

International political theory, historical political philosophy and the constitutional underlabourer

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Abstract

This paper illustrates one way in which thinking about the democratic underlabourer model in relation to intra-state politics can be helpful for working up an analogous model for international politics. This move involves both a critical engagement with the initial articulation of the democratic underlabourer model and making explicit some of its background commitments. Drawing on my own work on refugees, it offers an extended example of what I refer to as ‘the constitutional underlabourer model’. In the final section, I considered two potential challenges to this model and show that addressing them involves drawing out potentials of the model that my example had failed to make explicit and hence helps to elaborate a richer understanding of the constitutional underlabourer model and its attractions.

Keywords

Constitutional underlabourer, democratic underlabourer, historical reconstruction, political activist, refugees

Within the framework of the democratic constitutional state, the question of the role of the political theorist has been addressed in a variety of ways. One traditional model is that of the ‘advisor to princes’ now transposed to Government House in which the political theorist is conceived as an expert with particular skills who, in virtue of these skills, advises government on constitutional or policy issues. Another model is the ‘activist political theorist’ who is, variously, conceived as a partisan, providing normative leadership to social or political movements via political theory as a circumstance-sensitive

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generator of perspicuous interpretations and prescriptive principles (Ypi, 2011, see also Owen, 2013) or as a critical mirror providing terms in which movements can make reflective sense of their own activity (Casals and Boran, 2008) or as a public critic who seeks to enable the formation of a new 'we' to address a novel problem (Foucault 1984). A more recent proposal for modelling the activity of the political theorist is that of the 'democratic underlabourer' (Swift and White, 2008). In this essay, I want to take up a question posed by Peter Niesen, who has highlighted the attractions of this model in its intra-state context, concerning whether it can be transposed to the international realm or, perhaps better, what implications taking this kind of model seriously poses for how we might think about international political theory (see Niesen, 2007 ; Niesen et al., 2015). In doing so, I will draw on some of my own previous work to provide an exemplar of how such an adaptation to the international domain might be carried out and some of the limitations of this move. It should be stated straightaway that it is not part of my purpose here to argue that political theory should embrace the proposed model to the exclusion of others. Political theory can play a range of different roles in relation to both the domestic and international realms (including putting pressure on that distinction) but the methodological choices that are made concerning the purpose of our theorizing have direct implications for the question of whom we are speaking to and who we want to listen.

I begin by briefly exploring the democratic underlabourer model and considering the issue of its transposability to the international realm. I then turn to sketch an approach that it is consonant with the motivations for, and justification of, this model in the international realm. I conclude by considering some of the challenges that such a model faces and the case for developing it further.

The democratic underlabourer

The democratic underlabourer model proposed by Swift and White (2008) argues that 'the political theorist tries to serve the democratic process in one of two ways: either she defends ideals or proposals that she herself believes to be correct or she seeks to clarify the terms of everyday political debate' (Baderin, 2016: 224). This model has both a negative and positive dimension:

Negatively, the underlabourer account says that the outputs of political theory do not have special weight in the democratic process. Positively, it says that political theorists have something useful to offer the democratic process. Political theorists might choose not to take on this second project, and we should not be criticized for that. However, if we do want to pursue the underlabourer model in a positive way, political theorists need to be genuine participants in public debate. This, in turn, means that we must offer arguments that people can understand and engage with. In this way, the democratic underlabourer model directs our attention towards evidence about the forms in which, and conditions under which, the arguments of political theory are comprehensible to a wider public. (Baderin, 2016: 225)

In this respect, as Baderin puts it, 'the democratic underlabourer view asks political theorists to turn outwards, towards real politics, and to find forms in which political theory can speak effectively to public political debate' (2015:227).

I want to address three types of issue with this model. The first concerns how to understand its claims concerning expertise. The second concerns the ‘or’ in the claim that ‘either she defends ideals or proposals that she herself believes to be correct or she seeks to clarify the terms of everyday political debate’. The third concerns its applicability if we switch to the contexts of international, transnational or global politics and the role of the political theorist in these contexts, notably, that these are not democratic contexts and that there is not a global public in the sense invoked although there may be, often issue-specific, international publics and identity-based or issue-based transnational publics.

