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Kant and Fichte on Freedom and Citizens' Assent

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Abstract

Kant argues that civic freedom amounts to being subject to laws to which citizens could have assented. Fichte conversely argues that personal freedom is only fully realized in a state of civil freedom and that citizens are only legitimately ruled by laws to which they have explicitly agreed. This paper shows how their differing accounts are rooted in a deeper disagreement about the relationship between transcendental and empirical freedom and the role empirical citizens' assent (*Beistimmung*) plays in justifying civil legislation. The confrontation also shows why reading Kant as requiring citizens' active assent may be problematic.

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Each person must have said to all [muß zu allen gesagt haben]: I want to live in this place, and to possess this or that thing as my own; and all must have responded by saying: yes, you may live here and possess that thing (Fichte, *Foundations of Natural Right*, 3:152).¹

1. Introduction

Can an agent be rightfully governed by laws to which he has not explicitly assented?² While insisting on the separation of law and ethics, Kant and Fichte both ground their legal philosophy on individual freedom yet come to radically different answers: Kant says yes – external coercion without explicit assent can be compatible with individual freedom, whereas Fichte says no – a free agent must explicitly assent to being governed by a country's laws. Kant argues that the individual citizen need not assent directly to civil legislation since the autonomous legislating body is not the collective of citizens but the common will of the people, which is an a priori idea of reason. Fichte, on the other hand, believes that the individual must assent to joining the people and being governed by their laws. This paper shows how their differing accounts are rooted in a deeper disagreement about the relationship between

transcendental and empirical freedom and the role empirical citizens' assent plays in justifying civil legislation. The confrontation with Fichte's active assent requirement also shows why we should resist reading Kant as requiring citizens' active assent.

The core dilemma is how civil authorities may impose legal obligations on residents and citizens without compromising their freedom. How can external lawgiving be legitimately binding and have the authority to coerce in case of non-compliance? If free agents are conceived as legislators of the moral law in the kingdom of ends, a salient generalization would be that autonomous individuals should also be legislators in the civil state. While this is the conclusion that Fichte draws, Kant takes a different route. Both see the justification of the state in its ability to warrant civic freedom, but their inferences of the normative implications for law differ radically. Fichte's argument that proper self-determination requires explicitly assenting to the social contract presents a challenge to Kant's account of civic freedom. Considering this challenge lets us understand why Kant resists explicit assent but also shows how the Kantian framework might give rise to several accounts of civic self-determination.

The main difference consists in the modality of citizens' assent. For Fichte, citizens' assent needs to be actual and explicit as '*an act that takes place in the sensible world and is perceptible at some point in time and is made possible only through free self-determination*' (FNR, 3:152). According to the standard interpretation, Kant requires citizens' assent to the social contract and civil legislation to be *possible*.³ Yet this interpretation has recently been challenged by republican readings of Kant, which stress that Kant requires citizens' assent to be actual but implicit.⁴ This interpretation would bring Kant much closer to Fichte than the standard interpretation, and exploring possible problems for Fichte's account will help us see potential problems for an actual assent reading of Kant as well. To see the difference between the two types of actual assent, consider the difference between contractual and common law marriage: a traditional marriage contract is an example of actual, explicit assent to which both parties have agreed in an explicit act in front of witnesses and an officiant. A common law marriage is a case of actual but implicit assent; the extended choice to live in a certain way implies merely implicit assent. Our aim in the following is to understand how Kant and Fichte theorize the relationship between freedom and citizens' assent and whether an explicit assent requirement might fare better in safeguarding citizens' freedom. This paper shows how Fichte provides an alternative way of grounding civic freedom yet also highlights how Kant's own account avoids the pitfalls that Fichte's assent theory ultimately falls into.

Section 2 introduces the problem of justifying a coercive legal order while preserving individual freedom. Sections 3 and 4 introduce Kant's and then Fichte's accounts of individual freedom and civil legislation, section 5 discusses the role of explicit assent in Fichte's social contract, and section 6 discusses how this might present a challenge for Kant's account. To consider the problems connected with an explicit assent requirement, this section explores Fichte's later legal philosophy and shows how the requirement for unanimous explicit assent leads him to promote the formation of a culturally homogenous people.

2. Kant and Fichte on the justification of civil legislation

Confronting Kant's and Fichte's accounts of citizens' assent is particularly fruitful because Fichte understood himself as building on Kant's philosophy in the 1796 *Foundations of Natural Law*, which was published a year before Kant's *Doctrine of Right*. Fichte rethinks natural law and grounds it on the self-positing subject as a finite rational being. From this single principle, he then proceeds to deduce a detailed account of natural law that includes state law, property right, family law, economic redistribution, and international law. While Kant postulates the universal principle of right without a deduction, Fichte provides a transcendental deduction of the principles of right as necessary conditions of self-consciousness for any finite rational being. He argues that self-consciousness presupposes recognizing others as equally rational and that rightful relations to others are a necessary condition for mutual recognition. Kant, on the other hand, had provided his account of moral autonomy in the *Groundwork* and proceeded to rethink legal philosophy in his *Doctrine of Right*, whose first part on private law is also a doctrine of natural law although it remains preliminary in the absence of a civil authority.

