

Moral Legitimacy and the Will of the People

A comment on A. John Simmons

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One of the criteria that John Simmons proposes for the moral legitimacy of governments or regimes is that they “speak for or represent the people as a whole (or the people’s will).” (p. 9) A few lines later he describes what he seems to think is the same idea by saying that both the institutions of government and the regime that is currently administering the government should “represent the *interests* of the people as a body” (p. 10; my emphasis). Already this raises a question: is representing the people’s interests the same as representing their will? When my lawyer represents me, he regards it as his job to try to explain to me where my interest lies: but in the end, if I disagree with him, he can represent me only by acting as I will. It is only in cases of mental incompetence that representatives are permitted to base their actions on the represented person’s interests rather than his will. We may make decisions for small children, the demented elderly, the severely retarded or the insane, on the basis of their interests; even then, especially in the case of the demented elderly, we are constrained by what we know would be their will. But we make decisions for adults, when we do so at all, on the basis of their will. I think we must assume at least ideally that the people who constitute a state are not incompetent. So I prefer to start with the formulation in terms of representing the people’s *will*, not their interests. This, as we will see later, does not mean that there is no role for an identification of people’s interests to play. In any case, the question I wish to discuss in these comments is what it means to represent the will of the people as a whole or as a body.

The example of the lawyer evokes a certain picture. I already *have* a will, but I do not know how to enact it within the mysterious confines of the law; my lawyer is doing a good or a poor job insofar as he successfully enacts my will, and in that way he represents me, or fails to. Do the people already have a will? Presumably, each of them does, but as Simmons remarks:

“It would be foolish, of course, to suggest that we have ready to hand an uncontroversial account of how a collective will is to be composed or aggregated from the divergent individual wills of members of or subgroups within the body, or even to pretend that the idea of ‘speaking for’ is more than instructive metaphor.” (p. 11)

I think we can identify two views that represent opposite extremes on this matter. On the one hand, there is the view that there is such a thing as the will of the people, prior to any institutions of government or actions by the regime in question, and what both the institutions of government and the particular regime ought to do in order to represent the will of the people is to *track* it, to enact it *correctly*. On the other hand, there is the view that the will of the people is *constituted* by the institutions of government and the actions of the regime that administers those institutions. We may think of these as substantive and procedural conceptions of the general will, respectively.

The romantic version of the substantive view holds that the general will or the will of the people is a kind of nebulous entity or fact, like the *zeitgeist* or the spirit of the age. The simplest version of the substantive view holds that the general will or the will of the people is simply the will of the majority. Probably much political rhetoric about the will of the people is based on a vague confusion between these two ideas: if there is something that most people want (maybe not a simple majority, fifty-one percent, but some indefinitely large majority), this view holds, we just get to call that “the will of the people,” even though many individuals deplore it. The tyranny of the majority is here concealed within a kind of romantic haze. The idea that the will of the people is given by the will of the majority, in its unconcealed form, depends on the thought that the majoritarian method of making group decisions is somehow the privileged method: if we cannot get a unanimous decision, the majority decision represents our collective will by default. Locke privileges majoritarian methods in this way, although Simmons does not seem to want to follow him in this (see fn. 12). Kant, as I read him, does not. He agrees with Locke that legitimacy depends on a kind of presumption of unanimous agreement to some form of collective decision making, but he

thinks that for all we know the people are just as likely to have agreed unanimously to be governed by Solomon as to be governed by the majority.

This idea – that there is no privileged form of collective decision-making – is part of the motivation for the proceduralist view. On the proceduralist view, the will of the people is *constituted* by the institutions of government and the decisions of the regime that administers those institutions. More generally, what motivates the proceduralist view is a certain conception of collective agency. According to this conception, the people as a body or as a whole do not have a will until they have a method of making collective decisions, and they do not have a method of making collective decisions until they have a set of institutions that define that method. I have to admit that I think there is a great deal to be said for the proceduralist view. To my mind, Locke's account of why majority voting represents a privileged form of collective decision-making captures exactly what is *wrong* with the substantive conception of the general will. Locke says:

For when any number of individuals have, by the consent of every individual, made a community, they have thereby made that community one body, with the power to act as one body ... [A]nd it being necessary to that which is one body to move one way; it is necessary [that] the body should move that way whither the greater force carries it, which is the consent of the majority... (§96 *Second Treatise*).

