

SYMPOSIUM
REPUBLICANISM BETWEEN JUSTICE AND DEMOCRACY



A PRÉCIS OF
ON THE PEOPLE'S TERMS
A REPUBLICAN THEORY AND MODEL OF DEMOCRACY
BY
PHILIP PETTIT

[THIS PAGE INTENTIONALLY LEFT BLANK]

A Précis of
On the People's Terms
A Republican Theory and Model of Democracy
Philip Pettit

Freedom is a property of both choices and persons. You enjoy freedom in a certain type of choice, according to the liberal sort of theory defended by Isaiah Berlin, insofar as you can choose as you wish between the options, regardless of what you prefer to choose. That means that in order to enjoy freedom in the actual world you must enjoy non-frustration in both the actual world where you prefer one option and in the possible worlds where you prefer others. Thus freedom in this sense — freedom as non-interference — requires non-frustration robustly across variations in your own preference as to what you should choose.

Republican theory argues that freedom in any type of choice requires a still higher degree of robustness. You must enjoy non-frustration, not just regardless of what you prefer to do, but also regardless of what others prefer that you do. You must enjoy it robustly across variations in your own preferences in the choice and robustly across variations in the preferences of others as to what you should choose there. Thus in order to enjoy freedom of speech you must enjoy non-interference in exercising speech or silence regardless of what you prefer to say or not to say and regardless equally of what others prefer you to say or not to say. This is freedom as non-domination, since it requires that no other

person or body be in the position of a *dominus* or master that can interfere at will in your exercise of the choice.

In order to be a free person or citizen — a *liber*, in the Latin tag — republican theory, as reconstructed here, requires that you should enjoy freedom as non-domination in a publicly determined range of choice-types and on a publicly assured basis. You should enjoy non-domination across the basic liberties that law and culture is required to define for your society; like freedom of speech, these are choices such that each can exercise and enjoy them consistently with others doing so at the same time. And you should enjoy non-domination on the basis of the protection offered by public laws and norms. The laws and norms of the local society should make your enjoyment of non-interference in the basic liberties robust across variations in your preferences, and the preferences of others, as to how you should choose in that domain. They should protect you against restriction and intimidation, private or public, in determining what you should think or say, for example, what religion you should practice, who you should associate with, where you should live, what job you should take, what you should do with your property, and so on.

As it is given substance in *On the People's Terms*, the republican ideal of the free person requires the laws and norms of your society — we set aside international issues here — to enable you to pass two tests. First, they should make it possible for you to enjoy private non-domination by giving you sufficient protection to ensure that you pass the eyeball test. According to that test, you should be able to look others in the eye without reason for fear or deference as a result of their power over you; and this, by accepted local standards as to when such reasons are present. Second, the local laws and norms should enable you to enjoy public or governmental non-domination by giving you an equal share in a system of popular control that is sufficiently effective

to enable you to pass the tough-luck test. According to that test, you should be able to take it as just tough luck if the laws or policies that the state puts in place are unwelcome to you or those in your corner; you should have reason not to treat those impositions as the proof of an alien or malign will at work in public life.

These ideas from republican theory support a theory of social justice and a theory of political legitimacy. The theory of social justice holds that the laws and norms of the society should give you and others enough in the way of resources and rights to enable you to pass the eyeball test. The second chapter sketches this theory and offers a rough model of the sorts of policies that it would require a regime to introduce. The theory of political legitimacy holds that the laws and norms of the society should be imposed on you and others under a popular system of control in which you equally share. The third chapter introduces this theory and the fourth and fifth chapters elaborate its implications, offering a model of the sorts of institutions that legitimacy in that sense would require.

The political theory of legitimacy imposes conditions under which a government that interferes in people's lives need not actually dominate them. Interference is not dominating if it is subject to the control of the interferee. The sort of interference that government inevitably practices in people's lives will not be dominating, then, if it is subject to the control of its citizens. And that is so, even though the control is shared. Assuming no one is special — this is a basic normative constraint — no one can complain about having to share with others in exercising this control.

This theory is undemanding insofar as it presupposes that there will be some state or government in place, without seeking to justify this. But that is not a serious lacuna from a republican

point of view, since it is a form of necessity rather than a dominating will that accounts for the inescapability of the state. It is a matter of historical necessity that everyone lives under government: the state-bound character of the earth is the byproduct of a long, often unfortunate history. It is a matter of political necessity that people live under a particular government without necessarily being able to gain admittance elsewhere: states cannot survive if they open their borders to all-comers. And it is a matter of normative necessity that the coercion required to keep some from abusing others is imposed equally on all: if only some were subjected to coercion then they would enjoy a special status, contrary to our basic normative constraint.

This is not to deny that a stateless or one-state world might do better by freedom as non-domination. But such a world is not accessible from here. And here is not inevitably inimical to freedom, since the necessities rehearsed mean that the bare existence of states does not in itself entail the presence of a dominating will in people's lives.

While the republican theory of legitimacy is undemanding insofar as it does not seek to justify the state as such, it is very demanding insofar as it requires the legitimate state to be subject to the control of citizens: to constitute a properly democratic regime in which the *demos* or people exercise *kratos* or power over government. The state has to be subject to an individualized form of control that is equally shared by all; an unconditioned form of control that is not contingent on the will of any third party or group; and a form of control that is efficacious in the sense of ensuring that the tough-luck test is satisfied: no one need think of unwelcome policies that the state delivers as the sign of an alien will in their lives.

People will control the state in the required manner to the extent that there is a system of equally accessible influence in

place that directs government towards the adoption of equally acceptable policies: that is, policies that people are equally disposed in actual fact to accept. Popular influence is necessary but not sufficient for democratic control; it must also have the effect of pushing government in a popularly acceptable direction. But could any feasible institutions deliver that sort of directive influence? The last two chapters of the book give support to a positive answer by describing broadly democratic institutions that might be expected to fit the bill.

Chapter 4 describes a system of popular influence in which electoral institutions are supplemented by institutions that are designed to provide for influence sufficient to support an individualized, unconditioned and efficacious system of control. The individualized clause requires the system to give each an equal chance of being on the winning side in any randomly chosen issue; given sticky minorities, this means that electoral results must be subject to a fair contestability regime, with perhaps some issues being taken off the electoral agenda. The unconditioned clause requires a resistance-averse government and a resistance-prone citizenry: in effect, a government that is subject to a mixed constitution, unable to close ranks against the people, and a community where specialized social movements mobilize and channel civic virtue. And the efficaciousness clause, tied up with the tough-luck test, requires a depth of influence available only under those same conditions. Elected government must be required, as under the mixed constitution, to operate in interaction with executive authorities like electoral commissions and central banks, contestatory authorities like ombudsman and auditor bodies, and the judicial authorities represented in various courts and tribunals. And the resulting network must be exposed at numerous points to the invigilation and contestation of effective non-governmental bodies.

Chapter 5 opens up the issue as to whether such a system of equally accessible influence could be expected to deliver equally acceptable policies. It offers a model of government in which this result may be secured, as by an invisible hand, provided that within the institutions described in the earlier chapter the participants always seek to play ‘the acceptability game’. They try to identify acceptable policies on the basis of considerations that all citizens can regard as relevant and they try to identify acceptable processes for resolving remaining disputes on the basis of just those same sorts of considerations. Under such a regime, so the chapter argues, we should expect stable community standards to emerge and shape the outcomes of government, thereby achieving policies that are to that extent acceptable to all.

This final chapter seeks to illustrate the plausibility of these claims by drawing on the history of democratic reforms in nineteenth-century Britain. And it elaborates the ontology of state and people that the emerging picture supports. On this ontology the people operate in a constituting role when they serve as citizens to keep government in line, imposing the standards that ought to serve in the long haul as substantive constraints on public policies and processes. But insofar as the people operate in that role, under a well-functioning mixed constitution, they will give themselves the corporate profile of a group agent and this corporate people can be identified with the state itself. These observations serve to resolve a variety of constitutional conundrums and to give us an attractive image of the way people and state connect under republican theory.

Princeton University



Australian National University

If you need to cite this article, please use the following format:

Pettit, Philip, "A précis of *On People's Terms: A Theory and Model of Justice and Democracy*," *Philosophy and Public Issues (New Series)*, Vol. 5, No. 2 (2015), 3-8,
edited by S. Maffettone, G. Pellegrino and M. Bocchiola

SYMPOSIUM
REPUBLICANISM BETWEEN JUSTICE AND DEMOCRACY



DEMOCRATIC CONTROL AND
CONTESTATION

BY

ENRICO BIALE

[THIS PAGE INTENTIONALLY LEFT BLANK]

Democratic Control and Contestation

Enrico Biale

In *On the People's Terms: A Republican Theory and Model of Democracy*,¹ Pettit not only develops a theory of freedom and government that will represent a benchmark for any Republican theory of justice and democracy but also, by defending the priority of democratic legitimacy over justice and grounding his account of democratic legitimacy in the contestatory power that is granted to citizens, establishes a framework for critical approaches that offer alternatives to liberal theories of justice and democracy.

Although both democracy and social justice are fundamental features of a republican theory of government, Pettit claims that justification of a democratic polity takes priority because “a failure in political legitimacy would compromise the robustness of freedom more deeply than a failure in social justice only. Where a lack of social justice alone would make us vulnerable only to our fellow citizens, a lack of political legitimacy would make us vulnerable” (24) to government and fellow citizens.

A legitimate democratic polity must not only ensure equal influence to its members but must also grant them control, namely an “individualised, unconditioned and efficacious

¹ Philip Pettit, *On the People's Terms. A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012). Unless specified otherwise, in-text references are to this book.

influence that pushes the state in a direction that they find acceptable” (239).

To pursue this aim, Pettit holds that citizens need to be granted political influence and contestatory power by complying with accountability requirements that define certain norms that orient public policy-making toward the common good. According to this perspective,² democratic legitimacy is grounded in citizens’ control that can be exercised through a contestatory power ensured to them by accountability requirements. What are the constraints that grant this model of control?

Pettit rightly distinguishes between bargaining³ (the acceptance game) and deliberative⁴ (the acceptability game) constraints by claiming that only the latter can ensure the contestatory framework that a republican polity requires.⁵ In fact, a bargaining process does not entail a critical evaluation of political proposals, unless this type of screening is useful for maximizing an individual’s chances to achieve what she wants.

² According to this dual model of control, Pettit claims, even when citizens do not always support proposals that are in the interest of all or trust their representatives to pursue this task, they unintentionally promote the common good by intentionally contesting and controlling political authority.

³ Howard Raiffa, *The Art and Science of Negotiation*, (Cambridge Ma: Harvard University Press, 1982); Howard Raiffa, *Negotiation Analysis*, (Cambridge Ma: Harvard University Press, 2002).

⁴ See Joshua Cohen, “Deliberation and Democratic Legitimacy,” in A. Hamlin and P. Pettit (eds.), *The Good Polity* (Oxford: Blackwell, 1989), pp. 17-34; Joshua Cohen, “Procedure and Substance in Deliberative Democracy,” in S. Benhabib (ed.), *Democracy and Difference* (Princeton: Princeton University Press, 1996), pp. 95-120.

⁵ For a clear contraposition between bargaining and deliberation see Jon Elster, “The Market and The Forum: Three Varieties of Political Theory,” in J. Bohman and W. Rehg (eds.), *Deliberative democracy: Essays on Reason and Politics* (Cambridge Ma: Mit Press, 1997), pp. 3-34.

Instead, deliberation embodies the idea of contestation by claiming that democratic institutions are legitimate when their decisions can be justified to those who are governed by them. Deliberative accountability ensures that people can challenge one another and their representatives if their claims are not grounded in acceptable reasons or if these claims are incoherent because they accept a value and then support a policy inconsistent with this value. Within such an argumentative decision-making process, citizens can effectively contest decisions and ensure that these decisions are in the interests of all by granting legitimacy to democratic procedures.

Although this account is in line with the deliberative ideal, there are important distinctions that particularly concern the role of dissensus that “always represents a second-best for deliberative democrats, whereas it is entirely acceptable, even desirable” (268) for Pettit.

If this conception of democratic control can ensure both critical reflexivity and respect for dissensus, Pettit’s version of republicanism could overcome the traditional objections addressed to the consensus-oriented structure of the deliberative ideal and establish a framework for those critical approaches that offer alternatives to liberal theories of justice and democracy.⁶

In my comment, I would like to challenge this idea by showing that although Pettit had the merit of acknowledging the importance of dissensus and contestation for a democratic polity, his account of democratic legitimacy is consensus-oriented and thus does leave much room for critical contestation.

To pursue this aim, I will focus on the role and content of dissensus and contestation for an account of democratic

⁶ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997).

legitimacy by considering procedural, deliberative and critical interpretations of the democratic decision-making process and showing that only the most radical conceptions can acknowledge dissensus and contestation as the proper grounds of democratic legitimacy.

Because a procedural conception of democratic legitimacy does not ensure any contestatory power to citizens, I will claim, in fact, that it acknowledges superficial but not critical dissent and systematically disadvantage the most marginalized citizens.

Although a deliberative account of democracy seems to overcome these shortfalls by empowering citizens and improving the quality of political decisions, I will contend that the epistemic structure of these accounts affects the role and content granted to contestation by simultaneously reducing the critical power that is ensured to citizens and undermining the legitimacy of democratic procedures.

To overcome these shortfalls, I hold that a shift of perspective is in order. Instead of developing models that reduce democracy to decision-making procedures, it is necessary to focus on processes of democratization that are concerned with the extension of the franchise, scope, and authenticity of control. Within this context, I will show that dissensus and contestation are not considered to be a mere feature of democratic polity or the outcome of an imperfect procedure; rather, they represent the proper expression of a deliberative rationality that legitimizes democracy by distinguishing it from any other form of government. Only this critical interpretation of democracy, I will conclude, can acknowledge dissensus and contestation as the proper grounds of democratic legitimacy.

My analysis will then focus on Pettit's account of democratic legitimacy and show that although the acceptability game shares

certain characteristics with this radical perspective, it is closer to the most traditional accounts of the deliberative ideal and their consensus-oriented structure, which underestimates dissensus and significantly constrains contestation by undermining the legitimacy of democratic procedures.

I

Dissensus and Contestation

In a pluralistic society, people disagree on which decisions should be taken by political institutions and on which values these decisions should be based. Democratic procedures address this type of disagreement by acknowledging individuals as being free and equal to ensure that any decision made by the majority is legitimate and everyone is abided to comply with it. However, it is very likely that although citizens comply with the outcomes of a legitimate decision-making process, they still consider these outcomes unjust or wrong. This type of dissensus is particularly problematic for a democracy because it shows that in a democratic polity, free and equal individuals are coerced into doing something that they consider wrong; simultaneously, it is also distinctive of a democracy because only in a context in which citizens are acknowledged as free and equal can dissent thus proliferate and lead to the contestation of legitimate decisions. Although dissensus and contestation are two constitutive and intertwined features of a democratic polity, they are not unanimously interpreted. In the following analysis, I would like to focus on some of these differences to elucidate the republican account of democracy developed by Pettit.

To acknowledge citizens as free and equal, procedural accounts of democracy claim that democratic procedures must ensure fair opportunities to influence decision-making processes to every member of the polity and must acknowledge that each claim is of equal worth. Within this context, citizens are free because they are bound only by the outcomes of democratic decision-making (thus, they are acknowledged as the only source of legitimacy for the norms that govern them), and they are equal because no one is excluded or finds his or her claim considered less worthy.

According to this perspective, democracy does not have to promote any substantive value because the common good can only be what equal citizens consider to be of public concern.⁷ As democratic fairness requires that all individuals must have the opportunity ‘to convince others that what in the past was not public in the sense of being a matter of common concern should now become so’⁸, no issues can be eliminated in advance, and citizens can ground their proposals in different values and provide different reasons, depending on the audience that they are trying to persuade.⁹

In cases of deep disagreements, citizens are required to create a framework for a minimal and ongoing compromise that

⁷ Robert Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989).

⁸ Nancy Fraser, *Justice Interruptus* (New York: Routledge, 1997), p. 86

⁹ See André Bächtiger et al., “Disentangling Diversity in Deliberative Democracy: Competing Theories, Their Blind Spots and Complementarities,” *Journal of Political Philosophy* 18, 2010, pp. 32-63; Stephen Elstub, “The Third Generation of Deliberative Democracy,” *Political Studies Review* 8, 2010, pp. 291-307.

demands a willingness to continue to cooperate on equal terms.¹⁰ Provided that dissensus does not undermine political cooperation, citizens can legitimately consider those compromised solutions to be incorrect or unjust and deeply criticize them. Although these perspectives fully respect dissensus, I suggest that they do not properly constrain citizens' claims in the decision-making process. Therefore, an authentic contestatory power is not permitted to citizens and it is very unlikely that decisions will pursue the interests of all,¹¹ undermining the legitimacy of democratic procedures. Let me clarify these points.

Although these accounts do not reduce the decision-making process to an acceptance game, to adopt Pettit's terminology, and do not legitimize decisions that are deeply affected by the bargaining power of the participants in the decision-making process, citizens can accept policies for different—and even conflicting—reasons, do not thoroughly justify their claims (incompletely theorized agreement), or ground their proposals in persuasive but not fully justifiable arguments.¹²

¹⁰ See James Bohman and Henry Richardson. "Liberalism, Deliberative Democracy, and 'Reasons that All Can Accept,'" *Journal of Political Philosophy* 17 (2009), pp. 253-274.

¹¹ José Luis Martí, "The Epistemic Conception of Deliberative Democracy Defended. Reasons, Rightness and Equal Political," in Martí and Lafont (eds.) *Deliberative democracy and its discontents*, (Aldershot: Ashgate, 2006); David Estlund, *Democratic authority: a philosophical framework* (Princeton: Princeton University Press, 2009).

¹² Jane Mansbridge, J. Bohman, S. Chambers, D. Estlund, A. Follesdal, A. Fung, C. Lafont, B. Manin, and J.L. Martí, "The Place of Self Interest and the Role of Power in Deliberative Democracy," *Journal of Political Philosophy*, 18, 2010, pp. 64-100. Jane Mansbridge, "Conflict and Self-Interest in Deliberation," in S. Besson and J. L. Martí (eds.), *Deliberative democracy and its discontents* (Aldershot: Ashgate, 2006), pp. 107-32.

These lax requirements ensure continuous cooperation on equal terms, but they do not provide standards to which political authority is accountable and that require political authority to answer to the citizens. If, in fact, individuals could adopt different arguments for different audiences or accept a policy that is grounded in a value that they explicitly consider unacceptable, then it would be difficult to assess their claims on their merits or to understand whether they are accepting a policy sincerely out of respect for their fellow citizens or only strategically to maximize their benefits.

Consequently, it seems to me that these accounts of democratic polity acknowledge superficial but not critical dissent; that is, they do not grant citizens contestatory power and, as a consequence, they undermine both the legitimacy of democracy and the egalitarian structure on which this ideal is grounded. When political authority cannot be challenged, it is very likely that the status quo will not change and that those who are particularly disadvantaged by this context will not have the opportunity to improve their condition.

To conclude, even when these accounts appear to acknowledge citizens as free and equal and to be respectful of their dissenting opinions, they disadvantage the most marginalized citizens and undermine democratic legitimacy by failing to ensure contestatory power to individuals and misrecognizing their equal status.

To overcome these problems, traditional interpretations of the deliberative ideal claim that democracy embodies an idea of citizens as free and equal by acknowledging their authority to reciprocally demand justification for any decision that governs them. Public accountability does not simply require that anyone participating in the decision-making process advances a consideration that she judges to be reasonable; rather, she must

find considerations that her fellow citizens can reasonably be expected to acknowledge as reasonable (the universality condition). Because in an ideal deliberation “no force except that of the better argument is exercised”¹³, citizens should be ready to modify their preferences and claims when a better alternative is supported to ideally achieve a rationally motivated agreement on the best policy available.¹⁴ Although this perspective idealizes the decision-making process, it significantly empowers citizens, especially the least advantaged, by ensuring their contestatory power and increasing the chances that the decision-making process will promote the interests of all.

When the only power allowed in an argumentative setting is the force of the better argument, decision-making is impermeable to economic inequalities, relatively advantaging those individuals who typically have less political influence, and decisions are judged on their merits rather than their advocates.

This perspective assumes that political proposals can be assessed against some standards of political correctness that are independent of democratic procedures and individual preferences and that the legitimacy of decision-making depends, at least partially, on its ability to identify and promote decisions that are consistent with these standards (epistemic accuracy).

Even when it is undeniable that this conception of democracy empowers citizens and improves the quality of political decisions, I would like to contend that the epistemic structure of these accounts affects the role and content granted to contestation by simultaneously reducing the critical power that is granted to

¹³ Jürgen Habermas, *Legitimation Crisis* (London: Heinemann, 1976), p. 108.

¹⁴ Even if this consensus cannot be granted, citizens should be able to agree on a set of legitimate and reasonable alternatives, and the values on which these alternatives are grounded, from which to choose.

citizens and undermining the legitimacy of democratic procedures.

Although deliberative constraints ensure that citizens can challenge political authority, contestation is the proper expression of a deliberative process when it corrects an incoherence or mistake made by those who do not properly comply with deliberative requirements. However, when deliberative constraints are fulfilled, the ideal outcome should be consensus on the best policy without leaving any room for contestation. Obviously, it is acknowledged that an authentic democracy cannot achieve consensus on the best policy but only approximates this aim and that therefore citizens can criticize the decisions made. However, according to my view, this contestation is delegitimized because it is not the proper expression of a deliberative process legitimizing democracy but is instead a tolerated deviation from an ideal that cannot be achieved by imperfect procedures because of the limits imposed by reality.

I contend that the role and meaning that this interpretation of the deliberative ideal grants to contestation underline how an account of democracy that aims to identify shared values and policies instead of constantly criticizing and revising them delegitimizes dissent and cannot ensure the contestatory power on which democratic legitimacy should be grounded.

To conclude, the consensus-oriented interpretation of the deliberative ideal may improve the quality of political decisions and grant some contestatory power to citizens, but it justifies a problematic idea of democracy that is not compatible with a polity in which citizens are fully empowered and democratic legitimacy is grounded in their critical contestation.

