

# A Critical Assessment of George Klosko's Version of the Principle of Fair Play

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**ABSTRACT:** The nature of our obligation to obey the law has consistently been an important object of philosophical dispute. Fair play based theories of obligation purport to show that it is unfair for us to benefit from an organizational scheme (such as the state) without contributing our fair share to the provision of goods. George Klosko is a major proponent of this approach. I develop his particular version of the argument from fair play into a defensible theory of citizens' obligation to obey the laws of their state.

In this paper, I will critically assess George Klosko's argument for the grounding of political obligations in the principle of fair play. In particular, I will inspect the validity of his argument for extending this obligation from schemes that provide only what he calls "presumptively beneficial goods" to those that also offer "discretionarily beneficial goods."<sup>1</sup> I will delineate how he explains obligations from fair play in the case of presumptive goods, but I will assume the argument is sound. I will argue that Klosko's particular justification of political obligations is intuitively valid by addressing two possible objections, which I call the "multiplicity of schemes objection" and the "process of addition objection." As I will

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1. George Klosko, "Presumptive Benefit, Fairness, and Political Obligation," *The Duty to Obey the Law: Selected Philosophical Readings*. ed. William A. Edmundson (Lanham, MD: Rowman & Littlefield, 1999): pp. 197-198.



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demonstrate, I believe the answer to the second objection obviates the first one, so that we may construct a theory of political obligation based on Klosko's position.

Klosko follows H.L.A. Hart and John Rawls in delineating a source of political obligation to a cooperative scheme grounded in the principle of fair play. In short, when we actively accept the benefits of the collaborative effort of a plurality of individuals, we may be obligated (to those individuals) to bear our fair share of the necessary work or costs. Klosko distinguishes between two types of goods that a scheme can offer: "excludable" goods can be provided to specific individuals and denied to others (such as electricity and water services); in contrast, "nonexcludable" goods cannot be kept from specific others.<sup>2</sup> Individuals cannot help but benefit from nonexcludable goods. For example, a state that concerns itself exclusively with national defense can be construed as a scheme that provides a single, nonexcludable good. While it is simple to apply the principle of fair play to cooperative schemes that provide excludable goods, as individuals must actively seek to become its participants in order to benefit from them, it is less clear when they supply nonexcludable goods. In the latter case, we must distinguish between one who actively seeks benefit and what Robert Nozick calls the "innocent bystander," who benefits from the goods offered despite her attempts to avoid them.<sup>3</sup>

This is where presumptive goods become relevant to the argument. According to Klosko, we can suppose by definition that everybody desires presumptive goods regardless of whatever else they want from a cooperative scheme. He argues that in the case of schemes providing presumptive goods the importance of the benefits provided overrides the prospective participant's normal right to choose whether she wishes to enter the scheme.<sup>4</sup> For example, we can assume that all citizens of a state desire na-

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2. Ibid., 197.

3. A. John Simmons. "The Principle of Fair Play," *Moral Principles and Political Obligations* (Princeton, NJ: Princeton UP, 1979): 120.

4. Klosko, "Presumptive Benefit, Fairness, and Political Obligation," 198.

tional defense whatever else lies in their interest. So even though we may not have accepted the benefit of national defense, the state (as a cooperative scheme) can assume that it is important enough that we all accept its provision. Klosko is thus able to avert a problem plaguing the idea of obligation to schemes that provide nonexcludable goods. We can now complete the definition of a cooperative scheme which, according to him, would bind everyone to participate from the principle of fair play. This scheme must provide nonexcludable benefits that are (i) worth their costs to the recipients, (ii) presumptively beneficial,<sup>5</sup> and (iii) balanced justly with burdens and distributed fairly within the scheme.<sup>6</sup> This is the explanation that I accept as sound for the sake of argument. The discussion becomes more complex when considering discretionary goods, because the argument of importance does not apply.

Klosko rightly notes that an obligation to schemes providing presumptive goods is not sufficient to describe political obligations, since governments offer a myriad of goods that do not fit this definition. Imagine a state that endeavored only to defend its territory from external invasion. As noted above, this would be a scheme that provides a nonexcludable presumptive good, but it is philosophically uninteresting since it does not in the least correspond to modern states. Modern states (for the most part) provide what Klosko calls discretionary goods, which may be desirable but “should not be viewed as essential to people’s well-being.”<sup>7</sup> How can an obligation from fair play to participate in schemes that produce presumptive goods be extended to those that offer discretionary goods? In my example, Klosko has explained why we may be obligated to states that ensure border patrol, but not why we should pay taxes for public schools.

Klosko argues for such an extension. He seeks to extend the function of cooperative schemes that already produce presumptive goods to

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5. *Ibid.*, 197.

6. *Ibid.*, 203.

7. *Ibid.*, 198.



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include discretionary goods. The idea is that there is a difference between demanding cooperation for a scheme that provides both presumptive and discretionary goods and requiring additional contributions of an individual to a scheme that already obliges him.<sup>8</sup> Thus, individual A has a *prima facie* obligation to cooperate with a scheme providing presumptively beneficial goods that, afterwards, begins to offer discretionary goods as well. In my example, citizens who are already obliged to contribute to the costs of national defense may, in a second moment, also incur an obligation to pay taxes for public education. In this case, Klosko writes, it is up to A to show that, once the scheme has assumed the provision of discretionary goods in addition to the initial presumptive ones, it no longer satisfies, as a whole, the criteria required for fair play-based obligation. So scheme X that provides presumptive goods and discretionary goods a, b, and c must be shown by A herself to be (i) overly costly or (iii) unfair to A in order for her to justifiably deny her contribution.<sup>9</sup>

For the remainder of the paper, I will focus on two pivotal criticisms of this argument. The first one, what I have called the “multiplicity of schemes objection,” attacks the notion of benefit packages implicit in Klosko’s argument. Klosko seems to imply that when members of a scheme decide to take on additional forms of cooperation, they are incrementing the package of benefits that the schemes in which they participate provide, but perhaps this is not the correct way to think about it. Maybe the result of assuming new forms of cooperation is a division into multiple schemes with one providing the original presumptive good and the others offering new discretionary goods. This means individual A would be free to subscribe to the former scheme (e.g. defense of the borders) without being a member of the latter ones (e.g. public education). Klosko could rebut since the cooperative members that provide the presumptive and discretionary goods are identical, it would not make sense to say that there are two dif-

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8. *Ibid.*, 205.

