THEORY

Legitimacy, Political Obligation, and Rule of Law beyond the Unitary State

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ABSTRACT

Political philosophers advance normative claims about civic ethics. Many of these, I show, rely on a hidden empirical premise: that the state has a particular structure and set of capacities that I call the unitary sovereign state. Unfortunately, this model proves not only inaccurate but unrealistic as a vision of how governing institutions do or could function. This has significant consequences for our theories of political obligation, legitimacy, and the value of the rule of law, among others. If we want to provide moral guidance, we need to develop moral theories capable of speaking to quite different empirical conditions than we have recognized.

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> To rule is easy, to govern difficult
> —*Attributed to Johann Wolfgang von Goethe*

Political philosophers are interested in many things. Ought citizens comply with the law? Do police officers have the right to force you to pay taxes under threat of violence? How should we go about formulating commands? In this sense their attention is often occupied by questions that address both the *rule* of law and the rule of *law*.

One thing that very much does not draw their focus, however, is just what rule and law actually look like—or could look like—on the ground. It was not always so. At one point in time, this kind of question was viewed as central to the project of political philosophy. Aristotle wrote that "he who would inquire into the nature and various kinds of government must first of all determine, 'what is a state?'"[1] But in recent years this kind of thinking has fallen out of fashion, viewed at best, as something of significance only to our empirically oriented brethren. As David Runciman writes, "it is rare to encounter a direct attempt to answer. . .the question. . .'what is the state' in recent works of political or economic theory; more often the answer to the question is assumed, and assumed to be irrelevant to the task at hand."[2]

Lurking in this focus is a kind of little-discussed presumption: we have a *good enough* commonplace understanding of state and laws to set such concerns aside and get on with the business of asking how such institutions ought to behave. As Michael Blake writes of political philosophy, "However much we disagree about what justice means, and how we might best pursue it, we have tended to operate with a remarkably similar vision of the empirical backdrop to the pursuit of domestic justice. . .we disagree widely about what policies and practices the state ought to pursue, but we tend to agree about the nature, and powers, of the state itself."[3]

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1. ARISTOTLE, POLITICS 31 (Benjamin Jowett trans., 1905).
2. David Runciman, *The Concept of the State: The Sovereignty of a Fiction*, *in* STATES AND CITIZENS: HISTORY, THEORY, PROSPECTS 30 (Quentin Skinner & Bo Strath eds., 2001).
3. Michael Blake, *Global Distributive Justice: Why Political Philosophy Needs Political Science*, 15 ANN. REV. POL. SCI. 121, 124 (2012).

My goal over the course of this essay is to reveal this modern tendency as a significant error, one that has done serious damage to our moral theorizing. To do that, I will first lay bare the "empirical backdrop" to which Blake refers—revealing the theory of the state operative in prominent philosophical claims. These assumptions about the nature of the state, I will show, are not only widely shared, but morally significant—they play a but-for role in the action-guiding conclusions that philosophers advance. Unfortunately, as I will make clear, these presumptions are false—and significantly so, to the extent that the relevant conclusions prove unjustified. Our tendency to agree about the nature and powers of the state has thus gotten in the way of attaining an accurate understanding of domestic justice.

To demonstrate this, I will consider two prominent kinds of moral theorizing: theories of political obligation, and theories of legitimacy, that is, arguments which contend that citizens have a duty to comply with the law and claims that governments have a right to make and enforce laws. Widely supported justifications for these conclusions, I will show, rely on erroneous presumptions about the nature of the state and the structure of law. Seen without these empirical mistakes, these arguments provided as-yet indeterminate moral guidance.

I. Accounts of Legitimacy and Obligation

For reasons of space and clarity, I will focus in this article on one of the most prominent threads of attempts to defend legitimacy or obligation: theories that contain a "functionalist" component- that is, whose claim that states have a right to command or citizens a duty to obey depends at least in part on the contention that states are necessary to the achievement of certain important aims. We will look at three instances of this phenomena: the claim that citizens have duties of political obligation grounded in *fair play*, the contention that the same obligations arise from duties of *Good Samaritanism*, and the claim that states have a right to coerce when they govern in a reasonably just manner and provide for *self-determination*.

My aim in this section is simply to provide a sense of the relevant arguments. In the next section we will begin to interrogate these claims a bit more thoroughly.

A. Fair Play

Begin with *fair play*. Advocates of the approach—most prominently George Klosko—hold that citizens have a duty of fairness to comply with the law because others doing so provides valuable benefits like public safety, environmental cleanliness, and health.

Compliance, proponents note, is burdensome. Nobody really wants to pay taxes or serve on a jury. We would all prefer to get away with spending our time and money on our own friends, family, hobbies or pet causes if we could. But this work has to be done if we are to enjoy the benefits of civic life. It is unfair to permit ourselves to profit at others' expense without taking on those some burdens ourselves. Consequently, we are duty-bound to obey the law.

Put more precisely, the argument goes something like this:

(1) Principle of Participation (PP): When people jointly conduct a burdensome activity that produces significant benefit they have a right to the participation of those who have benefited, so long as the distribution of benefits and burdens is sufficiently fair.

(2) Many citizens jointly engage in the activity of complying with the law.

(3) Complying with the law is burdensome.

(4) The activity of citizens jointly complying with the law provides all residents of a reasonably just state with significant benefits.

(5) The distribution of benefits and burdens in such a state is sufficiently fair.

Therefore: All the residents of a reasonably just state are obligated to comply with the law.

B. Good Samaritanism

The second view that we will consider *Good Samaritanism* was born of a prominent objection to fair play. Though fair play has many defenders, it has also been the subject of quite famous critiques. The first premise especially has come in for criticism. Robert Nozick, A. John Simmons, and many others have argued that it is not the mere receipt of benefits but only their active acceptance that generates obligations. It follows that citizens have no standing duty to comply with the law, since many have not accepted the benefits produced by others' legal compliance.

Good Samaritanism is in part an effort to answer this objection. The base of our duty to comply with the law, Christopher Wellman contends, lies not in repaying the goods we ourselves acquire, but instead in recognizing our duty to others. At the heart of political obligation is not what we owe because *we* receive goods like public health or safety. Instead, it is the fact that we owe it to others to make sure *they* receive these same goods.

The argument is relatively simple. The state of nature is a place of great peril. Such circumstances are rife with danger because people lack goods like health or safety. It is not fun to drink from a polluted river or worry that you will be assaulted every night as you walk home from work. When we can rescue people from such danger at relatively little cost to ourselves, we should do so. This, Wellman thinks, explains why states have a right to rule.

In turn, this duty creates a worry about fairness. Given that we are *all* subject to Samaritan obligations, it would be unfair for any of us to reap the benefits of others fulfilling this duty without being saddled with the relevant costs. I profit when you take on a burden that I would otherwise be morally required to take up—when you pay for my kids to get the winter coats that they need or provide food to the starving. Unlike the benefits at issue in fair play, the existence of my duty to repay such efforts does not depend on my actively accepting the good. I am *obliged* to be a good Samaritan and thus necessarily profit from your undertaking the work I am otherwise required to take up. It does not matter for these purposes if *I* accept clean water. I'm on the hook for contributing because I owe *my neighbors* clean water, and you have provided them with the relevant good, at a cost to yourself. The claim thus escapes the critiques that threatened the traditional fair play approaches - it doesn't matter whether *we* would reject others' efforts to benefit us.[4]

We can put the argument roughly like this:

P1: States provide vitally important benefits
P2: *The Samaritan Duty*-We have an obligation to ensure that other people have access to the benefits in (1) if it is possible to do so without incurring unreasonable costs (the Samaritan duty)
P3: States cannot achieve these benefits unless (enough) citizens comply with the law.
P4: Compliance is not unreasonably burdensome.
P5: *Principle of fairness*- those who benefit from other peoples' labor (either in the form of a benefit or in the satisfaction of a duty) in burdensome cooperative practices have a duty to abide by the rules of the relevant cooperative practice.
C: People should comply with the law (requiring) and states have the right to coerce to achieve the benefits (permissive part).

C. Legitimacy

The final view that we will consider focuses on the flip side of obedience, *legitimacy*—the contention that lawmakers have a right to make and enforce rules with coercive power. The view that we will consider is a recent one, advanced by Anna Stilz. Stilz contends that states have a right to rule so long as they satisfy two conditions. They must both:

(1) provide citizens with certain benefits such as "public goods only a state can provide" and

(2) instantiate collective self-determination.

The first desideratum is the now familiar notion that states provide goods like security and subsistence. As Stilz notes, these institutions wield enormous power and thus exercise considerable influence in this realm. Consequently, she contends, they are both obliged to provide these goods, and in part justified because, they can do so.