To overcome the shortfalls of the traditional interpretations of the deliberative ideal, I hold, following critical approaches, that a

shift of perspective is in order. Instead of developing models that reduce democracy to decision-making procedures, it would be necessary to focus on processes of democratization that are concerned with the extension of the following: 1) franchise (the number of people capable of participating effectively in collective decision), 2) scope (issues and areas of life under democratic control), and 3) authenticity of control (the degree to which democratic control is engaged through communication that encourages reflection upon preferences without coercion)¹⁵.

According to this perspective, when everyone is included on an equal footing within the decision-making process but some individuals are subjected to domination in their working context or political issues are framed by perspectives that systematically underestimate their claims, equality is not granted and democratic legitimacy is undermined. Democracy embodies an idea of egalitarian society that goes beyond the political context and requires an acknowledgement of the impact of socially constructed values and practices both on the lives of citizens and on the decision-making process. Because these features are not given but developed in the social context, democratic control, to my view, must be extended to ensure that these values and practices do not marginalize and exclude anyone and that citizens are genuinely acknowledged as free and equal.

Within this context, dissensus and contestation are not considered to be merely features of democratic polity or the outcome of an imperfect procedure; rather, they represent the proper expression of a deliberative rationality that legitimizes democracy by distinguishing it from any other form of

¹⁵ John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press, 2000), p. 29.

government.¹⁶ Deliberation does not have to identify and promote a set of shared values or the best policies available, but it must ensure critical reflexivity by introducing new perspectives and ideas that can challenge the dominant discourse and reframe political debate.

Because the specific boundaries and content of democratic processes cannot be defined in advance but are among the issues under contention, a certain level of instability and dissent is not only inevitable but necessary. “Democratic debate is like a ball game where there is no umpire to definitively interpret the rules of the game and their application. Rather in the game of democracy the rules of the game no less than their interpretation and even the position of the umpire are essentially contestable”¹⁷.

According to this account of democracy, a polity in which citizens agree on some sets of shared values cannot ensure the extension of franchise, scope, and authenticity that characterizes a legitimate and egalitarian democratic regime. Only when those dominant discourses that appear to be shared by every member of society are systematically challenged can the critical evaluation and revision of values and ideals on which democratic legitimacy is grounded be ensured. Democracy is a legitimate and egalitarian system because it redefines its grounds, boundaries, and content by acknowledging that only citizens can specify the aims that the socio-economic system must pursue, the values on which their society must be grounded, and the background against which they must develop their life plans.

According to this perspective, disagreement is not only the starting point of democratic decision-making but also it

¹⁶ See Seyla Benhabib, “Deliberative Rationality and Models of Democratic Legitimacy,” *Constellations* 1 (1994), pp. 26-52.

¹⁷ *Ibid.*, pp. 38-9.

represents one expression of democratic ideals because only when citizens disagree and express their dissent do they properly exercise political agency. Dissent and contestation do not necessarily have any impact on the quality of decisions, but they address the quality of the process that will produce these decisions, the values and claims on which these decisions must be grounded, and the individuals who are allowed to make these decisions.

To conclude, I claim that full contestatory power can be granted to citizens and that democratic legitimacy is thereby fully justified when dissensus is neither respected nor considered as second best but is instead pursued by a democratic polity that aims to revise and challenge values and policies rather than reaching agreement on them. Once the different roles that alternative interpretations of democracy grant to dissensus and contestation have been clarified, I focus on analyzing which role and function Pettit's account grants to these important features of democracy.

II

The Acceptability Game and Contestation

Because dissensus and contestation are the proper expression of the democratic control that legitimizes democracy by distinguishing it from any other form of government, the acceptability game should ensure the critical reflexivity that characterizes the most radical interpretations of the deliberative ideal. Along these lines, Pettit claims in a previous work that his version of republicanism could establish a framework for those

critical approaches that offer alternatives to liberal theories of justice and democracy.¹⁸

Similar to Pettit's republicanism, these critical perspectives justify an egalitarian society in which citizens do not have to submit to arbitrary power in a political context or in any sphere in which power can be exercised and acknowledge the priority of the political dimension. Although critical perspectives explicitly hold that this priority entails that democratic control should be extended to new issues and areas of life, Pettit does not clearly specify, according to my view, the scope of democratic accountability. Thus, it would be interesting to understand whether Pettit agrees with these radical perspectives and claims that democracy should not be limited to decision-making procedures that aim at collective decisions but instead should be interpreted as a process of democratization that involves every relation that is characterized by power and domination.

To be fair, although Pettit holds that contestatory power should not only be exercised within those deliberative moments in which citizens/representatives must make political decisions but that it also must characterize the entire democratic process (i.e., before, during and after a decision is made), he appears to interpret democracy as a collective decision-making procedure. Finally, even when he recognizes that the political sphere has priority over other domains, this recognition does not appear to entail an extended scope of democratic control but simply an acknowledgement that a dominated decision-making will be worse than an unfair distribution of opportunities. However, if this were the case, then Pettit appears to assume a traditional interpretation of democracy according to which democratic control should be exercised over those cases that strictly concern

¹⁸ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997).

the political domain and are mediated through law. Although I am sympathetic to this view, it seems to me that this perspective is not consistent with the idea of granting a framework for critical approaches that provide an alternative to liberal conceptions of justice and democracy.

To confirm my doubts regarding the compatibility between the acceptability game and critical interpretations of the deliberative ideal, I would like to underline that “the considerations that an acceptability game is likely to valorise this way will fall into two broad categories” (Pettit 256): considerations of convergent interests, such as the benefits that derive from equality, cohesion, prosperity or peace, and considerations of concordant interests, such as compensation from a previous injustice suffered by a disadvantaged group or a Paretian improvement that helps some while not doing any harm to others.

By focusing on the quality of the outcomes of an acceptability game, although it is not clearly stated, Pettit seems to assume some standards of political correctness that are independent of democratic procedures and individual preferences, against which political proposals should be assessed and that collective decisions should promote. However, if this is the case, then democratic legitimacy will not exclusively depend on democratic control, but it will depend, at least partially, upon the capacity of democratic procedures to make the most correct decisions (epistemic accuracy).

As previously shown, this idea of democracy would justify a corrective rather than a critical account of dissent and ideally would aim for consensus on the best outcome. Even if it were acknowledged that actual procedures could simply approximate this result and that dissensus would consequently be justified, this type of contestation is not considered to be the proper expression

of democratic control or critical reflexivity. These features confirm, I contend, that the acceptability game is not compatible with those critical interpretations of the deliberative ideal that ground democratic legitimacy in citizens' contestatory power.

To conclude, Pettit either grounds democratic legitimacy in democratic contestation but interprets democracy as a process of democratization that does not aim to identify correct and shared policies, or he interprets democracy as a decision-making procedure that promotes correct policies but then grounds democratic legitimacy in epistemic accuracy and does not consider dissent the proper expression of democratic agency.

University of Piemonte Orientale

If you need to cite this article, please use the following format:

Biale, Enrico, "Democratic Control and Contestation," *Philosophy and Public Issues (New Series)*, Vol. 5, No. 2 (2015), 9-24, edited by S. Maffettone, G. Pellegrino and M. Bocchiola

SYMPOSIUM
REPUBLICANISM BETWEEN JUSTICE AND DEMOCRACY



THREE COMMENTS ON PHILIP PETTIT'S
ON THE PEOPLE'S TERMS
BY
JOSÉ LUIS MARTÍ & HUGO SELEME

[THIS PAGE INTENTIONALLY LEFT BLANK]

Three Comments on Philip Pettit's

On the People's Terms

José Luis Martí & Hugo Seleme

Three years ago, Philip Pettit, quite possibly the most distinguished advocate of contemporary republicanism, published *On the People's Terms. A Republican Theory and Model of Democracy* (hereinafter OPT).¹ In that book, Pettit spells out the grounds of a distinctively republican theory of legitimacy that is eminently democratic. Justice and legitimacy, he argues, are the two normative domains in which political philosophy is divided, and both should be governed by the supreme value of freedom as non-domination. Justice, in short, is the domain that regulates the horizontal relations among citizens or individuals living together on equal terms, whereas legitimacy is the domain that involves the vertical relationship between those citizens and their governing institutions.

This does not mean, however, that for Pettit both realms are of equal importance. Political legitimacy, and therefore democracy, should enjoy some kind of priority over social justice. If we consider, then, that most of the previous work by Pettit on republicanism had actually focused on the issue of social justice—his book *Republicanism* (hereinafter R)² above all—the publication

¹ Philip Pettit, *On the People's Terms. A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012). Unless specified otherwise, in-text references are to this book.

² Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997).

of OPT it is to be celebrated, especially along republican lines. In this sense, the book is not only a step further and a necessary complement to Pettit's previous work but also provides the bones, so to speak, for all that flesh.

OPT, specifically Chapters 3 to 5, constitute the preliminaries of a republican comprehensive democratic theory and include valuable insight on a wide range of elements: from the general legitimacy theory and a sovereignty theory to a constitutional theory, a political representation theory, a certain political ontology, a theory on basic rights and liberties, and a political equality theory, among others. It is safe to say that OPT has already become one of the most important books in democratic theory to be published thus far in the 21st century. It will surely generate profound discussions and controversy in the years to come. In this brief note we will not systematically discuss the virtues of Pettit's theory of democratic legitimacy, nor will we develop a concrete line of attack. Instead, we will limit ourselves to sketching out three comments on three different aspects of his theory that we would like him to develop further or improve on, the first being the relationship between political legitimacy and social justice, the second his famous "eyeball test", and the third his dual-aspect model of democracy.

I

The Relationship between Political Legitimacy and Social Justice

Our first comment is basically a quest for clarification and expansion, and it concerns Pettit's distinction between political legitimacy and social justice, or more concretely, his idea that the former is somehow more important than the latter. Pettit acknowledges that such an idea is not directly addressed in the

book.³ We do not understand why, however, since it strikes us as being of major interest to his theory. Pettit permanently insists on the necessity of developing workable, applicable, realistic—although ideal—theories that can provide us with guidelines for real political life.⁴ In real life we are constantly cornered into making trade-offs between our values and our ideals, so it becomes crucial to know how to react to a potential conflict between these two realms of political philosophy. With this in mind, we would like to invite him to expand the idea a bit more.

For a long time now, Pettit has distinguished between two forms of domination: vertical (or public) and horizontal (or private).⁵ In OPT, this distinction has become central because the absence of either vertical or horizontal domination is equal to political legitimacy and justice, respectively, the two domains of political philosophy (24-5).⁶ In addition, Pettit offers a characterization of freedom as non-domination in terms of the absence of control. According to this characterization, an agent is not dominated by other agents when those other agents have no power of interference over his or her decisions or when such power is under his or her command (50).⁷ In turn, an agent may

³ OPT, pp. 24 and 294.

⁴ José Luis Martí and Philip Pettit, *A Political Philosophy in Public Life. Civic Republicanism in Zapatero's Spain* (Princeton: Princeton University Press 2011) chapter 5; hereinafter PPPL

⁵ The distinction traces back to the Roman distinction between *dominium* and *imperium* (R, p. 36), but it was developed significantly in terms of horizontal versus vertical domination in another recent book, *A Political Philosophy in Public Life*, pp. 52-66.

⁶ OPT, pp. 24-25; Philip Pettit, *Just Freedom. A Moral Compass for a Complex World* (New York: Norton and Co 2014), chap. 4 and 5.

⁷ This characterization in terms of control was not explicit in his early works, where non-domination was mostly characterized in terms of the absence of an *arbitrary* power of interference (R: Ch. 2, although the idea of control is occasionally mentioned, e.g. on p. 11). That notion of “arbitrariness”, which

control another agent when he or she holds power of interference over him or her that is not under his or her control, or when this power is not under the control of any third agent (171).

In combining these ideas, we can say that vertical domination (or political illegitimacy) takes place when citizens lack ultimate control over the power of interference of their government, while horizontal domination (or social injustice) happens only when citizens are exposed to the uncontrolled power of interference of other citizens. Consequently, there are two ways in which the horizontal domination of citizen A by citizen B can be prevented: 1) placing B's power of interference over A under A's control or 2) placing it under the government's control (C). In the latter case, political legitimacy may or may not be present, depending on whether the government's power of interference is itself under the ultimate control of the citizens. In any case, no social injustice will take place.

On two very important pages of the book (24-25; 130-131), Pettit connects legitimacy and justice in a very particular way, granting a type of priority or greater importance to the former. He writes that if a state produces vertical domination and is therefore illegitimate, it will necessarily result in certain costs in terms of justice as well. He argues that "where a lack of social justice alone would make us vulnerable only to our fellow citizens, a lack of political legitimacy would make us vulnerable on two fronts [...] The reason is easy to see. If we are subject to a government that can dominate us, as in an illegitimate regime, then we are going to lack control over changes in that government's will towards us and towards those of our kind. But

relates to the traditional republican concept *arbitrium*, was far from clear and produced some criticism. For that reason, Pettit preferred to avoid it in his later works (see OPT: 58; or PPPL: 34-38, containing the first central articulation of the idea of non-domination in terms of control).

this lack of political control means that any social controls we enjoy over changes in the will of our fellow citizens towards us are also likely to be somewhat precarious. While the law may put social controls in place, guarding us against private domination, those safeguards will only be as reliable as the will of the government that establishes and maintains them. Let legitimacy fail (...) and we will be vulnerable both in relation to the state and in relation to our fellow citizens” (24). This is why republicans should “put a certain premium on the value of legitimacy and on the democratic control that it requires” (25).

To be sure, Pettit does not believe that there is a conceptual priority or interdependence between political legitimacy and social justice. He clearly explains that “Social justice does not entail political legitimacy, by this account, nor does political legitimacy entail social justice” (130). However, this does not mean that these two ideals are completely independent or uncorrelated on empirical grounds. In effect, “[i]t’s unlikely that people who fared badly in justice terms could do much about constraining the state to satisfy legitimacy. And it is unlikely that the unconstrained state would do much to establish justice amongst its citizenry” (131). In this passage, Pettit seems to rely on the existence of a certain mutual empirical correlation between the two ideas based on probabilities. However, it is precisely because of its “mutual” nature that such a correlation would be insufficient to establish a priority of political legitimacy over justice. Thus, the reason for this greater importance must be found elsewhere.

As Pettit says in the relevant passage on page 24, quoted above, the reason for such priority is the lack of robustness on the part of institutional safeguards that are illegitimate, that is, those that escape our control. We are horizontally free only when our fellow citizens lack an uncontrolled power of interference. To make this possible, adequate and robust institutional safeguards

must be in place. If such safeguards escape our ultimate control, they would become precarious and be as reliable as “the will of the government that establishes and maintains them” (24).

If we interpret *robustness* as a synonym for *reliability* and an antonym for *precariousness*, any case of political illegitimacy (the absence of ultimate citizen control and therefore also reliable safeguards), by definition, would amount to a case of social injustice. This would certainly establish a priority of political legitimacy over justice, but such a priority would be far too strong. It would be conceptual, and contradictory to other claims made by Pettit since political illegitimacy would then entail social injustice. On the contrary, if robustness and reliability are two different aspects of the institutional safeguards of freedom, a benevolent despot could establish adequate and robust safeguards preventing social injustice, as Pettit admits, even if they are empirically unstable since they would only be as reliable as the will of said despot. However, in that case *unstability* and *unreliability* would simply be empirical properties of illegitimate safeguards that would lead us again to the kind of mutual empirical correlation between legitimacy and justice which, as we saw, appears to be insufficient to ground any superior importance of one over the other.

II

The Eyeball Test

Freedom as non-domination comes in degrees because of the variance in protection provided by institutional safeguards. To determine the minimum level of protection required by an uncontrolled power of interference so that an individual can enjoy freedom or non-domination, Pettit uses what he calls the “eyeball test”. This test consists of determining whether people

can enjoy a level of protection in their options to the extent that it allows them to “look others in the eye without reason for the fear or deference that a power of interference might inspire; they can walk tall and assume the public status, objective and subjective, of being equal in this regard with the best” (84).⁸

The eyeball test is conceived as a proxy, a part of the “guiding heuristic” of the *liber* or the freeperson (82ff).⁹ It constitutes “a good index of whether the guards against private domination are adequate” (124). It therefore plays a central role in Pettit’s theory, putting “the ideal of republican justice within feasible reach (...), not mandating impossible levels of personal assurance or material equality”.¹⁰ It should also be practically useful to make concrete judgments about institutional design or policy analysis, as Pettit shows occasionally in the book (85, 98, 105).

The eyeball test is neutral to psychological variations across persons. Some citizens are, in effect, more timid than others, and they might have greater difficulty in looking the other in the eye. Of course this does not mean that these individuals are less free than their fellow citizens. Pettit explicitly argues that “[t]he eyeball test does not require that people should be able to look one another in the eye, regardless of their personal lack of nerve. It requires that they have this capacity in the absence of what would count, even by the most demanding standards of their society, as mere timidity or cowardice” (84). The problem is that in order for

⁸ The eyeball test has gained importance during the evolution of Pettit’s work. In most of his previous works, he used the idea of being able to “look others squarely in the eye” basically as a metaphor or a symbolic example, but he had never referred to it as “a test” (see for instance R: viii, 5, 71, 87, 133, 166, 268, and 273). In PPPL he begins to call it the “eyeball test”, although it still plays a peripheral role in that work; in OPT it is finally given a central status.

⁹ OPT, pp. 82ff; see also Philip Pettit, *Just Freedom*, pp. xxvi and 98-100

¹⁰ Philip Pettit, *Just Freedom*, pp. 100; see also *Just Freedom*, pp. xxvi, 98-100, 142, 181, and 216

the eyeball test to be neutral to the morally irrelevant factor of variance in personal character traits, Pettit makes this test culturally sensitive, and this might leave his conception of freedom as non-domination open to an objection not unlike the one he directs against the competing notions of freedom as non-frustration and freedom as non-interference.

According to Pettit's presentation, the Hobbesian notion of freedom as non-frustration establishes that being free simply consists of doing anything one desires without experiencing interference from others. One way of reaching freedom, then, would be to simply remove any and all wishes that cannot be satisfied due to third-party interference, thus avoiding frustration. This, according to Berlin, would be counterintuitive.¹¹ Pettit subscribes to this argument and extends it to show that freedom as non-interference defended by Berlin, that is, being free consists only of not experiencing interference, suffers from a similar problem: one can become free simply by ingratiating one's self with whomever has the power of interference so that he or she will behave in a friendly manner and not exercise the power he or she wields by not interfering in one's course of action. Indeed, few of us would claim that a subject in this situation is free. To be free is to be protected from the interference of a third party, whether they are friendly or we ingratiate ourselves with them, or not.

The problem Pettit finds in these two competing views of freedom—freedom as non-frustration and freedom as non-interference—is that they are sensitive to morally irrelevant factors: the actual desires that either the subject or a third party may have. They lead us to morally spurious ways of obtaining

¹¹ Isaiah Berlin, *Four Essays on Liberty*, (Oxford: Oxford University Press, 1969); Philip Pettit, "The Instability of Freedom as Noninterference: The Case of Isaiah Berlin", *Ethics*, 121, 2011, p. 699; OPT, pp. 28-36.

freedom by extinguishing the desire of doing what we are prevented from doing, or by ingratiating ourselves with those who have the power of interference. The “eyeball test” has made Pettit’s conception of freedom as non-domination sensitive to morally irrelevant factors as well: it is sensitive to the actual beliefs and cultural standards that prevail in the society the subject is a part of, or, more precisely, it is sensitive to contingent social standards of shyness and cowardice. Such sensitivity produces, once again, a spurious way of gaining freedom.

Imagine two societies, S1 and S2, with similar laws and institutional safeguards, similar socio-economic conditions of development, similar distribution of wealth, similar educative levels, and so forth. They are equal in all that is primarily relevant in terms of social justice and political legitimacy. But these two societies differ in their cultural standards of shyness and cowardice. S1 has much higher levels of shyness in the sense that only very extreme pathological cases of shyness are considered as such. S2, in contrast, shows much lower levels of shyness. Now imagine an individual who is shy enough to meet the lower limits of shyness in S2, that is, she is considered a shy person in that society. She is not however shy enough to meet the shyness levels of S1 and is not considered a shy person in that society. Now imagine that this person, who travels often from S1 to S2, has difficulty looking others squarely in the eye in both countries. While this person would count as shy in S2, she would nevertheless pass the eyeball test there, and would be considered free regardless of her difficulty in looking others in the eye. As soon as she lands in S1, however, the fact that she is unable to look others in the eye as a person not considered to be shy would entail a failure in the test, and it would therefore mean that she is being dominated. Given that the institutional safeguards and the socio-economic conditions in S1 and S2 are the same, no one could say that this individual is free in S2 and dominated in S1 at

the same time. She could gain freedom just by moving to S2 from S1, even when all the relevant factors providing non-domination measured by the eyeball test are exactly the same in each society, a solution that represents a rather spurious way of obtaining freedom.

III

The Dual-Aspect Model of Democracy

Pettit's republican theory of democratic legitimacy establishes that a state is legitimate only if its citizens are able to exert influence on their government's decisions and actions, and if such influence imposes a welcome direction. For that to be possible, citizens must retain ultimate control over their political institutions and decisions. This control must be individualized, unconditioned, and efficacious.¹² According to Pettit, the only institutional design that makes this kind of control possible is, roughly speaking, a responsively representative, deliberative, contestatory democracy operating under a mixed constitution. But how citizens must exercise such influence and impose direction?

Pettit responds to this in chapter 5. He begins by presenting and discussing two "familiar" democratic models of popular influence and direction: one is the intentional model, according to which the people should be able to intentionally impose the

¹² It is individualized if all citizens can gain access to the system of control under equal conditions and the direction in which influence is exercised is equally acceptable to all. It is unconditioned when the influence each citizen is able to exert does not depend on another's will. Lastly, it is efficacious when it is effective enough to impose a direction upon collective decisions, but when a decision is contrary to the citizen's wishes, he or she sees it merely as a matter of tough luck, and not as the imposition of someone else's will (166-179).

direction they actually find most adequate to protect the public interest after careful consideration (243-247); the other is the non-intentional model of the invisible hand, according to which the citizens should be able to impose a direction unintentionally, just by aggregating their personal interests and private preferences (248-251).

