the problem goes away altogether (Kant 1996: 112). Second: the morally problematic character of interpersonal relations in the state of nature, as Kantians understand it, is not supposed to be a function of individuals' tendency to judge partially or of their proneness to violence. The fact that the state is a solution is not therefore supposed to be a matter of its limiting any such tendencies. Even a population of perfectly good-willed, peaceful, like-minded individuals could not live together in the state of nature consistent with their innate rights (Kant 1996: 89–90). As Ripstein explains, the need for the Kantian state is not supposed to reflect human limitations. It is a matter of facts of reason "internal to the concepts of acquired rights" (Ripstein 2009: 146).

2. Two objections to the Kantian account

The Kantian account is attractive. It promises to dissolve doubts about state authority and power in part by appeal to the very values—individual freedom and equality—that make them seem suspicious in the first place. And it claims the dialectical virtue of not relying on empirical speculation about the state of nature. But there are two simple objections that the account must address if it is to live up to its promise.[10] The first is that the Kantian state isn't sufficient to

solve the problems of the state of nature, even as the Kantian conceives them. The second is that the Kantian state isn't necessary to solve those problems either.

a. Is the Kantian state sufficient?

The insulation problem. As we've seen, the Kantian solution relies heavily on the idea that legislative, executive, and judicial acts are expressions of a public, omnilateral will because the roles in question are defined by obligations to create and sustain through law a rightful condition. The trouble is that in any existing or realistically possible state, these roles will be occupied by humans, whose acts in their official capacities will presumably reflect and so privilege their own judgments about the law and its application. Their public judgments cannot be perfectly insulated from their private judgments. It seems impossible, therefore, that even a perfectly constituted state could eliminate the asymmetry of subjection to individual judgment that precludes the possibility of acquired rights in the state of nature.[11]

The guarantee problem. Moreover, no existing or realistically possible state can guarantee that no one will take advantage of others' compliance with the law by failing to comply herself, in just the way identified by Kantians as problematic in their elaboration of the problem of assurance (see Kolodny n.d.: 16). So we have another reason to doubt that the Kantian state is sufficient to solve the problems of the state of nature.

b. Is the Kantian state necessary?

The ideal state of nature. The second objection is that the Kantian state isn't necessary to solve the problems that Kantians identify anyway. The thought here is that there isn't any reason why the state of nature couldn't *in principle* be a place in which the following conditions obtained:

a) everyone agrees upon both the specification and the application of the laws of external freedom;
b) the content of the laws is substantively just;
c) the specification and application of the laws aren't influenced by any objectionable bias towards any particular person's private purposes; and
d) each person is assured of everyone else's compliance, thanks to universal, stable, independent, and completely effective dispositions to prevent violations of the rights specified under those laws. (Kolodny n.d.: 16)

In such an ideal state of nature, it would seem that neither individuals' claims of acquired right nor their activity in accordance with their claims would be inconsistent with anyone's innate rights. And so if the Kantian state is necessary at all, then that's not something that can be shown without recourse to empirical speculation—it depends on the fact that the ideal state of nature, though conceivable, is practically unattainable.

c. How the two objections interact

Note that anything Kantians might say by way of reply to the sufficiency objection will tend to undermine their ability to give a satisfactory reply to the necessity objection. Suppose, for example, that Kantians advance some consideration that explains why state officials can be relied upon not to make or apply law in a way that objectionably reflects their private judgments. It's hard to see why any such consideration could not also be invoked in respect of at least the ideal state of nature. If state officials can be in sufficiently good faith, for example, why couldn't private individuals in the state of nature be in sufficiently good faith too as they apply the norms of organically evolved and long-established practices of acquired right? Perhaps it's less likely that everyone in the state of nature could be relied upon to act from public motives than it is that officials of the state can, since the officials are presumably fewer in number. But unless it's categorically impossible for them to act only from appropriately public motives, the problem remains.

Similarly, the condition (d) of assurance of compliance in the ideal state of nature suggests that anything that can be said on behalf of the Kantian state's powers to solve the problem of assurance can also be said on behalf of the ideal state of nature's. And nor do the idealizations of power involved in imagining a genuinely omnipotent executive seem available only to those who are imagining a state. Even if omnipotence is what it takes, that seems no better for the Kantian than her opponent.

3. Ripstein's account

To illustrate the force of these objections, consider Arthur Ripstein's influential presentation of the Kantian account in *Force and Freedom*. Ripstein goes into more detail than anyone else about the way in which official roles are supposed to make the difference in the Kantian state. If the objections above seem troubling even for his view, then further elaboration of the account is needed.

As part of what seems to be his response to the insulation problem, Ripstein stresses that official positions in the Kantian state are defined by an absence of private interests, embodied in the obligations associated with the positions, so that they constitute a public, objective standpoint (Ripstein 2009: 191–8). Accordingly, in the Kantian state officials are permitted only to act for the purposes of creating and sustaining a rightful condition, and there are prohibitions on the use of public office for private purposes, ruling out nepotism, bribery, and other forms of corruption (Ripstein 2009: 192–3). Ripstein suggests that thanks to these institutional provisions, "the distinction between an official's acting within his or her mandate and outside it does not depend on the official's attitude" (2009: 193).