The second desideratum reflects an endorsement of the value of self-direction, of governing yourself in accordance with your own agency in a way that reflects your convictions. Stilz worries that an account of legitimacy which relied only on

4. Christopher Wellman, *Liberalism, Samaritanism, and Political Legitimacy*, 25 PHIL. & PUB. AFF. (1996).

the former criterion—as the theories of political obligation discussed above in good part do—suggests that sufficiently high-functioning colonialist states have a right to rule, since they provide the relevant goods.[5] She finds the possibility that persons must be rightfully subject to such governments to constitute an unacceptable form of alienation from control over one's life. To the former consideration she therefore adds the second requirement—a "maker dimension" to accompany the "taker dimension" of legitimate governance. Citizens, she contends, must be able to view themselves as authors of the institutions that produce the relevant benefits. "This," she holds, "requires some channel by which the people might revoke authorization of their government if it were to cease to reflect their shared will."[6]

II. OUR THEORY OF THE STATE

Most philosophical discussion of arguments like those above focus on the views' normative claims. Critics argue, for example, that the moral principles on which such accounts rely are foundationally mistaken.[7] Their worries vary—some contend that the mere receipt of benefits cannot generate an obligation, others that we have no obligation to assist those who have not provided us with value, still others hold that mere expectations generate no duties, that we don't have to step in when others have failed already to do their part, and on and on. I have myself raised concerns about the principle of participation, which I think fails to capture the nature of fairness.

All these are important worries that any full defense obligation or legitimacy must answer. My concern here, however, lies elsewhere, in what follows if we accept, at least for the sake of argument, that something like the normative principles these theories lay out generate real moral obligations in much the way that advocates describe.

Typically, this has been thought sufficient to prove the existence of legitimacy or political obligation. We can infer this from that fact that proponents of these views typically offer a defense of these normative claims, and then, having taken themselves to have bested their critics on these grounds, draw the relevant action-guiding conclusions. As Blake contended of distributive justice, the background application of these views is taken for granted—dispute is focused on the nature of justice itself.

My aim in this article is to show that this inference is mistaken. Lurking in these accounts of political obligation and legitimacy, I will reveal, is not only a normative claim about the moral reasons that generate obligations, but also a

5. It is worth noting that fair play accounts of political obligation typically presume that the division of benefits must be sufficiently fair to generate obligations. Thus, while these views might theoretically entail obligations that to a colonialist state, they would likely not do so in practice, since few oppressive states actually distribute benefits and burdens in an equitable fashion.

6. *Id.*

7. *See, e.g.*, A. John Simmons, *The Principle of Fair Play*, 8 PHIL. & PUB. AFF. 307 (1979); Rolf Sartorius, *Political Authority and Political Obligation*, 67 VA. L. REV. 3 (1981); ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM (1970); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950 (1973); A. John Simmons, *The Anarchist Position: A Reply to Klosko and Senor*, 16 PHIL. & PUB. AFF. 269 (1987); Tommie Shelby, *Justice, Deviance, and the Dark Ghetto*, 35 PHIL. & PUB. AFF. 126 (2007).

theory of the state- an empirical claim about what states are really like, how they are structured, how they operate, and what they are capable of achieving. This theory is not merely an idle notion. It is *necessary* that states have these features if the conclusions that proponents of these views defend are to follow from the arguments that they advance. To put it more precisely, the issue goes something like this:

P1: Normative claim X is true (What advocates defend)
P2: Normative claim X entails Y in conditions C (What I will show)
P3: Conditions C apply (What we can therefore infer advocates presume)
C: Y (The conclusion that advocates advance)

Unfortunately, as we will see, P3 proves unwarranted. States do not in fact have the features political philosophers assume them to possess. Consequently, their conclusions are unjustified *even if their normative claims prove true*.

In this section, we will focus on teasing out the theory of the state implicitly operative in the accounts of political obligation and legitimacy laid out in the previous section. In later sections, we will call that theory into doubt.

As we will see, each of these theories rely on the notion that states:

a) have a certain structure (a unified, hierarchical nature) and

b) operates in certain manner (in accordance with classic notions of the rule of law).

A. Fair Play

Let's start with an investigation of fair play, since advocates of the view have been a bit more explicit about their empirical presuppositions. Recall, this view holds that:

(1) Principle of Participation (PP): When people jointly conduct a burdensome activity that produces significant benefit they have a right to the participation of those who have benefited, so long as the distribution of benefits and burdens is sufficiently fair.

(2) Many citizens jointly engage in the activity of complying with the law.

(3) Complying with the law is burdensome.

(4) The activity of citizens jointly complying with the law provides all residents of a reasonably just state with significant benefits.

(5) The distribution of benefits and burdens in such a state is sufficiently fair.

> *Therefore*: All the residents of a reasonably just state are obligated to comply with the law.

Our focus will be on (4), the view's little discussed empirical presumption.

Advocates of fair play hold that it is *the fact that enough citizens comply with the law* that brings about the benefits that give rise to a demand for fairness. This is baked into the joint contentions that:

(1) people must participate in the burdensome activity from which they have benefited and,

(2) what they must do is *comply with the law*.

Why do advocates grant the law this special standing? That is, why do they think it is *compliance with the law* that produces goods like security or public health or a clean environment? The answer is that they view the law as the solution to a significant challenge: the *problem of complex coordination*.

Goods like health or environmental cleanliness are very difficult to produce. This is true not just because their production is burdensome—because it involves painful and sometimes undesirable work—but also because their existence depends on many different actions being taken by a very large number of actors. If we are to enjoy health, somebody needs to produce insulin, somebody needs to sterilize surgical tools, somebody needs to make sure the vaccine clinic is adequately staffed, and suchlike.

Even more challenging- there is not just one way we might go about achieving the desired ends. Sometimes there is only one combination of behaviors that will produce a desired outcome. If we want to generate a molecule of water, we need two hydrogen atoms and one oxygen atom. Nothing else will do. But health and security are not like that.[8] There are any number of ways that we might go about producing desired outcomes (The American healthcare system and the Swedish healthcare system differ in any number of ways, but all can be said to improve public health). Success, however, requires that we *coordinate*. We can build a house if you work on the walls and I work on the roof, but we will find ourselves in some difficulty if we all get to shingling and nobody digs a foundation.

The production of public goods demands this kind of coordination on a massive scale. In such cases, goodwill alone will not suffice. Even the best intentioned of actors can fail to align in the right way. We need effective ways of coordinating the sub-plans of the many actors whose behavior must align. To lay on the example too thickly, if you and I are both going to the store to buy shingles, we need a way of making sure somebody knows it is time to break out the backhoe.

8. And, of course, at a more detailed level, water isn't quite like that either. You can, for example, use different sources of energy to produce the relevant reaction. Or hold the atoms at different angles, and suchlike.

Advocates of fair play take the law to play this role. As George Klosko writes: "because the goods in question require large-scale, complex coordination, it cannot be assumed that people will organize themselves spontaneously. A general plan or planning agency must be able to issue commands and to assure compliance, if need be through coercion."[9] Lawmakers, proponents of fair play think, select a plan from among the necessary options and detail all its complex components by means of law so that the desired outcomes will ensue so long as enough people do as they are told. This explains why it is *complying with the law* that generates the relevant benefits that are due a fair return and *complying with the law* that constitutes participation in the relevant beneficial practice.

Implicit in this vision is a theory of how states are structured. On this account, states have:

1. *Agency*-A decision-making process that reliably establishes coherent goals and assigns the task of fulfilling those aims to identifiable actors who are dependably adequately positioned to pursue these goals,
2. *Evidence responsiveness*-in a manner that is capable of being responsive to relevant evidence,
3. *Traditional actors*-is directed by lawmakers acting by means of the issuing of laws,
4. *Power*-and exercise control over important common goods like public health, safety, a clean environment, and suchlike.

Let me say a little bit more about each of these features.

States must have *agency* if they are to have the capacity to issue commands that are directed towards a desired end. Without this they could not set out *any* effective plan, much less one for the pursuit of complex goods like health or environmental cleanliness. At issue here is not individual agency. Nobody thinks the state is a kind of literal omni-person. Instead, what is at issue is the notion of a group whose decision-making is structured in such a way that it can operate as a distinct entity to whom decisions can be attributed, one that is independent of the discrete persons of whom it is composed.[10]

Evidence responsiveness is necessary if lawmakers are to select a plan that is capable of bringing about the desired ends. Absent this characteristic, lawmakers might be able to issue commands, but these plans would not produce the goods said to give rise to duties. Picture a person who is blindfolded and given noise canceling headphones. The person is perfectly agential—they can issue directions as well as anyone. But they are poorly suited to leading an unfamiliar orchestra to

9. GEORGE KLOSKO, POLITICAL OBLIGATION 24 (2005).

10. We can set aside here the usual questions about whether this agent is an appropriate subject of praise or blame; all that is at issue is whether the agent can operate with the kind of coherent decision-making process that theories of group agency have in mind.

soaring musical heights. They simply lack the ability to receive the sensory inputs necessary to make reasonable judgments as to what the circumstances require.

The *traditional lawmakers* standard is necessary if *law* is to be the mechanism by which the plan is made and executed, and consequently the thing that beneficiaries are required to undertake. Were some other action or actor the mechanism by which the plan was enacted, it would be *that* behavior that those who enjoyed the benefits would be required to take up. If we enjoyed public safety because, say, religious leaders offered suggestions by prophecy—the law would not be the practice by which people are benefited and which they would be bound to undertake. Instead, we would all be required to act in accordance with the relevant divinations.