Pettit rejects both models. The intentional model is problematic because it relies on a high degree of civic virtue on behalf of the citizens and their representatives, who must all be committed to the common good when contributing to the public decisions instead of trying to advance their own private interests. But this required virtue would be, according to Pettit, “unmotivated”, since “[t]here need not be any elements of personal interest or spontaneous commitment to support it” (246). Therefore, we cannot take it for granted either: “such virtue is not an assured commodity and a system that requires it is not guaranteed to be sustainable” (246).

The non-intentional model does not presuppose any civic virtue in the citizens or their representatives. It proposes to see the democratic system as a huge mechanism of invisible hand through which a collective equilibrium protecting public interest will emerge from the aggregation of citizens’ private preferences or interests. The public interest is thus equated with satisfaction with the preferences of the greatest number of members of the society. The electoral system would theoretically provide adequate incentives for representatives seeking election to contribute to such a level of satisfaction. However, this model is objectionable: if both citizens and their representatives are simply self-interested actors maximizing their private interests, nothing would prevent them from trying to “form coalitions to impose their particular sectional interests in a way that is unresponsive to minority interests within the society” (250).

In contrast with these two familiar models, Pettit has built up a third, hybrid model supposedly combining the attractive elements of the previous two models while removing their perils and deficiencies. It is what he calls the “dual-aspect model of democracy”. This intermediate model subscribes to the view of public interest presupposed by the intentional model, thus requiring some degree of civic virtue, but it does not rely on the purely virtuous intentional actions and decisions of the people. It shares with the non-intentional model the view of democracy as an invisible-hand mechanism (276). Citizens are supposed to participate politically in a complex process of multiple contestations and deliberation, and do so motivated by personal interests—for instance, the interest in not being deprived of their freedom. Such complex processes, supposedly governed by social deliberative norms, will however result in adequate guidelines for policy-making processes. Thus, the system must “ensure that the policies and processes of government conform to popular, equally acceptable norms. But it need not be manifest to members of the group—that is, it need not be a matter of common belief amongst them—that they can achieve that aggregative, cumulative result” (277). It must also do this while economizing on virtue and using a more realistic design than that of the intentional model (247).

The dual-aspect model is named after the fact that it relies on the juxtaposition of two different levels of democratic process: on the one hand, a sort of fast democracy that requires “the short-haul, highly charged process of campaign and election, proposal and counter-proposal, debate division and contestation”, and on the other, a somewhat slower type of democracy functioning by means of a “long-haul process, as silently as gravity, whereby participants are wittingly or unwittingly led to establish only such policies and processes as conform to the norms of argument and association that prevail amongst them” (270).

Pettit's presentation of the dual-aspect model of democracy in Chapter 5 contains many interesting points that we unfortunately cannot address here, such as his distinction between the constituting and the constituted peoples meant to dissolve one of the classic paradoxes of democratic constitutionalism. However, we must note that OPT provides only the preliminaries of a democratic theory and not a fully articulated account. Pettit leaves out many crucial issues, particularly issues of institutional design. He does not take sides, for instance, with respect to concrete systems of political representation, namely, the Westminster system versus that of Washington. He does not favor any concrete electoral system or any concrete regulation of political parties or campaign donations. Nor does he take sides in questions regarding how rigid a constitution should be or what form of judicial review is best. Furthermore, he does not tell us if the dual-aspect model of democracy would favor the use of wide and efficacious mechanisms of participatory democracy, such as popular initiatives, citizen assemblies, referenda, and so forth, and if so, what conditions such mechanisms would be subject to. The book fails to provide concrete examples of how the dual-aspect model of democracy could be institutionalized.¹³

Such limitations make it difficult to compare the dual-aspect model with its two main counterparts. However, as part of this comment we would like to outline one general objection to his model in order to provide him with the opportunity to clarify some aspects of it. Pettit advocates a hybrid model of democracy by proposing to combine certain aspects of each model. In doing

¹³ The exception is the story Pettit tells, following the works of Oliver MacDonagh, about early nineteenth-century England (OPT, pp. 270-274). This historical example is however of little help in understanding the kind of democratic reform that Pettit might be willing to support in today's democracy.

so, he attempts to extract the best of two possible worlds while avoiding their respective shortcomings. However, like in other endeavors of this kind, Pettit's third way might easily fall under crossfire from both trenches. Does the dual-aspect model really overcome the difficulties he identifies in the other two models? Does it succeed in adequately differentiating itself from the others? We have our doubts, as we explain below. We will then end this piece by providing an alternative interpretation that may address our questions.

Pettit's main objection to the non-intentional model of democracy is the possible danger of an abuse of power by those in government or by tyrannical majorities inclined to rule for their own benefit. Is the dual-aspect model immune to this peril? How can it be secured against political representative abuse of power, especially if no requirement is made to display any type of civic virtue or commitment to the common good? The short answer is that the people, on one hand, must be able to contest the decisions and policies adopted by their representatives through some sort of short-haul, fast democratic process, and on the other hand they must retain ultimate control to impose influence and direction through a long-haul process. Would this not mean, then, that the people themselves would be strictly required to display civic virtue?

Let us provide a concrete example. Imagine a large majority of the population in a country defends same-sex marriage, a position that is in conflict with the existing law of that country. Imagine now that the main political institutions of that country support the existing law and reject the idea of recognizing same-sex marriage. This may happen when such institutions are counter-majoritarian—in the Supreme Court, for example—and differ ideologically from the majority of the population, or because majoritarian electoral institutions are strongly lobbied by more

conservative minorities. At some point, the majority in favor of same-sex marriage may not only be discontent with the existing law, but also outraged by how little influence they have on the government despite representing the majority opinion. Pettit's republican democratic theory, in our view, should give these people ultimate control of the situation, thus granting them the capacity to impose explicitly and intentionally the direction of their political institutions. The best way to do this may not be granting the power to overturn Supreme Court decisions, but rather allowing them to amend the constitution as long as an adequate process is in place to do so. In any case, a sustained majority must ultimately be able to impose their views on such laws. Any other system would not be democratic or legitimate.

Of course, one problem is that the reverse situation may occur. How can we be sure that a sustained majority, having ultimate control and therefore being able to impose their direction on the state, will not use such power to impose the unjust idea of prohibiting same-sex marriage, or even worse, the idea that certain racial minorities should be “tolerated” as “equal” as long as they are segregated? Pettit's short answer to this is that we should rely on the effectiveness of an invisible-hand mechanism made up of a complex, deliberative, and contestatory process of popular decision-making. But could this really take place without any requirement for civic virtue?

Pettit himself raises this question. In effect, he admits that his model requires a certain degree of civic virtue. It contains “an optimistic vision of how things can transpire” and “it will only materialize under quite demanding conditions” (279). The people must remain active, highly-committed, and vigilant with respect to what their representatives do and be prepared to participate in such contestatory processes. Citizens must show some commitment to the rules of acceptability that the deliberative

regulation of public business requires, they must be willing to seek out equally acceptable norms that are oriented to living together on equal terms, and they must show a “commitment to seeking solidarity in collective decision-making”. They must also display some virtues of civility and be “willing to think from the point of view of the group as a whole” (259). Finally, they should be committed to norms of equality of influence, mutual respect, liberty, and independence, among others. (262-3).

As a republican theory, it is indeed not surprising that Pettit’s model relies on significant degrees of civic virtue, both on behalf of the representatives and the people. As we saw, however, such a model attempts to economize in virtue (247). In Pettit’s view, this might constitute its main advantage or improvement over the intentional model. While the latter requires unrealistic doses of civic virtue, with a generalized commitment to the common good and an active disposition to participate politically, without which the model would fail, the dual-aspect model would be much less demanding. The difference, apparently, would be in the degree of civic virtue. But is this difference so great? We wonder if the reason Pettit finds a significant contrast between these two models derives from his particular interpretation of the intentional model, which he seems to conceive as the imposition of virtue on all agents involved in an all-or-nothing process. In other words, he appears to assume that unless all agents display all required virtues entirely, the system as a whole would fail. Should we interpret the model in such a restrictive way? Why not see it, instead, as a regulative ideal, making it compatible with Pettit’s own model?

Imagine once again two societies, S3 and S4, with exactly the same constitutional and institutional systems, the same laws, and the same socio-economic conditions. Imagine both societies display the minimum level of civic virtue both in their citizens

and their representatives as required in the dual-aspect model. Both societies would therefore rank as sufficiently democratic and politically legitimate, according to Pettit's view. However, let S3 now improve its levels of civic virtue by adopting a special education program. In theory, both representatives and citizens should become more committed to the common good and less selfish and strategic, adopting social norms of equal respect, solidarity, freedom, and so forth. S3 citizens would also become more interested in politics and more personally involved in vigilance and contestation. Both societies would remain identical in terms of their respective institutions and economic conditions, but S3 would be much more virtuous than S4, and therefore much less inclined to support openly unjust policies such as segregation. Could we then say that S3 is more legitimate than S4? S4 may be sufficiently legitimate, but we might also recognize that S3 is even more so.

Pettit's dual-aspect model, in our opinion, should recognize this. This is in fact what follows from his characterization of political legitimacy as an ideal. Ideal (or perfect) legitimacy may be impossible to attain in real life. Fortunately, we are able to determine a threshold for a sufficient level of legitimacy that can distinguish between legitimate and illegitimate states. This threshold may be identified through a "tough-luck" test. The idea of a minimum threshold is nonetheless compatible with recognizing differences among states that are situated above it. The mere fact that one state is situated above the threshold does not mean, however, that they have nothing to improve on.¹⁴

¹⁴ Sweden and Spain may well be both sufficiently democratic, but Sweden is quite possibly a greater democracy than Spain. All things being equal, the difference may be found in the levels of civic virtue. Even if Spain continues to be above the minimum threshold, it may still need to improve in order to

In conclusion, if we interpret the intentional model as a regulative ideal, it does not differ much from the dual-aspect model of democracy. Indeed, these two theories could be seen as complementary, with the latter establishing the threshold required to recognize sufficient political legitimacy, and the former identifying the ideal to which we should nevertheless ascribe. We cannot help asking, would this make Pettit's theory more robust yet equally realistic?¹⁵

Pompeu Fabra University



National University of Córdoba

match Sweden, and what is more, Sweden might legitimately try to improve itself in this aspect even more.

¹⁵ José Luis Martí is Associate Professor of Law at Pompeu Fabra University in Barcelona (Spain). Hugo Seleme is Professor of Law at the National University of Córdoba (Argentina). We want to thank Sabina Vöss for revising and editing the English of this note.

If you need to cite this article, please use the following format:

Martí, José Luis, & Selme, Hugo, “Three Comments on Philip Pettit’s *On the People’s Terms*,” *Philosophy and Public Issues (New Series)*, Vol. 5, No. 2 (2015), 25-42, edited by S. Maffettone, G. Pellegrino and M. Bocchiola

SYMPOSIUM
REPUBLICANISM BETWEEN JUSTICE AND DEMOCRACY



REPUBLICAN DEMOCRACY AND THE
PRIORITY OF LEGITIMACY OVER JUSTICE

BY

PAMELA PANSARDI

[THIS PAGE INTENTIONALLY LEFT BLANK]

Republican Democracy and the Priority of Legitimacy Over Justice

Pamela Pansardi

In *On the People's Terms: A Republican Theory and Model of Democracy*,¹ Pettit offers the most accomplished, if not the definitive account of his republican theory of freedom and government previously presented in the books *Republicanism*² and *A Theory of Freedom*³ and in a series of articles.⁴ The originality of this latest work lies in the attempt to provide a theoretical framework for the analysis of two different questions of political theory. The first question is, in Pettit's words: 'what decisions or

¹ Philip Pettit, *On the People's Terms. A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012). Unless specified otherwise, in-text references are to this book.

² Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997).

³ Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Cambridge: Polity Press, 2001).

⁴ See Philip Pettit, 'Freedom as Antipower', *Ethics*, 106 (3), 1996, pp. 576-604; Philip Pettit, 'Actions, Persons and Freedom as Nondomination', *Journal of Theoretical Politics*, 10 (3), 1997, pp. 275-283; Philip Pettit, 'Agency-freedom and Option-freedom', *Journal of Theoretical Politics*, 15 (4), 2003, pp. 387-403; Philip Pettit, 'Freedom in the market', *Politics, Philosophy and Economics*, 5, 2006, pp. 131-149; Philip Pettit, 'Free persons and free choices', *History of Political Thought*, 28 (4), 2007, pp. 709-718; Philip Pettit, 'Republican Freedom: Three Axioms, Four Theorems'. In Cecile Laborde and John Maynor (eds), *Republicanism and Political Theory*. (Oxford: Blackwell Publishing, 2008), pp. 101-130; Philip Pettit, 'Freedom and Probability: A Comment on Goodin and Jackson', *Philosophy and Public Affairs*, 36 (2008), pp. 206-20; Philip Pettit, 'The Determinacy of Republican Policy: A Reply to McMahon', *Philosophy and Public Affairs*, 34 (3), 2008, pp. 275-83.

policies should the state impose in order to establish social justice in the relationship between citizens?’ (p. 75). The second question is: ‘what processes of decision-making should [the state] follow, if it is to count as a politically legitimate decision-maker for its citizens on questions of justice?’ (p. 75). The first question is a question about *social justice*, and aims at investigating the way in which the relationships amongst fellow citizens in a society should be structured. The second question is a question of *political legitimacy*, and is directed at the identification of the way in which the relationships between citizens and the state should be organized.

Pettit’s republican theory, as expounded in this book, is then both a theory of justice and a theory of legitimacy, and aims at addressing both questions on the basis of the single ideal of freedom as non-domination. However, unlike other political philosophies, such as Rawls’s theory of justice,⁵ Pettit’s republican theory underlines the need to keep the two normative questions distinct. Justice and legitimacy, in Pettit’s view, represent two distinct goals of political philosophy, which could be promoted independently of each other. Both at the theoretical and at the empirical level, justice and legitimacy do not imply each other. On the one hand, ‘a state may be fully legitimate [...], and yet not succeed in furthering the cause of social justice very well’ (p. 130). On the other hand, just societies may not be fully legitimate. For instance: ‘we can imagine a benevolent despotism [...] under which people’s relations with one another are ordered in a socially just manner’ (p. 130). The distinction between social justice and political legitimacy, however, should be described as a ‘conceptual divergence’ (p. 131) more than a practical one, since: ‘It is unlikely that people who fared badly in justice terms could do much about

⁵ John Rawls, *A Theory of Justice*. Revised Edition (Cambridge: Harvard University Press, 1999), quoted in Pettit, *On the People’s Terms*, pp. 76-77.

constraining the state to satisfy legitimacy. And it is unlikely that the unconstrained state would do much to establish justice amongst its citizenry' (p. 131).

The promotion of social justice and that of political legitimacy are both tasks of republican theory, and they both concur to the promotion of freedom as non-domination. As we will see later in detail, in Pettit's account social justice refers to the elimination and prevention of *private* forms of domination among fellow citizens (p. 77), while legitimacy refers to the elimination and prevention of *public* forms of domination concerning the relationships between citizens and the State (p. 77). However, if we are presented with the choice between a society which scores better in terms of justice, and one which scores better in terms of legitimacy, according to Pettit, we have reasons to choose the latter: 'A failure in political legitimacy would compromise the robustness of freedom more deeply than a failure only in social justice. Where a lack of social justice would make us vulnerable only to our fellow citizens, a lack of political legitimacy would make us vulnerable on two fronts' (p. 24). The reason for this, in Pettit's view, is quite straightforward: in the absence of popular control on state decisions, social justice may be just a contingent feature of the society, subject to the arbitrary power of a good-willed ruler. Social justice, thus, understood in terms of non-domination in the relationships amongst fellow citizens, would not be enjoyed in this case in the 'robust' sense entailed by republican theory.

The interpretation of the relation between the two goals of republican theory just expounded may be described as entailing a *normative priority of legitimacy over justice*. However, in this note, I shall argue that, within the boundaries of the same republican account, justice is relevant to the achievement of legitimacy, and that, as well as explicitly assuming a normative priority of

legitimacy over justice, republican theory implicitly assumes a *logical priority of justice over legitimacy*. I shall argue, more specifically, that the same definition of republican legitimacy contains ‘social justice’ amongst its elements. Moreover, I shall offer normative reasons for arguing in favor of a priority of justice over legitimacy; in other words, I shall explain why social justice, within republican theory, *should* be considered as a necessary condition for legitimacy. I shall claim that the equal share of each citizen in the popular control of the government – which is at the core of the idea of the legitimate state – can only be achieved when citizens are resourced and protected from (actual and potential) domination on the part of their fellow citizens. This argument will be in line with the republican interpretation of justice and legitimacy in ‘procedural’, rather than ‘substantive’ terms, according to which both of these normative goals refer to the structure of the social and political relations under scrutiny (that is, non-dominating relations) and not to the obtainment of particular goods. Accordingly, the absence of domination amongst fellow citizens should be thought of as a necessary ‘procedural requirement’ for a legitimate democratic society.⁶

I

Distinguishing Social Justice and Political Legitimacy

In Pettit’s account, the promotion of freedom as non-domination entails the elimination and prevention of relations of domination of both a *vertical* and a *horizontal* kind: ‘Where the issue of social justice is a matter of the horizontal relations of

⁶ Pamela Pansardi, ‘Democracy, Domination, and the Distribution of Power: Substantive Political Equality as a Procedural Requirement’, *Revue Internationale de Philosophie*, 70 (275), 2016, (forthcoming).

citizens to one another, political legitimacy is a matter of their vertical relations to the state that rules over them’ (p. 136). Accordingly, political legitimacy entails the elimination of relations of domination of the state over the citizens by means of an equally shared ‘individualized, unconditioned, and efficacious control’ (p. 167) over the government, while social justice entails the elimination of domination in relations among fellow citizens, and consists in the ‘equality in the enjoyment of certain fundamental choices, the basic liberties, on the basis of a guarantee of public resources or protection’ (p. 77). In the rest of this section, I shall offer a more detailed account of Pettit’s interpretation of the two normative goals of republican theory.

Social justice

Social justice, according to Pettit, refers to the equal attribution of the status of free person (p. 88) to each citizen in a society, where citizens are understood as ‘the adult, able-minded, more or less permanent residents of the society’ (p. 87). In order to promote social justice, ‘the state ought to promote the enjoyment of free or undominated choice amongst its citizens, under the expressively egalitarian constraint of treating those citizens as equals’ (p. 82). In order to specify what the republican theory of justice entails, according to Pettit, three kinds of reflections are needed. Firstly, it is necessary to define *which choices* or which domain of choice should be protected by the State. Secondly, it is necessary to identify *the way* in which the State should protect these choices from domination. Lastly, it is necessary to define *the level at which* those specific choices need protection. In addressing these questions, Pettit writes: ‘The choices to be entrenched are the basic liberties; the kind of entrenchment to be provided is the public sort that enlists laws and norms; and the level to be secured is whatever is necessary

for passing the eyeball test in the local society' (p. 88). Let us consider each of these points in turn.

The identification of the choices that need protection to guarantee to each individual the status of a free citizen – those that he calls the 'basic liberties' – is based on two tests. The choices that are to be protected need to be both co-exercisable and co-satisfactory. What does it mean that they should be co-exercisable? It means that the choices included in the list of basic liberties should be exercisable conjunctively both at the individual and at the collective level. Co-satisfaction, on the other hand, means that those choices should adequately satisfy each single individual as well as the collectivity: 'The criterion of individual satisfaction argues that the choices we entrench as basic liberties should be ones that by received social criteria promote the enjoyment and welfare, over the long term, of those who make them' (p. 98).

The identification of the strategies for the protection of the basic liberties points to the establishment of the relevant legal norms, but also on the consequent diffusion of cultural and moral norms. He writes: 'Corresponding to the coercive effect of laws against fraud or violence or murder, we might expect to find norms that occasion a complementary approbative effect, deterring potential offenders by holding out the prospect of communal disapproval' (p. 83-84).

Lastly, the degree to which the basic liberties should be protected is defined on the basis of a particular test: 'people should securely enjoy resources and protections to the point where they satisfy what we might call the eyeball test: they can look others in the eye without reason for the fear or deference that a power of interference might inspire; they can walk tall and assume the public status, objective and subjective, of being equal in this regard with the best' (p. 84). The eyeball test allows the

expectations of the republican theory of social justice to be more feasible and realizable, being independent from individual differences, for example, in timidity or cowardice. This kind of individual differences should not be taken into account in determining the level of resourcing and protection available for a society. Moreover, material inequalities are accepted, as long as the ‘threshold of resourcing and protection that should be secured for all in the domain of basic liberties’ (p. 85) allows each citizens to pass the eyeball test. However, the asymmetries in power generated by material inequalities should be regulated by the state, in order to prevent such inequalities from resulting in forms of domination: ‘Certain differences of wealth and power may jeopardize the freedom as non-domination of the less well off, as we shall see, and be objectionable on that count. But, assuming that they are not allowed to have this effect, they are consistent with the status of a free citizen being available to all, richer and poorer alike’ (p. 85).

Political legitimacy

The republican theory of legitimacy assumes that each citizen should be treated equally in the way in which a political order is imposed by the state. Given the plurality of views on social justice held by citizens in a society, a legitimate state is one in which citizens share the ability to control the government’s decisions and in which, by reason of that, they ‘accept the decisions of the state as binding on them all and [...] submit to the coercive application of those decisions by the state’ (p. 131). The definition of republican legitimacy relies thus on the definition of those criteria that allow us to identify the case in which ‘a state can impose coercively on citizens without dominating them’ (p. 147). The problem of the coercive nature of the state is addressed by relying on the republican distinction between mere

interference and domination. State interference does not necessarily impinge on people's freedom; it does so only when it constitutes an instance of domination. Accordingly, the controlled interference of a non-dominating state is consistent with freedom as non-domination: 'if people governed by a state control the interference practiced by the government – if they control the laws imposed, the policies pursued, the taxes levied – then they may not suffer domination at the hands of their rulers and may continue to enjoy their freedom in relation to the state' (p. 153). In this situation, the state 'would practice interference, for sure [...] but it would only interfere with them on their terms, not at its own will or pleasure' (p. 153).