Despite the differences in argument and justificative structure, the institutional implications of the two theories are quite similar. Fichte's actual assent requirement provides an active role for the citizen, but this role is limited to assenting to the social contract or leaving the civil state. Once assent is given, a second contract delegates the powers of government. Similarly, Kant argues that the united will of the people holds the legislative power yet argues that this power may be delegated to either an individual, a group, or an elected legislative body. Though neither of the two thinkers grants an official right to resistance, Fichte points out that citizens will hold governors responsible if they fail to represent the people's interests (*FNR*, 3:161).

The puzzle for individuals is how they can enforce their rights without imposing their own unilateral will on another unilateral will. Kant and Fichte share the insight that only a common will can possess the authority to enforce right through coercion without jeopardizing individual external freedom. Consequently, both argue that the creation of a common will is a necessary condition for right. Yet they differ on the means of creating this common will.

3. Kant on freedom and citizens' assent

Both Kant and Fichte put citizens' freedom at the core of justifying civil legislation. For Kant, this reflects the central role of freedom in his practical philosophy; acting freely and taking responsibility for one's actions are necessary conditions for both law and ethics as the two areas of morality. In ethics, individual freedom is conceived as moral autonomy, which stipulates that an agent is free if and only if he is obliged by self-imposed legislation. For this reason, any moral imperative must take the form of self-imposed legislation rather than heteronomous external coercion.⁵ Yet Kant does not ground his legal and political philosophy directly on moral autonomy but rather on external freedom of action, which ensures that a state may be ruled rightfully even if its citizens fail to act ethically.⁶ His legal philosophy defines right as hindering hindrances to the external exercise of freedom (*DR*, 6:231). Although Kant does not use moral autonomy to justify the principles of right, the notion of freedom as self-determination through legislation is still central to his thinking. We see this in the

one innate right, which is the right to freedom, and this freedom is guaranteed by joining an autonomous civil body.

Pauline Kleingeld has documented how Kant adopts the language of autonomy from political philosophy as seen in the *Feyerabend* student notes from Kant's lectures on natural law in 1784, in whose introduction Kant provides the first description of moral autonomy as self-legislation (Kleingeld 2018). As the political analogy suggests, autonomy entails that an individual gives himself laws not individually but rather as a member of a self-legislating collective. The individual legislates for himself and everyone else as expressed in the notion of a kingdom of ends in which all are legislators. In the political realm, this analogy translates into a test on legislation – the individual or collective delegated with legislative power ought to ask themselves whether the people could have agreed to this law. The idea of *possible* assent provides a check on civil legislation rather than a source of material positive law. Kant writes that the guiding norm behind a state's inner constitution is '*the state in idea*, as it ought to be in accordance with pure principles of right. This idea serves as a norm (*norma*) for every actual union into a commonwealth' (DR, 6:313). Kant argues that this ideal form follows from the a priori concepts of external right. Since these principles provide the general forms of laws, most material topics of legislation are presumably left to the discretion of the legislative authority using the a priori principles of right as a guideline.

Kant's solution to the challenge posed by guaranteeing individual freedom under civil laws consists in a people giving itself laws even if this does not mean that each individual citizen participates actively in the legislative process:

The legislative authority can belong only to the united will of the people. For since all right is to proceed from it, it *cannot* do anyone wrong by its law. Now when someone makes arrangements about another, it is always possible for him to do the other wrong; but he can never do wrong in what he decides upon with regard to himself (for *volenti non fit iniuria*). Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative. (DR, 6:313–14)

In the state, the people is autonomous since it gives laws to itself, and as a member of the state, the citizen partakes in this civil freedom in regard to external freedom since 'each decides the same thing for all and all for each', meaning that the law applies to everyone in the same manner and there are no distinctions made between individual citizens. For Kant, the people remain self-governing even if they delegates this legislative power to a group or an individual.