Instead, advocates seem to have in mind something specific when they talk about our duty to comply with or right to execute law- roughly the issuing of commands in accordance with something like what Lon Fuller referred to as, "the inner morality of law."[11] On this account, law is governed by eight moral principles:

1. *Generality*-Laws should be stated in general terms and apply equally to all persons within relevant classes rather than being ad hoc.
2. *Publicity*-Laws should be publicly promulgated in a manner that is open to all.
3. *Prospectivity*-Laws should not be applied retroactively.
4. *Intelligibility*-Laws should be clear and understandable by all who should have open access to them.
5. *Consistency*-Law should remain relatively consistent and be non-contradictory.
6. *Achievability*-Law should not demand conduct beyond what people can achieve
7. *Stability*-Laws should be maintained across time so that people can rely on them.
8. *Congruence*-The enforcement and administration of the laws should be consistent with the laws as they are formally stated.[12]

Advocates presume this in taking the laws to be a good source of a complete and efficacious plan for the production of public goods. For plans to play this role in the manner that advocates like Klosko seem to have in mind, their directives

11. LON FULLER, THE MORALITY OF LAW 42-43 (1st ed., 1964).

12. *See*, *e.g.*, Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 L. AND PHIL. 239 (2004); Alexander Motchoulski, *Reciprocity and the Rule of Law*, AUSTRALASIAN J. OF PHIL. 1 (2024).

must be consistent and intelligible, stable and public in just the way these principles envision.

Finally, *power* is necessary to merit the belief that lawmakers can provide the coordination required to achieve goods like public safety, health, or a clean environment. Absent this capacity they might be able to achieve a plan for *something* (hosting a BBQ or building a go-cart) but they would not be able to bring about these benefits. Consequently, they could not be the subject of citizens' duties of fair play.

Call this vision of the state *the unitary sovereign model.*

B. Good Samaritanism and Legitimacy

Advocates of fair play are far from alone in adopting this model. As I noted earlier, political philosophers have long operated with a shared working vision of the state. We can thus equally see the model at play in the other moral claims on which we are focused.

Take the claim that citizens have a *Samaritan* duty to comply with the law. Like fair play, this theory implicitly presumes the unitary model. Indeed, it relies on precisely the same mechanisms. Lurking in the notion that citizens ought to comply with the law *because it is the thing that provides others with needed goods like safety and health* are just the features that we have now seen constitute the model. If any of these characteristics were absent, the conclusion would not follow. Citizens are only obliged to comply with the law because it is the plan that produces public health, safety, and other goods.

Stilz' contention that states (or at least the subset of states that constitute something like functioning democracies) enjoy a right to rule makes much the same presumptions. Like the fair play and good Samaritan accounts just considered, the view requires that it be lawmakers operating by means of laws that bring about the desired goods. Were it not so, they would not acquire a right to issue coercive commands. In adopting this claim, Stilz thus equally ties herself to the unitary state model.

But her claims adds a further component to our vision: the *agency* in question must be meaningfully that of the people collectively. Other ways of achieving the relevant goods will not do.

We can call this the *Responsive Unitary State Model.* On this account, states have:

1. *Agency*-A decision-making process that reliably establishes coherent goals and assigns the task of fulfilling those aims to identifiable actors who are dependably adequately positioned to pursue these goals,

2. *Evidence responsiveness*-in a manner that is capable of being responsive to relevant evidence,

3. *Traditional actors*-is directed by lawmakers,

4. *Power*-and exercise control over important common goods like public health, safety, a clean environment, and suchlike
5. *Collective responsiveness*-in such a way that the process that provides the relevant goods is constrained to reflect the self-determined will of the citizens.

As we can see, this model is widely shared, in just the way that Blake described. It is what philosophers have had in mind when they "agree about the nature and power of the state itself."[13]

Of course, to say that they have had this in mind is not to say that they consciously endorse it. I doubt they do. Instead, the model is implicit in the accounts of legitimacy and obligation that we have discussed—so much so that it likely slips by without intentional consideration. As I noted at the outset, contemporary political philosophers have paid little attention to the state. Instead, they have tended to operate with a kind of hand-wavey notion in the back of their head - a notion that we have now revealed to have roughly the form of the unitary state model or its responsive cousin.

That is all well and good if the model is a decent working mockup. The mere making of empirical assumptions is not itself problematic. We must make simplifying assumptions of some sort if we are to get on with the business of making progress along any dimension. One can't, for example, get very far in assessing how to maximize the efficacy of carbon credits if you feel compelled to know the middle name of every enforcement agent who might play a part.

Such simplifications are only problematic when our assumptions deviate enough from the real world to alter the questions we should ask or the conclusions that we are justified in reaching. And that is just what we will now see has happened to our vision of the state. The world that the model envisions looks very little like the one we inhabit. Our empirical backdrop has led our moral map very much off course.

III. GOOD SAMARITANISM AND LEGITIMACY

A. Our tool

To show this, I want to take a break from pure moral theorizing and turn to legal theory.

Unlike their intellectual brethren, legal scholars are often forced to attend to real-world institutional features by the need to apply their theories to concrete legal cases. Conceptualizing the state is one such arena. Features of the legal system have compelled legal scholars to consciously debate just what it is that states are like—and in doing so have laid bare significant challenges to the unitary model.

In the United States and many other legal jurisdictions, a legal principle known as *the state action doctrine* holds that *state actors* —that is to say, those persons whose actions are properly attributed to the state rather than to themselves as

13. Blake, *supra* note 3, at 124.

ordinary individuals—are subject to distinctive constitutional demands. [14] For example, only state actors act illegally if they violate the equal protection clause of the Fourteenth Amendment. Consequently, courts have had to develop mechanisms for ascertaining what exactly a state *is* at a high enough level of detail to determine what peoples' behavior count as actions of "the state" as opposed to those of ordinary private persons. j

In doing so, courts have sought to apply the unitary sovereign model to the real world.[15] Their experiences serve as a useful tool for assessing the degree to which the model effectively captures real-world conditions.

To see this, we need only consider the tests that courts have used to identify state actors. Each tracks one of the model's central features. If the model decently captures core components of existing institutions, the tests should thus effectively distinguish those who instantiate the state from those who do not, at least in the presence of adequate empirical evidence.[16]

Entanglement tests track the unitary model's first desiderata: *agency*. These tests aim to determine whether a given action is best attributed to the person who undertakes it, in her own right, or should instead be ascribed to the decision-making process of the state. A sheriff who enforces a law holding that black children cannot attend a public school, for example, is taken to be acting as the state on the grounds that his behavior is advancing the goal set by the *state's* decision-making procedures, as he is bound to do. We need not presume that his behavior tells us anything about his own views on the business. By contrast, the same person refusing to invite the same children to *his* birthday party is not considered a state actor, on the grounds that the actions are best understood as instantiating *his* goals, not the state's. We need not presume that his behavior tells us anything about the *state's* view on the business.

Courts have looked to several factors in assessing entanglement. *Entwinement* tests, for example, consider how closely acknowledged government decision-making procedures are connected to a group's management or control,[17] *nexus* tests analyze whether there exists a close enough link between the state and an entity such that the "action of the latter may be fairly treated as that of the state itself,"[18] *state compulsion* tests examine the degree to which the state exercises

14. *The Civil Rights Cases*, 109 U.S. (1883). *The Civil Rights Cases* consist of five cases (ultimately consolidated) in which black citizens were denied access to white-only facilities (*U.S. v. Stanley*, *U.S. v. Ryan*, *U.S. v. Nichols*, *U.S. v. Singleton*, and *Robinson v. Memphis and Charleston Railroad*).

15. It is perhaps unsurprising that the widely accepted presumptions of philosophers are broadly shared by the general public—philosophers too exist in the wider world!

16. The state action doctrine does not track evidence-responsiveness since reliably producing desirable outcome is not itself a criterion of being a state (as opposed to being a state that can make a claim to rightly exercise power). However, the difficulties we will see the doctrine face call into question whether existing entities can achieve even this lower barrier.

17. Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) (holding that a sports association counts as a state actor because it is entangled with state action).

18. Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992) (finding that a community mental health center was not a state actor).

coercive power over the choices of a purportedly private organization or person,[19] and *symbiotic relationship* tests consider the level of interdependence between an entity and the state.[20] Judges rely on a multiplicity of types of information to make these assessments, including: the extent to which the people or institution in question receives government benefits,[21] whether they receive overt assistance from state officials,[22] whether they are deliberately imbued by governmental authorities with the capacity to undertake actions traditionally associated with the state such as the "power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual,"[23] whether a purportedly private action is "intertwined with governmental policy,"[24] and whether the state has provided a great deal of "encouragement, either overt or covert" for the entity's actions.[25]

Traditional state actor tests track the unitary model's third desiderata. On this approach courts identify individuals or institutions as state actors on the grounds that they occupy offices widely associated with the state in public and academic discourse. For example, in *Shelley v. Kramer*, the Supreme Court found that judges count as state actors even when enforcing private contracts on the grounds that their holding that role when they act in their official capacities, "is a proposition which has long been established by decisions of this court."[26] This tracks one of the hidden presumptions we saw in our earlier discussion: the state isn't just any old decision-procedure setting and regulating any old set of goals. It is a *specific* decision-procedure taken to operate by means of *specific types of actors*. Presidents, prime ministers, police officers and others who make and enforce laws in accordance with a structured decision-making process count, poultry pluckers typically do not.