Let’s start though by noting that the concept of ‘democracy’ in the democratic underlabourer model is doing three pieces of work. First, it is setting up a legitimacy constraint on a hypothetically imperial political theorist who, it is imagined, might otherwise – given the power to do so – look to impose their preferred view concerning justice, liberty, equality, etc., on a subject population. Second, it is pointing to the existence of a democratic public in which the political theorist is (presupposed to be) an equal participant as a fellow citizen. Third, it is claiming that the political theorist – insofar as they are concerned with political theory as a practical discipline oriented to affecting politics – should aim to engage with this public in ways that are ‘public’, that is, comprehensible to their fellow citizens as a democratic public. The public are the ultimate addressees of democratic speech and hence that fact needs to be acknowledged and respected in the political theorist’s public political speech.

Whether this model is seen as an alternative to the other models or a democratic inflexion of them will depend on how continuous one envisages the role of the political theorist using technical vocabulary to advise a government ministry with that of the same political theorist giving expression to the views that are manifest in their technical communication in public political speech. If, like me, you see no compelling reason to deny such continuity, then the democratic underlabourer model might be seen as a subset of a wider ‘advisor to ruler’ model with the specificity in this case being provided by the presumption of popular sovereignty, namely that the ruler is the people, and the concomitant twist that the political theorist is one of the rulers in this sense. We might note that the constraints identified do not entail that the ‘pathway to impact’ is via a direct relationship to the public. The political theorist may be advising or aiming to persuade a political party or a government or a social movement, what matters is that the advice or persuasion can be expressed as democratic speech that is politically intelligible to the public not that it is expressed in this way when talking at a party conference or government committee or movement gathering.

It is at this stage that the ‘expertise’ question arises. Swift and White put their claim by distinguishing two roles for the political theorist. The first is to help raise the quality of political argument:

For us, the political theorist is essentially a democratic underlabourer. Trained in particular skills—the making of careful distinctions, an understanding of how to assess and examine arguments about values, arguments for and against political principles—the political theorist is specially equipped to help her fellow citizens make their political choices. She can help them understand better what is at stake and can offer them a perspective from which to assess and evaluate their would-be leaders’ political rhetoric. (2008: 54)

The second is make proposals:

But she can do more than this. Not confined to this clarificatory role, she can offer arguments and justifications of her own, seeking to persuade her readers about which values (or, more likely, which *conceptions* of those values, or which *balance* between competing values) are the right ones for them to be pursuing in their policy choices. This last role remains underlabouring, despite being substantively normative, precisely because the arguments she makes are, indeed, *offered*. It is for her fellow citizens to decide whether they want to accept them. (2008: 54)

Two different readings of the democratic underlabourer model that hang on how the relationship between authority and expertise is construed are possible in this context. The first reading, advanced by Lamb (2020), is that the democratic underlabourer thesis holds that ‘the special skills acquired through training make the political philosopher an expert and theoretical authority on political morality and the person whom her fellow citizens and politicians should be guided by, even though they retain the democratic right not to be’ (p. 921). Expertise underwrites authority. Even in its weak form, this is, Lamb contends, the thesis ‘that political philosophers tend to possess important skills acquired through academic training and that these skills can enable normative political authority. On this understanding, political philosophers are more likely than the ordinary citizen to have superior answers to questions of political morality, most, though not all, of the time’ (2020:921). The second reading argues that the democratic underlabourer role makes no special claim to normative political authority and is *either* concerned to clarify the normative character and stakes of public political concerns and debates, *or* to offer – as one citizen among others – their own conceptually articulated normative views concerning some of other political issue. I share Lamb’s scepticism towards the substantive thesis expressed in the first reading, that is, I do not think that expert skills in normative arguments concerning political morality ground a privileged claim of authority for political theorists relative to other citizens. Unlike Lamb, however, I do not see Swift and White’s essay as committed to more than the second reading. Whether or not this is correct, I will address the democratic underlabourer thesis in terms of the second view that denies that political theorists have any special claim to normative political authority in virtue of being experts characterized by the skills that doing this political theory competently demands.¹ The distinction that Lamb draws is, however, useful because it helps us to differentiate the figure of the activist political theorist in the partisan form advocated by Ypi from the underlabourer model precisely because the partisan model of the activist political theorist is committed to the stronger claim about expertise grounding authority. Ypi’s view involves an account of the division of labour between, and relationship of, the political theorist and the political activist pictured in terms of partisans through their activity, its circumstances, effects and obstacles, providing material for activist political theorists to reflect on and the partisan theorist then providing, in virtue of their expertise, authoritative normative and practical direction to the activist whose activity then provides further material for the theorist and so on. This is a more dialectical picture than Lamb envisages but the central claim is the same: expertise ground a privileged claim to authority (Owen, 2013).