If the united will of the people holds legislative power, this raises the question of the relationship between the people and individual citizens. How can an individual be conceived as gaining civic freedom by joining a civil condition in which the state may force him to comply with its laws and punish infractions? Kant's solution is the union of wills in a contract: the people are formed through a social contract into which individuals in a state of nature can legitimately coerce one another (DR, 6:307). This contract forms the people as a metaphysical entity in a manner similar to the creation of a corporation: 'everyone (*omnes et singuli*) within a *people* gives up his external

freedom in order to take it up again immediately as a member of a commonwealth, that is, of a people considered as a state (*universi*)' (DR, 6:315–16). These individuals are 'united through their common interest in being in a rightful condition' (DR, 6:311). The social contract expresses the transformative nature of civil society; individuals give up their unregulated external freedom to receive civil freedom as a member of an autonomous state. Since Kant conceives of right as 'hindering of a hindrance of freedom' (DR, 6:231), he argues that members of a state have gained an assurance of their external freedom although they have given up the unregulated exercise of freedom exercised in the state of nature. The social contract allows individuals to gain civic freedom and live in a society in accordance with the commands of reason.

In *Perpetual Peace* (1795) and *Theory and Practice* (1793), Kant specifies that citizens' assent to all legislation must be *possible*: external freedom is 'to obey no other external law than those to which I could have given my consent' (TPP, 8:350). In *Theory and Practice*, possible consent is a negative criterion for justice: 'if a public law is so constituted that a whole people *could not possibly* give its consent to it (as, e.g. that a certain class of *subject* should have the hereditary privilege of *ruling rank*), it is unjust; but if it is *only possible* that a people could agree to it, it is a duty to consider the law just, even if the people is at present in such a situation or frame of mind that, if consulted about it, it would probably refuse its consent' (TP, 8:297). Onora O'Neill provides a clear explanation of the possible assent requirement:

Kant does not say here that the *hypothetical* consent of (idealised) rational beings constitutes the touchstone for justifying constitutions and laws, and thereby fixes the terms of the Social Contract. He suggests that it is *possible* agreement that is decisive. He appeals to *possible* universal consent, not to hypothetical consent. The criterion is apparently modal und not hypothetical. (O'Neill 2015, 177–78)

In contrast to this possible assent requirement, there are passages in Kant's *Doctrine of Right* that suggest an actual assent requirement. To define a citizen, Kant describes his lawful freedom as 'the attribute of obeying no other law than that to which he has given his assent [*Beistimmung*]' (DR, 6:314, translation amended). Michael Gregory has recently drawn attention to this passage to argue that in this work, 'Kant radically advocates for the unanimous agreement of subjects in the legislative will' (Gregory 2023, 125) – an interpretation that brings Kant much closer to the early Fichte than the possible assent interpretation of Kant's common will. The cited passage is crucial because it establishes that all citizens must assent unanimously to laws to preserve their freedom, but Kant specifies neither whether this assent should be explicit nor on which level of legislation assent is required. Citizens' assent might come into question on at least two levels: first, on the constitutive level where one agrees to live under a legislative order, as illustrated in the social contract. The idea of a contract emphasizes that wills are united for a particular purpose, which might require assent to constitute a united will. If the contract is an idea, this assent is either merely possible or implicit, but if the contract is actual, explicit assent may be required. Second, assent to legislation might also be required in the active legislative process. This would leave space for a more radical democratic reading of Kant than the possible assent interpretation of the common will. Gregory argues that Kant requires

actual assent (which he calls agreement) on both the constitutional and legislative level: 'Kant advocates unanimous agreement on two levels: the idea of reason which is the unanimous agreement of all subjects in the original contract and of the actual citizens in voting' (2023, 125–6). Gregory's point is that citizens unanimously assent in the original contract to be ruled by the majority principle in the active legislative process (2023, 132).

To assess the role of assent in the social contract and the legislative process, we first need to clarify how Kant understands citizens' assent (*Beistimmung*) to legislation. *Beistimmung* seems to differ from the contemporary understanding of consent, as evidenced in the fact that the term also features prominently in Kant's theory of assent in judgements of taste, which do not require a consenting act licencing an otherwise prohibited behaviour. For this reason, I am translating *Beistimmung* as assent, which is also the translation used by Paul Guyer and Eric Matthews in the *Critique of the Power of Judgment* (2000, xlviii), but other possible translations would be consent, agreement, or approval. To see why consent would be misleading, consider this example from A. John Simmons: 'In giving consent to another's actions, however, our primary purpose is to authorize those actions and, in so doing, create for or accord to another a special right to act' (1976, 276). This is not what Kant has in mind: *Beistimmung* or *Einstimmung* is not an act that changes the normative landscape but rather mutual assent or agreement among a group of people, which is also seen in a draft for the *Doctrine of Right* where Kant puts *Einstimmung* under the category of quantity of the common will (23:302). Note in contrast how Kant describes contracts as consisting of two constitutive legal acts: a promise and an acceptance (*Annehmung*) (DR, 6:272). When Kant describes the normative foundation of a society as a contract, these structures are implied, yet he does not write that citizens accept the contract or the resulting civil legislation but rather that they assent or agree to it. The most notable difference here is that assent (*Beistimmung*) is not a legally constitutive act, whereas acceptance (*Annehmung*) is.