The popular control of the government is thus necessary for legitimacy. It consists in both a direct influence in the process of decision-making and in the capacity to provide a direction, i.e., in the ability to provide an input that may result in a specific output. Moreover, a legitimate system of popular control should be individualized, unconditional and efficacious. It should be individualized in the sense that gives every citizen an equal share of control – understood in terms of the ability to control, although it may be different in terms of its effect. It should be unconditional in the sense of being independent of any changes in the will of the government, and efficacious in the sense of actually participating in, and limiting, the government decision-making power (p. 167). Pettit writes: 'If it allows the wills of some to rule on certain matters, as in giving the majority party control of various issues, it does so only because such restricted empowerment is consistent with all that popular direction and control requires; like the power that I enjoy when you give me the key to the alcohol cupboard, the power given to the majority party can only be exercised within accepted bounds and need not count as dominating' (p. 176).

However, cases in which the decisions imposed by the state are not in line with certain citizens' interests may occur, but they do not necessarily constitute cases of domination. In particular, where a system of popular control is established and effective in providing guidance for the government decisions, Pettit claims that 'unwelcome results of public decision-making are just tough luck' (p. 177). These 'unwelcome results' may be thought of as contingent and accidental outcomes of the decision-making process that however do not constitute infringements on freedom as non-domination. The 'tough-luck test' is, then, according to Pettit, the counterpart of the 'eyeball test' in assessing the degree of popular control needed to constitute non-domination: 'Where the eyeball test is a good index of whether the guards against private domination are adequate, a parallel tough-luck test is a good index of whether the guards against public domination are efficacious' (p. 176).

II

Is There a Priority of Legitimacy Over Justice?

In the previous section, I have presented Pettit's republican interpretation of both social justice and political legitimacy. In this section I shall firstly take into account Pettit's assumption of a normative priority of legitimacy over justice. Secondly, I shall offer reasons for suggesting that republican theory implicitly assumes a logical priority of justice over legitimacy. Lastly, I shall provide a few arguments for explaining why, within republican theory, we *should* consider social justice as a necessary condition for legitimacy.

As mentioned earlier, according to Pettit every relations between justice and legitimacy is only contingent, since no direct (logical or empirical) implication between the two exists: 'Social

justice does not entail political legitimacy [...] nor does political legitimacy entail social justice' (p. 130). However, Pettit values legitimacy more than justice since justice, in the absence of an established and effective system of popular control, may be subject to changes in the will of the dominating government. In the absence of legitimacy, then, justice may be a contingent feature of a society, dependent upon the discretionary will of the ruler: 'While the law may put social controls in place, guarding us against private domination, those safeguards will only be as reliable as the will of the government that establishes and maintains them' (p. 24). Legitimacy is thus to be preferred to justice not because legitimacy implies justice, but because the absence of legitimacy entails a lack of 'robustness' in any attribution of justice.⁷ The point here, however, is not that legitimacy offers a more 'robust' defense of social justice in a society, but that the lack of legitimacy put citizens in the condition of being exposed to two different evils: *actual* vertical domination and *potential* horizontal domination. In Pettit's words: 'Where a lack of social justice alone would make us vulnerable only to our fellow citizens, a lack of political legitimacy would make us vulnerable on two fronts' (p. 24). Accordingly, political legitimacy should be more valued than social justice as a goal that republican theory should promote, leading to the assumption that republican theory entails a *normative priority of legitimacy over justice*.

However, if we look more closely at Pettit's definition of the two normative goals of republican theory, a different interpretation of the relations between justice and legitimacy can

⁷ It is not clear, however, how can we claim that the absence of legitimacy entails a lack of robustness in social justice without claiming, at the same time, that the presence of legitimacy entails more robustness in social justice – which is expressly excluded by assuming the absence of any logical or empirical implication between the two goals.

be seen to emerge. Let's take Pettit's indicative list of basic liberties, which represents the set of choices that should be protected in line with the republican theory of justice:

The freedom think what you like.

The freedom to express what you think.

The freedom to practice the religion of you choice.

The freedom to associate with those willing to associate with you.

The freedom to own certain goods and to trade in their exchange.

The freedom to change occupation and employment.

The freedom to travel within the society and to settle where you will (p. 103).

These liberties more or less mirror the classical liberal civil and political liberties and are at the basis of the constitutions of liberal-democratic governments; they are also consistent with the basic liberties identified by Rawls's first principle of justice.⁸ In order to support Pettit's claim of a 'conceptual divergence' (p. 131) between legitimacy and justice, the definition of the two concepts should diverge in terms of the elements included in them. The question here is whether it is possible to conceptualize legitimacy without including in its definition the attribution of those basic liberties to the citizens in a society. Is Pettit's definition of legitimacy independent of the basic liberties? Are the basic liberties excluded from the 'procedural' liberties (p. 185) that Pettit's theory of political legitimacy entails? Or, to put it differently, is it possible to imagine a definition of 'popular control' that does not include a reference to the enjoyment of these basic liberties – for example, freedom of speech or freedom of association? The answer is very likely to be a negative one.

⁸ Rawls, *A Theory of Justice*, p. 53.

In line with this reasoning, I suggest we should consider social justice, as Pettit defines it, as a necessary – although not sufficient – condition for legitimacy. In the absence of the basic liberties, the ‘procedural liberties’ mentioned by Pettit in the discussion of political legitimacy become void. Legitimacy, in this sense, comprises justice. Accordingly, I suggest a partial reconciliation between the concept of political legitimacy and social justice: justice does not entail legitimacy, although it is a precondition for it. And legitimacy implies justice, in the sense that in the absence of justice, legitimacy is not in place. As a consequence, we can assume a *logical priority of justice over legitimacy*. Recognizing the logical priority of justice over legitimacy does not entail, however, that we need to completely abandon a reference to the *normative priority of legitimacy*. If both justice and legitimacy are understood in terms of degrees, as Pettit does, that rise above a ‘sufficient’ threshold (p. 88), we can still claim that between two societies that both satisfy the minimal requirements for justice and legitimacy, the one we should prefer is the one which scores better in terms of legitimacy.

It is worth noting, however, that Pettit’s definition of social justice implies something more than merely a formal legal right to the basic liberties. He distinguishes his reference to the protection of the basic liberties from the one emerging from Rawls’s first principle: ‘In Rawls’s usage people are free to do or not do something just insofar as it is legally permissible for them to do it or not to do it: they have a legally protected right in respect of the choice’ (p. 108). Pettit writes: ‘liberty to choose in this [Rawlsian] sense between two options is quite consistent with an inability to make the choice: having the ability is not required for the liberty as such, only for its worth or value’ (p. 108). By contrast, republican theory implies that the basic liberties are both *resourced* and *effectively protected from domination*. Accordingly, for Pettit, basic

liberties should constitute not naked, but vested liberties⁹ insofar as they are not based on mere legal permissions, but on permissions that are ‘protected by a structure of claim-rights on the part of [an individual] that others act or refrain from acting in various ways’.¹⁰ In the republican view, basic liberties should be ‘vested’ in the double sense of being actively protected by the state and being resourced for: they correspond to an idea of ‘substantive’ freedom in terms of freedom as-ability.¹¹ Pettit writes: ‘Republican theory casts the procedural rights that people are to enjoy [...] as *powers* that they must each fully enjoy and equally exercise if they are not to suffer subjection and domination by an uncontrolled state’ (p. 185). Basic and procedural liberties are then not to be understood as mere liberty-rights, but rather as social powers, in the sense that they are both effectively protected and resourced.¹²

I suggested earlier that the entitlement to the basic liberties is a necessary condition for legitimacy, since basic liberties represent part of the requirements for popular control to be in place. However, is the effective protection and resourcing of the basic liberties in the ‘substantive’ sense just expounded also a necessary condition for legitimacy? The argument here moves back from the conceptual and logical to the normative level, and the

⁹ See Ian Carter, ‘The Myth of Merely Formal Freedom’, *Journal of Political Philosophy*, 19(4), 2011, pp. 486-495.

¹⁰ Carter, ‘The Myth of Merely Formal Freedom’, p. 488.

¹¹ Carter, ‘The Myth of Merely Formal Freedom’, p. 492.

¹² Understood in this sense, basic liberties can be described as ‘powers’, in line with what contemporary power theory labels ‘power to’. On the relations between power and freedom in the ability-based sense see: Peter Morriss, ‘What Is Freedom if It Is Not Power?’, *Theoria: A Journal of Social and Political Theory*, 59 (132), 2012, pp. 1-25, and Pamela Pansardi, ‘Power and Freedom: Opposite or Equivalent Concepts?’, *Theoria: A Journal of Social and Political Theory*, 59 (132), 2012, pp. 26-44.

question it aims to answer is the following: Should basic liberties be protected and resourced – and not only formally attributed – in order to have political legitimacy? Undoubtedly, we can have elections and political competition also in the absence of the full realization of social justice, but would every citizen, in that case, share an equal control over the government? If we take the ideal of freedom as non-domination seriously, we should consider the effects of private (horizontal) domination in the citizens' capacity to actually exercise their procedural rights to control the government. If citizens do not enjoy the status of 'free person' at the societal level, they may share an equal *impact* in the political decision-making process,¹³ by reason of their right to vote, but they would not share an *equal opportunity of political influence*¹⁴ in terms of *powers* (p. 185). In order to actually share equal power on the government's decisions,¹⁵ citizens should see their procedural rights to take part to an individualized, unconditional and efficacious system of popular control 'resourced' and 'protected' not only against their infringement on the part of the government, but also against the potential infringement on the part of their fellow citizens. It follows that the full realization of social justice, embedded in the protection and resourcing of the

¹³ Ronald Dworkin, *Sovereign Virtue* (Cambridge: Harvard University Press, 2000), p. 191.

¹⁴ Pansardi, 'Democracy, Domination, and the Distribution of Power'; Harry Brighouse, 'Egalitarianism and Equal Availability of Political Influence', *Journal of Political Philosophy* 4 (2), 1996, pp. 118–141; Jack Knight, and James Johnson, 'What Sort of Political Equality Does Deliberative Democracy Require?'. In *Deliberative democracy: Essays on reason and politics*, ed. James Bohman, and William Rehg. (Cambridge: MIT Press, 1997), p. 293.

¹⁵ Pansardi, 'Democracy, Domination, and the Distribution of Power'. See also Pamela Pansardi, 'A Non-normative Theory of Power and Domination', *Critical Review of International Social and Political Philosophy*, 16 (5), 2013, pp. 614–633.

basic and the procedural liberties, should be thought of a necessary condition for political legitimacy.

III

Conclusion

The arguments set out in the final part of the previous section allow us to put forward the following claims. Although political legitimacy is considered, in republican terms, as more valuable than social justice, the former is, to an extent, dependent on the latter. Only the full entitlement, in terms of protection and resourcing, to the basic liberties – up to the ‘sufficient’ threshold identified by the eyeball test – can allow each citizen to fully enjoy *equal* ‘procedural rights’, understood as *powers*, in the control of the government. Accordingly, the promotion of private freedom as non-domination should be thought of as a necessary condition for the promotion of public freedom as non-domination. As a consequence, what Pettit labels social justice should not be thought of as the ‘substantive’ aim of the decisions or the policies that the government should implement, but rather as an *a priori* ‘procedural requirement’ for political legitimacy to be in place.¹⁶

University Of Pavia

¹⁶ Pansardi, ‘Democracy, Domination, and the Distribution of Power’.

If you need to cite this article, please use the following format:

Pansardi, Pamela, "Republican Democracy and the Priority of Legitimacy Over Justice," *Philosophy and Public Issues (New Series)*, Vol. 5, No. 2 (2015), 43-57, edited by S. Maffettone, G. Pellegrino and M. Bocchiola

SYMPOSIUM
REPUBLICANISM BETWEEN JUSTICE AND DEMOCRACY



PETTIT ON DELIBERATIVE DEMOCRACY,
AND VICE VERSA

BY

JOHN PARKINSON

[THIS PAGE INTENTIONALLY LEFT BLANK]

Pettit on Deliberative Democracy, and Vice Versa

John Parkinson

Deliberative democrats and republicans have rarely had much to say to each other. Deliberative democracy has been cast as a liberal or critical enterprise; and has attracted and incorporated criticism from difference democrats of various stripe. But while participatory democrats of the 1970s knew their Rousseau¹ – or at least a selection of his ideas – modern deliberative democrats have kept their distance from modern republicans, and vice versa.

Philip Pettit's *On the People's Terms*² opens up space for what could be a productive engagement by placing a variant of public reason and an active, contestatory citizenship at the centre of his 'dual-aspect model' of democracy. Some of Pettit's presentation of deliberative ideas and practices will look a little old-fashioned to deliberative insiders. His model relies at important points on claims in classical deliberative theory which have long been rejected, rendering the model less persuasive than it may once

¹ See Benjamin Barber, *Strong democracy: participatory politics for a new age* (Berkeley & Los Angeles: University of California Press, 1984); Jane Mansbridge, *Beyond adversary democracy* (Chicago: University of Chicago Press, 1983); Carole Pateman, *Participation and democratic theory* (Cambridge: Cambridge University Press, 1970).

² Philip Pettit, *On the people's terms: a republican theory and model of democracy* (Cambridge: Cambridge University Press, 2012). Unless specified otherwise, in-text references are to this book.

have appeared. It would be a mistake to dismiss Pettit's work as a result. He asks powerful questions of any democratic system, questions which deliberative democrats frequently avoid; and his model has more in common with modern deliberative theory than he acknowledges.

On the People's Terms builds an argument carefully, layer by layer, claim by claim, each premise explored, each alternative considered, dismissed or selected. As a result, the overall vision of democracy does not emerge until well into the final chapter, as the final blocks are put in place and the overall structure stands before us. It is thus dangerous to offer a critique that focuses on particular elements, and so while this article concentrates very much on the way Pettit uses deliberative democracy, and his model's application to deliberative theory, it tries to keep an eye on Pettit's overall concerns, and the architecture of his scheme. I therefore start by offering a very quick and rough sketch of Pettit's model, showing how that matches in important respects the deliberative systems turn in democratic theory. I then use his claim to be a proceduralist as a lens to focus on a number of broad structural and institutional claims, connecting those observations with his overall analytic approach. I claim that Pettit is not as much of a proceduralist as he makes out; but that his argument for proceduralism and the idea of deliberative norm dispersal could have important impacts on deliberative theory.

It is important to note the obvious at the outset: Pettit's project is not a deliberative one, it is a republican one. His aim is to see what the republican requirement of freedom as non-domination requires of a political system more broadly. And his answer to that question is that the people should *influence* government by checking, contesting and scrutinising through a system of open, transparent institutions, some of which will be elected, others non-elected counter-weights; and should *control*

government through a dual system of long-term deliberative norm dispersal on the one hand, and short-term electoral methods on the other. Pettit's overarching vision is of a large collection of people nudging the state along through a very large number of small, individual pushes which collectively create a direction, a democratic analogue of the invisible hand.

Pettit's 'dual-aspect' model of democracy is his answer to the question of how to organise a democratic system such that it protects republican freedom as non-domination. It is a system which, Pettit argues, gives each individual equal influence on the direction of the state, and equal control over the acts by which the state, necessarily, interferes in our lives. Each of these elements is carefully argued for: the necessity of the state and the necessity of its interference; a step-by-step unpacking of the ideal of individuals' equal participation in the influence and control of that interference; and the systemic features that help ensure each. I will not repeat the whole argument here – Pettit himself does a marvellous job of doing so in the final chapter – but in brief, what guarantees that influence and control over the state is (a) the dispersal of the deliberative democratic norms of equal respect for arguments and the primacy of public reason throughout a society, through use and performative reinforcement; (b) a transparent system of representative government which is dependent on the people's judgements and choices at elections, supplemented by more direct devices as necessary; and (c) a contestatory citizenry willing and able to scrutinise governments and challenge specific policies, demanding and receiving justifications.

Just based on this rough outline, it appears there is much in common between Pettit's scheme and the emerging deliberative

systems approach in deliberative democracy.³ The approach is in part a reaction against claims that small-scale institutions can possibly embody all the deliberative democratic desiderata at once; partly an insistence on the importance of context (institutional, cultural, political-economic, etc.) in any analysis and normative prescription; and partly an attempt to recover deliberative democracy as a descriptive and normative account of democratic societies, inspired more by Habermas (1996)⁴ than Habermas (1984)⁵. The systems move is very new and the contours of various controversies have barely been sketched out, let alone resolved. However, in some variants it too features a relationship between a vibrant, dispersed and normatively prior public sphere – Pettit’s contestatory citizenry – and some form of representative policy making institution, itself embedded in a network of transparent and mutually open state and non-state institutions. On this view it makes no sense to label a single institution ‘deliberative democracy’; that label refers to a salient characteristic of democracy, just as a ‘diesel’ describes a salient aspect of a type of vehicle, and does not describe the entire machine. Thus, a deliberative democracy is one that features rather a lot of deliberation, but not *only* deliberation. It includes other things, such as contestation, voting, party competition, the rule of law, and so on.

However, Pettit’s route to his vision is a combination of extraordinarily elegant theorising that draws on sometimes-surprisingly conservative examples. This is partly a result of his

³ See John Parkinson, and Jane Mansbridge, eds., *Deliberative systems: deliberative democracy at the large scale* (Cambridge: Cambridge University Press, 2012).

⁴ Jürgen Habermas, *Between facts and norms: contributions to a discourse theory of law and democracy* (Cambridge: Polity Press, 1996).

⁵ Jürgen Habermas, *The theory of communicative action* (Boston: Beacon Press, 1984).

classically analytic approach: the examples from which he extracts principles are very often constructed in small-scale ways – one person helping another to avoid alcohol, a group of people managing a condominium – and the lessons are then applied directly to large-scale groups. But there is a significant danger in this approach: it fails to acknowledge that complexity and scale present their own problems, problems that are not revealed by examples of small-scale dynamics. Compare what in the United States is called the ‘family budget fallacy’, the misapplication of homely analogies to nation states in which debt plays a very different role. Pettit approaches deliberative ideas in a similar way. While they feature prominently in his model, they are generally drawn from what scholars are calling its ‘classical’ phase: a set of early statements of principle from Cohen⁶, Elster⁷ and Rawls⁸ to some extent and a (much smaller) set of isolated institutional innovations which some early deliberative democrats claimed best exemplified the principles. This is the deliberative democracy of public reason in the sense of fully comprehensive and consistent reasons for a course of action which all accept, hitched to relatively small-scale practices.

I have already noted the recent move away from the small scale in deliberative theory, but that was made possible by a much earlier abandonment of the strict account of public reason. Scholars in the field favour working agreements for multiple,

⁶ Joshua Cohen, ‘Deliberation and democratic legitimacy.’ In *The good polity: normative analysis of the state*, edited by Alan Hamlin and Philip Pettit (Oxford: Blackwell, 1989), pp. 17-34.

⁷ Jon Elster, ‘The market and the forum: three varieties of political theory.’ In *Foundations of social choice theory*, edited by J. Elster and A. Hylland, (Cambridge: Cambridge University Press, 1986), pp. 103-132.

⁸ John Rawls, ‘The idea of public reason revisited.’ *University of Chicago Law Review* 94, 1997, pp.765-807.

sometimes incompatible reasons;⁹ or the more modest requirement of a meta-deliberation on the nature of the issue being faced;¹⁰ or a rejection of Socratic reasoning in favour of something more grounded in everyday experience ;¹¹ more narrative ,¹² more openness to ordinary communication styles, even less reliance on talk at all;¹³ and much more openness to contestatory engagement. These moves were in response to a series of criticisms from critics like Sanders, Young, and more recently Mouffe,¹⁴ who noted the strong exclusionary tendencies of such an approach to collective decision making. One can imagine *deliberation* taking place under the classical, restrictive conditions, in a very small number of suitably-constrained forums, but not deliberative *democracy*.

That might lead deliberative democrats to reject the first part of Pettit's characterisation of public reason, but not the second, 'which all accept'. Recall his aim: a legitimate state that interferes

⁹ Cass Sunstein, 'Argument without theory.' In *Deliberative politics: essays on Democracy and disagreement*, edited by Stephen Macedo (New York: Oxford University Press, 1999) pp 123-150.

¹⁰ John Dryzek, and Simon Niemeyer, 'Reconciling pluralism and consensus as political ideals.' *American Journal of Political Science*, 50, 2006, pp. 634-49.

¹¹ Simone Chambers, 'Deliberative democratic theory.' *Annual Review of Political Science* 6, 2003, pp. 307-326.

¹² Andre Bächtiger, Simon Niemeyer, Michael Neblo, Marco R. Steenbergen, and Jürg Steiner. 'Disentangling diversity in deliberative democracy: competing theories, their blind spots and complementarities.' *Journal of Political Philosophy*, 18, 2010, pp. 32-63.

¹³ Tobold Rollo, 'The Deliberative Ultimatum: Privileging and Abjuring 'Voice' in Deliberative Systems.' American Political Science Association Annual Meeting, Chicago, 29 August - 1 September 2013.

¹⁴ Lynn Sanders, 'Against deliberation.' *Political Theory* 25, 1997, pp. 347-376; Iris Marion Young, 'Activist challenges to deliberative democracy.' *Political Theory* 29, 2001, pp. 670-690; Chantal Mouffe, 'Deliberative democracy or agonistic pluralism?' *Social Research*, 66, 1999, pp. 745-758.

with our lives in a way that is nonetheless consistent with freedom as non-domination. If one is aiming at that target, it is clear to Pettit that one cannot simply treat social justice as a trump card that beats democratic legitimacy every time, because it is the actual, equal, effective direction and control of the state by its members which legitimates action, not its rightness from some external viewpoint. One can imagine a legitimate state which acts unjustly in some instances; just as one can imagine an illegitimate state which acts justly on occasion. As a result, a contractualist approach, for example, will not do – the state is not legitimised by reasons that all *could* accept if they thought about it hard enough; nor is it legitimised by once-and-for-all constitutional specification, no matter how democratic the initial deliberations that created those documents. Only a proceduralist approach will do, the actual involvement of free and equal citizens in setting the direction of the state and controlling its movement, and thus it is clear that the criterion for public reason from a republican point of view is reasons that ‘all accept’, not ‘all could accept’.

