Fairness, Political Obligation, and the Justificatory Gap

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Abstract

The moral principle of fairness or fair play is widely believed to be a solid ground for political obligation, i.e., a general *prima facie* moral duty to obey the law *qua* law. In this article, I advance a new and, more importantly, principled objection to fairness theories of political obligation by revealing and defending a justificatory gap between the principle of fairness and political obligation: the duty of fairness on its own is incapable of preempting the citizen's liberty to reciprocate fairly in ways *other* than obeying the law. This justificatory gap is unaffected by the ongoing debate between the voluntarist and the nonvoluntarist accounts of fairness, and it cannot be bridged by the two arguments that are perhaps implicit in Klosko's account, namely the presumptive benefits argument and the democratic procedure argument.

Keywords

Klosko – presumptive benefits – political obligation – Simmons – the duty of fairness

The moral principle of fairness or fair play is widely believed to be a (if not the only) solid ground for political obligation, i.e., a general *prima facie* moral duty to obey the law because it is the law.1 As commentators have already noted, two

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alleged attractions are common to all fairness theories of political obligation. First, the principle of fairness “obviates the need for deliberate undertaking of obligation,” for it imposes on those who directly benefit from the nonexcludable goods produced by a joint venture or cooperative enterprise a duty to contribute their fair share. A fairness theory of political obligation, therefore, could bypass a problem that plagues consent theory of political obligation—namely that no modern state was or is founded on the consent of its subjects. Second, because the principle of fairness “grounds political obligation not in any individual act, such as the expression of consent, but in the character of the body politic itself [i.e., the state as a large-scale cooperative enterprise],” it automatically grounds a general duty to obey the law.

The principle of fairness, however, is not without criticisms. Following Nozick and his famous case of the “public address system,” one might reject the principle altogether by arguing that a cooperative enterprise can only bind its participants or “insiders,” as opposed to mere beneficiaries or “outsiders,” yet the obligation participants incur is grounded in their consent to the enterprise. Alternatively, one might concede that benefiting from a cooperative enterprise does generate a duty to reciprocate, but argue that this duty is nothing more than a duty of gratitude; in other words, there is no such thing as a duty of fairness. While Simmons attempts to save the principle of fairness

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3 The nonexcludability of the goods serves as a necessary condition for the duty of fairness, for if outsiders can be and are excluded from benefiting, then their only way to benefit is by becoming insiders, that is, by joining the scheme. In that case, however, their duty to pay back is based on consent. The nonexcludability qualification applies throughout this article, such that all cooperative benefits discussed later are nonexcludable.

4 Dagger, Civic Virtues, p. 69. For a similar point, also see Simmons, Justification and Legitimacy, p. 10.


6 Simmons suggests this Nozickean objection to the principle of fairness. See Simmons, Justification and Legitimacy, p. 15.

7 For this line of argument, see Daniel McDermott, “Fair-Play Obligations,” Political Studies 52, no. 2 (2004): 216–32. McDermott’s argument, however, seems to overlook the subtle difference between the duty of gratitude and the duty of fairness. The difference, as Simmons
from collapsing into the principle of consent or into the duty of gratitude, he also criticizes the principle of fairness as overreaching, insofar as it imputes obligation to mere beneficiaries. According to Simmons, a beneficiary is bound by the duty of fairness only if he or she accepts or voluntarily takes benefits produced by the enterprise. On the other hand, a beneficiary who merely receives the benefits is not obligated. This is Simmons’ voluntarist account of fairness, which is to be contrasted with the nonvoluntarist account that denies voluntary acceptance as a necessary condition for the duty of fairness.

According to Simmons, however, the voluntarist account of fairness will not succeed in justifying political obligation. Simmons’ skepticism is based on his claim that most citizens of a state have not accepted the benefits produced by the state either because “they have not taken the benefits (with accompanying burdens) willingly,” or because “they do not regard the benefits of government as the products of a cooperative scheme.”

Nevertheless, Simmons’ way of rejecting the fairness theory of political obligation is subject to serious disputes. Advocates of fairness theories of political obligation have made two types of responses to Simmons’ skepticism (though Simmons also replies to these critics and maintains his position unchanged). Some people continue to defend nonvoluntarist accounts of fairness, e.g., Klosko argues that when the public goods in question are undeniable and presumptively beneficial, one has a duty to do one’s fair share even if one merely receives them. Others like Dagger and Song accept Simmons’ voluntarist account of fairness, but challenge Simmons’ claim about the cooperative nature of political societies.

rightly observes, is that a beneficiary owes a duty of gratitude to the benefactors only if they provide benefits in good faith, that is, not for reasons of self-interest, whereas a beneficiary has a duty of fairness to reciprocate even if the benefactors (that is, the cooperators) provide benefits for reasons of self-interest. See A. John Simmons, Moral Principles and Political Obligations (Princeton: Princeton University Press, 1979), pp. 172–74.

Simmons, Justification and Legitimacy, pp. 18–20.

Advocates of the nonvoluntarist account often invoke unavoidable public goods to show that voluntary acceptance is impossible. For instance, Klosko observes that public goods such as national defense are not only non-excludable but also unavoidable in the sense that one “does not have the opportunity not to receive them.” See Klosko, The Principle of Fairness and Political Obligation, p. 36.

Simmons, Justification and Legitimacy, p. 25.

Ibid., pp. 27–42.

See Klosko, The Principle of Fairness and Political Obligation, Chapter 2.