The question of assent is complicated because Kant does not conceive of the social contract as based on an actual act but rather as an 'only the idea of this act, in terms of which alone we can think of the legitimacy of a state' (DR, 6:315). As an idea, the social contract describes the conditions of the possibility of a state. Here the external freedom of the individual is reconceptualized in a holistic account of civic freedom coordinated by civil legislation. This is a presupposed contract, meaning that empirical citizens have had no opportunity for explicit assent. However, as a presupposition of living in a state, we might conceive of this assent as implicitly given by any citizen. The intended assent at the constitutive level can only be implicit since Kant's social contract is an idea of reason.

This brings us to the second level: the legislative process. Here explicit assent would be possible and might take the form of unanimous assent or majority vote. When addressing voting, Kant argues that those who are unfit to vote still belong to the people although others vote on their behalf and 'these laws must still not be contrary to the natural laws of freedom and of the equality of everyone in the people corresponding to this freedom, namely that anyone can work his way up from this passive condition to an active one' (DR, 6:315). Citizens, Kant writes when discussing the right to go to war, must always be regarded as 'colegislating members of a state (not merely as means, but also as ends in themselves)' (DR, 6:345). Also in this case,

citizens must give their assent to go to war and failing to regard citizens as co-legislating members would infringe on their humanity by not treating them as ends in themselves. Although this might suggest a more active role for citizens' assent, the case in question here is the extraordinary situation of sending citizens to war and requiring them to risk their lives for the commonwealth. In this case, Kant requires that the citizen gives his assent but crucially specifies that this goes through a representative. Kant's conclusion is that 'the people will have to be regarded as having given its vote to go to war' (DR, 6:346). Contrary to Gregory's reading, Kant does not require a direct vote but a test that puts restraints on possible legislation.

Gregory's active assent reading of Kant brings him much closer to the early Fichte, yet exploring Fichte's account of active assent will help us understand the problems associated with active assent for citizens. Rethinking Kant's account of autonomy as self-consciousness, Fichte offers a different solution to the tension between the individual and the commonwealth. Like Kant, Fichte emphasizes that the individual gains access to a normatively different freedom when joining a commonwealth, but unlike Kant, he sees unanimous explicit assent as a necessary presupposition of the social contract.

4. Fichte's *Foundation of Natural Right*

Fichte's 1796 *Foundations of Natural Right* was written in the long waiting period between Kant's *Groundwork* in 1785 and his systematic account of its legal and political ramifications in the *Doctrine of Right* in 1797. Fichte argues that his account of natural law would fit within the Kantian system but specifies that there are differences between his own account and the one Kant provides in *On Perpetual Peace*, which had appeared the previous year.⁷ Like Kant, Fichte distinguishes between moral and juridical laws, but Fichte's separation between the two is more radical. While Kant includes both right and ethics under morality and argues for a single structure of obligation under a categorical imperative (DR, 6:222), Fichte separates their justification completely. He provides a separate deduction for his notion of right that starts from the self-positing activity of the subject and argues that right is a presupposition of self-consciousness for finite rational beings. In contrast, Kant does not deduce the universal principle of right and instead introduces it as a postulate incapable of further proof (DR, 6:231).

Fichte aims to provide a deduction of right from a single principle with the self-consciousness of a finite rational being as a starting point. From the philosophical standpoint, he deduces the necessary conditions of self-consciousness and their grounding in a state under the rule of law. Crucially, he argues that self-consciousness presupposes the recognition of another finite rational self. In §3 of the *FNR*, Fichte introduces the idea of a Summons (*Aufforderung*) by another finite rational being, which includes a suggestion that the subject should adopt an end provided by the other (*FNR*, 3:33). This Summons is a crucial turning point because it makes the recognition of and by others a condition of individual self-consciousness. The idea that others can also set ends and that they can prompt us to adopt certain ends leads the subject to understand its own activity as a free agent. The other may suggest an end, but the agent is free to accept or decline. Recognizing others as capable of setting ends leads the subject to recognize itself as free to set its own ends yet at the same

time limited by its circumstances. The Summons requires that the subject recognizes the other as a rational agent, that is, as a free end-setting being, since the other is prompting the subject to adopt a certain end. Only when both are prompted and limited by the other does the subject see its own freedom and limitation. By understanding that it can either accept or decline the Summons, the subject sees that it is also free. This follows from Fichte's focus on the subject as a limited agent since any limit presupposes something limiting it.⁸