Now, this does highlight what may be an important advantage of the state over many states of nature—namely, that it offers better protections against partiality and bias in the framing of laws of acquired right.[12] It seems a likely defect of the state of nature that people's attempts to act in accordance with claims of acquired right will tend to reflect judgments that are biased in the sense that the laws invoked are framed, cynically or otherwise, to further the private ends of those invoking them. From a Kantian perspective, the natural

way to think about this defect would be as a particularly grievous instance of the problem of unilateral choice—although that problem is supposed to persist in the state of nature even when everyone is in perfect good faith. But what Ripstein says doesn't seem to show that any concretely existing Kantian state *could* adequately address such instances of the problem. Even perfectly enforced prohibitions on bribery and so on presumably can't altogether preclude the use of official powers to pursue private interests. So if that's what's needed, the Kantian state is no solution.

Moreover, the partiality concern is distinct from the more general concern that was originally at issue. This general concern wouldn't be adequately addressed by Ripstein's remarks even if the partiality concern were. The general concern wasn't that officials of the Kantian state can use their offices to pursue private interests, but that their activities express and so privilege their private judgments, making these judgments instrumental in the specification of the law and its application, and so in the configuration of the state's system of constraints on external freedom. Yet how are legislators and judges supposed to reach their official conclusions other than through the exercise of their own judgment? Insulation from such judgment seems not only practically impossible but also theoretically undesirable insofar as there seems to be no attractive alternative to it.[13] So in any concrete Kantian state, the judgment of some individuals must inevitably be privileged over that of others.

Now, Ripstein explicitly denies that the Kantian solution "rests on any claim about the ability of officials to do anything more than act on their own best judgment" (2009: 191). But he does not explain how the general concern is

supposed to be alleviated. I think that's because he doesn't take it to be a concern at all. The problem of unilateral choice is a problem about the arrogation of authority; Ripstein thinks that officials in the Kantian state really *do* have the authority to choose for all, and so the problem goes away no matter how the occupants of official positions go about arriving at their decisions. Once you really are in authority, after all, it doesn't matter if your private judgment informs your public decisions, so long as you comply with any accompanying obligations.

But the reason that an individual doesn't have the authority to choose for all in the state of nature, even if she takes herself to be bound to choose as a Kantian official would be bound, was that her having that authority would involve privileging her and her judgment in the way that I described above. If that asymmetry undercuts any claim to authority in the state of nature, why doesn't it also undercut any claim to authority in the Kantian state? It doesn't seem satisfactory simply to assert that since official roles define a public rather than a private perspective, Kantian officials have authority that individuals in the state of nature lack. The puzzle was to explain precisely how that is supposed to be compatible with the innate right of equal freedom, given the inevitable involvement of occupants' judgments in the genesis of their public decisions.

The objections concerning the problem of assurance are also inadequately addressed by Ripstein's account. Key to the Kantian state's capacity to solve the problem, according to Ripstein, is its ability to "provide everyone with systematic incentives in relation to the possession of others", which makes

rights violations "prospectively pointless" (2009: 165). Even if you do manage to steal my property, it will remain my property in the eyes of the state, and the state will render my right in it effective by forcing you to give it back to me. "You have what is yours", Ripstein says, "because if another wrongs you, you will be able to get it back." (2009: 167) So the assurance problem is solved.

But this clearly assumes that the state's enforcement is fully effective. If it weren't, not all rights violations would be prospectively pointless, and it wouldn't be true that you were always able to get back what was taken from you. Yet it's precisely this assumption that the guarantee problem calls into question, and Ripstein says nothing to explain what justifies it. Nor does he explain why whatever justifies it wouldn't also be possible in the state of nature.

4. Where this leaves us

As we saw, Kantians think there is a categorical difference between the state of nature and the civil state, and that showing this does not depend on empirical speculation. The lesson of the preceding two sections is that it's difficult for the Kantian approach to vindicate this claim. The best that can be said for the Kantian state as a solution to the problems that Kantians identify doesn't seem adequate. What's more, it doesn't seem better than the best that can be said for the ideal state of nature either.

Niko Kolodny deploys these objections to argue (among other things) that the Kantian concern with freedom should ultimately be interpreted as a concern about status relations, and that only so interpreted can it justify state authority. A state can enshrine equality of status (e.g. through democratic

procedures), even if it can't provide assurance that no one's judgment will be privileged in the determination of operative constraints on external freedom. It can do so because its institutions can secure equality of opportunity to influence the state's decisions, and this is enough to provide assurance that no one is subordinated to anyone else, even if some have decision-making power over others. The institutional tribute to our equality is sufficient to allay anxieties about relations of social inferiority. (Kolodny n.d.: 17–23; see also Kolodny 2014a; Kolodny 2014b; Kolodny 2016.)