Having the view clearly in mind, let us turn to take up that odd disjunctive ‘or’ in the claim that ‘either she defends ideals or proposals that she herself believes to be correct or she seeks to clarify the terms of everyday political debate’ (Baderin, 2016: 224). My point here is that the presentation of the two possible tasks of the political theorist on the democratic underlabourer model as mutually exclusive is unmotivated and unjustified. If it appears natural, that is an artefact of a (prevalent) ahistorical approach to political theory exhibited in an exemplary way in the work of the early Rawls.

To illustrate this point, consider how the task of clarifying the terms of everyday political debate can be related to the task of articulating ideals that one defends as a political theorist. Here is an example. The figure of the refugee in contemporary politics (as well as academic literature) is caught between two distinct and opposed pictures of refugeehood – *humanitarian* and *political* – that give rise to rather different accounts of who is entitled to refugee status, of the obligations owed to refugees and of the appropriate international organization of refugee protection. The dilemma constructed by the co-existence of these different pictures is both political and philosophical. It is political, first, because it generates ethical indeterminacy concerning *who* should count as a ‘genuine’ refugee that is often exploited by politicians and media commentators for their own purposes. At the same time, second, this indeterminacy makes it difficult to hold states politically accountable for their responses to flows of asylum seekers (even if a shared legal definition of a refugee is adopted for policy purposes) precisely because the nature and extent of their duties is conditional on how the institution of refugeehood is conceived. The dilemma posed by the co-existence of the distinct pictures of refugees is also philosophical. It is so for the obvious reason that it poses the challenge of working out an adequate normative account of refugeehood in the face of two contrasting and incompatible views. But the challenge is philosophically deeper than that because, if it is to be satisfying, such an account must also make sense of the grip that these two pictures have established on our ethical and political imaginations. I want to stress this last point. It is not enough to point to the two pictures and defend one or the other or to propose a new and different account, rather to free ourselves and others from the grip of these pictures, we need to offer an account that enables us to see how we have come to be held captive by them and caught in the oscillation between them. The failure of the democratic underlabourer model to see this point is a product of the failure to distinguish a form of conceptual clarification that operates within a picture from the problem of having two distinct pictures.

What is more insofar as Swift and White model of the democratic underlabourer is itself held captive by a particular picture of political theorizing exemplified by Rawls, it exhibits the error nicely expressed by Wittgenstein:

‘But being guided is surely a particular experience!’—The answer to this is: you are now thinking of a particular experience of being guided. (1958 s.173)

This is not to object to Rawls’ approach to political theory which offers one way of being guided; it is to object to the view that this is *the* experience of being guided qua political theory.²

If we are to grasp the sources of our public confusions and oscillations around the figure of the refugee, to return to my example, we need an historical approach, but the historical approach can also inform our articulation of the normative ideal. This is a point nicely made by Brandom:

The model I find most helpful in understanding the sort of rationality that consists in retrospectively picking out an expressively progressive trajectory through past applications of a concept. so as to determine the norm one can understand as governing the whole process and so project into the future, is that of judges in the common law tradition. Common law differs from statutory law in that all there is to settle the boundaries of applicability of the concepts it employs is the record of actually decided cases that can serve as precedents. . . . So whatever content those concepts have, they get from the history of their actual applications. A judge justifies her decision in a particular case by rationalizing it in the light of a reading of that tradition, by so selecting and emphasizing particular prior decisions as precedential that a norm emerges as an implicit lesson. And it is that norm that is then appealed to in deciding the present case, and is implicitly taken to be binding in future ones. In order to find such a norm, the judge must make the tradition cohere, must exhibit the decisions that have actually been made as rational and correct, given the norm that she finds is what has implicitly governed the process all along. Thus each of the prior decisions selected as precedential emerges as making explicit some aspect of that implicit norm, as revealing a bit of the boundary of the concept. . . . Telling a story of this sort - finding a norm by making a tradition, giving it a genealogy - is a form of rationality as systematic history. (2002: 14)