That individual self-consciousness requires the mutual recognition of others is a radical departure from Kant. Although Kant considers debate, communication, and community to be important features of an enlightened society, he conceives of individual free agency as the conditions of their possibility, but not vice versa. Recognizing and respecting others as free agents is ethically required, but this requirement does not transform the agent's self-understanding in the way that Fichte conceives it. Fichte proceeds from the self-positing activity of a finite subject. Yet he also admits that this self-positing is inherently circular since self-positing presupposes self-consciousness, and vice versa (*FNR*, 3:30). When Fichte opens the door to the conditions of individual self-consciousness, he needs to explain how a finite agent may also be free despite empirical influences, and this is where the meeting with another such agent becomes decisive. Self-consciousness is consequently not something that can be learned from introspection; instead, it is revealed when we meet others who prompt us to act in certain ways, and we realize that we are free to choose whether we accept their suggestions or not.⁹ This structure of mutual recognition then serves as the justification of right.

This approach to right is radically different from the social contract tradition on which Kant is building. Here we do not start with a state of nature in which all are at war with each other. Instead, we start by meeting another in mutual recognition. The other does not meet us with aggression or hostility but with an invitation. In this invitation, he recognizes that we are capable of setting ends, and we recognize that he can set ends because he is providing us with one. For this reason, Fichte infers that we cannot conceive of human beings in isolation but only in a community (*FNR*, 3:39). Given that Fichte starts from an almost solipsistic principle, this deduction of the community as a condition of self-consciousness is a surprising departure from his focus on the subject in the remaining *Wissenschaftslehre*.

Yet this approach also brings difficulties. Fichte's focus on the subject as an empirical agent leaves his argument vulnerable to objections from a Kantian standpoint. Wolfgang Kersting objects that since Fichte grounds his deduction of right on theoretical self-consciousness, he is ultimately grounding the validity of legal norms on the preservation of an interest. Kersting points out that the law's ability to serve an interest cannot ground its practical legitimacy. The promotion of self-consciousness might be an additional feature but cannot justify a legal structure. While Kantian right may be realized independently from morality, it cannot be legitimized independently from morality. This justification in rational, practical legislation is lacking in Fichte's attempt to ground right in a theory of self-consciousness (2001, 36). While Kant seeks to provide a principled justification of right, Fichte gives an instrumental account of why we need right to recognize one another as free agents. This argument mixes rational requirements with the adoption of such requirements by a single agent. Fichte's account thus comes closer to interest

theory, which justifies political obligation with reference to the interests of individuals. Such accounts are also defended by, for example, Hobbes and Locke who argue for the commonwealth as the best way to defend the interests of the individual. Still, Fichte differs from interest theories because he argues that empirical interests serve a transcendental purpose: the empirical agent gains self-consciousness as transcendently free due to his empirical circumstances. This relationship between empirical circumstances and the transcendental conditions of their possibility complicates Fichte's account of right. Through the empirical limitations of his ability to exercise freedom, the agent understands that his freedom goes beyond mere empirical circumstances, and he seeks to promote those empirical conditions that will allow him to exercise his transcendental freedom. Empirical interests are thus not the immediate justification of right but a means to understanding and realizing transcendental freedom.

5. Fichte's social contract

The requirements of individual self-consciousness are also at the centre of Fichte's reformulation of the social contract. Like Kant, Fichte sees the social contract as the foundation of a civil condition, but Fichte conceives of a series of contracts rather than a single contract and also rethinks the place of the contract in the justification of right. A crucial difference to Kant is Fichte's idea that every individual must freely accept the state constitution and that living in a state presupposes this assent:

Every citizen of the state must vote in favor of the constitution, which can be established only through absolute unanimity; for the constitution is the guarantee that each receives from all the others, for the sake of securing all his rights within the society. (*FNR*, 3:16)

Everyone must agree to the constitution unanimously, which makes the societal contract concrete.¹⁰ It is an actual agreement between actual citizens that guarantees and defines the tasks of a state. Through this constitution, citizens mutually assure rights within the state, which makes the assent to the constitution an expression of freedom. Indeed, there is no duty to enter the civil state according to Fichte; rather, it is a free association: 'That I must restrict myself specifically in relation to these particular human beings derives from the fact that I live in community specifically with them; but I live in community specifically with them as a result of my free decision, not through any obligation' (*FNR*, 3:14). The implication is not a democratic form of rule but rather a free decision to live in a state and subject oneself to its rules. Although Fichte, like Kant, recognizes that we live in a limited world and will necessarily limit one another's freedom, he argues that an individual has the free choice to live outside any state and there is consequently no right to coerce others to join us in the civil condition. In contrast to Kant, Fichte sees the social contract as an actual contract in which each limits his own freedom to live in a society with others. This contract is consequently not imposed but represents a free association (*FNR*, 3:14). Still, Fichte admits that the decision to limit one's freedom to live in society with others still lacks specific content since it is not yet decided how much

freedom each is granted and how large the sphere of their individual freedom must be to live peacefully with others.