Public function tests reflect the unitary model's fourth desiderata: *power*. On these assessments persons or groups qualify as state actors if they exert distinct control over goods like public health and safety. This criterion was most notably employed in *Marsh v. Alabama* where courts found that an otherwise private corporation counted as a state actor because it *governed* in a particular region, as exemplified by the fact that it owned and operated all the sidewalks and streets in the area, employed a police officer, and provided the usual accouterments of municipal life. Courts have used similar reasoning to classify as state actors those who perform a wide variety of services, including (to name but a few) people who make peremptory challenges during jury selection, organizations that provide medical

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19. Blum v. Yaretsky, 457 U.S. 991 (1982) (holding a nursing home did not count as a state actor).

20. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (finding that a coffee shop counted as a state actor because of a close symbiosis between the shop and government).

21. Tulsa Pro. Collection Serv. v. Pope, 485 U.S. 478 (1988) (finding a collection agency connected to a hospital to count as a state actor).

22. Sniadach v. Fam. Fin. Corp. of Bay View, 395 U.S. 337 (1969).

23. Nat'l Coll. Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988) (holding that the NCAA does not constitute a state actor).

24. Evans v. Newton, 382 U.S. 296 (1966) (finding that operating a park is a public function).

25. Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001).

26. Shelley v. Kraemer, 334 U.S. 1, 14 (1948).

care in prisons, groups that provide transportation, as well as people who oversee parks, take custody of neglected children, or manage libraries.[27]

Since the tests seek to embody the unitary model's features, they serve as a useful yardstick for our investigation. If the model does a decent job of depicting real world conditions, it should not prove too troubling to identify state actors, at least when sufficient data is available.

B. Our findings

Alas, what we find is quite the opposite. Far from permitting us to easily pick out who represents the state, the doctrine has proven catastrophically troubled. Charles Black famously noted that the doctrine resembles "a torchless search for a way out of a damp echoing cave.[28]" Laurence Tribe has declared the doctrine to be in a state of bankruptcy.[29] Even the lightest perusal of literature on the subject turns up sentences like, "the state action doctrine is slowly descending into utter confusion,"[30] "the state action doctrine [is] one of the most complex and discordant doctrines in American jurisprudence,[31]" or, as Daniel Gifford gently puts it, the "case law exhibits a remarkable lack of coherence."[32]

Importantly, the problem is not empirical. It is not that we lack the information required to accurately apply the tests—that we can't tell who reports to whom, or what actors influence the decisions of others. Instead, the issue is more foundational. The tests seem to point in quite contradictory directions. Actors that clearly satisfy one set of criteria will fail by another. None even remotely satisfy all our desiderata. And confronted with the conflict we seem to have no theoretically satisfying answer or justification for prioritizing one criterion over another. As Christian Turner writes, "it is unclear which facts truly matter, how much they matter, or why they matter."[33]

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27. West v. Atkins, 487 U.S. 42 (1988) (finding that private physicians under contract to provide prisoners with medical care constitute state actors as part of the state's standing obligation to provide medical care to prisoners); Edmonson v. Leesville Concrete, 500 U.S. 614 (1991) (finding lawyers who make peremptory challenges to prospective jurors in civil trials to be state actors on the grounds that shaping the body that administers justice is a quintessentially state power); Evans v. Newton, 382 U.S. 296 (1966) (finding the trustees of a park to be state actors on the grounds that the park was an integral part of the city's activities, that parks were necessary to maintain the public domain and that citizens needed places to recreate free from the constraints private actors place on their property); Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974) (finding that private hospitals who provided health services to neglected children are subject to section 1983 claims because the provision of care to abandoned and neglected children is a clearly public function); Chalfant v. Wilmington Inst., 574 F.2d 739 (3d Cir. 1978) (finding that a corporation operating a library under contract with the city was performing a public function because there is a public interest in an informed citizenry).

28. Charles Black, *Foreword: "State Action," Equal Protection, and California's Proposition* 14, 81 HARV. L. REV. 69, 95 (1967).

29. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1149 (1978).

30. Julie Brown, *Less is More: Decluttering the State Action Doctrine*, 73 MISSOURI L. REV. 561 (2008).

31. *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARVARD L. REV. 1248, 1250 (2010).

32. Daniel Gifford, *A Consistent Free-Market Policy*, 44 EMORY L. J. 1229 (1995).

33. Christian Turner, *State Action Problems*, 65 FLA. L. REV. 281, 290 (2013).

In response, contemporary courts have largely thrown up their hands. After endless legal and academic efforts to rejigger or refine the relevant tests, most have simply resorted to a heavy reliance on the traditional state actor test—functionally announcing that they will count as state actors those and only those that have long been considered as such, with no further theory offered as to what connects or more fundamentally justifies the inclusion of the relevant roles or individuals. At heart, this is a declaration of defeat.

I think there is a simple, if challenging, explanation for the doctrine's failure. We cannot polish the tests into clarity because they are looking for what does not exist. The unitary model is an unworkably poor way of conceptualizing our actual institutions and circumstances. We keep looking for yetis in a world of artic wolves.

The model presumes that there exists:

(1) A singular (collective) agent (the agency desideratum)

(2) with a decision-making and execution procedure that consists in law-making (the traditional actor desideratum)

(3) and that can by means of law effectively control outcomes to ensure the existence of desirable goods like public and safety (the evidence responsive and power criteria).

The problem is that 1 and 2 are in tension with 3. A system organized in accordance with the structure outlined in the first two premises cannot effectively ensure the provision of complex desirable goods.

In this section I will focus on a weaker version of the claim: the idea that the model poorly describes *our existing structures*. There does not, I will show, exist:

(1) a singular agent

(2) that actually does control the existence of desirable goods

(3) by means of law.

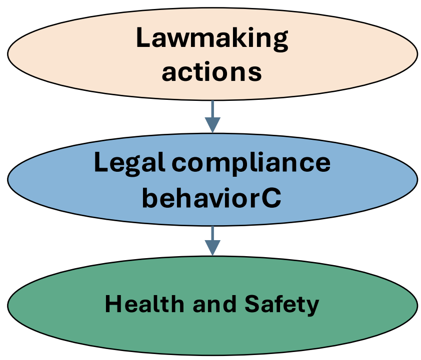
In the next section I will defend a stronger version of this claim: The structure the unitary model has in mind is not merely *absent* but *unattainable* such that efforts to achieve it often prove undesirable.

Let me start by giving a hint of the kind of structure that I think better reflects our actual reality. While the unitary model pictures a single (collective) agent controlling the production of public goods, what we can call the *governance* model envisions a wide variety of meaningfully distinct, often roughly hierarchical actors each of whom exercise measurable influence over the existence and shape of public goods, but none of whom enjoy singular control. As Walter Kickert writes:

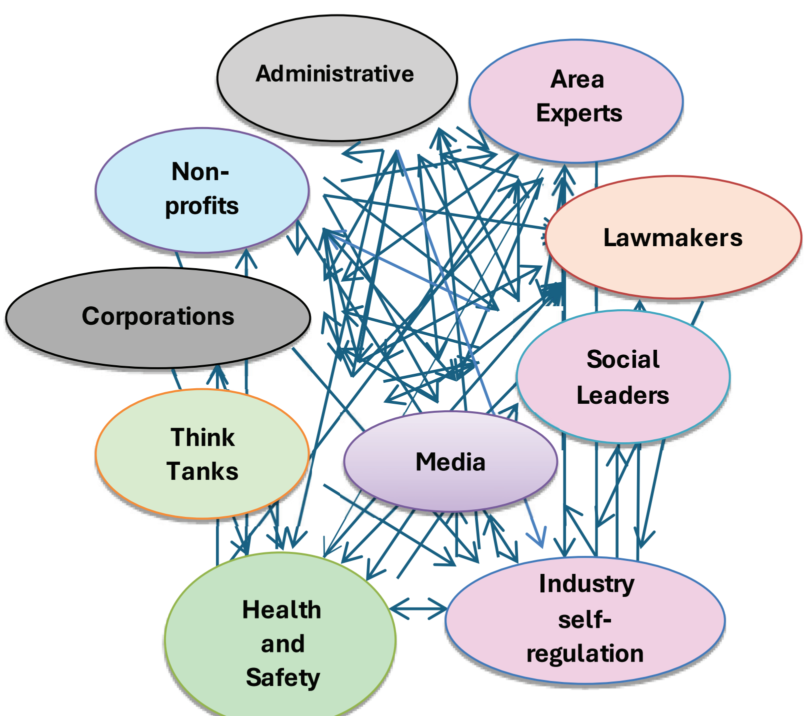
> Government is only one of many actors who influence the course of events in a social system. Government does not have enough power to exert its will on other actors. Other social institutions are, to a great extent, autonomous. They

> are not controlled by a single, subordinated actor, not even the government. They largely control themselves.[34]

The unitary model envisions something roughly like this.



But in place of this kind of structure of production, what we see looks much more like this:



34. Walter Kickert, '*Autopoiesis and the Science of (Public) Administration: Essence, Sense and Nonsense*, 14 ORGANIZATION STUDIES 275 (1993).