We can see here one model for an historical form of political theorizing. In the case of two conflicting pictures that give rise to different norms, the reconstructive task involves the dimension of giving a reading that can overcome (in a suitably Hegelian sense) the antinomy between the two pictures. The analogy here is thus with a common law judge who is confronted with two competing reconstructions of the norm issued by the prosecution and the defence.

This model can help draw out a second issue concerning ideals because the political theorist can conceive ideals in two ways. The first is one in which they invoke their own preferred conceptions of justice and/or the good life to articulate an ideal that they take to be true or at least the best rational candidate for being true. The second is one in which they build an ideal that acknowledges the circumstances of plurality and disagreement that they inhabit, and that aims to articulate an ideal that is legitimate in the face of such disagreement. If we reflect on our common law judge, it is important to see that his practice is an example of the second, not the first. As a private individual, the judge may disagree with the judgement to which her reconstruction of the law leads her and, as a citizen, may campaign for changes that would be consequential for this judgement; but, as a judge, she is constrained to offer the best reconstruction of the legal norm that she can regardless of her personal views on the matter. There is thus an important distinction between the political theorist as a partisan offering a vision of justice or the good life to her fellow citizens, and the political theorist as a mediator who is trying to outline an understanding of democratic society that her fellow citizens may endorse from their own standpoints. Although the points that underlie this distinction are present in Swift and White's articulation of the model, their implications are not clearly elucidated.

This excursus on forms of political theorizing may seem to have taken us some distance from the issue of the question of the role of the political theorist and the implications of taking the motivations of the democratic underlabourer model seriously for conceiving of the role of the political theorist in the international realm, although we will see shortly that it has also provided a resource for addressing this question. But before I turn to the example through which I hope to illustrate and establish this point, it will be useful to step back and make explicit the commitments that underlie the democratic underlabourer model in order to establish the grounds of continuity.

There are two points to be made here to draw out what is significant for this essay which concern two unstated (because taken for granted) assumptions in the democratic underlabourer model. The first is that this is a 'constitutional democratic' underlabourer model in which we stand in constituted relations to one another as equal citizens. The second is that we have reason to endorse this political condition. A political theorist may contingently be located in a constitutional democracy or a dictatorship, but the unstated assumption is that there are moral and not merely prudential reasons for being located in a constitutional democracy to shape how one conceives of one's public activity as a political theorist, most fundamentally, the recognition of others as having equal standing both as subjects of the constitutional order and as democratic authors of this order. Exposing these unstated assumptions helps us to see both that this model is predicated on a background commitment to the moral equality of persons and that it would be possible to separate the constitutional and the democratic dimensions of the model to address contexts in which there is a constitutional order but not a democratic one. Acknowledging these two points together provides for the possibility of articulating a model for the international realm, that of the constitutional underlabourer.

The constitutional underlabourer: an extended example

In *What do we owe to refugees?* (Owen, 2020) I propose an approach to specifying the normative character of the international refugee regime that combines an historical (practice dependent) reconstruction of the point and purpose of this governmental structure against the background of an account of the basic legitimacy conditions of the international state system. In outline, the aim of this account is roughly as follows:

1. We have two incompatible pictures of the refugee – humanitarian and political.
2. These are both rooted in the historical development of the refugee regime.
3. To address this dilemmas, political and philosophical, to which this gives rise, we need to offer an historical (practice-dependent) reconstruction of the point and purpose of the international refugee regime.
4. This reconstruction will enable us to articulate a picture of refugeehood that supersedes/overcomes the two conflicting pictures and in doing so allow us to specify the relevant political ideals concerning refugee protection.