But, whatever the merits of democracy or other institutional arrangements as a way of allaying such anxieties, this proposal doesn't really do justice to Kantian concerns. It certainly doesn't *look* as if Kantians are ultimately worried about relations of social inferiority. In Kant's own work, the justificatory story that leads from the freedom of the rational will via the 'Universal Principle of Right'[14] to the innate right of equal freedom includes no trace of a concern with status relations as they feature in the contemporary accounts of political egalitarianism that Kolodny draws upon.[15] What's at stake are more familiarly Kantian concerns about universality and equality—prohibitions on treating oneself as special, as an exception to the general rule, and on not valuing others as equals in that sense.[16] And contemporary Kantians are all trying to stay fairly close to Kant's account.[17]

So it seems worth considering whether there is another way to avoid the objections and vindicate the Kantian account of political authority. I think there is. On my way of understanding the Kantian account, the fundamental problem that arises in the state of nature is that no one can make claims of

external right without effectively taking herself to be exceptional in just the way that you would expect a Kantian to find objectionable. The problems of unilateral choice and interpretation are instances of this more fundamental problem, which can be solved only by the constitutional norms of a Kantian state. Thus the necessity objection is met.

The problem of assurance is not an instance of the fundamental problem I have just described, and so it is a separate task to address it. The key thing here, I believe, is to see that the needed solution is not a *guarantee* but *equality* of assurance. Now, although this may be achieved in the ideal state of nature, it may also be achieved in the Kantian state. Thus the sufficiency objection is met.

In the remainder of the paper, I set out my proposed solutions in more detail.

5. Why the Kantian state is sufficient

a. The insulation problem

The insulation problem was that no realistically possible state looks as if it can help with the problems of unilateral choice and interpretation. Official roles are going to be occupied by humans, whose acts in their official capacities will privilege their judgments about the law and its application. So if privileging of one person's judgment over others' is objectionable, the privileging of official judgments over others is objectionable.

In order to make progress with this problem, let's reconsider the problem with privileging my judgment in the way that I would if I could effect authoritative appropriations in the state of nature. Obviously the idea is that it's inconsistent with our innate equality, because it would involve an asymmetry in capacity to constrain others. But perhaps not all such asymmetries are inconsistent with our innate equality, when that is properly understood.

My suggestion is this. There is an distinction between *reflexive* and *non-reflexive* privileging of an individual's judgment. An individual's judgment is reflexively privileged in the determination of the distribution of external freedom when she gives her own her judgment that role. An individual's judgment is non-reflexively privileged when her judgment is given that role from without.

This distinction can make the difference Kantians need. The idea is that what's wrong with claims of acquired right in the state of nature is that they privilege individuals' judgments reflexively. And this unjustifiably treats the person making the claim as if she is a special source of authority over her fellows: as if she has by nature a unique power to bind others. By contrast, in a properly constituted state, at least, the privileging of the judgments of legislators and judges is non-reflexive.

How could this solve the problem? You might protest that even if the judgment of an official role-bearer in the Kantian state is non-reflexively privileged, it would still seem that his choices constrain others more than theirs constrain his, in violation of the innate right. For when another person finds

her options constrained by the distribution of external freedom, the explanation of that appeals to facts about the role-bearer's judgment but not to any facts about the other person's. So the distinction between reflexive and non-reflexive privileging of a person's judgments seems not to be any help.

But this way of expressing skepticism about the proposal begs the question against it. It's true that the role-bearer's choices constrain others in the envisaged situation, but it need not be true that the explanation of why *his* choices should constrain others need presuppose that he has by nature a unique power to bind others.

To see this, consider the following sequence of fantastical scenarios. In COMPUTER 1, the laws of external freedom are made, applied, and (fully effectively) enforced by some kind of computer system, so that the judgment of a human is not called for at any point. Assume further that no human input was called for in the programming or setting up of the system—that it was created and switched on a freak act of nature. The computer's algorithms model the perspective of the omnilateral will: it acts as if with the pure intention to create and sustain through law a rightful condition, and the specification of its laws meets the substantive justice condition of compatibility with individuals' innate rights. I take it that COMPUTER 1 would solve the problems that Kantians identify with the state of nature, even on our earlier analysis, which makes the sufficiency and necessity objections bite in respect of any realistically attainable state.[18]

Next, in COMPUTER 2, we can introduce the following feature: the computer needs to route a signal internal to its operation via a human ('the Connector'),

who is selected (by the computer) on the basis of her electrical conductivity from those volunteering for the role. (As it turns out, only one person satisfies the computer's conductivity requirements.) Surely this makes no difference: COMPUTER 2 would also solve the problems of the state of nature. There is no Kantian objection to the Connector's role in the determination of the distribution of external freedom. After all, her judgment is not being privileged at all—it plays no role whatsoever.

Next, imagine a slightly different version of the system in which the computer's legislative output is sensitive to the content of the Connector's judgment about the appropriate distribution of external freedom, because the relevant electrical signals pass through the physical structures on which the relevant states of her mind supervene—although she is still selected for her conductivity. In COMPUTER 3A, the computer's legislative output does not match the Connector's judgment, but is still sensitive to that judgment in the sense that a change in the content of the judgment implies a change in the legislative output and vice-versa (all consistent with the conditions on the algorithms listed above). In COMPUTER 3B, the computer's legislative output does match the Connector's judgment. In all cases, the Connector's judgment is substantively compatible with the general principle of equal freedom.

If the problems of unilateral choice and interpretation are understood to arise in any case in which one person's judgment is instrumental in the determination of the system of constraints on external freedom, then neither COMPUTER 3A nor COMPUTER 3B solves the problems. In both cases, the resultant

system of constraints on external freedom privileges the Connector's judgment over others' judgments.