Fichte's version of the social contract as a unanimous assent to state power puts free assent at the core of justifying the civil condition. The implications he draws from this assent, however, leave less room for popular legislation than Kant's. While Kant advocates separating the three powers of government, Fichte states that executive and legislative power should be delegated to the same ruler as an interpreter of the common will. This task is delegated to the ruler who possesses both executive and legislative power and is thereby the 'natural interpreter of the common will' (FNR, 3:16). Only in virtue of the social contract does the citizen agree to have his freedom limited by this power. While Kant identifies right with an authorization to coerce and argues for a right and even duty to force others to join a civil state, Fichte sees this association as voluntary. Because the individual needs to live in a rightful condition to gain self-consciousness, he must join this condition freely. While Kant conceives of coercion not as a limitation of freedom but rather as a hindrance of freedom, he argues that others may be forced to limit their natural freedom to gain a different type of civil freedom.

Fichte also sees civil freedom as a normatively justified type of freedom, yet he does not see the coercion of others for the sake of their own freedom as warranted. If joining the civil condition serves to promote an individual's freedom, then this individual must assent. As a result, Fichte's deduction of the concept of right states that any limitation of freedom must be consensual:

But now the end of existing with another person in a community of freedom is attainable only under the condition that this other person has also imposed upon himself the law of respecting the first person's freedom, or his original rights. This law is completely inapplicable to my behavior with respect to someone who has not given this law to himself, since the end for the sake of which I was supposed to respect the other person's original rights no longer exists. (FNR, 3:94–95)

Fichte understands civil law as self-imposed since only the individual can limit his own freedom for the sake of another. What is left for the civil ruler is the *interpretation* of the extent of this limitation and the material content of civil legislation.

For Fichte, the individual gains self-consciousness by joining the collective once this has been formed by means of the three social contracts:

Each citizen, preserves only itself in the place that has been determined for it by the whole, and in the very act of doing so, it preserves the whole in this particular part: and precisely because the whole preserves each part in its place, the whole returns into itself and preserves itself. (FNR, 3:209)

The collective and the citizen determine each other reciprocally, and only in this relationship do they become themselves. The citizen is determined by his estate in the collective, and the collective is defined by every part of an estate. While Kant conceives of the state as a civil condition in which right is established, Fichte understands this voluntary creation of a collective as a necessary condition for individual selfhood. Although Fichte's social contract is voluntarily agreed upon,

only this assent provides the citizen with civic personality and individual self-consciousness.

Fichte argues that all citizens must assent to form the common will (FNR, 3:181). This assent needs to be ‘an act *that takes place in the sensible world and is perceptible at some point in time and is made possible only through free self-determination*’ (FNR, 3:152). The creation of a common will is thus not a metaphysical presupposition but instead an actual, observable act that is not forced but freely agreed upon. This sounds much more promising for democratic participation than Kant’s duty to coerce others to join us in a civil condition. ‘Each person must have said to all: I want to live in this place, and to possess this or that thing as my own; and all must have responded by saying: yes, you may live here and possess that thing’ (FNR, 3:152). However, while Fichte argues that every citizen needs to agree to the social contract, this does not translate into a democratic voting process for legislation. He states that civil legislation is a branch of the executive power and argues that these two powers should be delegated from the people to a single council of rulers (FNR, 3:16).

Fichte’s insistence on explicit assent does not lead him to argue for democratic rule. On the contrary, he writes that democracy is rarely the best way to warrant civic liberty.

Now as long as the people have not yet attained this high degree of culture, it is better – once and for all time – that even the right to elect regents be alienated (which, of course, can happen only through absolute unanimity) and that a fixed plan for the succession of regents be established for all time. In a republic the regents may elect their own successors; if the ephorate is sufficiently effective, it will be of the greatest importance to them to conduct this election with the utmost care. In a monarchy it is difficult to imagine who ought to elect the monarch other than the people, which – as stated above – should not vote. Therefore, the monarch could not be elected at all, but would have to be determined by birth. (FNR, 3:288)

Fichte’s insistence on freedom and assent only continues until the civil state is formed. Once the state is formed, he goes as far as claiming that the people no longer exist:

With the completion of the transfer contract, the populace automatically become subjects; and from that point onward, the populace as such no longer exist; the people are not a people, not a whole but only an aggregate of subjects; and the magistrates, too, are no longer part of the people. (FNR, 3:176–7)¹¹

The people as an entity was necessary to complete the three social contracts that create the state but once it is created they become subjects. This passage is surprising given Fichte’s own focus on individual freedom of the members of a community. Instead of democratic rule, Fichte places legislation with a council of ephors, who, like in the Kantian framework, ought to legislate in accordance with the common will. Fichte comments that if this is not the case, civil unrest will arise to hold legislators responsible (FNR, 3:161). This, however, appears to be a pragmatic rather than a

normative point. The people will hold legislators responsible as opposed to their having a right to hold legislators responsible.