The relationship of this to the underlabourer issue is made clear by the choice to engage in this task through a reconstruction of the political context in a way that respects and offers a reading of the international state system in terms that make sense to states and

their citizens as citizens. In other words, the argument of *What do we owe to refugees?* does not express my own preferred/partisan view about refugees and global political order (which would be rather more radical), rather it attempts to provide an account that speaks to states and their citizens in terms of an account of commitments that they can already see themselves as having.

Let me give a summary description of the argument:

1. The international state system is a normative order characterized by commitment both to the Janus-faced international norm of state sovereignty/non-intervention and to a cosmopolitan order of human rights. This combination finds expression in a division of labour in which primary responsibility for securing the human rights of persons is to be achieved by way of their allocation to particular states as members of those states.³
2. At the same time, the international state system is a dispersed regime of global governance in which states in their relations to each other are the primary agents through which this regime of global governance is constituted and reproduced. States are jointly responsible for the character and functioning of this regime of governance; for example, the legal powers that it grants to states to determine their own nationality laws or to regulate entry at their territorial borders. They share responsibility because (a) they are co-participants in a practice of governance who recognize each other as co-participants and (b) no participant has the unilateral power to determine the norms of this practice of governance.
3. It is important to note here that 'statehood' is a normative status in the same way that 'citizenship' is a normative status. In virtue of being recognized within (and by) the international state system as having this normative status, a political body acquires a range of liberties and powers as well as a range of duties and responsibilities.⁴
4. Against this background, we can note that a first responsibility that falls jointly on states is the duty to ensure that all human beings are members of a state. The existence of stateless persons raises an immediate legitimacy challenge to the international state system because state membership is the primary mechanism through which responsibility for full coverage of positive human rights obligations is shared between states. Ensuring that all human beings have membership of a state is not an external constraint on states' sovereignty but an internal condition of the legitimacy of the state system as a dispersed order of global governance committed to securing full coverage of human rights.⁵
5. If we turn now to the obvious fact that the legitimacy of the international state system is compromised by the failure of at least some states – whether as a matter of capacity or disposition – to secure the human rights of their members, what follows? The claim to political legitimacy of this regime of global governance hangs on being able to sustain the imagined reconciliation of an international order of sovereign states and a cosmopolitan order of human rights (at least at the level of basic human rights), and the failure of states to secure the basic human rights of their citizens undermines the ability of the regime to sustain this pictured consonance.

6. To address the structural problem of states lacking the disposition or capability to secure the basic rights of their citizens requires a variety of work by the international community (e.g. global development programmes, international human rights law, etc.) that serve to reconcile an international order of autonomous territorial states with an order of human rights. However, to address the immediate consequences of state failures to protect basic rights that threaten the claim to legitimacy of the regime of global governance requires *legitimacy-repair mechanisms* that are not only compatible with the normative ordering of this regime but *enact and thereby re-affirm the imagined reconciliation of an international order of sovereign state and a cosmopolitan order of human rights*.
7. We can, I claim, see the normative function of the international refugee regime as to be such a legitimacy-repair mechanism – and indeed as one of two general legitimacy-repair mechanisms developed by the regime of global governance with the other being what we might call ‘the international emergency assistance regime’. Each of these regimes provides a legitimacy-repair mechanism through which a distinct class of those who are subject to non-protecting states can be provided with protection in a way that affirms the dual commitment to state sovereignty and human rights, that is their point and purpose. The difference between them is that whereas the emergency assistance regime acts as a *supplement* to a functioning state in addressing the basic rights of persons within its territory, the refugee regime acts as a *substitute* for the state in addressing those whose basic rights protection is best served by flight from or non-return to, the state (or, in cases of a non-functioning state, by constructing international zones of protection). In respect of the refugee regime, Carens puts the general point nicely:

The modern state system organizes the world so that all of the inhabited land is divided up among (putatively) sovereign states who possess exclusive authority over what goes on within the territories they govern, including the right to control and limit entry to their territories. Almost all human beings are assigned to one, and normally only one, of these states at birth. . . . Even if being assigned to a particular sovereign state works well for most people, it clearly does not work well for refugees. Their state has failed them, either deliberately or through its incapacity. Because the state system assigns people to states, states collectively have a responsibility to help those for whom this assignment is disastrous. The duty to admit refugees can thus be seen as an obligation that emerges from the responsibility to make some provision to correct for the foreseeable failures of a social institution. Every social institution will generate problems of one sort or another, but one of the responsibilities we have in constructing an institution is to anticipate the ways in which it might fail and to build in solutions for those failures. If people flee from the state of their birth (or citizenship) because it fails to provide them with a place where they can live safely, then other states have a duty to provide a safe haven. Thus, we can see that states have a duty to admit refugees that derives from their own claim to exercise power legitimately in a world divided into states. (2013: 196)