Consider, for example, health and safety, two of the goods that are we earlier saw treated as central to legitimacy and political obligation. The degree to which the public enjoys these goods is determined not only by the degree of compliance our society has with formal law, but also by the legally discretionary decisions of groups almost too numerous to mention. The Joint Committee on Accreditation of Hospitals, a not-for-profit corporation, sets professional standards for hospitals and evaluates their performance. Another non-profit, the National Fire Protection Organization has created hundreds of standards that govern most fire-safety. The American Society for Testing and Materials develops and manages over 12,000 standards aimed at safety. UL enterprise, a for-profit corporation, sets and administers thousands of safety standards. The American Petroleum Institute certifies and inspects industrial equipment. And on and on and on.[35]

This complex web of influence is common to the production and maintenance of most of the goods that we enjoy. It is for precisely this reason that the United States Supreme Court once declared the American Society of Mechanical Engineers to be, "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce."[36] The same could be said of the North American Electric Reliability Corporation (NERC), a nonprofit corporation which sets standards, ensures compliance, and guarantees the overall reliability of the (literal) power system. NERC even has meaningful coercive power: for instance, its website explicitly features a Compliance Enforcement section, which lays out in detail how sanctions against violators are determined, enacted, and lifted.[37] Or consider the Marine Stewardship Council (which sets guidelines on the management of global fishing stocks) and France's Autorité de Régulation Professionnelle de la Publicité (through which all prospective TV advertisements must be evaluated for fairness standards before they are cleared to run). Or consider FINRA, the Financial Industry Regulatory Authority, a private corporate self-regulatory organization that oversees brokerage firms and exchange markets.

These organizations (and many others) exert meaningful autonomous influence over social conditions. Citizens' access to public health, safety, environmental quality and so on—has the shape it does because of these entities' self-regulating decisions—the legally discretionary standards they choose to promulgate or with which they select to comply, the choices they make, the opportunities they decide to provide to others, the guidance they issue, the risks they hedge against, and suchlike. As the business writer Matthew Levine notes:

> There is a government of the U.S., consisting of a president and Congress and so forth . . . There is another government . . . consisting of a handful of gigantic institutional asset managers—BlackRock, Vanguard, Fidelity, etc.—who own (on

35. My focus here will be on American examples. But this is merely a matter of drawing our attention to a single case—the same issues occur in every regulative context.

36. Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp, 456 U.S. 556, 570 (1982).

37. *Compliance and Enforcement*, NORTH AM. ELEC. RELIABILITY CORP., https://www.nerc.com/pa/comp/Pages/default.aspx [perma.cc/2Q9T-8GD3].

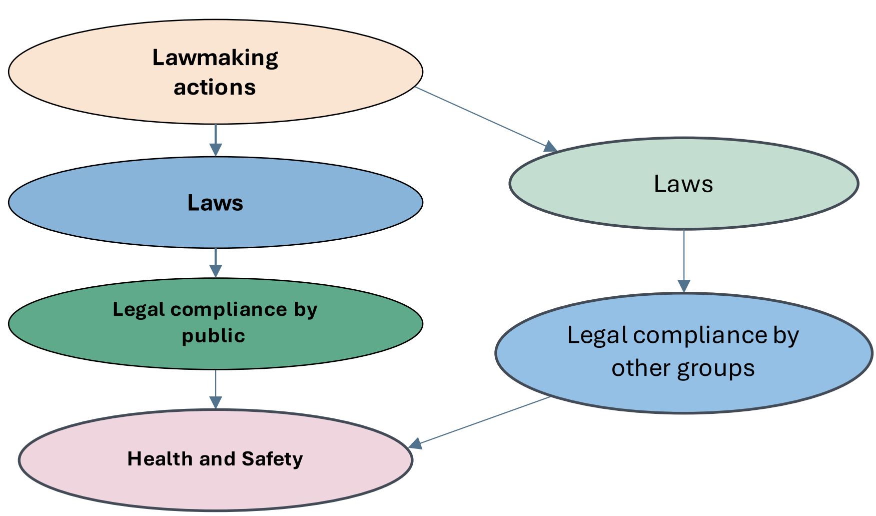
> behalf of their customers) most of the stocks of most of the public companies, and can, in some loose sense, tell those companies how to behave . . . . There is a lot of overlap between what the regular government does and what the government-by-asset-managers does. Not total overlap, of course—the U.S. government has an army, BlackRock does not, etc.—but in broad areas of business and business-adjacent conduct, the U.S. government, and state governments, and BlackRock all have overlapping legislative power.[38]

C. Objections

This brief empirical survey might seem already sufficient to upend the unitary model. It is not lawmakers issuing laws that control the shape of valuable goods. Instead, it is those lawmakers in conjunction with a whole host of independent and quasi-independent entities acting through a variety of mechanisms.

But a critic might object that this seeming diffusion of influence hides a deeper and more simple truth: lawmakers control the additional sources of influence that we have seen.

Understood in this way, the vision of the unitary model portrayed above was foundationally accurate. It was simply misleadingly presented. Instead of a more spartan line of control going directly from laws to social conditions, we have a kind of second-order-law-making control:



38. Matt Levine, *The Government Wants ESG Out of Pensions*, BLOOMBERG MONEY STUFF (June 25, 2020), [perma.cc/E2UZ-CF4F].

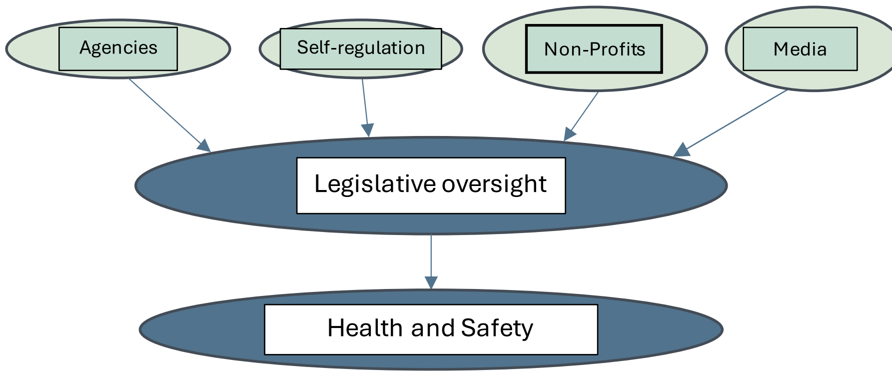
On this reading lawmakers remain in full command, even though other actors sometimes *appear* to exercise distinct influence. They are simply acting as lawmakers would have them behave.

This objection would seem to have some ammunition. After all, in *theory* the alternative is unconstitutional. According to the *non-delegation doctrine* administrative agencies, for example, are forbidden from exercising regulatory power unless Congress provides an intelligible principle to guide their action. As the Hoover Commission Report of 1949 noted, "The organization and administration of the Government . . . must establish a clear line of control from the President to these department and agency heads and from them to their subordinates . . . cutting through the barriers which in many cases made bureaus and agencies partly independent of the Chief Executive."[39] Such clear lines of control would justify the revised vision of the model above: it merely *looks* like other actors have independent influence: in actuality they instantiate lawmakers' directives and aims.

But there is little evidence that such lines meaningfully exist. Consider, for example, the Federal Communications Commission, which undertakes an action classically associated with the state—the regulation of radio, television, wire, satellite, and cable. The agency's operating instructions are to issue regulations, "as public convenience, interest or necessity require"—hardly the stuff of clear collective judgment or non-conflicting aims.[40] This kind of functional non-directive is routine. As anyone with even passing familiarity with American legal history is aware, the non-delegation doctrine is an empty shell. Since 1936, the U.S. Supreme Court has upheld every statute it has reviewed under the doctrine, permitting agencies to exercise authority pursuant to authorizing statues that provide little to no direction, in circumstances where they are subject to little or no meaningful control or review. Indeed, it has always been so. Popular narratives aside, historians have shown that apart from a brief blip around the new deal, the notion that the non-delegation doctrine was *ever* meaningfully enforced is "more mythical than historical."

Proponents might seem to have a ready response. The error, they might suggest, lies in presuming that unification occurs *ex-ante* in the form of clear directions, rather than *ex-post* in the form of oversight and correction. Lawmakers do not tell other actors how to behave. They simply issue rectifications whenever others' behavior deviates sufficiently from what they had in mind. Understood this way, the provision of goods looks (very roughly) like this:

39. U.S. Comm'n on Org. of the Exec. Branch of the Gov't (1949), [perma.cc/GR3T-NNJR].
40. U.S. v. Southwestern Cable Co., 392. U.S. 157 (1968).



There is nothing *theoretically* problematic about this structure. And sometimes, it likely even happens. But defenders of the unitary model need something more than evidence of occasional legislative oversight. They need to prove that every decision that significantly shapes the production of public goods is meaningfully overseen by lawmakers. There is little evidence of anything remotely like oversight at this scale. As one political scientist writes, "scholars who have examined congressional oversight are in general agreement that very little of it gets done."[41]

Indeed, evidence suggests quite the opposite. There is good reason to think that congress *lacks the ability* to undertake such oversight. As Matthew Stephenson notes, "the informational asymmetry that justifies the delegation in the first place makes it difficult for Congress, or other overseers, to monitor [an] agency."[42]

This takes us to the stronger version of our claim. The failure of the unified model is not, I want to suggest, an accident. It reflects a recognition of what is required to bring about the kinds of outcome that we desire.