There is one key caveat to Pettit’s proceduralism, and that is his ‘democratic proviso’, something he shares with Walzer.¹⁵ This is the thought that democracy should trump ‘the right thing’ in every case except democracy itself. It is worth quoting the final words of the introduction to show its force:

We ought not to recommend that our society should give people an equal share in control of government, provided this proposal is itself democratically endorsed. We ought to recommend that our society should give people an equal share of control, period. This, in Wittgenstein’s image, is where the spade turns. This is bedrock.¹⁶

¹⁵ Michael Walzer, *Spheres of Justice*, (Oxford: Martin Robertson, 1983).

¹⁶ P. Pettit, *On People’s Terms*, p. 25.

This, it seems to me, is important for deliberative democrats. By and large, the literature has had a buck each way, insisting on a broadly proceduralist line but on the grounds that good procedures lead to good outcomes. This is asserted more in hope than certainty – the limited empirical evidence is not supportive¹⁷ – while little guidance is provided for cases where substantive and procedural rightness pull in different directions.¹⁸ Deliberative democrats could draw on Pettit's analysis here to help draw that line a little more clearly, to insist on the proceduralism that seems broadly in keeping with deliberative instincts and not flipping so readily to a more perfectionist position when procedures look in danger of delivering a wrong answer.

There is a danger though, related to the point that there is still much debate about what democracy requires. It has become a habitual tic in the democracy literature to claim that there is no agreement about what democracy means, although I think that is wildly to overstate the case.¹⁹ However, the danger is that principles are notoriously slippery things to implement, and so particular institutions come to be seen as the bedrock which must not be touched instead, something we see as Western democracies react to crises of legitimacy and security by declaring their particular electoral or party systems untouchable, and equating the call for their removal with supporting the overthrow of the state, full stop. And thus it behoves democrats of all stripes

¹⁷ Lucio Baccaro, André Bächtiger, and Marion Deville. 'Small differences that matter: the impact of discussion modalities on deliberative outcomes.' *British Journal of Political Science*, 2014 doi: <http://dx.doi.org/10.1017/S0007123414000167>.

¹⁸ For a notable exception see Gutmann, Amy, and Dennis Thompson. 1996. *Democracy and disagreement*. Cambridge, MA: Belknap Press of Harvard University Press.

¹⁹ John Parkinson, *Democracy and public space: the physical sites of democratic performance*. (Oxford: Oxford University Press, 2012).

to be more clear on the principles they wish to defend, while remaining open-minded about the particular institutional forms the principles can take. Pettit is well aware of this, and for the most part avoids the problem by arguing at a higher level of abstraction than discussing the particular merits of this minipublic or that parliamentary procedure. However, he does not stay away from institutions entirely, and I argue that Pettit does not apply his proceduralism consistently enough, especially when it comes to conflicts between hypothetical publics over actual, flesh and blood publics.

Consider Pettit's views on the relative roles and merits of citizen forums – minipublics, to most of us – and elected assemblies, which he examines not simply in some formal way, but in terms of the knock-on effects such forums have on the rest of the democratic system. Both feature representation, but Pettit distinguishes between the 'indicative' nature of minipublics and the 'responsive' nature of elected assemblies. As a microcosm of the people, an indicative forum provides evidence of 'the decisions the people as a whole would support, were they able to assemble and deliberate appropriately'.²⁰ Pettit contrasts that with an elected assembly which, while carrying the danger of creating a caste of decision makers with interests independent from the wider citizenry, has important benefits that the forums lack. In particular, he argues:

- that it allows for more direct control over and accountability for policy making through electoral mechanisms, guarding against mistakes and oversights, where indicative assemblies lack such mechanisms;

²⁰ P. Pettit, *On People's Terms*, p. 196.

- that a representative assembly builds up experience and continuity, and thus learns from the past and is more able to hold other state institutions to account;
- that the effective running of elections requires the satisfaction of three basic liberties, namely speech, assembly and travel, which are then generalised throughout the society by virtue of being so central at these highly salient moments.

There is something a little romantic about the account of elected assemblies, a quality reminiscent of Kateb in particular.²¹ For one, participation and representation are analysed in dualistic fashion following a standard account of Pitkin;²² but even if Pitkin herself had not rejected the work of her early days²³ then Mansbridge with her three categories²⁴ and Rehfeld with his eight have surely shown how inadequate the standard story is.²⁵ Further, indicative institutions can in principle be accountable, not so much in a performance management sense (although see Roche for an argument which says that an institution can be held

²¹ George Kateb, 'The moral distinctiveness of representative democracy.' *Ethics*, 91, 1981, pp. 357-374.

²² Hanna Pitkin, *The concept of representation* (Berkeley and Los Angeles: University of California Press, 1967).

²³ Hanna Pitkin, 'Representation and democracy: uneasy alliance.' *Scandinavian Political Science*, 27, 2004, pp. 335-342

²⁴ Jane Mansbridge, 'A 'selection model' of political representation.' *Journal of Political Philosophy*, 17, 2009, pp. 369-398.

Jane Mansbridge, 'Clarifying the Concept of Representation.' *American Political Science Review*, 105, 2011, pp. 621-630.

²⁵ Andrew Rehfeld, 'Towards a general theory of political representation.' *Journal Of Politics*, 68, 2006, pp. 1-21.

Andrew Rehfeld, 'Representation rethought: on trustees, delegates, and gyroscopes in the study of political representation and democracy.' *American Political Science Review* 103, 2009, pp. 214-230.

Andrew Rehfeld, 'The Concepts of Representation.' *American Political Science Review* 105, 2011, pp. 631-641.

accountable in this way even if the its individual instances cannot)²⁶ but in a publicity principle sense – the idea that publicity exerts a disciplining force over the arguments that can and cannot be made in public. On the same point, enthusiasts of representative institutions greatly overstate the degree to which elections convey clear policy messages or even policy programmes (p. 284), partly because of the fact that policy manifestos can only ever be aggregations – electoral processes choose governments, not policies. That is in addition to the purely empirical objection that parties campaign these days on the basis of symbols not substance, often for structural reasons to do with communications technology that challenge Pettit’s preferences regarding independent media. The idea that elected assemblies build up experience and continuity on some issues relative to indicative institutions might be plausible if one considers them in isolation, but place them in a context of powerful, alternative communication sources, let alone in a context of hegemonic discourses, and then factor in cognitive limits,²⁷ and assemblies often turn out to be more subject to momentary ‘whim’ than the allegedly inexperienced indicative assemblies.

Now, that is not to say that minipublics are perfect—I have argued at length that they are not.²⁸ But it is frustrating that when Pettit appeals to examples of indicative assemblies he tends to point to some of the least appealing and not the most, while doing the opposite for elected assemblies. While Mansbridge may recently have lauded deliberative polls as the ‘gold standard’ of

²⁶ Declan Roche, *Accountability in restorative justice* (Oxford: Oxford University Press, 2003).

²⁷ John Forester, ‘Bounded rationality and the politics of muddling through.’ *Public Administration Review*, 44, 1984, pp. 23-30.

²⁸ John Parkinson, *Deliberating in the real world: problems of legitimacy in deliberative democracy* (Oxford: Oxford University Press, 2006).

deliberative minipublics,²⁹ critical voices are finally gaining traction.³⁰ Instead, there is increasing evidence about what sorts of democratic innovations work to shore up which goods in a democratic system more generally, goods which cannot simply be reduced to epistemic ones;³¹ and evidence about how a rich variety of contextual factors mute or amplify messages emerging from small-scale deliberative institutions, just as they impact on elected assemblies.³²

Such empirical objections weaken Pettit's case for the central role of elected assemblies. But there is an important theoretical objection too, which is that the primary role that Pettit assigns such assemblies is in an important sense 'hypothetical'. In the passage quoted above, and in a clear echo of Fishkin³³ and

²⁹ Jane Mansbridge, 'Deliberative polling as the gold standard.' *The Good Society* 19, 2010, pp. 55-62.

³⁰ See Genevieve Fuji Johnson, *Democratic illusion: deliberative democracy in Canadian public policy* (Toronto: University of Toronto Press, 2015); Espen D.H. Olsen, and Hans-Jörg Trenz, 'From citizens' deliberation to popular will formation? Generating democratic legitimacy in transnational deliberative polling.' *Political Studies*, 62 (Supplement S1), 2014, pp. 117-133; John Parkinson, 'Rickety Bridges: Using the media in deliberative democracy.' *British Journal of Political Science*, 36, 2006, pp. 175-183.

³¹ See Archon Fung, 'Survey article: Recipes for public spheres: eight institutional design choices and their consequences.' *Journal of Political Philosophy*, 11, 2003, pp. 338-367; Graham Smith, *Democratic innovations* (Cambridge: Cambridge University Press, 2009).

³² Fuji Johnson, *Democratic illusion*; Yannis Papadopoulos, 'On the embeddedness of deliberative systems: why elitist innovations matter more.' In *Deliberative systems: deliberative democracy at the large scale*, edited by John Parkinson and Jane Mansbridge, (Cambridge: Cambridge University Press, 2012), pp. 125-150.

³³ James S. Fishkin, *When the people speak: deliberative democracy and public consultation*. (Oxford: Oxford University Press, 2009).

MacKenzie and Warren³⁴, Pettit states that their proper role is to provide evidence of the decisions the people as a whole would support, were they able to assemble and deliberate appropriately. But this kind of hypothetical is something that he was so careful to argue against in his discussion of legitimacy and the state: there, legitimacy depended on the actual control of the people (p. 25), not the people bowing to ‘recommending force’, no matter what its source.

As an aside, few outsiders to the deliberative club take this ‘recommending force’ claim seriously. As an empirical matter, real minipublics that deliver results contrary to wider public opinion are often dismissed as push polling on the one hand, or the ravings of the demented on the other.³⁵ Even the lauded British Columbia Citizens’ Assembly process failed to deliver the required super-majority to change the province’s electoral system³⁶—a point Pettit concedes in a footnote—while the attempt to copy that process in Ontario was a dismal failure.³⁷

The plot thickens when considering the major role that deliberation is expected to play in the dual-aspect model: not so much direct participation in deliberation but via deliberative norm

³⁴ Michael K. MacKenzie, and Mark Warren, ‘Two trust-based uses of minipublics in deliberative systems.’ In *Deliberative systems: deliberative democracy at the large scale*, edited by John Parkinson and Jane Mansbridge, (Cambridge: Cambridge University Press, 2012), pp. 95-124.

³⁵ John Parkinson, *Deliberating in the real world*.

³⁶ Fred Cutler, Richard Johnston, R. Kenneth Carty, André Blais, and Patrick Fournier, ‘Deliberation, information, and trust: the British Columbia Citizens’ Assembly as agenda setter.’ In *Designing deliberative democracy: the British Columbia Citizens’ Assembly*, edited by Mark Warren and Hilary Pearse, (Cambridge: Cambridge University Press, 2008), p. 188.

³⁷ Fred Cutler, and Patrick Fournier, ‘Why Ontarians said no to MMP.’ *Globe and Mail*, 25 October 2007.

dispersal.³⁸ Pettit makes some remarks (p. 268) about the differences between his scheme and deliberative democracy, one of which is a claim about consensus and dissensus which no longer applies, given that deliberative democrats abandoned consensus more than 10 years ago. Many now think of dissensus as an essential part of deliberative systems. The second is more significant: that one of dual-aspect democracy's modes of operation is 'regulation by deliberatively tested norms – that is essential, not the deliberative conduct of decision-making at every site and on every occasion'. The idea here is that what is valuable in a freedom-protecting democracy is that decisions are made in ways that treat others with respect; that treat arguments and evidence as king rather than raw power politics; and that the more those in power operate according to deliberative norms, the more the norms will percolate through a society, becoming the standard *modus operandi* for any collective decision making process, whether fully 'deliberative' or not. As a result, actual deliberation may fade into the background – the more that deliberative norms take root, the more they are seen as 'the way we do things', the less need there is for special, micro, indicative (to use his term) events.

It is unclear what Pettit means by 'deliberation' at this point. He cannot mean deliberation as inclusive, respectful, argument-focused discussion between equals—that *is* the norm he wants to generalise. Instead, he seems to treat deliberation, deliberative

³⁸ Pettit does not cite any of this literature, and uses slightly different terms, but it could be fruitful for deliberative democrats to examine the idea of norm diffusion that originated in constructivist international relations, an idea that has gained significant ground over the last two decades. Park sketches a model to be used in empirical research; clearly related ideas on cultural diffusion and identity formation are available from linguistics and anthropology. Susan Park, 'Theorizing norm diffusion within international organizations.' *International Politics*, 43, 2006, pp. 342-61.

democracy and minipublics as interchangeable, something that few deliberative democrats would do, following the systemic turn. However, if he means that deliberative minipublics would fade into the background as the norms themselves become generalised throughout a society, then that is something more interesting. We might doubt the ‘fade into the background’ part—how are members of a deliberative society to be socialised into the norms without having the opportunity to practice them? how would such a regime be legitimate in Pettit’s own terms if actual deliberation was only practised by our ‘betters’?—but still hold onto the idea of deliberative norm dispersal as essential to achieve deliberative (and republican) goals. On this point, compare Boeker³⁹ who argues that deliberative systems need to pay attention to deliberative cultures—not just a focus on the institutional hardware but the discursive ‘software’ that brings the institutions to life.⁴⁰

In a different guise, the idea of norm dispersal reappears in a discussion of elections as being not simply means of choosing governments, but promoting key freedoms in the wider society. There is an echo of this idea in some corners of participatory and deliberative democratic writing, something often labelled the ‘spillover thesis’⁴¹: the idea that participation in one small moment of collective decision making—even being invited to participate—increases a personal sense of efficacy, which then

³⁹ Marit Boeker, ‘The (missing) cultural dimension of deliberative systems.’ *Scaling and Innovation: Contemporary Difficulties and Future Prospects for Participatory and Deliberative Democracy* (Newcastle, 2014).

⁴⁰ Cf. John Dryzek, ‘The informal logic of institutional design.’ In *The theory of institutional design*, edited by Robert Goodin, (Cambridge: Cambridge University Press, 1996), pp. 103-125.

⁴¹ Neil Carter, ‘Political participation and the workplace: the spillover thesis revisited.’ *British Journal of Politics and International Relations*, 8, 2006, pp. 410-26.

makes it much more likely that the person will participate in other aspects of collective life. At present, deliberative democrats are rather more focused on the content of communication and the ability of different institutions to transmit that content undistorted, which creates problems for a theory which, in its classical formulations, was explicitly about transformation of views in light of better arguments and evidence, not faithful transmission. What Pettit challenges us to do is to think of democratic practices not just as communicators of content but as content in their own right; that is, as symbols which communicate messages that may or may not reinforce their substantive content. Then we have something very interesting and something inherently systemic to think about.

All this matters because it speaks to the degree that ‘the people’—and there is another problematic category, for Pettit and deliberative democrats alike—are able to influence and control their government as Pettit prescribes. His standard might be the right one, but there is an ambiguity in his stance on whether democracy demands actual participation and deliberation of the people or something more elitist than that, an ambiguity that arises, it seems, because he draws on a standard but limited direct participation / elected representation distinction, on a conflation of deliberation and deliberative democracy. And the objections I have pressed here take Pettit on his own terms; they are not even the half of it when it comes to alternative ways of describing the relationship between the state, law-making, representation,

contestation and discourse from the likes of Dryzek⁴², Hajer⁴³, Saward⁴⁴, or Tilly⁴⁵, for instance.

There is much more that could be said: about the concept of ‘the people’, for instance and the unusual use of the word ‘patriotism’; about the approbation of unelected bodies as counterweights to elected politicians, which further undermines his proceduralism. Two points are worth noting in a little more detail. First, the account of the ‘discursive dilemma’ is strange because it seems not to be a *discursive* dilemma at all, but an aggregative one, a problem that emerges by constructing the case in Arrovian terms. He acknowledges Mackie’s extensive criticism of Arrow and his followers in a footnote (p. 194), but doesn’t do anything with those criticisms, which show that deliberation collapses such dilemmas in large part by eliminating and reconfiguring options. Second, while a deliberative democrat would applaud the dismissal of consensus, she would not applaud Pettit’s grounds. Yes, veto exposes the group to individual ‘whim’ (there’s a pejorative label). However, majorities can have ‘whims’ too, and not be effectively exposed to the whimsical nature of their preferences simply by virtue of the fact that they are in a majority. They encounter others’ views less often; have their whims reinforced if shared; and discount evidence to the contrary as evidence of unreasonableness.

⁴² John Dryzek, *Discursive democracy* (New York: Cambridge University Press, 1990)

⁴³ Maarten Hajer, *Authoritative governance: policy-making in the Age of Mediatization* (Oxford: Oxford University Press, 2009).

⁴⁴ Michael Saward, *The representative claim* (Oxford: Oxford University Press, 2010).

⁴⁵ Charles Tilly, *Contentious performances* (Cambridge: Cambridge University Press, 2008).

Given all that, what remains of fertile ground for conversations between republicans and deliberative democrats? Rather a lot. To deliberative democrats, Pettit offers a powerful argument for proceduralism with a democratic proviso, something that deliberative democrats could usefully deploy to avoid flapping in the breeze whenever good process and good outcome seem to be pulling apart. The arguments for proceduralism can also be usefully deployed when thinking about claims of ‘recommending force’ of minipublics, as well as to engage the whole epistemic strand of deliberative theory. While I have roundly criticized the limited two-category analysis of representation and assemblies, Pettit challenges deliberative democrats to think much more clearly and systemically than they have done so far about the relative roles of different kinds of representative body—or representative claim makers⁴⁶—especially to think of them as symbolic messages and norm dispersers in their own right, and not just as institutional vessels for what we allege is the ‘real stuff’ of politics—arguments. Indeed, the idea of norm dispersal merits particular attention—it is a mechanism that deliberative democrats have barely touched on. It could, I suggest, help deliberative democrats avoid the old pluralist trap of viewing everything and anything as somehow ‘functional’ in a deliberative system⁴⁷ and thus failing to notice the more subtle ways in which power operates to distort deliberative systems in favour of particular discourses, particular power relations.

⁴⁶ M. Saward, *The representative claim*.

⁴⁷ Jane Mansbridge, James Bohman, Simone Chambers, Thomas Christiano, Archon Fung, John Parkinson, Dennis Thompson, and Mark Warren. ‘A systemic approach to deliberative democracy.’ In *Deliberative systems: deliberative democracy at the large scale*, edited by John Parkinson and Jane Mansbridge, (Cambridge: Cambridge University Press, 2012), pp. 1-26.

In the other direction, Pettit's scheme and the deliberative systems approach have rather more in common than Pettit allows, focused as he is on early statements of deliberative principle and practice without noticing the important shifts in deliberative theory over the last 15 years; especially the last five. Deliberative democracy has become systemic; is no longer so obsessed by minipublics; embraces contestatory citizenship (indeed, gives it normative priority); and is beginning to think about the relationships between representative institutions of a variety of stripes, the 'wild' public sphere, and policy and law making. Modern deliberative democracy challenges Pettit to look beyond small-scale institutions and small-scale examples, and thus present something more thoroughly in keeping with his own aims—a philosophy of democratic systems that is less reliant on the philosophy of small engagements writ large.

University Griffith, Brisbane

If you need to cite this article, please use the following format:

Parkinson, John, "Pettit on Deliberative Democracy, and Vice Versa" *Philosophy and Public Issues (New Series)*, Vol. 5, No. 2 (2015), 59-77, edited by S. Maffettone, G. Pellegrino and M. Bocchiola

SYMPOSIUM
REPUBLICANISM BETWEEN JUSTICE AND DEMOCRACY



KANTIAN REPUBLICANISM
AND THE INTERNAL RELATION
BETWEEN JUSTICE AND LEGITIMACY

BY
JAMES GLEDHILL

[THIS PAGE INTENTIONALLY LEFT BLANK]

Kantian Republicanism and the Internal Relation Between Justice and Legitimacy

James Gledhill

It is a commonplace to observe that, under the influence of Rawls, Kantian ideas displaced utilitarianism from its dominant position within analytic political philosophy. And yet considerable obstacles remain to the assimilation of the Kantian framework, and the wider tradition of the philosophy of right. Much contemporary political philosophy remains Platonic in its focus on justice and the role of law in promoting justice; Lockean in its voluntaristic, natural rights view of the demands of legitimacy; and consequentialist in its concern for promoting just and/or legitimate states of affairs. As a result, all too often it fails to engage with central categories of modern political thinking centred on the idea and reality of the law-governed sovereign state. In this paper, I argue that a realistic approach to political theory requires a broader shift from a moral to a juridical frame of reference, in which legitimacy is understood in the context of the idea of sovereignty and the closely related concept of public law, or political right. In defending a form of Kantian Republicanism that draws upon the work of Habermas, I contrast this with the republican theory of legitimacy recently developed by Phillip Pettit.

It is a commonplace to observe that, under the influence of Rawls, Kantian ideas displaced utilitarianism from its dominant position within Anglo-American political philosophy. And yet considerable obstacles remain to the assimilation of the Kantian framework, and the wider tradition of the philosophy of right. Much contemporary political philosophy remains Platonic in its focus on fact-independent principles of justice, and the instrumental role of law in promoting justice; Lockean in its voluntaristic, natural rights view of the demands of legitimacy; and consequentialist in its concern for promoting just and/or legitimate states of affairs. Sustained by a widely assumed, if often implicit, view of the genealogy of political thought, these assumptions mean that contemporary political philosophy all too often fails to engage with central categories of modern political thinking centred around the idea and reality of the law-governed sovereign state.¹

My aim in this paper is to explicate and defend a form of Kantian Republicanism and to argue that it offers a distinctive and attractive way of understanding the relationship between justice and legitimacy. I will defend such an approach both in general terms, as a tradition of thought extending through Rousseau, Kant and Hegel to Rawls and Habermas, and specifically in the Habermasian form that I take to be the most adequate. In doing so, I will contrast this position with that of

¹ Admittedly this is a sweeping claim, but the general assumptions upon which it depends are neatly encapsulated in what G. A. Cohen took to be the three central questions of political philosophy: (i) What is justice? (ii) What should the state do? (iii) Which social states of affairs ought to be brought about? G. A. Cohen, “How to do Political Philosophy”, in *On the Currency of Egalitarian Justice and Other Essays in Political Philosophy*, ed. Michael Otsuka (Princeton: Princeton University Press, 2010). See also the critical discussion in Jeremy Waldron, “Political Political Theory: An Inaugural Lecture”, *Journal of Political Philosophy* 21 (2013): 1-23.