But in the case of COMPUTER 3A, at least, this is surely not objectionable from a Kantian point of view in the same way that taking the Connector's acquisitions to be authoritative in the state of nature would be. In the state of nature, the only explanations that can be offered for taking her claims of acquired right to be authoritative arbitrarily and unjustifiably take her to be by nature exceptional, a natural authority over others. The fundamental Kantian objection to this is obvious: no one is exceptional in this way by nature, and to treat oneself as if one is exceptional in this way is to act in a way that cannot be universalized (Kant 1997: 33–4; O'Neill 1989: 94; Wood 1999: 108–9). By contrast, in COMPUTER 3A, no one objectionably treats herself as exceptional in this way, and no one needs to assume that the Connector is exceptional in this way to explain why the Connector's judgment plays the crucial role in the determination of external freedom.

It might be objected that the objectionable assumption *is* made in all of these cases, because of the way in which the computer picks people according to the criterion of conductivity. Surely it's no more justifiable to privilege a person's judgment because of her conductivity than it is to privilege her judgment because she is a natural authority? But this objection is mistaken. It would be unjustifiable *in the state of nature* to privilege one's judgment because of one's conductivity. One's explanation would have to appeal to some procedure that made conductivity relevant (perhaps because it is randomly distributed, for example), and, as I noted earlier, Kantian principles of equality

are not sufficiently determinate to uniquely pick out any such procedure. So, to privilege one's judgment (or anyone else's) about the distribution of external freedom because of one's conductivity would be to presuppose that one's judgment about the procedure for selecting whose judgment should count was specially authoritative. But in the computer-run state, privileging a person's judgment because of her conductivity is not objectionable in that way, because the procedure for bringing about the rightful condition is not selected by anyone.

Now, I think what can be said about COMPUTER 3A can also be said about COMPUTER 3B, even though the legislative output in that case reflects the content of the Connector's judgment. There is no relevant difference between them from the point of view of the innate right of equal freedom. The point is once again that the privileging of the Connector's judgment does not involve any arbitrary assumption that she has a natural power to bind her fellows. So even though the Connector's judgments play a determining role in the system of constraints in force in the computerized state—a role that no one else's judgments play—and are in that sense privileged, the privileging is not objectionable from a Kantian point of view.

We can now see why the Kantian state need not give rise to the problems of unilateral choice and interpretation. For the Kantian state is relevantly like the computerized states. The Kantian state is constituted, as we saw, by institutional norms that give rise to official positions. So long as the constitution's selection of occupants of these official positions is relevantly like the computer system's procedures for selecting the Connector in that they

require no presupposition that the occupants are by nature special sources of authority over their fellows, then there is no reason why it should give rise to the problems. For that reason, perhaps hereditary monarchies are ruled out, as perhaps are 'epistocracies' to the extent that the selection of the rulers (the epistocrats) is on the basis that they know best in the way Kantians deny they can know best (see section 1a above).[19] Democratic and lottocratic constitutions, meanwhile, seem more obviously favored, since (in at least some forms) they clearly do not presuppose that anyone is a special source of authority by nature.

This does not mean that no official may be selected at any level on grounds of moral sophistication or virtue, or that in resolving indeterminacies in the application of *a priori* principles of right officials must take care not to assume that their judgment is better than others'.[20] It's important to stress this, because otherwise it may seem that the argument tends in the implausible direction of legislation by roll of dice. It doesn't tend in that direction. The argument is neutral between constitutions—that is, the systems of norms that set up official roles, their obligations, and the procedures of selection for them—so long as the explanation of the final authority (i.e. the last word on the choice, interpretation, or enforcement of the distribution of external freedom) that they bestow makes no appeal to natural authority. So it is neutral between randomly selected rulers and democratically selected rulers at least, though it constrains the rulers not to violate *a priori* principles of equality in their rule. And once the explanation of final authority is in this way freed of the objectionable assumption that anyone is a natural authority over her

fellows (or that any group is naturally authoritative over any other), it may be delegated by those who are selected as rulers more or less freely, including on grounds of moral sophistication or virtue.[21] And this is why the insulation problem is not a problem—and why Ripstein is right to say that whether an official's is acting within her mandate does not, on the Kantian account, depend on the official's attitude.

b. The guarantee problem

The foregoing shows that the Kantian state may be sufficient to solve the problems of unilateral choice and interpretation after all. But the problem of assurance remains. Since the problem of assurance concerns the security of our acquired rights rather than anything to do with the privileging of judgments, none of what I said in the preceding section looks as if it will help with this problem.

Is there any other reason to think that the Kantian state could solve it? As with the insulation problem, the thing to do is review the way in which our innate equality is supposed to generate the difficulty in the first place. The problem was one of dependence: if the laws I implicated with my claim of acquired right in the state of nature were authoritative, they would constrain others to respect my claims even in the absence of assurance for them that I would be likewise constrained by their claims. The only assurance available to them would depend upon my will. In this way, the laws would authoritatively constrain some to leave themselves open to being taken advantage of by others.