This is like putting a lot of mice inside of a bag and seeing which way it moves. Though such a bag would no doubt move in the direction preferred by the majority of the mice, it would not therefore be an agent with a will. One might reply that an individual person has a will precisely because she is *not* in this way at the mercy of the play of motivational forces within her, but rather has a method of making decisions. Instead of working on her causally, moving her in accordance with the vector sum of their forces, her desires present themselves to her as *considerations* for and against doing certain things. She is then able to ask herself whether these considerations count as reasons – perhaps, as Kant would have it, by asking whether the maxims of acting on them can consistently serve as universal laws for her

conduct. In the same way, the people as a body or a whole have a will not because the vector sum of their individual wills move the body as a whole this way or that causally, but rather because the people have a method of making collective decisions. The wills of the individual citizens appear as *considerations* for or against collective action, and the congress or the senate or the king decides whether to count these considerations as reasons – perhaps by asking whether the maxims of acting on them can consistently serve as universal laws for the conduct of the state, or perhaps, as Plato would have it, by considering what is best for the state as a whole. In short it is precisely the mark of a being with a will that it is not merely moved by the sum of forces working within it, but that it moves in accordance with a decision made by some faculty that represents the being as a whole.

[In fact one way to put the view I have just described is to say that having some part of you that represents and decides on behalf of the whole of you is what having a will is all about. The business of the will is to be the source of actions, and part of what makes an action *an action* is that it can be ascribed to its agent as a whole, not just to one of the forces, or the sum of the forces, within the agent. But since there are multiple motivational forces, both within an individual person and within a state, this cannot happen unless the business of controlling movement is assigned to some faculty whose function it is to decide on behalf of the whole.]

As I said, I think there is much to be said for this proceduralist view (at least from the point of view of the metaphysics of collective action), but in the present context it has a cost. We cannot in any straightforward way ask whether the government represents the general will, because until there is a government – that is, an instituted method of making collective decisions – there simply is no general will. There may be a majority opinion, of course, but insofar as that is all it is, it is not a will, but just a collection of forces. And if it determines the way the body politic moves, in the absence of a unanimous decision to accept majority rule as our method of collective decision-making, it is just an instance of the tyranny of the majority. Indeed the proceduralist view calls into question an idea that Simmons wants to defend, which is that the state pre-exists the government. In a footnote Simmons remarks:

States on this model... are logically prior to and can exist without governments... This view of states is frequently denied, usually because it is observed that states require governments in order to control territories and populations, enter into relations with other states, and, more generally, to fulfill the legal definition of states. But government is clearly *not* necessary to the existence of a state. If it were, then states would cease to exist whenever, say, their governments were destroyed by unjust foreign invasion.” (fn. 9, p. 8)

The view I am describing gives a more basic reason for denying that states can exist without governments than the opponents Simmons cites here do, although it is one that is implied by what they say. A state cannot exist without a government because a state is an agent and its government is its will, and an agent cannot exist without a will.

The scarier cost of the proceduralist view, of course, is the implication that the government cannot *fail* to represent the will of its people. On the proceduralist view, the will of the people just *is* what its government says it is. At least so long as the present regime does not in any gross and obvious ways violate the rules of the institutions of government, the people’s will is what the government says. It doesn’t matter if the vast majority of the people believe that what the government does is wrong; the majority does not represent the will of the people unless the government is a pure democracy – which in the case in question, of course it is not, or the problem would never have arisen.