In this article, I join with Simmons in criticizing fairness theories of political obligation. But my critique proceeds along a different path than Simmons'. In the first section, I distinguish between reciprocation and cooperation (narrowly conceived, i.e., cooperation as rule-following) and argue that there is a justificatory gap between the duty of fairness and political obligation, for insofar as fairness only demands that a beneficiary reciprocates, it cannot preempt the citizen's liberty to reciprocate fairly in ways other than obeying the law. I then defend the distinction between reciprocation and cooperation within the nonvoluntarist account of fairness against certain objections. In the second section, I argue that the distinction between reciprocation and cooperation also proves fatal for the voluntarist account of fairness. Thus, the justificatory gap cannot be bridged. In light of this justificatory gap, in the third section I re-examine fairness theories of political obligation, showing that they either overlook the justificatory gap or try to get around it by (mistakenly) taking fairness as demanding a beneficiary’s equal submission to the rules of a cooperative scheme. In addition, I anticipate and refute two possible arguments—the presumptive benefits argument and the democratic procedure argument—implied in Klosko's fairness theory of political obligation that might be expected to fill the justificatory gap.

1 Fairness and Political Obligation: The Justificatory Gap

As I have indicated, contemporary literature on fairness and fairness theories of political obligation largely revolves around the dispute between voluntarist and nonvoluntarist accounts of fairness. The dispute, we should recall, is about whether a beneficiary (as opposed to a participant or cooperator) is bound by the duty of fairness upon the receipt of benefits from a cooperative scheme, provided that other conditions necessary for the duty of fairness are met. The importance of the rivalry of the two accounts of fairness might lead someone to believe that the question of whether one is obligated to reciprocate when one merely receives cooperative benefits is the only decisive issue in fairness theories of political obligation, as if once the question were answered positively, then a citizen's political obligation flows naturally, if not directly, from his or her duty of fair contribution, provided that the state can be conceived as a cooperative scheme.14

14 My argument proceeds as if this claim is true, for as I have indicated I do not intend to engage in the dispute concerning the cooperative nature of the state.
But this belief seems to be unwarranted. To establish whether one has a duty to obey, fairness theorists need to show not only that one bears a duty to contribute one’s fair share upon the receipt or acceptance of benefits from the state, but also that one has a duty to contribute precisely what the state commands that one contribute. While the first issue concerns the question of why one does not have a liberty not to contribute, the second issue concerns the question of why one does not have a liberty to contribute fairly in ways other than obeying the law. In light of the difference between the two liberties, political obligation cannot follow directly from the duty of fairness. There is, therefore, a gap between the duty of fairness and the justification of political obligation, as the duty of fairness in its own right does not preempt one’s liberty to contribute fairly in ways other than obeying the law. This is what I call the justificatory gap.

One may, however, point out that the justificatory gap rides on a vague account of “fair share.” For instance, we might ask: if someone who receives benefits from a cooperative scheme has a duty of fairness to reciprocate or contribute, exactly what is that person’s fair share? Might not a duty to do one’s fair share require submitting to the governing rules of the cooperative scheme just like cooperators do, provided that the rules divide benefits and burdens fairly? Indeed, one may be tempted to say that interpreting the fair share as equal submission to the rules is intuitively appealing, for we often praise players of a game for “playing fairly” if they follow the rules of that game strictly.

I don’t think the principle of fairness requires a beneficiary’s submission to the rules of a cooperative scheme. (The argument from game playing, incidentally, does not work: insofar as those players typically join the game voluntarily, their duty to submit to the rules is ultimately derived from their consent to play the game, not from the principle of fairness.) Let us consider a case where on the nonvoluntarist account the duty of fairness arises:

In a community where John lives, there is a cooperative scheme to clean communal walkways every Saturday afternoon. The scheme replaces the original voluntary cleaning team, which had difficulty attracting enough neighbors. By contrast, the scheme runs effectively as it covers the vast majority of neighbors and distributes the workload fairly to them. While

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15 To my knowledge, Kent Greenawalt does explore the possibility of “meeting the duty of fair play by noncompliance.” Nevertheless, he seems to underestimate the force of this gap, concluding only that this gap together with other things make the scope of the duty of fair play “considerably more limited than the duty to obey all laws on all occasions.” See Kent Greenawalt, Conflicts of Law and Morality (New York: Oxford University Press, 1987), p. 136, 140.
John benefits from tidy communal walkways (he jogs quite often) as much as his neighbors, he is not a participant of the scheme as he explicitly refuses to join the scheme.

Assuming the validity of nonvoluntarist accounts of fairness, we could say that John acts unfairly. But how can John avoid acting unfairly? One natural way for John is to join the scheme and do the workload as his neighbors do. But is it the only way available for John to act fairly? Not really. Let us complicate the case a little bit:

John refuses to participate in the scheme because he loves making cakes and Saturday is the only time available for him to try new recipes. But soon after the scheme starts to run, John realizes that he has been free riding. He then comes up with the idea that he should make more cakes on Saturday afternoon and put them in the community center for his participating neighbors to enjoy. It turns out that his neighbors love his cakes very much.

I believe it is safe to say that assuming that the time and costs John invests are as burdensome as each neighbor’s workload, John is no longer acting unfairly when he refuses to participate in the cleaning scheme but instead makes cakes for his neighbors. John acts fairly because he “pays” his neighbors for the benefits received from the scheme. The principle of fairness, after all, is simply that “we owe a fair return for services rendered to those who supply the services.”16 The moral basis of the principle of fairness, as Klosko quotes from David Lyons, is “the just distribution of benefits and burdens.”17

Nevertheless, one might concede that John is acting fairly in terms of the distribution of benefits and burdens, yet still object that John is acting unfairly in that by making cakes rather than cleaning paths, John is treating himself differently from his neighbors; and this special treatment involves a breach of a certain form of impartiality that constitutes unfairness.18 But for the

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17 Klosko, *The Principle of Fairness and Political Obligation*, p. 34.
18 According to the account of fairness Garrett Cullity offers, fairness is an appropriate form of impartiality required to accomplish a goal that all things considered ought to be done. But he is content to only propose a formal account, offering “no simple and general unitary explanation of when and why different forms of impartiality are appropriate.” See Cullity, “Public Goods and Fairness,” p. 5.
objection to succeed, it must explain exactly what form of impartiality that is and why such a form of impartiality serves as the moral basis of fairness. If the objection assumes that equal submission on the part of John and other neighbors is the appropriate impartiality in question, then it simply dodges the question as to why fairness demands John’s submission. Alternatively, in light of the fact that John and his neighbors are all equal members of the community, the objection may argue that the membership implies that the proper impartiality between John and his neighbors is the equal submission to the rules of the cleaning scheme.19 But since the membership is often based on the fact that the people live in that community, there is little reason to assume this impartiality, especially given that John refuses to join the scheme; he is only an outsider to that scheme, as opposed to his participating neighbors, whose consent binds them to the scheme.