This way of setting out the problem, which is representative, makes it natural to think that what's required is assurance of full and universal compliance with claims of acquired right—which of course gives rise to the guarantee problem. But that's misleading. What's required is only that I am not *more* assured of compliance with my claims of acquired right than you are of yours. For only that makes for a problem of *unequal* freedom. Strictly speaking, a law with which no one had any hope of anyone's compliance wouldn't require anyone to lay herself open to being taken advantage of by others in a way that's incompatible with our innate equality. And nor does a law with which we can all expect the same degree of compliance by others, even if that's not 100%.

Now, in a state of nature where the only source of assurance that anyone has is her own strength and the willingness of others to refrain from interfering with her acquired rights, the condition of equality of assurance will most likely not be met, since some will be more able to ensure others' respect for their claims of acquired right than the others are to ensure reciprocal respect. But the same need not be true in a well functioning state, for the state's power is sufficiently great that it eclipses even that of the strongest individual. Superior strength therefore does not provide one with greater assurance of respect for one's acquired rights, since the measure of one's assurance is the much greater power of the state, which is the same for everyone.

As a result, it does not matter that the state cannot guarantee everyone's compliance with acquired rights. What matters is that no one has *ex ante* greater assurance than anyone else of respect for her acquired rights. And the

state can secure this condition. Even if some are better positioned than others to violate acquired rights, they don't have a better prospect than others of maintaining the resultant configuration of external freedom. So, for example, even if I'm more able to steal your car than you are to steal mine, I don't have a better prospect of maintaining the situation in which I have your car and you don't than you do of maintaining a situation in which you have my car and I don't. So long as no one can reasonably expect to be at an advantage in respect of her capacity to evade justice (including the restitution of what is yours according to the laws of acquired right), the laws' authoritativeness does not involve authoritatively constraining anyone to leave herself more open to being taken advantage of by others than they are open to being taken advantage of by her. And this despite the possibility that some will violate others' acquired rights and get away with it. For although in one sense the existence of this possibility entails that some must have been left open to being taken advantage of by others, it does not entail that they must have been *more* open to being taken advantage of than the others were to being taken advantage of by them—that they had better prospects *ex ante* than the others.

I am not claiming that any existing state secures the condition of equal assurance.[22] But it is not implausible to think that a realistically attainable state might. And so the guarantee problem is not the obstacle it appeared to be.[23]

6. Why the Kantian state is necessary

The response to the assurance problem that I have just described shows that the associated sufficiency objection is not fatal for the Kantian view. But the

resources it employs aren't the exclusive preserve of a state. And, as section 2c predicted, this makes the necessity objection look all the more forceful.

After all, the state's strength supervenes on its citizens' support. If a sufficiently large number resist enforcement of the law, then it will no longer be true that it can secure the condition of equal assurance, and so it won't solve the problem. By the same token, if a sufficiently large number of people in the state of nature are disposed to enforce laws that they all accept, then their collective strength may eclipse that of any individual in just the way that's sufficient to solve the assurance problem. And that is just what's envisaged in condition (d) of the ideal state of nature that I described in section 2b above.

Kantians should concede this point. A feature of the way that the problems of the state of nature are typically set out makes the concession look worse than it really is. The problem of assurance is presented as something that arises even if there is unanimous agreement on both the laws of acquired right and their application to particulars.[24] This suggests that unanimous agreement on the laws and their application is sufficient to solve the problems of unilateral choice and interpretation. But if that's right, then the problem of assurance will have to explain why the state is necessary, since unanimous agreement on the laws and their application is clearly possible in the state of nature. Hence, conceding that the assurance problem can also be solved in the state of nature looks fatal.

But unanimous agreement on laws of acquired right and their application is *not* sufficient to solve the problems of unilateral choice and interpretation. Even if we all agree, and act as if the laws we agree on are in force, and I

recognize this in making a claim of right in the state of nature, in doing so I'm still assuming that I can bind others through my act, and expecting others to recognize my acts as binding. I act as if I am a ruler who is particularly attentive to the views and prevailing behavior of her subjects, or who takes the law of acquired right to be sensitive to existing practice. I act as if I occupy an official role even though there are none. This might be about the least grievous instance of unilateral lawgiving imaginable, but it's unilateral lawgiving nonetheless. It assumes that I'm a special source of authority over my fellows by nature. So, idyllic in many respects as the ideal state of nature may be, no acquisition in it can be authoritative.[25]

7. The power of constitutional norms

I am claiming that the existence of a suitable state constitution is both necessary and sufficient, given equal assurance, for action under it to be authoritative. The existence of a suitable constitution alone suffices because it alone creates suitably defined official roles of authority in the determination of the distribution of external freedom through acquired rights, and the existence of these official roles is what makes it possible to regard their occupants' judgments non-reflexively privileged, deployed for the purposes of sustaining a rightful condition by the people as a whole, rather than as imposed by the occupants themselves on the objectionable assumption of their own natural authority. What it takes for there to exist a state constitution is a complex matter of actual practice—of rule-following behavior among the relevant population. There must be a legal system, which means that there must be

Hartian 'rules of recognition' and officials who take the 'internal point of view' of them (Hart 1994: 56–7, 116–7), for example, as well as appropriately supportive behavior from enough others.[26] But I take it that the basic idea is clear enough.