IV. *The State in Expectation*

The above is enough to suggest that the world looks little like what the unitary model envisions. But critics might suggest that there is an easy answer: we should revise our institutions to better align the structure. What we have revealed is a failure of institutional design.

It is certainly true that our institutions are far from ideally constructed (one does not need to have spent time in line at the DMV to reach this conclusion). There are plenty of things we might—and some we perhaps should—do to increase the unity of government, the degree to which our institutions embody rule of law, and the effective scope of lawmakers' powers. If we really cared about

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41. D. Roderick Kiewiet & Mathew D. McCubbins, The Logic of Delegation 11 (1991).
42. Matthew Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, J. of Law, Econ. & Org. 23 (2007).

unity we might disallow formal delegation, shut down administrative agencies, break up large corporations, and suchlike. These changes (might) do more to prop up our agency criteria, allowing us to see state actors more routinely as a singular unified entity to whom certain decisions can properly be attributed.

But the unitary model is not interested in the existence of any old group agent. It is specifically interested in the existence of a group agent *with a particular capacity*, namely, one that can effectively control outcomes to ensure the existence of desirable goods like public health and safety (the evidence responsive and power criteria). Efforts like the ones described would increase cohesiveness at the expense of this desideratum. If anything such changes would *decrease* our capacity to effectively bring about or sustain desirable benefits. Our deviations from the model are not fundamentally a failure of institutional design or a product of laziness. Instead, they reflect a deeper reality about what is required to produce complex goods.

To see this, we need look no further than the work of legal scholars who have focused on issues like the rule of law. As we saw earlier, proponents of the unitary model take the classical structure of the law to be central to its success at bringing about desired benefits. The unitary model's centralized structure makes possible the consistency, stability, publicity and intelligibility they believe necessary for the law to operate as an effective plan for the production of complex goods. But proponents of the rule of law suggest otherwise. These very features, they contend, make the law an *ineffective* mechanism in many cases.

Take Lon Fuller, who is quite explicit that the rule of law is poorly suited to the achievement of some kinds of ends. He declares, for example, of efforts to manage the economy:

> the economic manager must take into account every circumstance relevant to his decision and must himself assume the initiative in discovering what circumstances are relevant . . . when . . . we attempt to discharge tasks of economic management through adjudicative forms there is serious mismatch between the procedure adopted and the problem to be solved . . . tasks of economic allocation cannot be effectively performed within the limits set by the internal morality of law. The attempt to accomplish such tasks through adjudicative forms is certain to result in inefficiency, hypocrisy, moral confusion and frustration.[43]

Why would there be a mismatch between the structure of the unitary state with its reliance on legal planning and the problem of producing benefits like public health, safety, environmental cleanliness, economic opportunity and suchlike? At issue is the very factor that led proponents of legitimacy and political obligation to grant the law special status: the complexity of the issues at hand and the breadth of actors involved.

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43. FULLER, *supra* note 11, at 172.

Advocates of the unitary model see the wide variety of things that must be aligned to achieve the outcome they desire and respond by looking for a central source of coordination. The thinking is clear: "it's too complicated for ordinary individuals to figure out- we need someone in charge!"

That is all well and good when we need to run a small bakery (the Cuban economy might have something to say about the efficacy of this approach for running larger bakeries). But this approach clearly falls apart in the face of large-scale complex public goods. Advocates have simply failed to see the full scope of the difficulty such tasks involve or to understand what it requires: not the strictly controlled managed conditions of the model's portrayal but a far more diffuse, distributed, shared and ongoing process of de-centered co-regulation.

The processes in question are simply too intricate and byzantine, the circumstances too rapidly changing, the information that must be processed too sweeping to be controlled in the manner that the model envisions. In such conditions, no single locum of decision-making can effectively provide direction and guidance. Nor can the relevant guidelines effectively be stable, intelligible, or public in the way that the structure of law is thought to require. As Jan Kooiman writes, "No single actor public or private has the knowledge and information required to solve complex, dynamic, and diversified problems; no actor has an overview sufficient to make the needed instruments effective, no single actor has sufficient action potential to dominate unilaterally."[44]

Lurking behind the idea that we could reform our institutional structure to accord with the unitary model is the lingering sense that lawmakers delegate or permit others to make difference-making decisions because they are lazy or disinterested or remediably distracted. And of course, being human, they are all these things in all kinds of ways.

But the simple truth is that the matters are *too complicated* to be overseen in this centralized way. No amount of realistic reform would get us anywhere close. As one political scientist writes:

> No amount of congressional dedication and energy, no conceivable increase in the size of committee staffs, and no extraordinary boost in committee budgets will enable the Congress to carry out its oversight obligations in a comprehensive and systematic matter. The job is too large for any combination of members and staff to master completely.[45]

Lawmakers consciously delegate (or in many cases, simply unknowingly leave it open to others to make difference-making decisions) because they lack the knowledge to provide meaningful direction or the attention span to notice when direction is required. They routinely fail to provide ex-post oversight for just

44. Jan Kooiman, *Levels of Governing: Interactions as a Central Concept*, *in* DEBATING GOVERNANCE: AUTHORITY, STEERING, AND DEMOCRACY 142 (Jon Pierre ed., 2001).

45. MORRIS OGUL, CONGRESS OVERSEES THE BUREAUCRACY 5 (1976).

those same reasons.[46] As Matthew Stephenson notes, "the informational asymmetry that justifies the delegation in the first place makes it difficult for Congress, or other overseers, to monitor [an] agency."[47] Indeed, it is on just these grounds that the United States Supreme Court has concluded that asking lawmakers to provide meaningful direction or oversight to administrative agencies and others to whom they grant discretionary power is "impractical in view of the vast and varied interests" involved. It could "bring about confusion, if not paralysis, in the conduct of public business."[48]

That is the thing about complexity. It is complex. Lawmakers are better positioned than most to understand the factors that shape the benefits we desire. But they are not well enough positioned to set out a plan that will consider and respond to all the eventualities that influence these goods. No agent—collective or otherwise is. The political scientist Terry Moe puts it like this. Centralized control, he writes, is "quite unsuited to policy problems of any complexity . . . although the group has the political power to impose its will on everyone, it almost surely lacks the knowledge to do it well. It does not know what to tell people to do . . . the knowledge requirements of a halfway decent job would prove enormously costly, cumbersome, and time consuming."[49] To put the claim in our terminology, any entity that satisfies our *agency* desiderata will fail to satisfy our *evidence responsiveness* and *power standards*. The features are simply not functionally compatible.

Over and over again, political scientists, economists, sociologists, and others who consider the matter reach the same conclusion. As Richard Stewart notes, policy failures can often be blamed on "excessive reliance on command-and-control methods of regulation, which suffers from the inherent problems involved in attempting to dictate the conduct of millions of actors in a quickly changing and very complex economy and society throughout a large and diverse nation."[50] On these grounds legal scholars and economists Ian Ayres and John Braithwaite conclude, that, "[t]he empirical foundation for their [people who are concerned with outcomes] analysis of what is good regulatory policy is acceptance of the inevitability of some sort of symbiosis between state regulation and self-regulation."[51] In this same vein the legal scholar Louis Jaffe writes, "[i]t has long been accepted that where regulation is necessary the legislature cannot by statute alone provide

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46. This account of "government overload" is commonly recognized by empirical political scientists. *See e.g.,* DAVID BEETHAM & STUART WEIR, POLITICAL POWER AND DEMOCRATIC CONTROL IN BRITAIN (1999) (describing ministers moving between portfolios as unsuccessful football managers do between clubs).

47. Stephenson, *supra* note 42, at 23.

48. Union Bridge Co. v. U.S., 204 US 364, 386 (1907); Standard Oil Co. of N.J. v U.S., 221 US 1 (1911).

49. Terry Moe, *Toward a Theory of Public Bureaucracy*, *in* ORGANIZATION THEORY 132 (1995).

50. Richard Steward, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 446 (2003).

51. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION, TRANSCENDING THE DEREGULATION DEBATE (1992).

a system sufficiently complete. It has neither the personnel nor the information to provide the detailed day-by-day regulation which is necessary if regulation is to be responsive to complex, ever changing situations and to attach to itself and direct such personal would destroy its general legislative function."[52] Even Congress' own branch of research experts, the Congressional Research Service, notes that, "organizing for complexity means giving up some control to search for new solutions . . . ."[53]

Here it might be helpful to picture a little more clearly what these scholars have in mind when they talk about something like a "symbiosis between state-regulation and self-regulation. "The imagined circumstances that the proponents of legitimacy and political obligation we considered above seemed to picture when they envisioned the alternative to the unitary model was a conditionwhere all the millions of people in a given country simply did whatever they happened to think would produce public goods. As they worried, we have little reason to think this would result in good outcomes. The unitary model was their solution to that problem.

As we have now seen, we have little reason to think that this would result in good outcomes, either.

But there is another alternative. Rather than treating governance as a step by stop plan laid out by a single actor, we can think of instead of those who are positioned to meaningfully influence production of important resources as a set of jazz musicians improvising together. Each treats relevant moves by the others as (at least temporarily) fixed points against which to conduct their own decision-making, while feeling free to make independent choices which others must account for in their own actions. Nobody is fully constrained. But so too, nobody is simply free to act as they will. In this way, laws—like decisions by administrative agencies or self-regulatory groups, warnings by experts, or corporate choices—all provide a kind of general direction for a plan, upon which others must build and to which they must respond, but which they may also sometimes be in a position to ignore or reshape as necessary.