It might be objected that the above case nonetheless fails to reveal the difference between reciprocation and cooperation. While John acts fairly by offering his cakes, the objection continues, the fairness of his act is due to the fact that his participating neighbors like the cakes, that is, they accept the form of reciprocation John chooses. But once his neighbors accept this form of reciprocation, John’s effort in baking cakes can be taken as a form of cooperation as rule-following (rather than mere reciprocation), for now the rule of the walkway-cleaning scheme becomes something like: everyone except John cleans the walkway; John bakes cakes. If, however, John’s neighbors do not accept his cakes (perhaps he is a poor baker) or other forms of reciprocation as a suitable substitute for wielding a broom, reciprocity does require John to cooperate by cleaning the walkway. Either way, the distinction between cooperation and reciprocation collapses, and hence the justificatory gap disappears.

In reply, we should first note that central to the above criticism of the justificatory gap is the implicit claim that what counts as a “fair return” should be determined by the cooperators in light of their aims and desires. But even if that were true, what counts as a “benefit” should then, for the same reason, be determined by the aims and desires of those (assumed) beneficiaries. In other words, it cannot be the case that the aims and desires of the cooperators determine both: what a benefit is (and for whom), and what a fair return is. Otherwise, a group could unjustly dominate other people by imposing on them a “cooperative” scheme that is beneficial only to the group (and such an implication would, particularly in the context of an account of “fairness,”

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19 Cullity seems to indicate that the impartiality he has in mind is the impartiality among members of a group: “In doing what the group needs its members to do, I am doing what is required of me simply as a member of the group.” See ibid., p. 10, emphasis in the original.
reduce the objection to absurdity). But since what counts as a benefit should be determined by those assumed beneficiaries, it is rather easy for them to deny that the scheme is beneficial (unless they willingly accept or pursue the benefit). Consider again the case of the walkway-cleaning scheme: if the aims and desires of John's neighbors can determine that John must pick up a broom on Saturday afternoon, then the aims and desires of John can determine that a clean communal walkway is not of benefit to him, or that the benefit is disproportionately small compared to the loss he incurs by giving up making cakes. But this renders the whole scheme not beneficial to John at all, and consequently John does not incur a duty of fairness by jogging on the communal walkway. As should be clear by now, the central claim on which the attack on the justificatory gap is built does not come without a cost; it undercuts the nonvoluntarist account of fairness, for the assumed beneficiaries can legitimately reply that according to their aims and desires, a cooperative scheme providing a certain nonexcludable and unavoidable good is not beneficial to them at all.

One may point out that my refutation of the claim loses its force when the goods in question cannot be reasonably denied as beneficial, i.e., goods with considerable values or goods that are indispensable for life. The problem with the reply is that invoking the notion of “reasonableness” actually undermines the central claim. If by the force of “reasonableness,” the right to determine whether some goods are indeed beneficial is taken out of an assumed beneficiary’s hand, then by the same token, the notion of “reasonableness” also greatly undermines the cooperators’ right to determine, according to their aims and desires, what a fair return should be. If John invests a comparably fair amount of time and money, and offers reasonably nice cakes instead of wielding a broom, on what ground could one maintain that it is still up to his participating neighbors to decide the proper form of a fair return?

It thus seems safe to conclude that within the nonvoluntarist account of fairness, a beneficiary is not required by the duty of fairness to cooperate (i.e., to follow the rule of the scheme), provided that his or her reciprocation is reasonably fair and beneficial. Consequently, the justificatory gap between the duty of fairness and political obligation remains.

2 The Voluntarist Account of Fairness Cannot Fill the Justificatory Gap Either

At this point, one may wonder whether the voluntarist account of fairness gains an advantage over the nonvoluntarist account in demanding a beneficiary's
submission to the cooperative scheme. This possibility is worth exploring, for it might be the case that one’s (voluntary) acceptance of cooperative benefits ties one to the cooperative scheme in a way that requires one to submit to the rules like other cooperators. Let us, therefore, consider a case suggested by Simmons where the duty of fairness arises due to one’s acceptance of benefits:

There is also a problem with the neighborhood’s water supply ... A neighborhood meeting is called, at which a majority votes to dig a public well near the center of the neighborhood, to be paid for and maintained by the members of the neighborhood. Some of the members clearly give their consent to the proposed scheme. Others, who vote against the proposal, do not. Jones, in particular, announces angrily that he wants to have nothing to do with the scheme ... But in spite of his opposition, the well is dug, paid for, and maintained by the other members of the neighborhood. ... Jones begins to be envious of his neighbors, who go to the well daily. So he goes to the well every night and, knowing that the water will never be missed, takes some home with him for the next day. It seems clear to me that Jones is a perfect example of a “free rider.” And it also seems clear that, having accepted benefits from the scheme ... he has an obligation to do his part within it.\(^{20}\)

There is little doubt, as Simmons points out, that Jones has a duty to do his part, and that the duty is not based on Jones’ consent to the scheme. But how could Jones do his part? By saying “to do his part within it,” Simmons seems to imply that Jones has a duty to bear the burdens assigned by the rules (e.g., paying 5 dollars per month for the maintenance) just as his neighbors do. Indeed, he even continues to say that “Jones has made himself a participant in the scheme.”\(^{21}\) In other words, Simmons seems to believe that while the acceptance of cooperative benefits differs from the consent to the cooperative scheme (hence the principle of fairness does not collapse into the principle of consent), they nevertheless bind agents in the same way so that Jones, like his neighbors, also becomes a participant, and is thus subject to the rules of that scheme.