However, this account may seem to give rise to a problem of regress. I argued that even unanimity in belief and practice about laws of acquired right wouldn't be enough to confer authority on my claims under them. For in making such claims I would expect others to take my claims to be binding with ultimately no explanation of their authority but that I make them. And that objectionably reflexively privileges my judgment. But if that's the problem, isn't it a problem for the higher-order authority-conferring norms that constitute a state too? After all, I have said that *a priori* principles do not pick out a unique set of norms conferring authority to determine the first-order laws of acquired right. So there's indeterminacy here too, which seems to raise just the same question of the authority to resolve it that arose in the case of the indeterminacy left by a priori principles at the level of first-order laws of acquired right. Why isn't anyone's act in compliance with the authority-conferring norms an act of unilateral lawgiving? If widespread acceptance isn't enough in the case of the first-order claims of acquired right, it needs explaining why it would be here.

The explanation turns on the fact that acting in accordance with the authority-conferring norms is simply a matter of treating someone as authoritative (or, in the case of the authority herself, acting as the role specifies), which is not itself a matter of constraining others' external

freedom.[27] If I make a claim of acquired right under circumstances in which there has been no authoritative promulgation of laws of acquired right, then unless I myself am a special source of the authority to constrain, my and anyone else's actions in accordance with my claim are nothing more than unilateral constraint of others' external freedom. But when I act in accordance with prevailing authority-conferring norms, even if no higher power has conferred authority on those norms, my actions are not like this. For authority-conferring norms are norms of deference that—unlike first-order norms of acquired right—purport to authorize no direct constraint on anyone's external freedom.[28] Following them does not in itself involve taking oneself to have title to physically constrain anyone. So the problem that is generated by claims of acquired right in the absence of authoritative promulgation, even when everyone agrees on the laws of acquired right, is not generated by action in accordance with authority-conferring norms.

Once the norms are in place—and note that they can have evolved organically, like a language, without anyone's having imposed them—then official directives and verdicts concerning acquired right do not reflexively privilege the official's judgment, as we have seen. And claims of acquired right and the enforcement of such claims do not either, since they need presuppose no special authority on the part of the claimants or enforcers, thanks to the prior promulgation of the laws through official directives and verdicts. (This is why the promulgation condition is so important.) So no one acts as if she is by nature a special source of authority in the determination of the distribution of external freedom, and everyone's innate right is respected.

Conclusion

By analyzing more closely the problems of the state of nature, I hope to have cleared a path to vindicating Kantian claims about the state's capacity to solve those problems, and the need for it to do so. Space constraints and philosophical deficiency prevent me from trying to defend the analysis from every objection, and much more would be needed in any case to vindicate the Kantian account of political authority fully. For instance, in expounding the notion of equal innate freedom that is at the heart of the account, Kantians often invoke ideas about being dependent on another's will as a slave is dependent on a master. But we have seen that what ultimately drives the account is a worry about who gets to resolve indeterminacies in the application of *a priori* principles of right to the physical world, and that seems at best only a marginal element in what makes slavery worrying. So it may be doubted whether this is important enough to vindicate state authority, let alone notorious Kantian conclusions about the impermissibility of revolution in even an unjust state, for example.[29]

On the other hand, when, laboring under what Rawls (1996: 55–8) calls the 'burdens of judgment', we do disagree about what constitutes the right political expression of our equal freedom—even as we concede that others are not unreasonable in their own claims—it can matter very much how the decision gets made. Whether we can be reconciled to the arrangements that are chosen may depend on whether they are the upshot of a process that can be regarded as recognizing our freedom and equality, especially given that for every political

choice that is made between arrangements, there will be people who think that those who prevailed got it wrong.[30] In this light, the considerations that drive the Kantian argument do not look so marginal after all.

In any case, my account gives us a way to make sense of the faith that Kantians place in the particular kind of rule-following that constitutes the state, and it thereby shows how a Kantian account may escape one of the most significant challenges that it faces. On Kantian terms, even if not on any terms, public positions, and only public positions, have the power to realize our equality and freedom.[31]

Works cited

Anderson, E. 1999. 'What is the Point of Equality?', *Ethics* vol. 109, no. 2, pp. 287–337.

Copp, D. 1999. 'The Idea of a Legitimate State', *Philosophy & Public Affairs* vol. 28, no. 1, pp. 3–45.

Enoch, D. 2010. 'Not Just a Truthometer: Taking Oneself Seriously (but not Too Seriously) in Cases of Peer Disagreement', *Mind* vol. 119, no. 476, pp. 953–997.

Enoch, D. 2013. 'The Disorder of Public Reason', *Ethics* vol. 124, no. 1, pp. 141–176.

Estlund, D. 2008. *Democratic Authority*. Princeton: Princeton University Press.

Flikschuh, K. 2000. *Kant and Modern Political Philosophy*. Cambridge: Cambridge University Press.

Flikschuh, K. 2008. 'Reason, Right, and Revolution: Kant and Locke', *Philosophy & Public Affairs* vol. 36, no. 4.

Gaus, G. 1996. *Justificatory Liberalism*. Oxford: Oxford University Press.