Picture the kitchen of a high-end restaurant. The celebrity chef has set the theme and the menu but is often out of the kitchen (doing stints on Top Chef, making an episode with Padma Lakshmi). They have been quite clear: we are doing Malaysian. That choice makes any number of moves inappropriate. I cannot tell customers that bratwurst is an option. I can't hand out croissants with the amuse bouche. I can't place an order for chainsaws and direct customers to begin carving birdhouses. But if I am an employee of the restaurant there are many things that I can do—even that I *should* do—that the Chef has in no way dictated and of which she may well be unaware. I can 86 dishes that run low or where the

52. Louis Jaffe, *Law Making by Private Groups*, 51 HARVARD L. REV. 210 (1937).

53. *Congressional Reorganization: Options for Change*, Report of the Congressional Research Service, Library of Congress, to the Joint Committee on the Organization of Congress S. Prt. 103-19 103rd Con., 1st Sess. 60 (1993).

ingredients are lower quality than I believe we should serve. I can comp customers drinks or desserts. I can rearrange reservations. Indeed, I may well be required to do things that *explicitly reject* commands made by the chef: if she has set a menu but the relevant sous chef has not arrived or the ingredients fall victim to supply chain issues, I may replace whole courses with substitute options. I may even have to throw in a few things better described as Indonesian or Filipino. The alternative is to not to run a successful restaurant at all.

This is precisely what we see to be true of the production of importantly beneficial complex goods. Our options are either not successfully producing these goods at all or giving up on strict unified control.

Critics might raise epistemic worries about this model of planning. It is, they might suggest *challenging*. Surely people and entities will get it wrong if they attempt to make decisions independently, rather than simply following guidelines laid down by superiors. And so they might. Indeed, so they will. But so too will unified leaders attempting to provide all-inclusive directions. The alternative is not a world where everyone follows the set plan to a successful end. The alternative is where everyone follows an inevitably incomplete, inaccurate, and sketchily laid plan in such a way that they are not able to bring about desired ends. That is precisely what our discussion has shown. The notion of control towards which I am gesturing is not a proscriptive claim. It is simply a more accurate description of the circumstances in which we actually live.[54]

Why then has the unitary model remained so widespread and so persistent?

There are, I think, two reasons. The first reflects a kind of hazy nostalgia for what seems like an easier time, matched with little historical detail paid to how things actually were. Surely, we imagine, there was some prior time when the world was young and the government centralized, before things got so complicated. (Complaining about the complexity of the modern era is as old as eras). Edward Rubin writes:

> Those who resent legislation's current role tend to look back to the halcyon days before regulation and redistribution, when the legislature generally limited itself to drafting statutes that courts could enforce. Such statutes comported with the delegation doctrine in its rigorous form.[55]

But this way of thinking ignores that history makes exactly our point. The kind of times this way of thinking imagines were in fact far from tranquil, in good part *because* the more strictly unified exercise of formal power proved not up to the

54. For that very reason, public administration scholars have moved away from talk of government or lawmaking to notions of "governance," or "new public governance" a more encompassing term that recognizes that many different actors exercise autonomous influence over social conditions. *See, e.g.*, R.A.W. Rhodes, *The New Governance: Governing Without Government*, 44 POLITICAL STUDIES, 652, 652-67 (1996).

55. Edward Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 395-96 (1989).

task of exercising effective control over social conditions. Jerry Mashaw writes of the United States in the early 1800s:

> Managing enormous, indeed explosive, growth in territory, population, and commerce, while maintaining the idea of a small and frugal national government, put serious strains on the efficacy of administration. Administration was demanded, but Congress was loath to fund it. The insistence on congressional control introduced both inefficiencies and local politics into national administrative organization and functioning. And as federal officialdom expanded numerically and spread across a vast territory, the administrative and legal control mechanisms employed in the Federalist period often proved either inadequate or counterproductive.[56]

The second reason is simply that it is *hard* to think of or model a complex array of entities who share power. It is much easier to think of providing guidance to a single agent who can bring about the ends we desire if only it chooses to do so.

I am sympathetic to this challenge. I will bring it up again in the final section. But it is not itself a justification for a model that has proven misleading enough to lead our reasoning astray.

V. Reconsidering Legitimacy, Obligation, and the Rule of Law

And lead us astray it has. Following this empirical interlude, let us return to the normative arguments that initially attracted our attention. In each case, the failure of the unitary model calls into question the moral claims that we investigated earlier.

A. Fair Play

Consider Klosko's assertion that citizens have a duty of fair play to comply with the law. As we saw above, this argument holds that:

(1) Principle of Participation (PP): When people jointly conduct a burdensome activity that produces significant benefit they have a right to the participation of those who have benefited, so long as the distribution of benefits and burdens is sufficiently fair.

(2) Many citizens jointly engage in the activity of complying with the law.

(3) Complying with the law is burdensome.

(4) The activity of citizens jointly complying with the law provides all residents of a reasonably just state with significant benefits.

(5) The distribution of benefits and burdens in such a state is sufficiently fair.

56. Jerry Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era 1801-1829*, 116 Yale L. J. 1636, 1671 (2007).

> *Therefore*: All the residents in a reasonably just state are obligated to comply with the law.

As phrased, the claim implies that the activity of citizens jointly complying with the law is *sufficient* to provide all the residents of a reasonably just state with significant benefits. That is, advocates of fair play read (4) as if it held:

> (4) The activity of citizens jointly complying with the law is *sufficient* to provide all residents of a reasonably just state with significant benefits.

This is consistent with Klosko's vision that the commands of lawmakers provide clear direction and coordination sufficient to bring about desired benefits.

But we have seen otherwise. Laws are only one component of the complex and ongoing process of coordination that helps bring about and sustain the benefits that proponents of fair play value. At best, the premise should therefore hold that:

> (4) The activity of enough citizens jointly complying with the law plays a *necessary* part in providing all residents of a reasonably just state with significant benefits.

To this, we can add a further claim:

> (5) A wide range of legally discretionary and sometimes burdensome actions play a *necessary* part in providing all residents of a reasonably just state with significant benefits.

Notice, this claim accepts that laws play *some* role in governance. Indeed, it accepts the more controversial claim that enough people complying with the law is *essential* to the provision of these goods. It simply holds that their doing so is not *sufficient* to bring about public goods: all those other actors making independent decisions matter as well, in just the way we have seen empirical scholars note.

However tepid, this empirical revision poses a serious challenge to fair play defenses of political obligation. On this reading of (4) it no longer follows from the argument presented that the residents of reasonably just states are obliged to comply with the law.

Recall, the principle of participation holds that people who "jointly conduct *a burdensome activity* that produces significant benefit" have a right to "the participation of those who have benefited." Because Klosko presumes mere compliance with the law will be sufficient to bring about the relevant benefits, he simply assumes that *obeying* is the "jointly burdensome activity" that brings about the relevant benefits and which in turn beneficiaries are required to take up.

But the situation is more complex on our revised empirical view. We have seen that the law is not the only thing that plays a necessary role in producing the valued goods. It is reasonable to conclude that the "jointly burdensome activity that produces a significant benefit" consists in the *whole* set of actions that play a part in generating that benefit— that it is the very act of improvising and of supporting such improvisation that we have associated with governance. As we have seen, that set includes numerous legally discretionary actions, undertaken by a wide range of actors: from industry self-regulation and corporate decisions to deliberately refraining from taking advantage of available loopholes to scholars who undertake necessary research and non-profits who step up to provide direction or fill in gaps.

This leaves a gap in the case for political obligation. If the set of actions picked out in P1 includes many different activities, it does not follow from the fact that participants are due "the participation of those who have benefited" that what they are owed is *others' compliance with the law.* Those who undertake other actions in the set can plausibly say that they *have participated* and thus paid their debts even if they do not comply. As classically formulated, the argument is thus unable to justify the conclusion its advocates have defended.

This is not a knock down argument against political obligations based in fair play, nor is it intended as such.[57] Instead, what it shows is that advocates have not justified their conclusion. If they wish to contend that citizens have a duty to comply with the law, they will need to do one of two further things:

(A) Provide a further explanation for why compliance is distinctive among the set of burdensome actions that constitute our plan and planning process for the provision of important goods

Or

(B) Provide an *allocative theory* – specifying how citizens should relate to the *whole set of qualifying activities* that entails that citizens are obliged to take up the particular task of compliance

Since it lacks either of these features, the extant argument from fair play is not up to the task of providing concrete moral guidance.

B. Good Samaritanism

The other moral theories that we examined earlier fall victim to the same concern. It comes as no surprise that the Samaritan defense of political obligation proves similarly unjustified. After all, the view relies on the same presumption that drove the fair play account: the notion that beneficial goods exist *because, and only because, enough people comply with the law.* Recall, the good Samaritan argument went like this:

P1: States provide vitally important benefits

P2: *The Samaritan Duty*—We have an obligation to ensure that other people have access to the benefits in (1) if it is possible to do so without incurring unreasonable costs (the Samaritan duty)

57. I leave that to my other writings—*see, e.g.*, Brookes Brown, *Reciprocity without Compliance*, 48 PHILOSOPHY & PUBLIC AFFAIRS 382 (2020).