I think Simmons is mistaken to regard the acceptance of cooperative benefits and the consent to the cooperative scheme as having the same normative effect. By taking water from the well, Jones incurs a duty of fairness, which

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21 Ibid., p. 17.
requires Jones to pay his neighbors for the water they produce by cooperation. But the fact that his neighbors produce water by cooperation does not seem to imply that Jones’ payment must also be done via cooperation. If Jones is a nutritionist, for instance, he could pay back by offering free lectures on nutrition and health to his neighbors. Even if Jones has no particular expertise, he can still reciprocate in ways other than paying 5 dollars per month, e.g., helping to clean the community center where neighbors hold all kinds of activities. In short, although Jones is bound to reciprocate to participants (his neighbors) of the scheme, he is not bound as a participant of that scheme.

The validity of my argument, however, might be thought to be case-dependent. In other words, one could acknowledge that in the case of the well, Jones’ deliberate taking of water does not bind him in the same way as his neighbors’ consent binds them, but argue that perhaps in a different case one’s acceptance of benefits binds one just as consent does. Consider the following case suggested by Garrett Cullity:

Public transport in my town is efficiently run on an “honor” system, which places the onus on passengers to buy a ticket before traveling and to cancel it in a machine on any vehicle they use. I ride without paying.22

One may take it to be a clear case where I incur a duty of fairness by riding public transport, but fail to discharge it.23 Moreover, one may argue that I act unfairly without paying even if I happen to regularly volunteer to maintain the buses on the weekend, and my volunteer work creates more value than what I would pay. I act unfairly, we might continue, because if residents of the town all take their liberties to decide how they contribute (e.g., Tom rides a couple of times without paying using the excuse that he once offered a gallon of oil to the operational center), then it is impossible to guarantee the proper functioning of public transport. It is, therefore, tempting to conclude that in this case, to the extent that my acceptance of benefits (riding) requires me to submit to the rule of public transport (paying), acceptance has the same binding force as consent.

As plausible as the above argument may appear to be, it is on shaky ground. The problem with this argument is that it misconceives the case as if it were a case where the principle of fairness is at play. The misconception is largely

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23 One might argue for the point as follows: since the system runs on the “honor” system, the good of public transport is nonexcludable, and since I can easily avoid taking public transport, the good is deniable. So by riding it I deliberately take the benefit, and therefore have a duty of fairness to do my part, that is, buy my ticket.
caused, I suspect, by the “honor” system of public transport, which leads one to mistakenly believe that the public transport in question confers nonexcludable benefits. But as Cullity points out, this confuses the openness of a benefit-conferring scheme with the nonexcludability of the benefits or service. Let me explain. There are open benefit-conferring schemes that provide excludable benefits. A restaurant is a clear example of this type of scheme: it is open to all potential clients, but it manages to provide food only to clients who give orders, not anyone else (e.g., those who live next to the restaurant or who happen to be standing outside the restaurant). Note also that the excludability of the restaurant’s service does not change even if the restaurant also runs on an honor system, i.e., no waiter comes to settle the bill, clients can simply put money in a box right beside the door of the restaurant. (If anything, the honor system only makes the restaurant more open, because those who cannot afford to eat there might come anyway, figuring to take advantage of the honor system.)

Now what makes me a client of the restaurant? Clearly, consent, or more accurately, tacit consent: with the knowledge of the convention that one should pay for the meals in a restaurant, by ordering a meal I tacitly consent to be a client of that restaurant. If I take advantage of the honor system and pay only half of the price, I obviously act wrongly, but only to the owner of the restaurant, not to other clients. Moreover, the wrongness of my action is not explained by the principle of fairness, but by the principle of consent.

There are, on the other hand, closed benefit-conferring schemes that provide nonexcludable benefits. The above case of the neighborhood-sustained water well falls under this type of scheme: it is closed because the scheme is intended to only benefit participants who dig and maintain the well, and

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25 By saying this, I do not deny that the force of tacit consent is often overstretched, especially when the convention in question is elusive and highly controversial. But in the cases of the restaurant and public transport, it seems to me that there is little reason to worry about overstretching tacit consent, since both conventions — “pay your food” and “pay your fare” — stand with good reasons and are widely practiced.

26 In other words, I only harm the owner of the restaurant directly, although in the long run I may “harm” other potential clients by contributing to diminishing their choices if too many clients take advantage of that honor system and finally bring the restaurant to a close.

27 One might argue that perhaps the well is also intended to benefit other people including Jones. But if that is the case, the water Jones takes becomes a gift to him, and he at most owes a duty of gratitude, not a duty of fairness, to his participating neighbors.
perhaps because it is impossible or extremely costly to make the well exclusively available to those participating neighbors, the water turns out to be a non-excludable benefit that Jones can enjoy as well. If Jones, as a beneficiary, does not reciprocate, he acts wrongly by taking advantage of his participating neighbors; the wrongness of his behavior can be explained by the principle of fairness.

Now the question to be asked, obviously, is: does the case of public transport fall under the first type of scheme or the second type? I contend that public transport is an open benefit-conferring scheme providing excludable benefits. It is run either by a private company or by a special public sector office, under the supervision of a town council, to provide residents (and perhaps tourists) affordable transport. I and many other residents are clients who can buy that service; we are not participants (just think of tourists using the transport system) in the way that Jones' neighbors are participants of the well scheme. This point is especially clear if the public transport scheme puts a ticket seller on each bus. Replacing ticket sellers with the honor system, however, does not change the nature of the public transport scheme; it only makes the system more open, and changes the way people pay their fares. Consequently, it also changes the way residents become clients, namely by tacit rather than explicit consent. Thus, although I act wrongly by free riding, the wrongness of free riding is not due to the breach of the duty of fairness, but due to the breach of the "contract" I tacitly consent to. This also explains why I cannot justify my free riding by doing volunteer maintenance sometimes: the obligator in a contract is not free to exempt him- or herself from the obligation unless the obligee grants it.