So we seem to have two options. On the one hand, we have the substantive view, According to this view, we may identify the will of the people in one of two ways, either one, as far as I can tell, by fiat. We may identify it with something like a *Zeitgeist*, which in turn is either a romantic fiction or the majority in disguise. Or we may identify it with the majority, undisguised, on the basis of Locke’s analogy with a body being moved by the balance of forces within it. I have suggested that this analogy captures exactly our notion of what it means to *lack* a will, and also that it provides no answer to our worries about the tyranny of the majority. On the other hand, we have the proceduralist view, which identifies

the will of the people with the dictates of its collective decision-making procedures – in other words, with the dictates of its government. But this view does not seem to allow us to say that the government fails to represent the will of the people. Both options clearly have problems. So are there any other options, is there something in between?

Simmons himself gestures in the direction of such an option in two of the things he says. First, he says that a government cannot be taken to represent the people as a whole unless it represents *all* of the people. He says:

“...both the institutions and the administrators of government can fail to qualify as legitimate not only by failing utterly to adequately represent the body of the people, but also by successfully representing one part of the people – even the majority part – without doing likewise for the rest.” (p. 11)

Second, he says that some of the substantive criteria that people have proposed for legitimacy – that a state cannot be legitimate unless it is acceptably just, democratic, or respectful of human rights – are actually just proxies or rules of thumb for identifying cases that satisfy “the prior and more fundamental idea of a government representing or speaking for its people.”

Simmons, if I have him right, understands the matter this way: we may take it as being roughly true that a government speaks for its people if *they* take it to do so, and, as he says:

“we quite reasonably find it very difficult ... to believe that the victims of injustice, human rights violations, or systematic disenfranchisement could in fact accept their government as representing or speaking for *them*.” (p. 12)

I like Simmons’s idea that we should take respect for human rights and democratic institutions as proxies for authentic representation, but this way of understanding the force of the idea is a little too empirical for me. I think the importance of Simmons’s idea here is this: that we cannot take a government to represent the people as a whole unless we can

plausibly take it to represent *each* of them individually. Making this a requirement, I believe, provides the only possible grounds for an answer to the worry about the tyranny of the majority. As I would prefer think of this criterion, it is best understood as imposing a helpful limitation on the *proceduralist* account of the will of the people. In other words, we will continue to say that the dictate of the government constitutes the will of the people, but we will now add that this holds only if it can plausibly be held to represent the will of each person, each citizen, and not just – as it does almost trivially – the will of the collective.

What are the criteria for a government representing each of its citizens? Here again we can take either a more substantive or a more proceduralist route. Respect for human rights, especially the rights of speech and thought, and the use of democratic institutions, represent the proceduralist route: here the idea is that each person is represented because he or she has some way of influencing the political process. Justice, at least if it is understood along Rawlsian lines, represents the substantive route; here the idea is that society is actually organized according to principles that each citizen – not all of them collectively, but each individually – could rationally agree to.

Of course either way this lands me just where Simmons landed – with a very idealistic conception of moral legitimacy, for which we apparently need to seek “second bests” for practical purposes. Procedurally, we might take the second best for the democratic process to be something along the lines of the “consultation hierarchy” that Rawls proposes as one of the criteria for a decent hierarchical society in *The Law of Peoples*. Substantively, we might take the second best option to Rawlsian justice more generally to be a society organized according to principles that are intended to benefit, not just all of the citizens considered as a collectivity but each of them individually, at least according to that society’s conception of the good. In other words, here, as in the case of dealing with mental incompetents, we would take the attempt to govern in each individual citizen’s *interests* as a rough substitute for the attempt to govern in accordance with each citizen’s will.

Of course all the difficulties will remain with attempts to apply these second best options in any helpful way. For instance, does a Fundamentalist Islamic state attempt to govern in

accordance with the interests of its female citizens, considered in the light of that state's conception of the good? Or is it a morally illegitimate state that only governs in the interests of the males? These questions, so far as I can see, remain as hard to decide as ever.