Philip Pettit. In important recent work, Pettit has extended his republican theory of justice, according to which the state is tasked with promoting freedom understood as non-domination, to encompass a republican theory of legitimacy, which requires a system of democratic popular control over government.² While in many ways this brings Pettit's approach closer to a Habermasian conception of radical democracy, fundamental differences remain. In particular, Pettit has been concerned to defend the 'Italian-Atlantic' tradition of republicanism, and its idea of the mixed constitution, against the 'Franco-German' republican tradition, originating with Rousseau and Kant, and its unitary idea of sovereignty. My defence of Kantian Republicanism will therefore take the form of a broader defence of the Franco-German tradition of the philosophy of right. Even if ultimately problematic, Rawls's approach, which is one of Pettit's main targets for criticism, shares the idea of an internal relation between justice and legitimacy that is central to this tradition.

When it comes to Pettit's own position, I will argue that with respect to justice, there is a tension between Pettit's republicanism and his fundamental commitment to consequentialism, and that as a result his approach effaces considerations about the fundamental constitution of the authority of government. With respect to legitimacy, on the other hand, in making no recourse to the idea of popular sovereignty, and in seeing legitimacy as a binary property that states either possess or lack, I will argue that Pettit's theory offers inadequate guidance for making judgements of legitimacy.

Recent interest in the concept of legitimacy has been fuelled by the work of political realists, for whom legitimacy provides a

² Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012).

necessary corrective to a liberal preoccupation with justice.³ While Pettit does not describe his position as realist, he shares a realist opposition to ideal theory and, to some extent at least, a prioritisation of legitimacy over justice. However, realists often fail to move beyond the idea that political philosophy is applied moral philosophy, embracing a “prescriptive realism” in which justice as a strong standard of normative evaluation is replaced by legitimacy understood as a weaker one.⁴ This leads to a fundamental ambivalence about the legitimacy of the state that Pettit’s approach shares. In prioritising legitimacy over justice, such an approach provides a more realistic standard for the state to meet, while at the same time raising the stakes should the state continue, as is likely to be the case, to fail to meet this standard.

By contrast, I will argue that what is required is a broader shift from a moralistic to a juridical frame of reference in which legitimacy is understood in the context of the idea of sovereignty and the closely related concept of public law, or political right.⁵ The relationship between justice and legitimacy that I will argue for is equivalent to the relationship between objective freedom and subjective freedom within a conception of political right. I will argue for two moves, then, in an understanding of justice and legitimacy and the relationship between them: first a procedural view of justice in which principles of justice constitute a practice of democratic constitutionalism and, second, a processual view of

³ For a survey, see Enzo Rossi and Matt Sleat, “Realism in Normative Political Theory”, *Philosophy Compass* 9 (2014): 689-701.

⁴ This is Michael Freeden’s term. See, Michael Freeden, “Editorial: Interpretative Realism and Prescriptive Realism”, *Journal of Political Ideologies* 17 (2012): 1-11.

⁵ For a related argument, see Terry Nardin, “Realism and Right: Sketch for a Theory of Global Justice”, in Cornelia Navari (ed.) *Ethical Reasoning in International Affairs: Arguments from the Middle Ground* (London: Palgrave Macmillan, 2013).

legitimacy, according to which a practice of democratic constitutionalism is legitimate to the extent that it enables an ongoing developmental process in which the justice of such principles is open to challenge.

Appreciating the nature and appeal of Kantian Republicanism requires situating it within the Franco-German tradition of republicanism. To this end, I begin in section 1 by setting out Pettit's distinction between two republican traditions. In section 2, in endorsing the Franco-German tradition, I sketch an alternative genealogy of the development of political philosophy from the perspective of the concepts of sovereignty and political right, and seek to restore these concepts to their appropriate place. In sections 3 and 4, I turn to the fundamental conceptual differences in the understanding of justice and legitimacy that these competing narratives serve to uncover. In closing, in section 5, I provide reasons for thinking that the Habermasian framework of Kantian Republicanism provides the most adequate development of this kind of approach.

I

The Italian-Atlantic and Franco-German Republican Traditions

In recent writings, Pettit has sought not only to defend republicanism against liberalism, but also to defend the “Italian-Atlantic” tradition of republicanism against the “Franco-German” tradition.⁶ Pettit recognises that both Rousseau and Kant defend a conception of freedom as non-domination,

⁶ Pettit, *On the People's Terms*, pp. 11-18; Philip Pettit, “Two Republican Traditions”, in Andreas Niederberger and Philipp Schink (eds.) *Republican Democracy: Liberty, Law and Politics* (Edinburgh: Edinburgh University Press, 2013).

understanding freedom in terms of independence from the will of others. But he argues that they depart from the Italian-Atlantic tradition in two crucial respects. In the first place, both reject the idea of the mixed constitution associated with civic republicanism. While civic republicans argue that governmental powers should be separated and shared out among mutually checking centres of power, Rousseau and Kant argue that sovereignty must be absolute and undivided. Second, they are also united in rejecting the civic republican idea of contestatory citizenship that complements its commitment to the mixed constitution. This applies both to Kant's notorious opposition to the right to resist the sovereign and Rousseau's vision of popular sovereignty in which individual citizens must conform to the general will of the collectivity. Taken together, in Pettit's view this means that despite their fundamental normative commitments, both end up departing entirely from the Italian-Atlantic tradition.

Pettit traces the roots of both of these departures to the idea of sovereignty that Rousseau and Kant inherit from Bodin and Hobbes, showing some sympathy for alternative views of sovereignty in which the constituent power of the people is not subsumed within the constituted power of the state.⁷ However, I think there is a more complex—indeed, dialectical—story to be told about how the very idea of sovereignty opens up a field of debate about the role of the government and people in the

⁷ Pettit, *On the People's Terms*, 288-92. Andreas Kalyvas distinguishes between an absolutist tradition of sovereignty which, in addition to Bodin and Hobbes, he takes to include Samuel Pufendorf, Benedict de Spinoza, John Austin and Max Weber, and a tradition focused on the constituent power of the people, comprising George Lawson, John Locke, Thomas Paine, Emmanuel Sieyès and Carl Schmitt. Rousseau, Kant and Hegel are conspicuous by their absence, for they do not sit neatly on either side of this distinction. Andreas Kalyvas, "Popular Sovereignty, the Constituent Power, and Democracy", *Constellations* 12 (2005): 223-44.

representation of the sovereignty of the state. Only in this way is it possible to make sense of how the idea of sovereignty develops within the tradition of the philosophy of right. The necessity of engaging with this development is a demand of realism in a twofold sense. First, the reality of the modern sovereign state and the threats it poses cannot be wished away. But, second, it should be recognised how progressive conceptions of popular sovereignty have been articulated in opposition to—indeed as the negation of—absolutist conceptions.

If, in line with Rawls, one traces the origins of liberalism to the Wars of Religion and the principle of religious toleration, then Bodin and Hobbes will have an important place in this story. The modern idea of sovereignty establishes the domain of the political as one independent of the person of the sovereign and of religious doctrines, thereby establishing the basis for a political liberal idea of equal citizenship. Since he recognises the motivations of Bodin and Hobbes in overcoming religious conflict and acknowledges that republicanism is a corrective to aspects of liberalism rather than a competitor, there is no reason to believe that Pettit would dispute this importance. Nevertheless, it is worth noting that what is in dispute between Pettit's republicanism and Kantian Republicanism is how freedom as non-domination can be realized within the institutions of the modern liberal state, not whether there exists a comprehensive alternative to this political order.⁸

Central to the genealogy of the development of the idea of sovereignty is the category of public law, or political right. The inherent complexity of this idea is compounded by the lack of a natural English translation, and within the Anglo-American tradition the concept of political right plays little role in the

⁸ Thus Pettit acknowledges that his approach might be described as republican liberalism or liberal republicanism. Pettit, *On the People's Terms*, 11, n. 8.

dominant narratives of political thought. However, the inescapability of the concept, and the continuing need to come to terms with it, is evident from a cursory scan of the modern canon, from Rousseau's *Social Contract*, with its subtitle *Principles of Political Right (Principes du droit politique)* and Kant's *Metaphysics of Morals*, with its first part the *Doctrine of Right (Rechtslehre)*, through Hegel's *Elements of the Philosophy of Right (Grundlinien der Philosophie des Rechts)* and the work of later Idealists, up to Habermas. The publication of Habermas's major work of political philosophy in English as *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* somewhat obscures its place within this tradition. A more literal rendering of its subtitle would make clear that it is a discourse theory of right and the democratic constitutional state (*Rechts und des demokratischen Rechtsstaats*). Lest it seem entirely foreign to the Anglo-American tradition, one need only note that Rawls is explicit that he aspires to establish a 'complete conception of right', a point to which I return below.⁹

Given the increasing interest in the specificity of Kant's legal and political philosophy, there is less need to argue for the distinctiveness and importance of the idea of political right than there once might have been.¹⁰ However, it remains difficult to make sense of the idea within dominant conceptual frameworks, and such difficulties are manifested in Pettit's analysis. In Pettit's narrative, while the "liberal opposition" represents the final nail in the coffin of the republican tradition, Rousseau inaugurates an earlier "communitarian opposition."¹¹ Kant is also placed in this communitarian camp, although the inaptness of this designation

⁹ John Rawls, *A Theory of Justice*, revised edn. (Cambridge, MA: Harvard University Press, 1999), 95.

¹⁰ Particularly in the wake of Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009).

¹¹ Pettit, *On the People's Terms*, 11-18.

is apparent in Pettit's qualification that he is using the term communitarianism in a way that does not imply contextualism.¹² What needs to be recognized, I think, is that Pettit is setting himself against more than a communitarian version of republicanism, but against the very idea of sovereignty in its modern sense.

In arguing for framing the debate in terms of the competing tradition of the philosophy of right, as opposed to that of a communitarian republicanism, I will adopt a different approach to the history of political thought. Pettit is clear that he is engaged in building philosophically on the republican tradition rather than relying on the idea that there is a continuous thread of republican ideas running up to the present.¹³ However, this involves making a historical jump from the 17th century to the present that passes over the history of the development of the modern state.¹⁴ It has been argued that Pettit's interest in putting the civic republican tradition to modern use results from sympathy with its elitism, but this criticism is uncharitable and overblown.¹⁵ Rather, Pettit's revival of civic republicanism comports easily with his

¹² Kant is only mentioned in passing in *On the People's Terms* (12 n. 9), but the argument is elaborated in more detail in Pettit, "Two Republican Traditions." The unhelpfulness of the communitarian label is further apparent in the suggestion that Hannah Arendt and Michael Sandel are inspired by the Rousseauian version of republicanism. Sandel is more concerned with an Aristotelian idea of personal virtues, while Arendt is a noted critic of Rousseau's idea of the general will and of the idea of sovereignty more broadly.
¹³ Pettit, *On the People's Terms*, 18-21.

¹⁴ My criticism here parallels that of Martin Loughlin—whose work I draw upon in the next section—in his critique of Adam Tomkin's republican constitutional theory. Martin Loughlin, "Towards a Republican Revival?" *Oxford Journal of Legal Studies* 26/2 (2006).

¹⁵ John P. McCormick, "Republicanism and Democracy", in Andreas Niederberger and Philipp Schink (eds.) *Republican Democracy: Liberty, Law and Politics* (Edinburgh: Edinburgh University Press, 2013).

fundamental commitment to consequentialism. For Pettit, as with classical utilitarianism, the fundamental form and constitution of the state, and its authority, is taken as given and the question for political philosophy is what normative goals ought to be pursued by the government. In contrast, I will suggest that there is a continuing conversation about the constitution and locus of authority of the state, and that the Kantian Republicanism that I wish to defend is continuous with this tradition.

II

Franco-German Republicanism and the Philosophy of Right

The historical development of public law, or political right, may be divided into three phases: the establishment of the concept of the state, or sovereignty; the birth of modern constitutionalism in the English, American and French revolutions; and the subsequent development of modern regimes of government. Imposing a simplifying framework upon a complex historical story, a recognisable pattern is discernible in the first two phases, in which the articulation of the sovereignty of the state forms the basis for the assertion of the sovereignty of the people, upon which the power of the state depends.¹⁶

Public law is a product of modernity, representing the secularization, rationalization and positivization of the idea of fundamental law, itself based on natural law. The birth of public law, associated with Bodin, involves the birth of an autonomous

¹⁶ In sketching this genealogy of sovereignty I draw upon Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010). This reflects my overall view that a juridical perspective is essential to an adequate understanding of the canon and a necessary corrective to the political moralism that informs the interpretation of the history of political thought in much contemporary political philosophy.

secular political order that is detached from both a transcendent religious source of authority and the person of the ruler. Bodin's establishment of the idea of absolute sovereignty is concerned with both constitutive rules for the establishment of a state—the formal logic of sovereignty—and the regulative rules and practices through which power is exercised within this framework. The constitutive rules of sovereignty place restrictions on power, establishing the right to rule, distinguishing public from private, and promoting religious toleration, but this enables practices that enhance the sovereign's capacity to rule. Modern natural law, epitomised by the work of Hobbes, can be seen as the rationalization of Bodin's thought. Hobbes explains the formation of the state through a contract, but as a consequence of individuals alienating their natural rights, the state is established as autonomous. Law and right are separated through the identification of law with the commands of the sovereign. However, as with Bodin, the criteria constitutive of sovereignty, the capacity to maintain peace, leaves citizens free to pursue their ends where the law is silent and establishes conditions of religious toleration. In this way, from the start, the capacity of the state to maintain its power is shot through with normative principles.

Crucial to my defence of the Franco-German tradition is the idea that popular sovereignty, the idea of the people as the repository of sovereignty, 'takes shape in the mirror of monarchical power'.¹⁷ The absolute sovereignty of the people is asserted against the absolute sovereignty of the ruler. Thus, for example, Johannes Althusius argues against Bodin that the right of sovereignty is equivalent to the right of the realm, that is, the

¹⁷ Marcel Gauchet, *The Disenchantment of the World: A Political History of Religion*, trans. O. Burge (Princeton: Princeton University Press, 1997), 58, quoted in Loughlin, *Foundations of Public Law*, 63.

sovereignty of the associated body of the people, rather than the sovereignty of the ruler. In turn, Rousseau's *Social Contract* can be seen as turning a Hobbesian conception of sovereignty on its head. In Rousseau, political right take the place of natural law. Whereas Hobbes's equation of liberty with the silence of the laws takes the issue of state formation off the agenda, Rousseau reopens the issue through the idea of the right ordering of the state. The relational logic of liberty and law is re-established through the idea of autonomy or self-government. Contrary to Hobbes, the sovereign is not a single man or a representative office but the public person formed by the assembled people. Sovereignty, or the exercise of legislative power, is distinguished from government, or the execution of the laws.

In reinterpreting Rousseau's idea of the social contract as an idea of reason, Kant's *Rechtslehre* threatens to sever the relationship between individual autonomy and political right. For Kant, it is only through law and the establishment of governmental order that freedom can be realized. One can accept the importance of Kant's view in establishing the idea of the modern law-governed state while recognising that it is Hegel who raises the question of how Rousseau's vision can be reconciled with modern social forms.¹⁸ Hegel can therefore be seen as occupying a fundamentally important place in the Franco-German republican tradition. Despite his professed opposition to Rousseau, he is best understood as concerned with how a Rousseauian idea of the general will can be realized in the institutions of the modern state.¹⁹

¹⁸ Frederick Neuhouser, *Foundations of Hegel's Social Theory* (Cambridge, MA: Harvard University Press, 2000).

¹⁹ On Hegel as a civic republican, see Paul Franco, *Hegel's Philosophy of Freedom* (New Haven: Yale University Press, 1999); James Bohman, "Is Hegel a Republican? Pippin, Recognition, and Domination in the Philosophy of

The fundamental insight to be gained from considering the tradition of political right is the distinction between public law and positive law, sovereignty and government. The tendency of Anglophone discourse to conflate the two is bound up with the fact that English lacks the vocabulary for distinguishing between ‘law as an instrument of government (*lex, la loi, das Gesetz*)’ and ‘law as an expression of the constitutive principles of right ordering (*ius, le droit, das Recht*)’.²⁰ Following this tradition, it is necessary to replace a twofold schema of ruler and ruled, government and citizens, with a threefold scheme of state, government and people. Such an approach unsettles the accepted frameworks of Anglo-American political philosophy.²¹ The tradition of the philosophy of right rejects the idea of pre-political natural rights that necessitate a justification of the state, taking freedom to be constituted by law and therefore the state to be essential to rather than inimical to freedom. But while taking the state to be necessary, the state is not equated simply with the government, which would allow one to immediately proceed to the question of what the government should do. Rather, the concept of political right concerns the rational authority of the state. What this serves to emphasise is that the tradition of Kantian Republicanism is not opposed to the separation of the powers of *government*, but rather to the possibility, as a conceptual

Right”, *Inquiry* 53/5 (2011); Andrew Buchwalter, *Dialectics, Politics, and the Contemporary Value of Hegel’s Practical Philosophy* (New York: Routledge, 2012).

²⁰ Loughlin, *Foundations of Public Law*, 8-9.

²¹ For many, a focus on what ought to be done by government is definitive of the task of political theory. For a particularly clear statement of this view, see John Plamenatz, “The Use of Political Theory”, *Political Studies* 8 (1960), who argues that that the use of political theory is to provide a normative theory of the purposes of government in contrast to a descriptive theory of how governments function.

and not simply a practical matter, of separating or dividing *sovereignty*.²²

While the concept of political right might be translated as either justice or legitimacy, neither wholly suffices. To the extent that it is concerned with the ordering of the state, it reflects concerns similar to those usually discussed with reference to social justice. However, this is not an idea of justice defined independently of law, but rather based on a normative idea of freedom intrinsic to law, understood in terms of political right.²³ In requiring that principles of right should be capable to being endorsed by free and equal citizens, it reflects concerns that would usually be associated with the idea of legitimacy, but it makes no appeal to the idea of consent, whether explicit, tacit or hypothetical. Rather, with Rousseau there originate the idea that it is the free will that is the principle of the modern state.²⁴ Indeed,

²² As Ingeborg Maus puts it, “The demand that all sovereignty be concentrated ‘undivided’ in the people is identical to the demand for a separation of powers between the legislature and the executive; it is intended to prevent regressions to absolutistic systems in which sovereignty and the monopoly on force coincide.” My argument does not depend, however, on the truth of Maus’s claim that an adequate conception of popular sovereignty is already to be found in the work of Rousseau and Kant themselves. Ingeborg Maus, “Liberties and Popular Sovereignty: On Jürgen Habermas’s Reconstruction of the System of Rights”, in René von Schomberg and Kenneth Baynes (eds.) *Discourse and Democracy: Essays on Habermas’s Between Facts and Norms* (Albany: State University of New York Press), 117.

²³ As H. L. A. Hart observes, while the idea of political right seems to Anglophone theorists “to hover uncertainly between law and morals”, it marks out a sphere of morality, the morality of law, with special characteristics, “occupied by the concepts of justice, fairness, rights, and obligations.” H. L. A. Hart, “Are There Any Natural Rights?” *Philosophical Review* 64 (1955), 177-78. This idea can be seen as exercising a decisive influence over Rawls’s approach.

²⁴ As Hegel puts it, “it was the achievement of Rousseau to put forward the *will* as the principle of the state, a principle which has thought not only as its form (as with social instinct, for example, or divine authority) but also as its content,

for the whole tradition of political right, extending from Rousseau, Kant and Hegel through Rawls and Habermas, it is the free will rather than any notion of consent that is central to the question of legitimacy. Hegel's account of social freedom involves two dimensions. It has an *objective* aspect, requiring that rational laws and institutions must constitute the status of being a free citizen and secure the social conditions necessary to realise this freedom. It also has a *subjective* aspect according to which rational laws and institutions must make it possible for citizens to affirm them as good, and good for the right reason; that is, because they realize freedom in such a way that citizens can regard the principles that constitute their fundamental political institutions and their political relations as coming from, or congruent with, their own wills.²⁵

In the next two sections, I will focus on Pettit's conceptions of justice and legitimacy and, through appealing to the framework of the philosophy of right and the requirements of objective and subjective freedom, I will argue that Pettit ought to move in the direction of the Franco-German tradition of republicanism in his understanding of both justice and legitimacy. Pettit principally contrasts his approach with Rawls's, arguing for more clearly separating the issues of social justice and legitimacy. While I will defend Rawls's conceptual framework, I will argue that Pettit is successful in drawing attention to deficiencies that result from its reliance on a Rousseauian idea of the general will. However, a Habermasian Kantian Republicanism represents an attractive way of continuing the Franco-German republican tradition that can

and which is in fact thinking itself." G. W. F. Hegel, *Elements of the Philosophy of Right*, ed. A. Wood. (Cambridge: Cambridge University Press, 1991), §258R.

²⁵ Neuhausser, *Foundations of Hegel's Social Theory*. See also, Kenneth R. Westphal, "Hegel's Standards of Political Legitimacy", *Jahrbuch für Recht und Ethik* 10 (2002).

respond to these criticisms. Central to my argument is the idea that justice and legitimacy have to be understood as interrelated. The role that legitimacy plays within a theory is conditioned by its understanding of justice. Before turning to the issue of legitimacy, then, it is first necessary to look at justice.

II

Republican Justice, or Objective Freedom

In line with his fundamental consequentialist orientation, for Pettit, freedom as non-domination is “an ideal for the state to promote.”²⁶ Justice concerns the horizontal relations between private citizens that are ordered by the state, whereas legitimacy concerns the vertical relation between the government and its citizens. From the perspective of Kantian Republicanism, though, republicanism and consequentialism appear as fundamentally incompatible.²⁷ Indeed, radicalising a republican demand of freedom, Kantian Republicanism requires that the idea of freedom as non-domination be applied reflexively to the very justification of a conception justice. The demands of freedom as non-domination apply at a more fundamental level to the very constitution of the authority of government. This involves

²⁶ Pettit, *On the People's Terms*, 3. For Pettit, consequentialism is the idea that “the right alternative in any choice is a promotional function of the agent-neutral good.” Philip Pettit, “The Inescapability of Consequentialism”, in Ulrike Heuer and Gerald Lang (eds.) *Luck, Value and Commitment: Themes from the Ethics of Bernard Williams* (Oxford: Oxford University Press, 2012). This good can be defined in terms of freedom just as much as it can be defined, in utilitarian terms, as welfare.