While agreeing with me on the role of tacit consent in the case of public transport, one may contend that, contrary to my claim, the duty of fairness is also operative in that case. The argument might hold that in the case of public transport running on an honor system, by failing to pay I act unfairly to other riders, as my free riding forces the company to hire a ticket taker, and hence indirectly penalizes all riders. Thus, according to this argument, I act unfairly because my act, e.g., free riding, unjustifiably gives rise to costs to others.

This argument for being unfair to others, however, is overreaching. If a restaurant running on an honor system closes down because too many customers choose not to pay, could we reasonably say that customers who do not pay act unfairly to other customers who like the restaurant and always pay properly, for the latter are "penalized" by the former's act? Or, if a department store recruits more security guards after a burglary and to balance the costs of security also reduces the discount in the season's sale, could we reasonably say that the burglar acts unfairly to the customers of the store by "forcing" them to
accept a higher price? I don't think so. Similarly, the fact that my free riding gives rise to costs to other riders does not mean that I act unfairly to them.

It turns out, therefore, that the case of public transport arguably has nothing to do with the principle of fairness. The argument that voluntary acceptance of benefits in this case binds a beneficiary just as consent does blurs the fine boundary between the voluntarist account of fairness and tacit consent.28

If my preceding argument is sound, then the distinction between reciprocation and cooperation also proves fatal for the voluntarist account of fairness and the justificatory gap cannot be bridged.

While the justificatory gap between the duty of fairness and political obligation poses an enormous threat to all fairness theories of political obligation, it would be too hasty for us to conclude at this point that the justificatory gap thereby precludes any fairness theory of political obligation. It seems advisable to examine whether there is any fairness theory of political obligation that can successfully fill the gap. This is the task of the next section.

3 Re-Examining Fairness Theories of Political Obligation

In this section I examine fairness theories of political obligation in light of the justificatory gap identified and defended in the preceding section. The examination can be divided into two parts. First, I will briefly discuss some further prominent formulations of the duty of fairness that simply overlook the justificatory gap or try to get around it by (mistakenly) taking fairness as demanding a beneficiary's submission to the cooperative scheme. These examples demonstrate that the oversight of the justificatory gap has already occurred in the inception of the fairness account of political obligation and then contaminated, as it were, subsequent formulations of it. Then, second, I will focus exclusively on Klosko's theory. Although on its face his theory overlooks the justificatory gap, it may be thought to imply two arguments that could bridge the justificatory gap. As will be shown, however, neither of them succeeds.

Let me begin with Hart's account of fairness and his fairness theory of political obligation. In a widely cited paragraph, Hart states:

A third very important source of special rights and obligations ... is what may be termed mutuality of restrictions, and I think political obligation is

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28 Thus, despite Cullity's efforts to distinguish the openness of a benefit-conferring scheme from the non-excludability of the benefits, he nevertheless fails to dig deeper and therefore mistakenly takes this case to be a paradigmatic case of unfairness.
intelligible only if we see what precisely this is and how it differs from the other right-creating transactions (consent, promising) to which philosophers have assimilated it. In its bare schematic outline it is this: when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission.29

Hart’s account of fairness (what he calls “mutuality of restrictions”) is vague in specifying the exact conditions for the duty of fairness to arise. But Hart seems to be very clear about what fairness demands. As my emphasis in the quotation indicates, Hart views fairness as demanding a beneficiary’s equal submission to the governing rules of a cooperative scheme. With this conception of fairness in hand, it is hardly surprising that Hart moves smoothly from the principle of fairness to the justification of political obligation. But the problem is that there is little reason for us to accept Hart’s conception of fairness in the first place.

We can find the same problem with Rawls’ fairness theory of political obligation. Fairness in his view demands that “a person who has accepted the benefits of the scheme is bound ... to do his part and not to take advantage of the free benefits by not cooperating.”30 But it is hard to see why, for the beneficiary to avoid taking advantage of the free benefits, he has to cooperate instead of reciprocating in other ways.

The principle of fairness, as Dagger formulates it, requires that “anyone who takes part in and enjoys the benefits of a cooperative practice must contribute to the production of these benefits, even when his or her contribution is not necessary to their production.”31 Dagger further clarifies that “[m]erely receiving the benefits of a practice ... is not enough to place one under an obligation to comply with the rules of the practice. There must be some sense in which one takes part in the enterprise...”32 Insofar as Dagger takes the fairness principle to be only applicable to participants of, or those who take part in, a cooperative scheme, I could agree that the principle of fairness does demand participants’ equal submission to the rules of a cooperative scheme. But since the paradigmatic way of taking part in a cooperative scheme is to consent to join, Dagger owes us an explanation as to why his account of the fairness principle is not

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29 Hart, “Are There Any Natural Rights?” p. 185, my emphasis.
31 Dagger, Civic Virtues, p. 68, my emphasis.
32 Ibid., p. 70, my emphasis.
merely a reformulation of the principle of consent. Dagger’s latter argument suggests that what he has in mind is a voluntarist account of fairness, although he softens Simmons’ criteria of voluntary acceptance to the extent that if one accepts cooperative benefits “not under constraints or duress,” one’s acceptance is voluntary. But if voluntary acceptance is the right way to make sense of “taking part in,” then Dagger can hardly explain, as my argument in the last section shows, why Jones, in deliberately taking the water from the neighborhood-sustained well, acts unfairly when he reciprocates in ways other than paying 5 dollars per month.