We can, then, see the point and purpose of the international refugee regime as such a legitimacy-repair mechanism; the institution of refugeehood provides a mechanism through which a distinct class of those who are subject to non-conforming states can be provided with protection

in a way that affirms the dual commitment to state sovereignty/non-intervention and human rights.⁶

On the basis of this reconstruction, I then proceed to show how we can supersede the two pictures of refugee protection we have inherited from the practice of refugee protection in a way that makes sense of why each has had a grip on us.⁷

Methodological reflections

The point of the approach to international political theory exemplified in the preceding section is to try to offer an account of state obligations that are not based on a (necessarily controversial) theory of global justice but that arises out of a plausible reconstruction of what states are committed to in virtue of being states in an international system of states that is (or at least says it is) committed to securing a global human rights regime, at least with respect to basic human rights. In this respect, it aims to construct standards for holding states to account that can be endorsed independently of one's political views or activist identity. We might think of this as a model of 'international public reasons', that is, reasons that arise for individuals as members of states (or as entitled to membership of a state) in an international system of states. Like the model of the democratic underlabourer within the state, it enables us to point to the skills of the political theorist in the activity of reconstruction in combination with a political modesty that comes from recognizing both that the reconstructions offered are necessarily defeasible and that the political theorist has no special authority with respect to states and their citizens, rather the reasons that they offer are invitations to take up a stance towards thinking about and making sense of, for example, international refugee policy.

The point about defeasibility is crucial here because it acknowledges that there can be plural reconstructions, and it will be a matter for those who are constituted as agents by and subject to this order, to consider which best makes sense to them. So, for example, the reconstruction offered in *What do we owe to refugees?* may be put into debate with that provided by Aleinikoff and Zamore (2020) in *The Arc of Protection* which also offers a reconstruction of this kind but which leads to a different articulation of the norm of protection. Both of these works can be understood as examples of the 'constitutional underlabourer' model. Like the common law judge in Brandom's example, they are concerned to provide an account that reflects not their own partisan views but the best rational reconstruction they can provide. This is a model of the *constitutional* underlabourer because it is concerned most fundamentally with questions arising from, and bearing on, the constitution of the global political order as an international system of states, where the role of the political theorists is to attempt to reconstruct and elucidate the normative character of this order. It is a model of the constitutional *underlabourer* because the political theorist puts himself or herself at the service of the international state system, officials of international organizations, state officials and representatives as well as citizens of states *as* citizens of states participating in this system in offering an orientation towards the normative issue in question. Notice that it is important to note that this orientating guidance extends to all individuals not as members of a global public but as members of a national/state public because it is with respect to that role that they

are called on to make choices about how to stand to the conduct of their state, other states (either individually or, where relevant, as regional associations) and the state system as whole. The political theorist is not here operating in the partisan mode of ‘activist political theory’ proposed by Ypi (2011); on the contrary, they are deliberately sustaining a clear distinction between their role as political theorist and their role as activist. (This is not to say that the political theorist should not take up the role of activist, only that it is important to distinguish between these roles and when and where they are being practised. Thus, for example, Hillier-Smith’s *The Ethics of State Responses to Refugees* (2024) offers an insightful philosophical argument concerning state’s moral duties to refugees that operates in the partisan activist-as-moral-critic mode.)

What are the limitations of the constitutional underlabourer model? Let’s consider two objections that might be advanced.

The first concerns the fact that we are addressing forms of governance such as, for example, the international regimes governing statelessness and refugee protection without addressing the fact that some individuals are directly subject to this regime of rule in ways that are very normatively consequential for their lives and do not insofar as they are de jure or de facto stateless have the relevant political standing through which to participate, directly or indirectly, in national and international deliberations concerning how they are to be governed. This does not, I think, pose a serious problem for the constitutional underlabourer model so much as help to highlight a feature that may be overlooked, namely, that a constraint on any plausible reconstruction of the relevant regime of international governance is that it should make sense to those subject to it and take up the question of how the issue of their political standing is to be addressed within this regime (an example would be the 2018 Global Summit of Refugees).