For Kant, the people possess the sovereign legislative power, but this power can be delegated to an individual or a group. The delegated legislator need not ask the people directly whether they agree to proposed laws but need only consider whether the people *could have* imposed such a law on themselves. The people thus function as a constraining thought experiment in legislation and are not necessarily given an active part. Even in a democratic setting, Kant specifies that only those citizens who qualify as active citizens in virtue of their civil independence may vote (*DR*, 6:314). Fichte, on the other hand, argues that legislative power is a branch of the executive since it does not introduce new laws but rather applies the fundamental law, which states that this group of people wishes to live next to each other (*FNR*, 3:160–1). For Fichte, the constitution declares the people as a community and thereby as a constituent power. This is necessary to avoid the conundrum that a constitution both presupposes and establishes a constituent power. In addition, Fichte declares that in case of an emergency, the people must be able to gather as a commune to speak (*FNR*, 3:171).

We now have two accounts of how the common will is created by means of a social contract. While Fichte insists that this social contract be actual and citizens' assent explicit, Kant argues that the contract is implied and that the assent is implicit or merely possible. In discussing declarations of war, he emphasizes that the ruler has a duty to *think of* citizens as active co-legislators. If the ruler is diligent, this test of conceiving of citizens as co-legislators allows rulers to disregard empirical obstacles to assent such as prejudice, economic inequality, social tension, etc. However, this same requirement also might also entail disregarding the actual interests of citizens and instead ruling them paternalistically. Fichte focuses on the explicit assent of actual citizens once this is granted; he argues that both legislative and executive powers are transferred to the ruler but that the people as a group may come together in case of emergency.

Fichte's focus on actual, unanimous assent later leads him to conceptualize the formation of a homogenous people, which he sees as an empirical condition for ensuring explicit unanimity among citizens. This focus on the empirical conditions of civic freedom leads Fichte to develop theories of economic redistribution in *The Closed Commercial State* (1800) and nation building in *Addresses to the German Nation* (1808). These still focus on autonomy but now in terms of economic and national autonomy as opposed to individual self-consciousness through legal recognition. The idea that all citizens must assent to the social contract or leave the state leads the later Fichte to consider which empirical conditions would shape citizens to unanimity. Fichte's idea is that a human being's outlook is not formed freely but rather determined by lived circumstances and previous education (*AGN*, 7:276). To shape the state, one has to start by shaping citizens' economic and educational circumstances. The *CCS* focuses on economic conditions and states that the division of property must be such that all can agree to it since all have the same right to live (*CCS*, 3:402). The aim of any free action is to make life possible and comfortable (*CCS*, 3:415), but since this is not the case in actual states, the state has the task of 'giving to each what is his' (*CCS*, 3:403).¹² This includes the state fixing prices and controlling commerce to provide citizens

with sufficient economic conditions for exercising their freedom. Fichte advocates pervasive state involvement in economic life and the control of commerce in order to ensure that citizens are provided with the empirical conditions for exercising their freedom. While Kant recognizes that economic dependence on others restricts the freedom of, for example, women and day labourers (DR, 6:314–5), he resists drawing conclusions about state intervention in commerce. Fichte argues that since the state warrants civic freedom, this includes controlling economic activity in a manner that allows most citizens to exercise their freedom even if this means limiting markets. Citizens are not required to agree unanimously at this level of legislation, which depends on the delegation of power through the previous unanimous social contract.

These material conditions are supplemented with cultural conditions in the *Addresses* that present an educational project to unite the German people (AGN, 7:267), with the purpose of building the foundation for a future national state. While the *FNR* provides atemporal deductions of the relationship between right and self-consciousness, the *Addresses* focus on the historical development of a national spirit. This historical development is intended as the empirical condition for realizing the rational concept of right. While the self in question in *FNR* is an individual, the *Addresses* focus on the formation of a national self. This formation is *Bildung* in both senses of the word; the German people are to be educated with the purpose of forming a unity (AGN, 7:278).¹³ While the early *FNR* left us with the issue of combining assent and unanimity, the *Addresses* provide the unified German nation as a solution. This suggested solution makes the question of unanimous assent more rather than less problematic despite its initial appeal for the political realization of individual autonomy since it ultimately requires national and individual identity to intertwine.