I will conclude my survey here, though it can be easily extended by examining other fairness theories of political obligation. In the remaining part of this section, I will examine Klosko’s theory alone, which is perhaps the most complicated fairness theory of political obligation.

Before I proceed, it is necessary to point out that Klosko has noted and dealt with a problem that, at first glance, appears quite similar to the problem of the justificatory gap I have in mind. The problem, according to Klosko, is that “[i]t remains possible that Green could have an obligation to cooperate with the members of Scheme X, but that this could be discharged in a manner that he rather than the scheme members should determine.” Nevertheless, I believe that the problem of the justificatory gap remains distinct. This is because the problem Klosko is concerned with is triggered by the indeterminacy in deciding just how much Green benefits from the scheme X, so that “in practical terms, there is no alternative but to allow” him to determine the burden he would like to bear. Klosko believes that this indeterminacy can be overcome by presumptive benefits: for goods like air or national defense, Green benefits as much as others. With regard to the justificatory gap, however, I can just assume that Green benefits as much as members of Scheme X, but nevertheless argue that this does not therefore guarantee that Green should submit to the scheme-members’ decision.

I suspect that Klosko may concede the justificatory gap, yet still argue that his theory implies two arguments, namely the presumptive benefits argument and the democratic procedure argument, that individually or together could overcome the justificatory gap. The gist of this reply is roughly: even if an

33 Ibid., p. 75.
36 Klosko further explains why Green should submit to the rules when presumptive benefits are involved. See ibid., pp. 64–6. His argument will be carefully examined shortly.
ordinary cooperative scheme cannot, on the ground of fairness, demand that a beneficiary submit to the scheme, a reasonably just state (also conceived of as a cooperative scheme) nevertheless stands out in two respects: it provides its citizens with presumptive public goods, and its governing rules (that is, laws) are democratically made; and these two features individually or together create the duty of fairness, which requires citizens’ obedience to the law. Let us therefore look at these two arguments in more detail.

For Klosko, “the principle of fairness is intended to show that the noncooperators [who also receive the cooperative benefits] also have obligations to cooperate.”37 Klosko attempts to show that provided that other conditions are met, the duty of fairness does arise when presumptive benefits or goods are involved. According to Klosko, presumptively beneficial goods are those goods that are indispensable for an acceptable life.38 Since presumptive goods are indispensable, no one can afford to lose cooperative schemes that produce these goods. In Klosko’s view, we can answer Nozick’s critique by invoking presumptive goods because Nozick’s public address case only involves a discretionary good (e.g., the benefit of listening to music), which cannot override a beneficiary’s liberty not to cooperate (the beneficiary can live without listening to the address system); by contrast, the significance of presumptive goods could override a beneficiary’s liberty not to cooperate, and thus give rise to the duty of fairness.39

This is Klosko’s original argument, which obviously addresses the question as to whether the duty of fairness arises if the goods in question are presumptively beneficial.

As I have noted, however, here I am not concerned with how fairness arises, but with what fairness demands. Thus, the question to be asked here is: how would Klosko utilize the notion of presumptive benefits to demonstrate that fairness demands a beneficiary’s equal submission to the rules of a cooperative scheme?

One natural way for him is to argue that the magnitude of benefits somehow makes a difference so that the significance of presumptive benefits not only overrides a beneficiary’s liberty not to reciprocate, but also overrides his or her liberty to reciprocate in any way he or she sees fit. To consider the plausibility of this line of argument, we can revise the case of the neighborhood-sustained well a little, making the well the only available water source for Jones and his neighbors. Now the well scheme provides Jones with a presumptive good.

37 Klosko, The Principle of Fairness and Political Obligation, p. 34.
38 Ibid., p. 39.
39 Ibid., p. 44.
But is Jones *therefore* morally required to pay 5 dollars per month after he takes water from the well? Realizing that the water is now more valuable to him, why cannot Jones, as a nutritionist, reciprocate by putting *more* energy in helping his neighbors to eat more nutritiously? It seems to me that as long as Jones' reciprocation is proportionate to the benefits he receives, he acts fairly.

Klosko, however, might take a different route. He might argue that what makes presumptive benefits special is the fact that no one can afford to lose a cooperative scheme that produces presumptive benefits.40 Now if noncooperating beneficiaries can be granted the liberty to reciprocate freely, Klosko might continue, so can cooperators; but if everyone exercised this liberty, the cooperative scheme would inevitably collapse. Since no one can live without presumptive goods, Klosko could conclude, noncooperators also have a duty to cooperate by submitting to the rule.41

Note, however, that this line of argument implicitly makes the assumption that the cooperators and noncooperators have the same normative status in relation to the cooperative scheme such that if noncooperators have a liberty to reciprocate freely, the same liberty can also be granted to cooperators. But this is apparently not true in the case of the neighborhood-sustained well, where Jones differs from his neighbors in that he never consents to the scheme. Unlike Jones, his neighbors, bound by their consent, do not have the liberty to reciprocate in whatever ways they see fit.

Klosko might respond that the assumption in question may nevertheless hold in the case of the state, where subjects rarely consent to be cooperators. But we have little reason to accept this point unless Klosko answers the following question: in a reasonably just state, how can we distinguish noncooperators from cooperators in a way that this distinction, at the same time, does not generate a moral difference between noncooperators and cooperators that would *allow* the former not to cooperate? A possible answer is implied in Klosko's discussion of a state-like scheme X that provides national defense to all X-ites, where Pickerel, an individual X-ite, refuses to cooperate. Klosko comments:

> Because the benefits are indispensable, he [that is, Pickerel] could not say that he does not want them. Nor could he distinguish himself from the other X-ites because he has not sought the benefits out. Because of the nature of national defense, none of the X-ites have pursued them. The X-ites can be presumed to differ from Pickerel in their willing acceptance

40 Ibid., p. 43.
41 See his “Fixed Content of Political Obligations,” pp. 64–6.
of the scheme’s burden. But Pickerel’s unwillingness to participate is difficult to defend. Unless there is some morally relevant difference between Pickerel and the members of X, his refusal to cooperate must be interpreted ... as a clear instance of free riding.