> P3: States cannot achieve these benefits unless (enough) citizens comply with the law.
>
> P4: Compliance is not unreasonably burdensome.
>
> P5: *Principle of fairness*—those who benefit from other peoples' labor (either in the form of a benefit or in the satisfaction of a duty) in burdensome cooperative practices have a duty to abide by the rules of the relevant cooperative practice.
>
> C: People should comply with the law (requiring) and states have the right to coerce to achieve the benefits (permissive part).

As we saw above, P3 proves misleadingly narrow. Even if we take it as given that adequate compliance with the law is *necessary* to achieve public goods, it is not, as this formulation would suggest *sufficient* to do so. A more adequate characterization of P3 would go something like:

> P3: States cannot achieve these benefits unless (enough) citizens undertake each of a wide array of burdensome activities including both compliance with the law and many legally discretionary acts.

Reformulated in this way the view, like its fair play brethren, proves unable to provide action-guidance. It does not follow merely from the fact that people should "abide by the rules of the cooperative practice" that they ought to *comply with the law*.

After all, as we saw earlier, the relevant practice is best understood as *the entire array of activities* that produce the burdensome goods. We have no explanation for what a person who takes up some of these legally discretionary actions is getting wrong if they refuse to comply on the grounds that they have *already participated*. As noted above, any attempt to refute this claim will need either to develop a further account of compliance's special standing or detail a workable allocative theory according to which compliance cannot rightly be avoided.

C. Legitimacy

Stilz' defense of state legitimacy suffers from similar flaws. Recall, her view holds that states' right to rule depends on two factors:

> (1) that states provide citizens with public goods and
>
> (2) that they do so in a way consistent with self-determination.

On these grounds, she suggests that at least some extant states have a genuine right to rule the residents of their territory. We can interpret the argument as roughly holding something like:

> P1: States have the right to rule if they provide their citizens with important goods in a way that is consistent with citizens' self-determination.

P2: [Some] states provide their citizens with public goods.
P3: [Some] states provide the goods in P2 in a fashion that provides sufficient opportunities for self-determination.
C: Lawmakers in [some] states have a right to rule.

Yet again, however, the understanding of P2 and P3 from which this conclusion follows proves misleadingly narrow. As we have seen it is not "the state" (understood narrowly as lawmakers) that provides the relevant goods. A wide array of other actors also plays a part, and necessarily so.

Consequently, we are left with uncertainty about what we should take Stilz' view to show us. If legitimacy requires that lawmakers *uniquely and single-handedly* provide these goods, extant political institutions do not qualify. They are illegitimate.

If the right to rule merely requires that the entity under consideration *play an important role* in the provision of public goods, then it would seem lawmakers share their right to rule with a very wide array of quite surprising actors—from CEOs and non-profit boards to wealthy or prominent individuals. What does that mean for how we should relate to them?

The situation only gets more complicated when we turn to the self-determination requirement. On Stilz' account, this desideratum necessitates that there be "some channel by which the people might revoke authorization of their government if it were to cease to reflect their shared will."[58] However, given what we have seen of empirical reality, we lack any justification for this focus on authorizing *the government* in specific. If other groups are playing a meaningful and independent part in the provision of public goods, then surely they too must be restricted in accordance with self-determination, for just the same reason as lawmakers. What would it mean for the people to have this kind of authority? Must "the people" have a seat on the board of every corporation, every standard-setting organization, every instance of industry self-rule that exercises power over the provision of public goods? Or would some other kind of authorization be sufficient?

Again, my point is not that these questions *cannot* be answered. Nor is my aim to advance any particular theory of how they *should* or *could* be answered. My goal is simply to note that they *must be answered* before we can determine whether existing states are legitimate *even if scholars like Stilz advance accurate normative theories*. Our implicit reliance on the unitary model has disguised the fact that extant moral theories are not yet up to the task.

D. Rule of Law

Finally, I think it is worth noting that the failure of the unitary model equally raises challenges for a way of thinking about the rule of law that is common among political philosophers and the general populace.

At base, the idea is simple. We ought to be governed not by the whims of individuals but by something more systematic and removed, i.e. *the law*. As Aristotle

58. ANNA STILZ, TERRITORIAL SOVEREIGNTY: A PHILOSOPHICAL EXPERIENCE 110 (2019).

writes, "it is proper for the law when rightly laid down to be sovereign."[59] Political philosophers tend to take this kind of sovereignty to be an importantly good thing. The more we get of it, the better. We see this sort of view echoed in public life as well, for example, in the United Nations declaration that the rule of law is:

> . . . the foundation of friendly and equitable relations between states and the base of fairs(sic) societies. . .the rule of law is fundamental to international peace and security and political stability; to achieve economic and social progress and development; and to protect people's rights and fundamental freedoms. It is foundational to people's access to public services, curbing corruption, restraining the abuse of power, and to establishing the social contract between people and the state.[60]

On this approach, as William Neukom, head of the World Justice Project, declares, "the rule of law is the foundation for healthy communities of justice, opportunity, and peace."[61]

But the failure of the unitary model reminds us that there are *competing morally significant considerations* that weigh against rule of law features, at least as they are classically understood.[62] The complexity, flexibility, and adaptability required for the successful production and maintenance of public goods often requires structures that are too varying degrees incompatible with publicity, intelligibility, and stability. We need rules that are readily altered, often highly technical, and shapable from enough influence points that they are difficult for the ordinary public to track in an ongoing fashion. The very limitations of lawmakers that we have discussed weigh against a strict focus on congruence. Often, informal norms and the need for rapid alteration cause enforcement and guidance to look different than the formal statement of rules might suggest. Indeed, it is this very fact that in part pushes against unique oversight by lawmakers and calls the viability of the unitary model into question.

VI. WHERE DO WE GO FROM HERE?

How should we respond to the failure of the unitary state? Here, what I offer are less answers than a plea for a methodological revolution.

David Foster Wallace once told the story of an older fish encountering two younger fish. "Morning boys, How's the water?" asks the first. The two young fish swim on for a bit, Foster tells us, and then one turns to the other and asks, "What the hell is water?" This, he writes, reminds us that, "the most obvious,

59. ARISTOTLE, *supra* note 1, at 1282(b).

60. UNITED NATIONS, *What is the Rule of Law*, https://www.un.org/ruleoflaw/what-is-the-rule-of-law/[perma.cc/2AUZ-BQ77].

61. WORLD JUSTICE PROJECT, *What is the Rule of Law?*, https://worldjusticeproject.org/about-us/overview/what-rule-law [perma.cc/6FMP-SWWG].

62. Legal scholars are long familiar with this notion. It is time that political philosophers more broadly and consciously caught up. See, for example, Joseph Raz noting that, "conformity to the law is a virtue, but only one of the many virtues a legal system should possess." JOSEPH RAZ, THE AUTHORITY OF LAW 208 (1979).

important realities are often the ones that are hardest to see and talk about.'"[63] The unitary model has been so long accepted that it has, in practice, faded from view. It is simply the water in the background against which political philosophers draw their other conclusions.

Our discussion has revealed this to be a serious mistake. The unitary model is not a harmless approximation of the world, "good enough for philosophical business." Instead, it is a significant misrepresentation, one that leads us to mistake the conclusions justified by our own claims and disguises the need to develop significant and complex moral theories. If we want to see the moral landscape clearly, we need to work out a way of conceptualizing our conditions that more accurately reflects the world in which we actually reside. I have but gestured towards the tiniest, first step in thinking about how we might do so.

Any such effort will be hard. It will require that we confront difficult moral questions. How is it that a *group* of distinct agents who together lack agential status can be held to account for a jointly produced result? Who is obliged to act when an action can be undertaken by one agent, or another, but need not be undertaken by both? What features make some agent the sort to be rightly held accountable for playing a part in producing some outcome, or failing to do so? What are different ways that a person can gain authority or a right to being treated as authoritative in a particular realm and how ought others to respond to that authority? How should we weigh the kinds of values embodied in the classic rule of law against the flexibility and diffusion of power sometimes required to create and sustain desirable outcomes? How, if at all, can we replicate some of these values in other forms?

These are challenging inquiries. Indeed, it is the very difficulty of these questions that has made global justice a site of so much controversy among political philosophers. That is precisely why Michael Blake took it to be so *valuable* that political philosophers "agree about the nature, and powers, of the state." By comparison with its global counterpart the domestic arena has seemed a site of moral clarity and progress precisely because we have thought ourselves able to avoid these questions.

But as we have witnessed, that *seeming* was erroneous; an illusion born of a failure to pay attention to the world as it is. Indeed, it is this very agreement that has led our philosophizing so far astray. In contrast to what Blake declared, we *cannot* "reason together about justice, without having to argue about what domestic states are actually like."[64] To know how to act, we must be able to see clearly how the things we care about actually work in their full, messy complexity.

63. David Foster Wallace, *This is Water*, Commencement Speech at Kenyon College (May 21, 2005).

64. Michael Blake, *Global Distributive Justice: Why Political Philosophy Needs Political Science,* ANNUAL. REV. OF POL. SCI. 15, 122-123 (2012).