²⁷ See also Rainer Forst, “A Kantian Republican Conception of Freedom as Nondomination”, in Andreas Niederberger and Philipp Schink (eds.) *Republican Democracy: Liberty, Law and Politics* (Edinburgh: Edinburgh University Press, 2013).

nothing less than an inversion of the relationship between justice and legitimacy as this is commonly understood. Pettit's approach grants the state the right to impose a theory of justice upon citizens, and then seeks to ensure that this is subject to the democratic control of citizens. Kantian Republicanism, on the other hand, demands that government act within a framework of principles that can be justified to persons as free and equal citizens. Rather than social justice being an independently justified end that the government seeks to promote, raising the danger that the state becomes a dominating power in doing so, social justice becomes a condition of the legitimacy of the state, or in other words, a condition of political right.

This reflects Rousseau's fundamental legacy, namely the idea that political right is an intersubjective relation.²⁸ As Habermas argues, Rousseau is the first to introduce a procedural idea of political right (or a normative idea of legitimacy), in which, rather than depending upon serving external substantive values, the rational authority of the state depends upon principles of political right that realise the objective and subjective freedom of citizens.²⁹ Rawls's commitment to such an intersubjective conception of political authority is evident in the idea that the power of the state is the power of the people collectively. As he puts it:

²⁸ “[R]ational authority, for Rousseau, is possible only *intersubjectively*—that is, as a network of relations of recognition among individual subjects, in which the sovereignty of each and the subjection of each to the whole are simultaneously acknowledged. Or, to put the point in Hegelian terminology: rational authority is an inherently ‘spiritual’ phenomenon, one that comes to be only through a supra-individual subject whose structure is that of an ‘I’ that is a ‘we’ and a ‘we’ that is an ‘I.’” Neuhauser, *Foundations of Hegel's Social Theory*, 216-17.

²⁹ Jürgen Habermas, “Legitimation Problems in the Modern State”, in *Communication and the Evolution of Society*, trans. Thomas McCarthy (Cambridge: Polity, 1991).

political power is always coercive power backed by the government's use of sanctions, for government alone has the authority to use force in upholding its laws. In a constitutional regime the special feature of the political relation is that political power is ultimately the power of the public, that is, the power of free and equal citizens as a collective body.³⁰

Justice, on such a view, becomes a horizontal relation between citizens, but in their public capacity as authors and not simply addressees of the principles of justice that constitute their political association, not as private persons whose relations are to be ordered by government.

Pettit contrasts his clear conceptual distinction between social justice and political legitimacy with Rawls's approach, in which the distinction between these two concepts is seemingly blurred in a conception of comprehensive or "social-cum-procedural justice."³¹ Pettit first establishes the basic liberties required by social justice, which the state must properly resource, and then turns to considering political liberties in a second stage when considering the demands of legitimacy. Rawls, on the other hand, includes political liberties within his two principles of justice, which results, on Pettit's view, in a devaluation of the question of legitimacy. Rawls's position appears differently, however, when viewed from the perspective of the tradition of the philosophy of right. Rawls is explicit that his concern is to develop a "complete theory of right", comprising principles for institutions, individuals and the law of nations.³² The principles agreed upon in the

³⁰ John Rawls, *Political Liberalism*, pbk edn. (New York: Columbia University Press, 1996), 136

³¹ Pettit, *On the People's Terms*, 143-44.

³² Rawls, *A Theory of Justice*, 93-98. This aspect of Rawls's view has been little discussed. One exception to this inattention is Jon Mandle, *Rawls's A Theory of Justice: An Introduction* (Cambridge: Cambridge University Press, 2009). Thomas Pogge jests that with G. A. Cohen's rescue of justice from Rawls

original position must meet the Rousseauian-Kantian “formal constraints of the concept of right”: they must be general, universal, public and complete.³³ Only in this way will they respect the demand that they be justifiable to persons as free and equal citizens. For Rawls, as for Rousseau, limitations on material inequality are a requirement of the legitimacy of the social order. Pettit objects that Rawls does not guarantee the resourcing required to ensure that liberties will be effective and not merely formal. This neglects the requirement that the fair value of the political liberties be guaranteed. More importantly, however, it neglects the fact that, in accordance with the four-stage sequence of application of the principles of justice, the first principle is a constitutional principle. The requirements of social justice are addressed at the legislative stage within this constitutional framework.

While the approach that I will defend is Habermasian rather than Rawlsian, getting clearer about how Rawls understands the relationship between justice and legitimacy is helpful for preparing the way. For situating Rawls’s approach within a tradition of the philosophy of right shows that his position is not a confused blurring of two distinct concepts, but the continuation of a venerable tradition. As part of a full conception of political right, Rawls’s procedural principles of justice are designed to constitute persons as free and equal citizens in a manner that ensures objective freedom. Social justice enters as a constitutive part of this ideal of the rightful ordering of the state. Rawls’s concern for stability—the congruence between the right and the

successfully accomplished, via the distinction between fundamental principles of justice and mere rules of regulation, “the next edition of John Rawls’s bestseller will bear the endearing title *A Theory of Regulation*.” Thomas Pogge, “Cohen to the Rescue!” *Ratio* 21/4: 455-56. However, I think it would do no violence to Rawls’s text if it were retitled *A Theory of Right*.

³³ Rawls, *A Theory of Justice*, 112-18.

good—reflects a concern with subjective freedom, that is, whether persons can feel will principles of justice as free and equal citizens. I will discuss this further in the next section.

It might be argued that I have exaggerated the extent to which Pettit's justificatory approach differs from Rawls's, and indeed the rest of the tradition of the philosophy of right. After all, Pettit follows Rawls in appealing to the capacity of a conception of freedom as non-domination to bring our considered judgements of justice into reflective equilibrium. But the analogy cannot be sustained, given that Pettit presents a philosophical theory that excavates an idea of freedom that he takes to have been almost completely buried by the triumph of liberal negative liberty. Like utilitarian theories, it remains a theory in the sense of a theory of government to guide the actions of policy-makers, albeit ones who are dependent upon the support of citizens. It therefore departs from Rawls's approach, in which a theory is offered to citizens generally as an explication of the relationship between objective freedom and subjective freedom upon which the legitimacy of the state depends.

IV

Republican Legitimacy, or Subjective Freedom

I have argued that Pettit ought to follow Rawls in applying the demands of republican freedom to the justification of a conception of justice, and therefore adopting a procedural view of justice. In place of Pettit's distinction between vertical and horizontal axes, this results in an intersubjective conception of the rational authority of the state. Having done so, the question of legitimacy will appear differently. For Pettit, the state, which in this case can be read as synonymous with government, is tasked with guarding its citizens against private domination by their

fellow citizens, but must in doing so avoid becoming a dominating power, exercising a form of public domination over citizens. The state needs to be forced to operate “on the people’s terms.” As Pettit puts it, then:

The social justice question bears ... on the character of the rules that determine the claims that citizens have, relative to one another, within the state. The legitimacy question bears on the way in which that set of rules—and any other associated rules—is imposed on citizens.³⁴

That is, the question of legitimacy concerns whether “it [the state] can treat citizens well and equally in ordering their relations with the coercive state itself; whether it can provide for their equal undominated status in those relations.”³⁵ This would be achieved if citizens shared equally in a system of democratic control over the state.

In emphasising the distinctness and importance of the question of legitimacy as opposed to that of justice, Pettit follows A. John Simmons and the Lockean tradition of natural rights.³⁶ From this perspective, Kant can be seen as suppressing the problem of legitimacy, moving from a demand of express consent to merely hypothetical consent. With the dominance of utilitarianism, under the influence of Bentham and Mill, the question of legitimacy is then fully suppressed. The turn to neo-Kantian approaches inaugurated by Rawls does little to change things on this view, for it adopts a Kantian idea of hypothetical consent. A concern with whether the state is properly supported on the basis of reasons that persons possess is replaced with the question of whether the state has an intrinsic character.³⁷

³⁴ Pettit, *On the People’s Terms*, 141.

³⁵ Pettit, *On the People’s Terms*, 147.

³⁶ A. John Simmons, “Justification and Legitimacy”, *Ethics* 109/4 (1999).

³⁷ Pettit, *On the People’s Terms*, 144.

In contrast to Simmons, however, having opened up space for consideration of the independent question of the legitimacy of the state, Pettit proceeds to narrow its demands.³⁸ First, on grounds similar to Kant, he argues that states are necessary in the modern world and that the challenge of anarchism is not one that his theory of legitimacy need directly confront. Second, he argues that what is required for the state to be legitimate is not consent, as in the Lockean tradition, but democratic control. Furthermore, he recognises that in practice, if not in theory, it is unlikely that social justice and political legitimacy will come apart.³⁹ I have argued that Pettit should recognise that any scheme of social justice that was imposed upon persons in a way that they could not will as free and equal citizens would *ipso facto* be unjustified. Having made this move, the role of legitimacy, or subjective freedom, and the way that Rawls treats this issue, appears in a different light.

As I have already suggested, the accepted narrative of the way that classical social contract theory takes the question of the legitimacy of the state off the agenda, with its focus on Locke and the idea of consent, misconstrues the significance of the tradition of the philosophy of right running through Rousseau, Kant and Hegel up to Rawls and Habermas. What is important in this tradition is not consent but will. Political right is neither an intrinsic property nor what persons pre-reflectively endorse. With respect to Kant, as Onora O’Neill has argued, his claim is modal rather than hypothetical, that is, it concerns what persons could will as free and equal rather than that to which they could

³⁸ For a critique, see Robin Douglass, “Control, Consent and Political Legitimacy”, *Critical Review of International Social and Political Philosophy* (2014), doi: 10.1080/13698230.2014

³⁹ Pettit, *On the People’s Terms*, 131.

consent.⁴⁰ With Hegel, this idea of objective freedom is complemented by an idea of subjective freedom, according to which citizens must be able to regard principles of justice as a product of their collective will. There is an internal relation between objective and subjective freedom, social freedom consisting in the unity of objective and subjective freedom.

Far from suppressing the question of legitimacy, as Pettit argues, Rawls is best seen as following in this tradition. From the point of view of objective freedom, Rawls argues that a procedural conception of justice for a democratic society is constructed in accordance with a constraint of legitimacy that establishes what it means to seek agreement between persons qua free and equal citizens. From the point of view of subjective freedom, according to Rawls's liberal principle of legitimacy,

our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.⁴¹

In other words, power must be exercised collectively by citizens in accordance with principles that would be chosen in the original position, or more simply still, principles that are just, in the procedural sense of being principles of political right.⁴²

⁴⁰ Onora O'Neill, "Kant and the Social Contract Tradition", in Elisabeth Ellis (ed.) *Kant's Political Theory: Interpretations and Applications* (University Park: Pennsylvania State University Press, 2012).

⁴¹ Rawls, *Political Liberalism*, 137.

⁴² I take this to be reflected in Sebastiano Maffettone's distinction between justice and legitimation in Rawls's work. See, Sebastiano Maffettone, *Rawls: An Introduction* (Cambridge: Polity, 2010). This interpretation contrasts with the idea that *Political Liberalism* is about legitimacy as opposed to justice. It also involves interpreting Rawls's liberal principle of legitimacy in a way that runs counter to Rawls's treatment of the contrast between justice and legitimacy in

While I do not seek to explore or defend the details of Rawls's view, I do want to defend its overall structure. Rawls argues that political authority cannot be freely accepted in the same way as, when afforded liberty of conscience, one may freely chose to accept ecclesiastical authority. Unlike non-public associations, the fundamental political association of the state exerts an immediate and profound influence over our lives. In support of the view that Rawls relies on a conception of "current consent", however, Pettit cites Rawls's remark that

we may over the course of life come freely to accept, as the outcome of reflective thought and reasoned judgement, the ideals, principles, and standards that specify our basic rights and liberties, and effectively guide and moderate the political power to which we are subject. This is the outer limit of our freedom.⁴³

But Rawls's own gloss on this remark offers reasons to believe that what is doing the work is not consent, but rational endorsement of principles of political right. For he comments: "Here I accept the Kantian (not Kant's) view that what we affirm on the basis of free and informed reason and reflection is affirmed freely; and that insofar as our conduct expresses what we affirm freely our conduct is free."⁴⁴ It is what citizens can

§5 of his 'Reply to Habermas'. Rawls, *Political Liberalism*, 429, n.76. Here, however, I follow the analysis of Simmons, who points out that Rawls's discussion in his 'Reply to Habermas' is concerned with the legitimacy of government and laws rather than state legitimacy, or the legitimacy of the constitution, and argues that Rawls's notions of justice and legitimacy are more closely related than commonly supposed. Simmons, "Justification and Legitimacy", 759-60, n. 48. However, I draw the opposite conclusion to Simmons: rather than seeking to separate justice and legitimacy, we should build on the way in which Rawls recognises that they are interrelated.

⁴³ Rawls, *Political Liberalism*, 222, quoted in Pettit, *On the People's Terms*, 158.

⁴⁴ *Ibid.*, 222 n. 9.

come to will freely, and not whether they consent to political authority, that is important.

Second, Rawls emphasises that within justice as fairness, justice and legitimacy, or in my terms, objective and subjective freedom, work in tandem:

the guidelines of inquiry of public reason, as well as its [liberal] principle of legitimacy has the same basis as the substantive principles of justice. This means in justice as fairness that the parties in the original position, in adopting principles of justice for the basic structure, must also adopt guidelines and criteria of public reason for applying those norms.⁴⁵

This offers clear evidence that as opposed to turning from justice to legitimacy, Rawls continued to regard his project as one of articulating a complete conception of right. Principles of justice, or principles of objective freedom, apply to the basic structure and constitute persons as free and equal citizens. The liberal principle of legitimacy, or the conditions of subjective freedom, concern the virtues of citizenship in the relationship between citizens within the basic structure, including political virtues of reasonableness and the duty of civility.

And yet Pettit is right to identify problems in Rawls's treatment of legitimacy that lead to shortcomings from the point of view of the idea of contestatory citizenship. Ironically, though, it is the aspect of Rousseau's view from which Pettit ostensibly takes inspiration, namely Rousseau's idea of deliberation, that is most inimical to a radical democratic conception of republicanism.⁴⁶ This is well brought out by Bernard Manin. As he puts it, "Rousseau's individuals are already supposed to know what they want when they come to a public assembly to decide in common." They "do not deliberate, not even within

⁴⁵ *Ibid.*, 225.

⁴⁶ Pettit, *On the People's Terms*, 15-16.

themselves.”⁴⁷ Or as Habermas puts the point, Rousseau’s is an idea of “democracy without public debate”, “more a consensus of hearts than of arguments.”⁴⁸ Strikingly, as Manin points out, all the elements of Rousseau’s conception—the requirement for unanimity, the absence of communication and the predetermined will of individuals—are present in Rawls’s idea of the original position. Furthermore, this remains the case when one considers how the standpoint of the original position is to be mirrored in practice through Rawls’s interconnected ideas of an overlapping consensus and public reason.⁴⁹ Rawls’s idea of public reason is

⁴⁷ Bernard Manin, “On Legitimacy and Political Deliberation”, *Political Theory* 15 (1987): 346, 347. See especially Jean-Jacques Rousseau, *The Social Contract*, in *The Social Contract and other later political writings*, ed. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), 73. Admittedly, this interpretation is controversial. Notably, Joshua Cohen rejects such a view. Joshua Cohen, *Rousseau: A Free Community of Equals* (Oxford: Oxford University Press, 2010), 76-77. While suggesting that Rousseau does not always employ the idea of deliberation in this way, Neuhouser broadly accepts Manin’s interpretation. Frederick Neuhouser, *Rousseau’s Theodicy of Self-Love* (Oxford: Oxford University Press, 2008), 202 n.27.

⁴⁸ Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Cambridge: Polity, 1989), 99, 98.

⁴⁹ See further, Michael Saward, “Less than Meets the Eye: Democratic Legitimacy and Deliberative Theory”, in Michael Saward (ed.) *Democratic Innovation: Deliberation, Representation and Association* (London: Routledge, 2000); Michael Saward, “Rawls and Deliberative Democracy”, in Maurizio Passerin d’Entreves (ed.) *Democracy as Public Deliberation* (Manchester: Manchester University Press, 2002). While Rawls is not a *discursive* democrat—in the sense of John S. Dryzek, “Discursive Democracy vs. Liberal Constitutionalism”, in Michael Saward (ed.) *Democratic Innovation: Deliberation, Representation and Association* (London: Routledge, 2000)—he can be seen as a deliberative democrat *avant la lettre*, in the sense in which the term was coined by Joseph Bessette to describe a tradition of American constitutionalism concerned to ensure that majority rule took a considered and deliberate form. Joseph M. Bessette, “Deliberative Democracy: The Majority Principle in Republican Government”, in Robert Goldwin and William Shambra (eds.) *How Democratic is the Constitution?* (Washington, DC: American Enterprise Institute, 1981). In

best seen as appealing to this Rousseauian idea of deliberation. It is not an idea of public reasoning, in the Habermasian sense of discourse or real processes of argument, even if it is often seen as such.

Notwithstanding these problems with Rawls's approach, its overall conceptual structure remains instructive. Consent operates as the gold standard for legitimacy within much contemporary political philosophy, but it plays only a minor role within the history of political thought, and plays no role within the tradition of the philosophy of right, within which it is the rational will and not consent that is crucial to the legitimacy of the state. Viewed from this perspective, far from devaluing the importance of legitimacy, Rawls can be seen as following a—if not the—leading modern tradition concerned with the rational authority of the state. I have argued, though, that Pettit is right to point to problems with Rawls's approach from the point of view of contestatory citizenship, and that these result from Rawls's inheritance of a Rousseauian idea of the general will. However, acknowledging these difficulties does not entail embracing Pettit's conclusion that contestatory citizenship is best secured by a mixed constitution. Turning to Habermas, I will argue, finally, that what is required to overcome the deficiencies of Rawls's approach is a move to a processual understanding of legitimacy within which the idea of the general will serves as a regulative ideal.

just this sense, Rawls takes majority rule to be subservient to a democratic constitution, whose role is to “compel a majority to delay putting its will into effect and force it to make a more considered and deliberate decision.” Rawls, *A Theory of Justice*, 201.

V

The Internal Relation Between Justice and Legitimacy

Pettit notes the fact that Habermas also rejects Rousseau's communitarian republicanism, and indeed that Habermas's approach shares many of the features of his own republicanism.⁵⁰ But he gives no consideration to the way in which Habermas has sought to revise Rousseau's framework, in an approach that he refers to as Kantian Republicanism. On this view, political justice is a matter of constructing a system of rights that enables voluntarily associated free and equal citizens to legitimately regulate their collective lives through positive law, in accordance with a Rousseauian-Kantian idea of self-legislation.⁵¹ Habermas presents this idea in terms of an internal relation between law and democracy.⁵² It might also be described as an internal relation between the normative and sociological aspects of legitimacy. In the terms of my argument, it emerges as a clear example of an internal relation between (political) justice and legitimacy, when this is understood as an internal relation between the objective and subjective dimensions of political right. Habermas's Kantian Republicanism is republican in maintaining a Rousseauian idea of popular sovereignty, but in place of Rousseau's substantive idea

⁵⁰ "For the record I think that Habermas's own views come close to republican views, as I conceptualize and defend them." Pettit, *On the People's Terms*, 12, n. 11.

⁵¹ For the idea of political justice, see especially Jürgen Habermas, "Reply to Symposium Participants", in Michel Rosenfeld and Andrew Arato (eds.) *Habermas on Law and Democracy: Critical Exchanges* (Berkeley: University of California Press, 1998), 406; Jürgen Habermas, "Reply to My Critics", in James Gordon Finlayson and Fabian Freyenhagen (eds.) *Habermas and Rawls: Disputing the Political* (New York: Routledge, 2011), 294-95.

⁵² Jürgen Habermas, "On the Internal Relation Between the Rule of Law and Democracy", in *The Inclusion of the Other*, eds. Ciaran Cronin and Pablo De Greiff (Cambridge: Polity, 1999).

of a self-governing people, it adopts a Kantian idea of legitimacy as involving the collective construction of positive law through the influence of procedures of the public use of reason upon the process of law-making.⁵³ This is a procedural view of popular sovereignty.⁵⁴ Furthermore, it is Kantian in disclaiming any suggestion that legitimacy is a property that any state could finally attain. Rather, it is processual, with a standard of what persons could agree to as free and equal citizens serving as a regulative ideal.⁵⁵

On this view, then, a state is legitimate to the degree to which its principles of justice establish a process through which, reflexively, these principles of justice may be freely challenged and reformed, and, moreover, this process can be recognised as moving in a progressive direction, in accordance with the regulative ideal of popular sovereignty. To be sure, such a processual approach is adumbrated by Rawls's treatment of civil disobedience as a means of challenging the justice of an existing regime while maintaining fidelity to the ideal of law upon which the legitimacy of the democratic state depends. But on Rawls's model this can only prompt individual reflection on a community's evolving sense of justice, not change the general will. In contrast to Rawls's approach, following Kantian

⁵³ Habermas describes his approach as a form of Kantian Republicanism in Jürgen Habermas, "‘Reasonable’ versus ‘True’, or the Morality of Worldviews", in *The Inclusion of the Other*, eds. Ciaran Cronin and Pablo De Greiff (Cambridge: Polity, 1999), 101.

⁵⁴ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: Polity, 1996), appendix.

⁵⁵ This is most evident in Jürgen Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" in *Time of Transitions*, eds. Ciaran Cronin and Max Pensky (Cambridge: Polity, 2006). On legitimacy as a regulative ideal, see Christopher F. Zurn, "The Logic of Legitimacy: Bootstrapping Paradoxes of Constitutional Democracy", *Legal Theory* 16/3 (2010).

Republicanism the locus of deliberation moves from individual self-reflection within the background culture of civil society to the discursive public sphere. The locus of the determination of the requirements of social justice likewise moves from the legislative sphere to the relationship between formal and informal public spheres.