Clearly, Klosko could take one’s “willing acceptance of the scheme’s burden” as a criterion to distinguish cooperators from noncooperators, but deny that the fact that Pickerel is unwilling to take the burden indicates any “morally relevant difference” between Pickerel and other X-ites. In the absence of any moral difference between Pickerel and other X-ites, Klosko could argue that Pickerel should not be the only one who gains the liberty to reciprocate freely: either all X-ites have such a liberty, or Pickerel must cooperate like other X-ites. The latter scenario is obviously preferable, as the former would eventually lead to the collapse of X.

The problem with this answer, however, is that since all X-ites but Pickerel in fact willingly accept the burdens assigned to them by the rules of X, it makes no sense to worry that if Pickerel can exercise a liberty to reciprocate freely, other X-ites would also exercise this liberty and therefore cause the collapse of X. Klosko might reply that my objection “fails to capture a crucial aspect of social cooperation,” which says:

The provision of presumptive public goods is not a one-time event. National defense is not provided for everyone once and for all. It results from ongoing, long-term patterns of cooperative activity.

Klosko could then argue that while at one particular moment other X-ites may willingly take the burdens assigned and therefore render Pickerel’s noncooperation harmless, there is no guarantee that they will continue to willingly cooperate later on; instead they will probably also take advantage of the fact that “general not universal compliance is necessary” for the well-functioning of X. Given the ongoing nature of X, Klosko would worry, quite reasonably,
that if Pickerel can exercise a liberty to reciprocate freely, there is nothing to stop other X-ites from doing the same thing, and there is nothing to stop X from collapsing.

At first sight, Klosko’s reply seems very compelling. Its persuasiveness, I suspect, is largely attributable to the structure of the prisoner’s dilemma it pictures: each X-ite has an incentive to take advantage of other X-ites’ cooperation so that he or she can exercise the liberty to reciprocate freely. So if all X-ites have this liberty, they will sooner or later all exercise it, which renders the coordination necessary for the provision of national defense impossible.

Unfortunately, the reply is not as persuasive as it appears to be. According to the reply, to overcome the prisoner’s dilemma that plagues the coordination of X-ites, all X-ites, including Pickerel, have to be put under the duty to cooperate such that they do not have the liberty to reciprocate freely in the first place. But this is not true. To overcome the prisoner’s dilemma, the state-like scheme X can simply employ coercive means to suppress X-ites’ incentive to not cooperate. Once coercion is factored in, there is no need, for the sake of successful cooperation, to put every X-ite under the duty to cooperate. In that case, it is not clear why Pickerel as a noncooperator has to bear the duty to cooperate.

Now Klosko may worry that without the X-ites’ moral duty to obey, X’s coercion of its subjects cannot be just. The reason for this concern is that if citizens do not have a moral duty to obey the law, then by the doctrine of correlative rights and duties, the state “has no right either to coerce its citizens into obeying the law or to punish its citizens when they break its law.”46 In reply, we should first note strictly speaking, the fact that there is no moral duty to obey the law logically implies only that the state has no claim-right to have the law obeyed. This claim-right is conceptually different from, and hence compatible with, the state’s liberty to coerce its citizens when they disobey, which means that the state is permitted to coerce citizens if they disobey. While it is a different matter whether the state is ultimately justified (all things considered) to coerce its citizens, the liberty to coerce does significantly lighten the moral burden the state has to bear in enforcing coercion. Given all the merits of a reasonably just state, it is very likely that even without political obligation, the state has a liberty to coerce its citizens if they disobey.47

47 Some might worry, as Senor does, that the lack of political obligation implies that “any person or organization that wanted to go into the punishing business could legitimately do so provided the punishment fit the crime committed.” See ibid., p. 265. Nevertheless, this worry is once again caused by conceptual confusion. The state’s claim-right to have
Second, as Simmons points out, “where a government acts without right, it need not act without moral justification.”\textsuperscript{48} If (1) there is no general political obligation, and hence (2) the only way to overcome the prisoners’ dilemma and maintain the effective provision of essential public goods is to coerce, it seems to me that coercion could be justified in most cases. So it is not clear to me why the state’s coercion of its citizens is deeply worrisome without political obligation.

Moreover, even if it were true that unless all X-ites have a duty to cooperate, the cooperation in X will not work (thus Pickerel’s duty to cooperate is taken to be a \textit{prerequisite} to successful cooperation), the reply would render Klosko’s whole argument question-begging. Recall that what Klosko has to demonstrate is that after Pickerel receives the benefits of national defense from the \textit{successful} cooperation of other X-ites, he is bound by the duty of fairness to cooperate as well. In the end, Klosko’s argument is no more that this: without Pickerel’s duty to cooperate, the scheme of X \textit{cannot successfully} work. But then how could X successfully work before Pickerel even has a duty to cooperate?\textsuperscript{49}

In light of these two critiques, it seems safe to conclude that the presumptive benefits argument ultimately fails to show why the principle of fairness demands that Pickerel, a noncooperator of state-like scheme X, cooperate. Similarly, we can conclude that the presumptive benefits argument does not succeed in overcoming the justificatory gap between the duty of fairness and political obligation.