We might think of this first objection as pointing to the problem of internal exclusions within the normative structure of the international state system. A second objection, however, cuts deeper because it points to what we might call ‘constitutive exclusions’ of the international state system. An illustrative case is that of indigenous peoples in settler colonial societies. The problem here is that taking the international state system and universal human rights as basic in the way that this approach – as exemplified by my work on refugees – has done, fails to make visible the claims of indigenous peoples for whom the constitution of global political order as an international system of states is precisely (part of) the problem. Can this type of case be addressed within the methodological commitments articulated here?

It is important here to note that the reason that my use of this approach to address the issue of refugee protection takes the international state system and universal human rights as basic is that refugees and regimes of refugee protection are a product of this system. This is a feature that the historical reconstruction of the norm of refugee protection make explicit. By contrast, if we are concerned with the type of case represented by indigenous peoples, the question concerns whether the current constitution of global political order in terms of the international state system is itself a structure of domination that does not acknowledge the equal standing of indigenous peoples in its constitution.

Addressing this question also involves the historical reconstruction of a norm but the question in this case examines the history of the norm of recognition in international law in terms of its effects on the realization (or undermining) of a more fundamental

background norm to which the global order asserts its commitment, namely, human equality. Thus, the common law model applies to the norm of equality and then reads the history of the norm concerning who has standing in international law against that background. This too may be understood as an activity of constitutional underlabouring, but one that addresses its audience not as constituted subjects of the international system of states, that is, as corporate agents, but as the incorporating peoples who jointly exercise constituent power as co-authors of global political order.⁸

Conclusion

In this paper, I have attempted to illustrate one way in which thinking about the democratic underlabourer model in relation to intra-state politics can be helpful for working up an analogous model for international politics. This move involved both a critical engagement with the initial articulation of the democratic underlabourer model and making explicit some of its background commitments. I then provided – drawing on my own previous work on refugees – an extended example of what I refer to as ‘the constitutional underlabourer model’. In the final section, I considered two potential challenges to this model and showed that addressing them involves drawing out potentials of the model that my example had failed to make explicit. Thus, addressing these challenges helps to elaborate a richer understanding of the constitutional underlabourer model and its attractions.

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Notes

1. Lamb rejects this reading of the democratic underlabourer model on the grounds that: they explicitly refer to the need to expose the citizenry to scholarship in normative political theory in order to ‘change people’s views and allow the exploration of more considered judgement and attitudes’. For them, ‘the political theorist’s task is to prevent the truth from slipping out of sight altogether, not simply to accommodate public opinion but. . .to change, and improve, it’. (2018:298, fn.14) But the evidence he adduces in this passage, although compatible with the first reading, does not necessitate it.
2. An illustration of the very narrow understanding of political theory that Swift and White operate with emerges when they remark ‘What is morally urgent, and what repays serious attention by the political theorist, do not necessarily coincide. Putting it bluntly, and perhaps

somewhat paradoxically, what is wrong about the most serious wrongs in the world is often so obvious that there is little of normative interest to say about them'. (2008:51) They provide the following example: Swift was approached by a would-be graduate student who wanted to work on sex trafficking. She was outraged by the data she had come across about the number of women being brought to the UK from Eastern Europe to work in the sex industry. Rightly sensing that her anger was moral, she thought that political theory was the proper discipline within which to research and write about sex trafficking and what might be done to end it. His response was that although he agreed entirely about the awfulness of sex trafficking and thought it an important (albeit also difficult and dangerous) subject for a graduate research project, he didn't see that there would be much political theory in it. It would not take long for her to articulate the values at stake, and there are unlikely to be many theorists offering arguments defending the practice. Of course, there are related issues that do indeed warrant serious theoretical attention. Whether people should be free voluntarily to sell sexual services to others is an interesting question that does raise deep questions—about the proper role of the state in limiting voluntary exchanges between individuals, about the extent to which a state's policies may legitimately reflect controversial judgements about how its citizens should live their lives. But what's wrong with sex trafficking has little to do with these more subtle or complex issues, and somebody really concerned to engage with and try to do something about it does not need to engage with political theory at graduate level to do that. A similar point applies across a whole range of issues. (2008:52) This strikes me as a surprisingly shallow response that can only be driven by an astonishingly narrow conception of political theory in which, for example, questions of power seem to be remarkably absent.