Fichte's unanimous assent thus leads him to argue for the homogenous national state. This outcome should make us resist a Fichtean reading of Kant's social contract. Reading Kant's social contract as an idea and assent as possible helps us circumvent the difficulties connected with explicit unanimous assent. While Fichte's explicit assent is limited to the social contract, Kant's possible assent presents a test for any proposed legislation. Only legislation to which all citizens *could* assent may be introduced in a republican state. This hypothesis brackets whether citizens might approve legislation due to empirical duress or economic dependence and asks instead whether they could rationally approve legislation.

6. Conclusion

Kant and the early Fichte both conceive of law as a necessary structure for promoting freedom through mutual coordination. While Kant describes law as necessary for rightful coexistence in which we all take responsibility for our actions, Fichte sees law as a necessary condition for self-consciousness and argues that we only understand ourselves fully when we recognize the demands of others. He thus sees the confirmation of the first-person perspective when it is mirrored in the relationship to another person. This difference in aim is followed by a difference in civic participation. Both authors share a deep mistrust of democracy due to its despotic potential, yet Fichte still describes the social contract as an actual contract to which each citizen must explicitly agree. Fichte's assent requirement initially promises to be

more in line with individual freedom than Kant's account of the social contract since an individual freely and explicitly submits to a state's laws and its coercion. Yet it turned out that this assent was necessary only for the creation of the social contract and that individual members of the people had no other option than agreeing unanimously or leaving the state. In addition, Fichte justifies the need to enter legal relations with reference to individual self-consciousness, making the state a means to an empirical end. Moreover, the unanimity requirement opens the gate to the creation of a homogeneous people who would empirically be able to agree unanimously.

Notes

1 I refer to Fichte's works, with pagination as volume:page referring to J. G. Fichte (1971), in the following way: *Foundation of Natural Right*, translated in J. G. Fichte (2000), as FNR, to *The Closed Commercial State*, in my translation, as CCS and *Addresses to the German Nation*, translated in Fichte (2009), as AGN.

I refer to Kant's *Doctrine of Right*, translated in Kant (1999), as DR, the *Critique of Practical Reason* as CPrR, *Towards Perpetual Peace*, translated in Kant (1999), as TPP, and *On the Common Saying: 'This May Be True in Theory, But it Does not Apply in Practice'*, translated in Kant (1999), as TP.

2 Following Kleingeld (1993), I keep the masculine pronouns when discussing Kant's and Fichte's accounts since they both explicitly exclude female citizens from any legislative process. Including female pronouns here would make these philosophies anachronistically more inclusive, which unfortunately is unwarranted.

3 O'Neill (2015, 185).

4 Maus (2015) and Gregory (2023).

5 Although both Kant and Fichte separate law from ethics, state law without assent risks treating citizens as mere means, which would violate the formula of humanity of the categorical imperative. On the problems connected with interpreting different types of consent in the formulas of humanity, see Kahn (2022).

6 As Kant writes, 'The problem of establishing a state, no matter how hard it may sound, is *soluble* even for a nation of devils' (TPP, 8:366). Kant's division between right and ethics has been intensively debated in recent years with defenses of both the dependence and independence of right and ethics. Variants of an independence thesis are found in Willaschek (1997) and Ripstein (2009), whereas the dependence of ethics and right is defended by Byrd and Hruschka (2010), Guyer (2016), and Ludwig (2013), among others.

7 Kant would probably not agree that Fichte's account is Kantian, as he noted with an Italian saying in a 1799 letter: 'May God protect me from my friends since from my enemies I can protect myself' (12:370–1, my translation).

8 Kant would disagree, since we may also conceive of boundaries that do not allow us to infer anything about what lies beyond this boundary. On the point, see Howard (2022).

9 Dean Moyer puts this nicely: 'Fichte's first major move in the *Natural Right* is to argue that one can only be free as the result of a summons to freedom by another individual' (2016, 220). For Fichte, the other individual does not start as a problem or an aggressor but rather as someone who summons us to freedom.

10 Ingeborg Maus convincingly argues that Fichte's unanimity requirement shows as an extreme democratic deficit since it presupposes homogeneity and in no way ensures the protection of minorities (2001, 154).

11 On this contradiction to the voluntariness of the social contract, see Maus (2001, 147).

12 This formulation echoes Kant's pseudo-Ulpianic formulas in the *Doctrine of Right* (6: 237), which Kant interprets in terms of entering legal relations with everyone rather than economic redistribution.

13 Gabriel Gottlieb argues that 'Fichte's so-called nationalism constitutes his response to the problem of stability' and should therefore be understood as a nonideal application of his liberal political theory as opposed to a departure from it (2016, 179). Although Fichte does indeed argue for the formation of a German people for the purpose of stability, he also argues for the superiority of the German people in

opposition to other European peoples in virtue of their language, which gives them spirit and makes them 'honestly diligent and serious in all things' (7:327, 59).

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