Gaus, G. 2015. 'On Dissing Public Reason: A Reply to Enoch', *Ethics* vol. 125, no. 4, pp. 1078–1095.

Hart, H.L.A. 1994. *The Concept of Law*, Second Edition. Oxford: Oxford University Press.

Hill, T.E. 2002. 'Questions About Kant's Opposition to Revolution', *The Journal of Value Inquiry* vol.36, no. 2–3, pp. 283–298.

Hodgson, LP. 2010. 'Kant on the Right to Freedom: A Defense', *Ethics* vol. 120, no. 4, pp. 791–819.

Hursthouse, R. 1990. 'After Hume's Justice', *Proceedings of the Aristotelian Society*, New Series, vol. 91, pp. 229–245.

Kant, I. 1996. *The Metaphysics of Morals*, edited by Mary Gregor. Cambridge: Cambridge University Press.

Kant, I. 1997. *Groundwork of the Metaphysics of Morals*, edited by Mary Gregor. Cambridge: Cambridge University Press.

Kolodny, N. 2014a. 'Rule Over None I: What Justifies Democracy?', *Philosophy & Public Affairs* vol. 42, no. 3, pp. 195–229.

Kolodny, N. 2014b. 'Rule Over None II: Social Equality and the Justification of Democracy', *Philosophy & Public Affairs* vol. 42, no. 4, pp. 287–336.

Kolodny, N. 2016. 'Political Rule and its Discontents', *Oxford Studies in Political Philosophy*, vol. 2.

Kolodny, N. [No date]. 'Being Under the Power of Others'. Available online at <http://sophos.berkeley.edu/kolodny/BeingUnderThePowerOfOthers4.pdf> . Accessed 2 Jan 2017.

Korsgaard, C. 1996. *The Sources of Normativity*. Cambridge: Cambridge University Press.

Miller, D. 1997. 'Equality and Justice', *Ratio* (new series) vol. X, pp. 222–237.

O'Neill, O. 1989. *Constructions of Reason*. Cambridge: Cambridge University Press.

Pallikkathayil, J. 2010. 'Deriving Morality from Politics: Rethinking the Formula of Humanity', *Ethics* vol. 121, no. 1, pp. 116–147.

Rawls, J. 1996. *Political Liberalism*. New York: Columbia University Press.

Rawls, J. 2001. *Justice as Fairness: A Restatement*, edited by Erin Kelly. Cambridge, Mass.: Harvard University Press.

Raz, J. 1971. 'The Identity of Legal Systems', *California Law Review* vol. 59, no. 3, pp. 795–815.

Raz, J. 1975. 'The Institutional Nature of Law', *The Modern Law Review* vol. 38, no. 5, pp. 489–503.

Raz, J. 1990. *Practical Reason and Norms*. Oxford: Oxford University Press.

Raz, J. 1998. 'Disagreement in Politics', *The American Journal of Jurisprudence* vol. 43, no. 1, pp. 25–52.

Ripstein, A. 2009. *Force and Freedom: Kant's legal and political philosophy*. Cambridge, Mass.: Harvard University Press.

Sangiovanni, A. 2012. 'Can the Innate Right to Freedom Alone Ground a System of Public and Private Rights?', *European Journal of Philosophy* vol. 20, no. 3, pp. 460–469.

Scheffler, S. 2003. 'What is Egalitarianism?', *Philosophy & Public Affairs* vol. 31, no. 1, pp. 5–39.

Sharon, A. 2016. 'Domination and the Rule of Law', *Oxford Studies in Political Philosophy*, vol. 2.

Stilz, A. 2009. *Liberal Loyalty: freedom, obligation, and the state*. Princeton: Princeton University Press.

Valentini, L. 2012. 'Kant, Ripstein, and the Circle of Freedom: A Critical Note', *European Journal of Philosophy* vol. 20, no. 3, pp. 450–459.

Viehoff, D. 2014. 'Democratic Equality and Political Authority', *Philosophy & Public Affairs* vol. 42, no. 4, pp. 337–375.

Williams, B. 2005. *In the Beginning Was the Deed*. Princeton: Princeton University Press.

Wood, A.W. 1999. *Kant's Ethical Thought*. Cambridge: Cambridge University Press.

Notes

[1] See e.g. Flikschuh (2000, 2008); Ripstein (2009), Stilz (2009), Hodgson (2010), and Pallikkathayil (2010).

[2] A distinct class of claims purporting to configure the appropriate distribution of individuals' external freedom are rights of bodily integrity. I set questions about such rights aside here.

[3] See Raz (1998: 27–8); Enoch (2010: 982; 2013: 159–60); Viehoff (2014: 344–5).

[4] See Gaus (1996: 122–9; 2015: 1091–3). The same problem arises even if I act on someone else's judgment: see below, especially section 6.

[5] Some Kantians would, I think, argue that the line of argument I'm offering here misconceives the problem. The problem, they would say, is that even if the only possible content of the only laws that could possibly be authoritative were fully determinately given, those laws could not be *binding* without the backing of some source of authority. (Compare Korsgaard 1996: 23–4.) But it seems to me that if the only possible content of the only laws that could possibly be authoritative were fully determinately given, then a unilateral acquisition according to those laws could not be objected to on the grounds that it lacked the backing of the right kind of authority, since the backing of such authority wouldn't change anything—it would have no choice but to ratify such an acquisition. So the indeterminacy of the application of the general principle of equal freedom is crucial to the Kantian argument, as I read it.