Let us now turn to the democratic procedure argument. By invoking democratic procedures, Klosko’s original purpose is, again, to identify the right conditions for the duty of fairness to arise. According to Klosko, among other things, the duty of fairness holds only if “the costs and benefits of the schemes


\textsuperscript{49} It might be objected that for Klosko’s argument to stand, it is not necessary that the scheme \textit{already} works successfully. One could, for instance, contend that since the scheme \textit{will provide} a presumptive good \textit{only if} everybody cooperates, this overrides the liberty of people not to cooperate in the implementation and maintenance of the scheme. But in this scheme, if one refuses to cooperate, the scheme will not work and the good in question will not be produced; one therefore cannot take advantage of others. Of course, given the significance of the good, one may have a duty to produce it, but this duty is not the duty of avoiding free riding (that is, not the duty of fairness), but is equivalent to a natural duty.
in question are distributed fairly.”\textsuperscript{50} But the problem, as he rightly notes, is that people have reasonable disagreements on what the fair distribution of costs and benefits should be.\textsuperscript{51} A beneficiary of a cooperative scheme, therefore, may deny his duty to cooperate on the ground that the scheme distributes costs and benefits unfairly. To overcome this problem, Klosko suggests that “a fair decision procedure should be used to select a principle of fair distribution from the class of defensible principles,” and that “the clearest aspect [of procedural fairness] is that an acceptable procedure should be democratic, granting each individual the right to have his or her opinion considered.”\textsuperscript{52} In Klosko’s view, democratic decision procedures can solve the above-mentioned problem because if the decision is made democratically, then an individual should “give it precedence over her own view” (this is what he calls “the precedence rule”).\textsuperscript{53}

The concern of this article is, of course, different. Neither Jones in the case of the neighborhood-sustained well nor Pickerel in the state-like scheme X challenges the condition of “fair distribution of costs and benefits.” What they challenge, instead, is the claim that they are bound by the duty of fairness to cooperate as well (and I have shown that so far there is no reason to hold that they cannot discharge the duty of fairness by reciprocating in other ways as they see fit). Since Klosko’s concern with the condition of fair distribution of costs and benefits is off the table, the democratic procedure argument, which initially serves as a \textit{subordinate} term to that condition, loses its force. Thus, if Klosko intends to employ the democratic procedure argument to show that Pickerel has a duty to take the burdens assigned by the rule that was democratically made by other X-ites,\textsuperscript{54} he has to \textit{reconstruct} the democratic procedure argument. How would he do that?

One possible way for Klosko is to make the democratic procedure argument work \textit{independently}. He could, for instance, just stretch the precedence rule and apply it to the whole scheme of X (not merely to the decision procedure concerning the fair distribution of costs and benefits) by arguing that given democracy’s value,\textsuperscript{55} all governing rules of X should be grounded, directly or

\begin{itemize}
  \item \textsuperscript{50} Klosko, \textit{The Principle of Fairness and Political Obligation}, p. 34., p. 63.
  \item \textsuperscript{51} Ibid., p. 64.
  \item \textsuperscript{52} Ibid., p. 64, 65.
  \item \textsuperscript{53} Ibid., p. 72.
  \item \textsuperscript{54} I assume Klosko would leave the case of the neighborhood-sustained well aside and focus exclusively on Pickerel’s normative situation, which is obviously more pertinent to the issue of political obligation.
  \item \textsuperscript{55} In the literature there is quite a debate on the issue of whether democracy is intrinsically valuable or instrumentally valuable. Klosko seems to view democracy as intrinsically justified, for in explaining the precedence rule he claims that “[Democratic decision]
indirectly, on a democratic basis. In that case, any governing rule could have precedence over the liberties of any X-ite, including Pickerel, despite their disagreements. As appealing as this strategy may be, it does collateral but fatal damage to Klosko’s fairness theory of political obligation: since democracy (with its underlying moral weight) alone could ground Pickerel’s as well as other X-ites’ moral duty to submit to the rules of X, the principle of fairness becomes otiose. Indeed, a similar critique has been leveled against fairness theories of political obligation by David Lefkowitz, who argues for the democratic justification of political obligation.56

Alternatively, Klosko could reconstruct the democratic procedure argument differently so that it does not replace but work in tandem with the principle of fairness, e.g., with the presumptive benefits argument. Consider the following account: the principle of fairness helps to explain the bonds that connect Pickerel with the scheme X; democracy then fills the justificatory gap by determining which form of cooperation Pickerel should take. While this account seems appealing, it is not without problems. First, to adopt this account is to acknowledge that the principle of fairness alone is incapable of grounding political obligation, for democracy is assigned to fill the justificatory gap. This is not a weak objection, for it shows that the main problem with Klosko’s fairness theory of political obligation is not that it is not comprehensive enough, but that it lacks justificatory force to ground any political obligation at all. Second, it is hard to see how democracy can play the justificatory role assigned. Consider again the case of walkway-cleaning. Suppose that the rule (cleaning the communal walkway on Saturday afternoon) is democratically decided by his neighbors—does John therefore have a duty to clean the walkway now? I don’t think so. As I have argued, the mere receipt or acceptance of benefits does not create the bonds that make John a member of that scheme: John is bound to reciprocate to his participating neighbors, but he is not bound as a member of that scheme. Democracy thus has no binding force for John, an outsider.57 Admittedly, the case of state-like scheme X is radically different


57 Cullity also suggests an argument that explains why John would act unfairly if he refuses to do what has been democratically decided: “[John’s] failure to respect our collective decision is not free riding. But it has the more general characteristic (identified in
from the case of walkway-cleaning, but the difference is not whether there is democracy or not, but whether the scheme provides presumptive benefits or not. I have already argued, however, that Klosko’s presumptive benefits argument fails to bridge the justificatory gap.

4 Conclusion

In this article, I advanced a new and, more importantly, principled objection to fairness theories of political obligation by revealing and defending a justificatory gap between the principle of fairness and political obligation: the duty of fairness on its own is incapable of preempting the citizen’s liberty to reciprocate fairly in ways other than obeying the law. In particular, this justificatory gap is unaffected by the ongoing debate between the voluntarist and the non-voluntarist accounts of fairness, and it cannot be bridged by the two arguments that are perhaps implicit in Klosko’s account, namely the presumptive benefits argument and the democratic procedure argument.\footnote{For helpful comments on previous drafts of this article, I am grateful to Richard Dagger, George Klosko, and Uwe Steinhoff.}