3. To put this in a little more detail: Human rights, including the right to state nationality, may be conceived as denoting the membership conditions of global political society, recognizing that we inhabit a global political order which is structured as an international order of states and committed to securing human rights: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'. (UNDHR Art.28) How is this duty to be discharged in an international order of states? It is important here to distinguish negative and positive duties: Negative duties—duties not to deprive people of what they have rights to are, and must be, universal. A right could not be guaranteed unless the negative duties corresponding to it were universal, because anyone who lacked even the negative duty not to deprive someone of what she has rights to would, accordingly, be free to deprive the supposed right-bearer. . . . The positive duties are the problem that feels severe because they involve the expenditure of resources already in one's possession, even if, where the duties are genuine, one is not actually entitled to keep those resources for oneself and, more important, because whatever proportion of the money, time and energy currently at one's disposal one actually owes to others, the total amount one can owe to others must be limited simply because one's total resources are limited. (Shue, 1988: 690) On the basis of this distinction, Shue notes: Universal rights . . . entail not universal duties but full coverage. Full coverage can be provided by a division of labour among duty-bearers. All the negative duties fall upon everyone, but the positive duties need to be divided up and assigned among bearers in some reasonable way. Further, a reasonable assignment of duties will have to take into account that the duties of any one individual must be limited, ultimately because her total resources are limited and, before that limit is reached, because she has her own rights, which involve the perfectly proper expenditure of some resources on herself rather than on fulfilling duties towards others. (1988:690) In the international order of states, the first cut at ensuring full coverage of human rights in a way that is compatible with the autonomy of states is by allocating primary responsibility to states for protecting and fulfilling the human rights of their own citizens.

4. Hence the current political debate around the recognition of Palestine as a state.
5. Notice that this offers a response to one obvious line of criticism advanced by David Miller via the hypothetical 'case of a state S that exercises jurisdiction over a territory to which its members have an undisputed historical claim, does a good job of protecting human rights internally and pays into an international fund for (natural) disaster relief, but in other respects stays aloof from interactions with other states: it self-isolates' (Miller, 2021) Miller's claim is that S's legitimacy is unimpaired by its failure to contribute to the legitimacy of the international state system but this claim fails to acknowledge that S's legitimate enjoyment of the normative status of statehood hangs the legitimacy of the international state system and its entitlement to the liberties and powers that it enjoys is compromised by legitimacy problems of the political order that constitutes it as having such an entitlement. S's legitimacy cannot be divorced from the legitimacy of the political order in which its normative status is constituted and it is in virtue of this that it has obligations to share the costs and risks of supporting the legitimacy of the international state system. Just as a citizen is in virtue of this status obligated to bear some of the costs of supporting the legitimacy of the state of which they are a member, so too a state is in virtue of this status obligated to bear some of the costs of supporting the legitimacy of the state system of which they are a member.
6. To put it another way, the first cut at securing full coverage of basic human rights is insufficient because states may lack the capacity and/or disposition to protect and fulfil the human rights of their citizens. Full coverage thus requires the construction or maintenance of international institutions that

- (a) *encourage and enable states to protect and fulfil the human rights of their citizens;*
- (b) *make available human rights protection (in ways compatible with the normative structure of international order) when the state(s) with primary responsibility are unwilling or unable to do.*

The duty to provide protection to those who become refugees is thus derivative of the wider duty to ensure full coverage of human rights in global political society and is triggered by failures in the initial scheme of full coverage based on a division of labour between states.

7. For some critical observations of whether I am successful in this endeavour, see Buxton and Draper (2022).
8. I draw on, and adapt from, the distinction drawn by Pettit (2023) between the unincorporated multitude, the incorporated people and the incorporating people.

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