[6] As I observed earlier, some Kantians might resist this claim. See note 5 above.

[7] I thank Stefano Lo Re and an anonymous referee for pressing me to clarify this.

[8] It is not part of the content of the laws that what people claim is theirs only on condition that they will respect others' claims. One problem with such laws would be that—assuming that it is indeterminate at time t_1 whether or not a person will respect others' claims—they would be incapable of specifying anything as determinately anyone's. Thanks to Tom Simpson for pressing me to clarify this.

[9] This way of putting the problem owes much to Ripstein's (2009: 159–68) discussion of it. Others, such as Stilz (2009: 51) and Pallikkathayil (2010: 139–40) emphasise individuals' dependence on others' being of similar will, in the state of nature, for the enjoyment of their acquired rights. I think the differences are ultimately only a matter of presentation.

[10] These objections are most clearly and powerfully articulated by Kolodny (n.d.). Of course, there are other objections to the Kantian account (see e.g. Sangiovanni 2012, Valentini 2012), but if it cannot address the two that are my focus here, it fails even by its own lights.

[11] See Kolodny (n.d.: 10–11).

[12] I do not think that there is any appeal to this advantage in Ripstein's own account of why official roles make the difference. But someone might suppose that it could be appealed to for that purpose. I thank an anonymous referee for pressing me to make this explicit.

[13] As Kolodny (n.d.: 11–12) points out, even if the law is never formulated by a legislator (because it arises organically, like language), its application would still call for individual judgment. See also Sharon (2016: 149).

[14] "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law." (Kant 1996: 24).

[15] See especially Miller (1997); Anderson (1999); Scheffler (2003).

[16] Of course, these concerns may resonate with contemporary Kantians because of deeper concerns about status relations. But equally, matters of social status may seem at stake in authority relations ultimately because of deeper, more familiarly Kantian concerns. Even in the former case, the distinctive form that the deeper concerns take in Kantian views may make for a distinctive account of political authority that is worth exploring in its own right.

[17] Though they may give more emphasis to notions of dependence and domination that the more fundamental Kantian concerns make salient.

[18] This is not to say that it would be a realization of the Kantian ideal. In particular, the Kantian-Rousseauian ideal of the people as ultimate authority would not be realised. But as far as the problems that Kantians identify with the state of nature are concerned, it seems to me that the ideal is important only in virtue of the fact that any *other* concretely feasible candidate ultimate authority would be morally problematic. For any such candidate would be a rational agent other than the people as a whole, so that regarding it as the ultimate authority would simply give rise to the problems all over again. In the fantastical world, there is another candidate: the computer system.

[19] I take the term 'epistocracy' from Estlund (2008).

[20] Arguably, conditions of fair equality of opportunity must obtain, however, if selection on such grounds is to be consistent with the substantive justice condition. Perhaps this rules out even fully democratic selection on grounds of natural authority. That would make the reasons that voters have for voting as they do relevant to the legitimacy of democratic authority, though. Compare Viehoff (2014: 373.)

[21] Although there will be constraints on the delegation, such as a requirement of equality of opportunity and compliance with laws against nepotism, and so on (see section 3 above).

[22] One clear worry concerns the way in which a state's military forces may become sufficiently powerful that they defeat the equal assurance condition. Another concerns inequality in access to justice (I thank an anonymous referee for pointing this out).

[23] An anonymous referee suggests that this account of the assurance problem makes the way the Kantian state solves it a matter of degree. I am not sure about this, but, as the referee notes, what I say in section 6 below would make the concession non-fatal.

[24] See e.g. Ripstein (2009: 159); Stilz (2009: 51); Pallikathayil (2010: 137–40). My own presentation above followed the example of these.

[25] For the same reason, Kantians may be able to concede that the Kantian state only provides a better approximation of equal assurance than the state of

nature—i.e. that the solution is a matter of degree. I thank an anonymous referee for pointing this out.

[26] For further discussion see Raz (1971, 1975); Copp (1999).

[27] Except where the roles of legislator or judge are combined with enforcement. But the Kantian state requires separation of these roles for precisely this reason.

[28] See Raz's (1990: 62–5) influential account of subjection to authority as a matter of treating directives as 'exclusionary reasons'.

[29] (Kant 1996: 6:320–3). For exposition and discussion see Hill (2002); Flikschuh (2008).

[30] See Williams (2005: 13). For the idea that this kind of reconciliation is a key role of political philosophy, see Rawls (2001: 3–4).

[31] I presented these and related arguments at the Nuffield Workshop in Political Theory in Michaelmas 2015, the *Oxford Studies in Political Philosophy* workshop in April 2016, and the 'Kant, Rights, and the State' conference in September 2016. I thank the organisers and participants for their comments. I am especially grateful to Richard Dagger, Cécile Fabre, Adam Kern, Nikolas Kirby, Niko Kolodny, Stefano Lo Re, Michael Otsuka, Thomas Simpson, Sandy Steel, Daniel Viehoff, and several anonymous referees for their criticism and encouragement.