9. *Ibid.*, 206.

ferent schemes. But this is not implausible: a credit card company, for example, offers very distinct benefits to its more longstanding (or wealthy) members than it does to regular customers.

Thus, we have a problem. How can we tie the additional discretionary goods Klosko writes about to the original presumptive good in such a way that they can collectively be considered part of the same “package of benefits?” We could undertake to demonstrate that the provision of national defense depends necessarily on the concomitant offering of goods such as public education. However, the manner in which Klosko frames his argument seems to preclude such an approach. The presumptive goods are chronologically prior to the discretionary ones. A more tenable method becomes apparent when we consider the process by which members of a scheme should decide to cooperate in the provision of additional discretionary goods, which takes us to the second objection to the overall argument.

The second counterargument, which I called the “process of addition objection,” asks the question of how the members of a cooperative scheme are to decide which discretionary benefits the scheme should provide in addition to the presumptive ones. Consider state X that provides its citizens only with the presumptive goods of national defense and physical security. According to Klosko’s position, the functionaries of this state could be justified in adding any task to their office so long as the sum-total of the goods provided met the three conditions necessary to generate obligation, even if they may be individually detrimental. Suppose state X now decreed that all citizens must be subject to forced labor for three hours every day. The overall scheme (assuming it is still a single one) may very well meet Klosko’s three criteria, but some of the collaborative “goods” now provided are not beneficial at all. So the extension of obligation requires a legitimate process of addition of collaborative ventures at the least.



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In what manner, then, should members of a scheme elect to take on the provision of particular discretionary goods? It appears to me that the most tenable method would include a democratic process: the members of the scheme should vote upon which discretionary goods to collaboratively provide. Being an insider to a collaborative scheme gives individuals many stakes in the scheme itself; it would be unfair for any insiders not to have a voice regarding the direction in which their scheme is being lead. Thus, the principle of fairness would apply not only to the distribution of goods but also to the process whereby it is decided which discretionary goods a scheme is to provide. By my position, if we live in a state that provides only national defense, we can subsequently convene in the town hall and choose democratically what else we would like the state (as a scheme) to do for us. Notice that we now think of the goods as a single package of benefits: the “multiplicity of schemes” argument loses impetus. This process of addition would also ensure that no detrimental “goods” be added to the scheme as in the forced labor example, thus countering the second objection. In my view, then, a democratic process of addition is necessary for fair-play-based obligation.

There are counterarguments to my view in favor of incorporating democratic standards in collaborative schemes to save the principle of fair play, but I hope to dismiss them. In the first place, it might be said that the collaborative scheme becomes susceptible to the problematic situation of the tyranny of the majority. If a consistent and unchanging majority systematically votes against the minority, the objection follows that the minority is in a *de facto* state of subjection to power. However, I believe the intuitive force of the counterargument is misplaced in this context: added discretionary benefits must each be worth their costs to their recipients. The objection loses considerable force once this is remembered: a perennial minority would not be disrespected or exploited, because it would actually benefit from the ordinances of the majority, just not in the way it envisioned.

The second objection grants that incorporating a democratic ideal into the process of addition of discretionary benefits would constitute sufficient grounds for political obligation. However, it seems that we are now merely supplementing the principle of fair play with another source of obligation, as opposed to extending its influence. If we accept this counter-argument, we would have to admit that fair play fails to generate political obligation on its own, and must be buttressed by another theory. I believe we can surpass this conceptual hurdle by writing the fair process of addition into the very conditions a scheme must satisfy in order to generate political obligation. Thus, we could add a fourth (iv) criterion: there must be a fair method of decision regarding which discretionary benefits to add to the scheme. Notice that though this is a slight modification of the reasons why we are bound to schemes by a principle of fair play, it is not a source of obligation independent of fair play. We are not obliged to schemes because we have a right to vote, but because in certain conditions (the vote being one of them) conducive to the generation of nonexcludable benefits, it would be unfair of us not to do our part for the scheme providing those benefits.

In conclusion, we can ascertain that Klosko's extension of fair play obligation from schemes providing presumptive goods to those that additionally offer discretionary goods is intuitively justified. However, his argument encounters several difficulties that somewhat mutate its premises and conclusions. Klosko is mistaken, for example, in thinking that the three conditions required for the generation of fair play obligation apply only to schemes as a whole. I have shown that it is more plausible to think they are applicable also to the individual benefits themselves. Along with the addition of the democratic ideal condition, this is the only possible way to make the assumption that schemes provide a package of benefits rather than considering each good as produced by a distinct scheme. Finally, we can circumvent the criticism that the argument no longer resembles one



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of fair play if we write the voting practice for the addition of discretionary goods into the initial conditions required for the generation of political obligation. In sum, we may be politically obliged to a scheme that satisfies these four criteria: (i) it provides benefits that are worth their costs to their recipients, (ii) at least one of these benefits is presumptively beneficial, (iii) the burdens and benefits are distributed fairly within it, and (iv) the discretionary benefits provided are fairly decided upon. ❖