What is fundamentally problematic about Pettit's approach is the idea that legitimacy is an "on-off" property that the state either possesses or lacks.⁵⁶ It leaves us with an uninviting dichotomy. Either a state fails to meet the standard of legitimacy, with implications for citizens that are profound but unclear. Or the state meets the standard, with the implication that legitimacy is not something that has to be continually earned and whose demands can change over time, but rather something that can finally be achieved and then simply maintained. When understood in relational and processual terms, by contrast, legitimacy may be conceptualised in scalar rather than binary terms. The idea of what all persons could will qua free and equal citizens serves as a regulative ideal with respect to which citizens may judge the legitimacy of the state in practice and which the state may asymptotically approach.

Such a view retains a unitary idea of sovereignty, albeit in a form that is both procedural and processual, in contrast to Pettit's view of a mixed constitution. Pettit argues in opposition to the idea of unitary sovereignty that

⁵⁶ Pettit, *On the People's Terms*, 139. In this respect I agree with John Horton that, "although there is a tendency to theorize political legitimacy simply as [a] property that a state either possesses or lacks, it also needs to be seen in terms of an ongoing process through which legitimacy is affirmed or denied." John Horton, "Political Legitimacy, Justice and Consent", *Critical Review of International Social and Political Philosophy* 15/2 (2012): 144.

There is absolutely no reason why the state should not be a distributed agency that is answerable to the demands of reason, like any agent, but answerable in virtue of the rules of coordination under which distinct component parts cooperate.⁵⁷

On this basis, he develops a dual-aspect theory of democracy under which collective control of government is a long-run emergent property of interactions that are often conflictual and not oriented towards seeking agreement under the ambit of a general will.

But Pettit fails to note that a Habermasian Kantian Republican conception of radical democracy has just this feature. Its central concern is to show how, out of the wild and anarchic arguments of the public sphere, something with the rational sanction of public opinion can arise that can hope to exert a steering influence upon government. The idea of popular sovereignty remains fundamental as an idea of reason according to which citizens collectively can seek to judge and challenge the legitimacy of laws. Now, it is not clear that Pettit would reject this. He takes his view to be consistent with the idea that “Popular sovereignty, understood as an *as if* regulating principle guiding citizens’ political judgements and action, is a central motor for democratizing representation.”⁵⁸ And yet such an idea plays no part in his theory.

The idea that the state should be understood as a distributed agency, “answerable in virtue of the rules of coordination under which distinct component parts cooperate”, is fine as far as it goes. But the fundamental question is how these rules of interaction arise. To use Pettit’s example, while it may be the case

⁵⁷ Pettit, *On the People’s Terms*, 224.

⁵⁸ Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (Chicago: University of Chicago Press, 2006), 223, quoted in Pettit, *On the People’s Terms*, 290 n. 29.

that the University of Oxford is not a concrete place that can be visited like the Colleges out of which it is composed, neither is it the case that the university simply emerges out of the interaction of the colleges. Rather, it exists because of the interaction between the constitution, and constitutive rules, of the university and the way in which colleges and their members orient their actions in accordance with these rules.

Ultimately, Pettit's use of the idea of the mixed constitution obscures the fact that the coordination of the state depends upon rules and these rules must be understood as having some basis, whether they are determined by the constituent power, the constituted power or the ongoing interaction between the two. Despite Pettit's remarks about the priority of the constituting people, his own approach can be seen as making the achievement of legitimacy something that is to be promoted by government.⁵⁹ For Kantian Republicanism by contrast, the internal relation between justice and legitimacy, as an ongoing progressive process of constitution-making oriented by the regulative ideal of agreement, means that the constitution of the state rests ultimately upon the popular sovereignty of the people taking shape through the medium of positive law and the public use of reason.

⁵⁹ Pettit, *On the People's Terms*, 280-92. Pettit's remarks in this context are difficult to interpret, particularly because of his rendering of Sieyès ideas of constituent and constituted power in terms of the "constituting people" and the "constituted people." What does seem clear, however, is that Pettit thinks of the role of the constituting people as taking place within a constituted state, rather than as the power that constitutes the state.

VI

Conclusion

In its inception, Pettit's republicanism can be seen as motivated by the idea of providing a new normative framework for a social democratic view of justice within a consequentialist, statist way of thinking about politics.⁶⁰ Through its idea of democratic popular control of government, Pettit's recent work has moved a considerable distance from this starting point, but its influence remains. In arguing for the superiority of a conception of Kantian Republicanism, I have argued for two moves, first a procedural understanding of justice in contrast to Pettit's consequentialist account, and second a processual understanding of legitimacy, in place of Pettit's idea of legitimacy as a binary property. As we have seen, while Pettit argues for the conceptual distinctness of the questions of justice and legitimacy, in practice his own approach closes the gap between the two. I have argued for going further in the above two senses. Only in this way is it possible to understand the tension between ideal and actuality that inhabits the idea of the law-governed sovereign state, the idea that is central to the Franco-German republican tradition of the philosophy of right and, in the form of Kantian Republicanism, remains indispensable.

University of Hong Kong

⁶⁰ Pettit's initial defence of the republican ideal builds upon a social democratic theory of the state. Philip Pettit, "The Freedom of the City: A Republican Ideal", in Alan Hamlin and Philip Pettit (eds.) *The Good Polity* (Oxford: Blackwell, 1989); Philip Pettit, "Towards a Social Democratic Theory of the State", *Political Studies* 35 (1987).

If you need to cite this article, please use the following format:

Gledhill, James, "Kantian Republicanism and the Internal Relation Between Justice and Legitimacy," *Philosophy and Public Issues (New Series)*, Vol. 5, No. 2 (2015), 101-133, edited by S. Maffettone, G. Pellegrino and M. Bocchiola

SYMPOSIUM
REPUBLICANISM BETWEEN JUSTICE AND DEMOCRACY



REPUBLICANISM AND STABILITY

BY
NATHAN BURROUGHS

[THIS PAGE INTENTIONALLY LEFT BLANK]

Republicanism and Stability

Nathan Burroughs

A key theme of the classical republican tradition is the problem of regime stability: whether a just government is capable of surviving across generations in the face of internal tumult and external aggression. Ancient and early modern writers gave considerable attention to the features required to sustain a popular regime, highlighting the importance of a virtuous, active citizenry dedicated to the common good, and the material conditions necessary to limit class conflict and cultivate civic virtue. Despite the profound changes over the last several centuries, whether democratic regimes are sustainable over time remains an open question.

In this work I build on the classical tradition and the contributions of more recent authors¹ to develop an account of stability that challenges two prominent forms of contemporary republicanism: the neo-Roman republicanism of Pettit,² and liberal republicanism based on interpretations of the late Rawls.³

¹ R. Dagger, *Civic Virtues* (Oxford: Oxford University Press 1997); I. Honohan, *Civic Republicanism* (London: Routledge 2002). J. McCormick, *Machiavellian Democracy* (Cambridge: Cambridge University Press 2006).

² P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press 1997).

³ A. Francisco, "A Republican Interpretation of the Late Rawls," *Journal of Political Philosophy* Vol. 14, n. 3 (2006): pp. 270-288; J. Rawls, *Justice as Fairness: A Restatement* (Cambridge: Belknap Press (2000); A. Thomas, *Value and Context* (Oxford: Clarendon Press 2006).

I

Stability in the Republican Tradition

In what has become a vast secondary literature, a number of different themes have been proposed as representing the key feature of republicanism, including liberty as non-domination, political participation, civic virtue, and the mixed regime. The distinctiveness of republicanism from liberalism has also been a subject of considerable debate. Republicanism itself has been distinguished between a more perfectionist conception influenced by Aristotle,⁴ and a realist republicanism informed by Machiavelli.⁵

In this paper I focus on one strand of republican thinking that cuts across these categories: the problem of stability. The difficulty of preserving a popular government has long concerned political theorists, but writers in the republican tradition have written most extensively on the problem of regime stability. I focus on two republican thinkers representing quite different brands of republicanism: Aristotle and Machiavelli. Despite their differences, they share a very similar view about the qualities that promote the durability of a free state.

My aim is not to identify the “real” republicanism or give an authoritative interpretation Aristotle, Machiavelli, or other republican writers. My purpose is to explain how particular strands of thought among republican authors can be synthesized into a concern of contemporary importance: how democratic regimes can preserve their democratic character. The goal is to lay out a plausible argument inspired by this tradition, rather than

⁴ M. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press 1982); R. Dagger, *Civic Virtues*.

⁵ Q. Skinner, “Machiavelli on the Maintenance of Liberty,” *Political Science* Vol. 18, n. 2 (1984): pp. 3-15. P. Pettit, *Republicanism*.

determine through detailed exegesis what Aristotle or Machiavelli might suggest. Just as contemporary neo-Aristoteleans have abandoned Aristotle's sexism and ethnocentrism, or neo-Machiavellians have rejected militarism, I believe that the republican tradition *as a whole* can be used to develop a serious challenge to modern democratic theory.

In Aristotle's *Politics*⁶, political stability is about more than maintaining order, but preserving a "correct" regime characterized by the rule of law and governance on behalf of the common good. These are distinguished from deviant regimes where the rulers act primarily in their own interest. According to Aristotle, the two most common types of corrupt regimes are oligarchies and democracies. In each the ruling element adheres to a flawed conception of justice: wealth for oligarchies and free birth in democracies.

Conflicts over political justice are strongly influenced by economic circumstances. In Aristotle's theory material conditions have a profound effect on the political psychology of individuals and the political sociology of communities. He argues that great wealth encourages the vices of factionalism, arrogance, and an inability to be ruled by others, while poverty results in servility and an inability to rule oneself or others. Because they both suffer from extremes of wealth, having either too much or too little, both the rich and the poor lack the cooperative virtues necessary for good citizenship. The empirical conditions of states shape the

⁶ Aristotle, *The Politics*, translated by Carnes Lord (Chicago: University of Chicago Press 1984). In interpreting Aristotle's views I follow Coby, Kraut, and Cherry, among others. P. Coby, "Aristotle's Three Cities and the Problem of Faction," *Journal of Politics* Vol. 50, n. 4 (1988): pp. 896-919; R. Kraut, *Aristotle: Political Philosophy* (Oxford: Oxford University Press 2002); K. Cherry, "The Problem of Polity: Political Participation and Aristotle's Best Regime," *Journal of Politics* Vol. 71, n. 4 (2009): pp. 1406-1421.

nature of the citizenry and limit the possibilities for a just political order. Great inequality and changes in the relative importance of economic classes are among the chief causes of instability. Aristotle also implies that the behavior and size of economic groups contributes to the role they play in political life, but that wealthy are always critical. When dominant they compete with one another, and in a democracy they may subvert the state in an effort to preserve their wealth or enhance their political status.

Aristotle argues that a large and self-sufficient middle class provides the best chance for a durable and reasonably just regime likely to be found in the real world. Cities which are more just will also be more stable. Extending his usual practice in ethics to the design of states, Aristotle praises the mean against the deviant extremes. Citizens of the middling type are less prone to faction and more capable of ruling and being ruled in turn. If they don't possess the full range of virtues found in the best regime, they at least are capable of exercising the virtues of good citizenship. Aristotle also advocates for a system of common education that fosters these civic virtues. Finally, Aristotle's polity gives scope for influence by the free born, wealthy, and the virtuous elite within political institutions with a mixed regime that blend elements of oligarchic and democratic constitutions. While high offices are generally held by the well-born, the citizenry as a whole holds sway in the assembly, juries, and elections.

Aristotle suggests political stability is always advanced by public-spiritedness and moderate laws. Even deviant regimes benefit from temperate behavior by its rulers and serving the common good rather than indulging in domination, while oligarchies and democracies are made more stable by adding features more like the other. An educational system that inculcates moderation and basic virtues appears to buttress nearly any sort of regime.

With respect to the sources of political instability, the Machiavelli⁷ of the *Discourses* has much in common with Aristotle. Like Aristotle, he argues that “the great” in society are prone to ambition and conspiracies, and that while material equality makes for free governments, great inequality makes it difficult to sustain republics. The nobility are contrasted with the people, who possess considerable political wisdom and desire only not to be dominated. Machiavelli highlights the danger of corruption, which is contrasted with patriotism, devotion to the common good, law-abidingness, and activity in public life. Citizens that are “accustomed to servitude” or concerned solely with wealth or their private affairs will find it difficult to preserve their freedom.

Machiavelli differs from Aristotle in some of his solutions to instability. Although he adopts many of the features of the mixed regime of shared powers, he emphasizes conflict rather than consensus. Citing the Roman Republic, he notes that it was the disputes between the Plebs and the Patricians that led to the creation of the Tribune and other means of checking aristocratic power. According to the interpretation of Brudney⁸ and Skinner⁹, rather than avoiding political conflict, Machiavelli advises that republics should institutionalize them by creating specifically class-specific institutions and relying on the self-interest of classes to preserve public liberty. Even more than Aristotle, Machiavelli emphasizes the essential mutability of political order—wars, economic change, personalities, and even trivial events all threaten to undermine regimes. Well-ordered

⁷ N. Machiavelli, *The Prince and the Discourses* (Modern Library College Edition 1960).

⁸ K. Brudney, “Machiavelli on Social Class and Class Conflict,” *Political Theory* Vol. 12, n. 4 (1984): pp. 507-519.

⁹ Q. Skinner, “Machiavelli on the Maintenance of Liberty.”

republics require more than good laws and institutions to survive; they also require a good deal of luck.

Republicans like Cicero, Harrington, and Tocqueville also address the themes of popular participation in government, civic virtue, checking the wealthy elite, and the material prerequisites for a republican regime. Although there are significant differences among them, all note the importance of a public-spirited citizenry and the cultivating a concern for the common good¹⁰. Although contemporary democratic theorists echo many of these themes, their relation to the maintenance of a popular regime has received less emphasis. It is commonly held that republics require civic virtue, broad-based participation, a recognition of common obligations and interdependence, and that these psychological components are often fragile. However, these features are not generally incorporated into an overarching theory of stability.

Three contemporary theorists who give considerable attention to the prerequisites of a democratic regime are Honohan, Dagger, and McCormick. Dagger¹¹ argues that civic virtue is critical to the democratic project. Citizens should recognize their interdependence as members of a joint political community. He views a republic as an “assurance game” based on conditional altruism and widespread public trust, relying on public education to inculcate these attitudes. Dagger criticizes the “market model” of democratic citizenship, characterized by individual atomism and self-interest (i.e. corruption). Markets have a tendency to dominate politics, with the wealthy holding outsized influence.

¹⁰ See I. Honohan, *Civic Republicanism*, for an excellent review.

¹¹ R. Dagger, *Civic Virtues*; R. Dagger, “Neo-Republicanism and the Civic Economy,” *Politics, Philosophy, and Economics* Vol. 5, n. 2 (2006): pp. 151-173; R. Dagger, “Citizenship as Fairness: John Rawls’ Conception of Civic Virtue,” in J. Mandle and D. Reidy (eds.), *A Companion to Rawls*, (Oxford: Wiley-Blackwell 2013) pp. 297-311.

He also calls for a “republican political economy” with widespread property-holding, limits on inequality of wealth, and a decent social minimum.

In synthesizing republican theory, Honohan¹² also emphasizes interdependence and the common good. Her list of civic virtues includes self-restraint, awareness, deliberative engagement, and solidarity. Following Machiavelli, Honohans claims that political participation is a precondition for achieving other goods. She is keenly aware of the fragility of public interest: corruption is an acute problem existing within individual persons as they weigh private interests against the public good. Honohan views equality in public deliberations the main avenue for citizen engagement and an essential component of a just regime. Political equality is partly based on rough economic equality; she argues that a degree of economic equality and individual self-sufficiency is necessary for the fraternity, independence, and political obligation necessary to sustain a republic.

McCormick¹³ adopts an explicitly Machiavellian framework for his political theory. In a populist interpretation of Machiavelli, McCormick places the control of the wealthy elite as a central aim of a democratic regime. He criticizes much contemporary (and republican) theory for focusing too much on controlling elected officials while ignoring the pervasive political influence of the wealthy. He also notes Machiavelli’s statements about the virtues of the people: their greater ability to identify the true public good, and capacity for making good decisions. McCormick believes that Pettit’s theory in particular is blind to the way in which appeals to

¹² I. Honohan, *Civic Republicanism*.

¹³ J. McCormick, *Machiavellian Democracy*; J. McCormick, “Republicanism and Democracy,” in A. Niederberger and P. Schink (eds.), *Republican Democracy: Liberty, Law, and Politics* (Edinburgh University Press 2013), pp. 89-127. See also J. Maynor, *Republicanism in the Modern World* (Cambridge: Polity 2003).

the common good can conceal class domination. He argues that democratic regimes should institutionalize class conflict, adopting mechanisms like lotteries and a version of the Roman tribunate.

II

The Problem of the Wealthy

These elements of republican thought can be synthesized into a general account of stability suited to a modern, pluralistic society and consistent with a commitment to democracy. Stability in modern democratic states cannot simply be a question of preserving order, which can be accomplished through fear or manipulation. Instead, democratic stability is understood as the durability of the basic, essential features of a popular regime across time; one based on publicity and legitimacy. A stable democratic regime enjoys widespread, voluntary adherence to its institutions and the principles and norms which animate those institutions. To be stable a democracy must continue to exhibit essential characteristics like protection of individual liberties and scope for participation in policymaking by all citizens. It cannot be a democracy in name only. It must also be a “correct” regime in the Aristotelian sense, serving the common interest rather than that of any one class, while also maintaining the rule of law.

Threats to a democracy’s stability include external domination (through conquest or hegemony), civil conflict (intensifying rivalries among groups within society that can lead to civil war), usurpation (one group or individual seizing power), and perversion (retaining its formal democratic institutions but in reality being an oligarchy or tyranny). These dangers can be linked: for example, a bitter rivalry between groups may result in the establishment of a tyranny.

Each of these dangers are influenced by the political character of the citizenry. States with citizens willing to betray their state to a foreigner for personal or political gain, or who are unwilling to risk their lives in its defense, will more easily fall prey to conquerors. Citizens who view each other as enemies, holding group loyalties paramount, are more likely to engage in internal conflict, the subversion of the rule of law, and perhaps civil war. A passive citizenry will be more easily manipulated, or fail to stop some would-be tyrant, as would citizens embroiled in bitter internecine disputes. Or, focusing on their private affairs, they might let the regime slip incrementally into another form as a wealthy elite or powerful executive gradually consolidates power.

Much current literature involves the risks of general disengagement, or of the “motivation problem”—that the modern liberal regime may be unable to generate sufficient commitment compared with religious, racial, ethnic, and other group identities.¹⁴ From this perspective, civil conflict between rival groups appears to be the key danger facing democratic republics. By contrast, the long period since the last war between great powers, and the apparent entrenchment of democratic institutions, suggests that external domination and usurpation are lesser concerns, at least in wealthy countries.

Contemporary republican thinkers have generally focused on the attitudes and behavior of the people as a whole. However, Aristotle and Machiavelli placed at least equal priority on the character of society’s leaders, and particularly of the wealthy few. Republics have endured when this class is possessed by a sense of noblesse oblige, desire for external glory, or a healthy respect for commoners’ ability to rebel. Under such conditions they are more

¹⁴ M. Sandel, *Liberalism and the Limits of Justice*; A. Thomas, *Value and Context*; C. Taylor, *Philosophical Arguments* (Cambridge MA: Harvard University Press 1995).

likely to accept sharing power—or at least engage in less gross oppression.

Too often, however, the richest elements of society lack these virtues. Instead of serving the common good, Aristotle and Machiavelli believed them more likely to suborn the state, using the instruments of public power to pursue their private or class interests. In many respects the wealthy appear more vulnerable to corruption, and to a more vicious kind—using their influence to transform a mixed regime into an oligarchy. Hence a major theme in the classical republican tradition is the centrality of class politics: the permanent differences between the rich and poor, and the danger that a restive and corrupt wealthy class poses to popular government.

Preventing the domination of society by the wealthy few is a significant problem for Aristotle and Machiavelli and modern writers like McCormick. It rests on two contestable propositions: first, that the wealthy have greater capacity for influencing public affairs than other citizens; and second, that the wealthy are more prone to place private interests above the common good.

On the surface it might seem strange that in a modern democratic society with equal voting rights, wealthy citizens might possess greater political influence. Formally, equal votes means that elected representatives should have an incentive to cater to the interests of the poorer section of society, and that the elite are in danger of having their resources expropriated by an envious citizenry. However, a brief survey of actual democracies suggests that the wealthy do possess outsized political influence. Even the most egalitarian societies display strong concentrations of *wealth* even where there is considerable equality of *income*. There are a number of avenues by which the richer elements of society exert greater influence over politics. First, there is great range in the monetization of elections due to differences in campaign

finance laws. In a more deregulated system like the United States the wealthy presumably have more say in which candidates are viable. Second, the wealthy have greater leisure to pay attention to and participate in politics. They also have the resources to hire agents to further their political interests for them (rather than having to do so themselves), resulting in a skew of lobbying in favor of well-heeled groups and a proliferation of think tanks and advocacy groups championing their interests. As Mancur Olson¹⁵ argued, because there are fewer wealthy interests—with more concentrated objectives—it is easier for them to organize at the expense of the common interest of a diffuse public. Third, the formal guarantee of equal political liberty is of greater worth to those with greater resources.¹⁶ Access to the public forum through political advertising requires money to buy time on the radio, billboards, television, and the internet. Television spots on programs with the widest viewership can command far higher prices, effectively squeezing out the lesser-endowed. Fourth, consistent with Aristotle's claim, representative systems tend to result in the election of representatives who are themselves quite wealthy.¹⁷ Fifth, their greater resources allow the very wealthy to leverage their social position to bribe, intimidate, or wring concessions from political authorities. Elected officials may be promised lucrative rewards after they leave office, thus severing the link of popular accountability. Large corporations can threaten to relocate if their political demands are not met.

In sum, there is ample evidence that even in a relatively well-ordered democratic society, there are a variety of legitimate means

¹⁵ M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge MA: Harvard University Press 1965).

¹⁶ J. Rawls, *Justice as Fairness: A Restatement*.

¹⁷ B. Manin, *The Principles of Representative Government* (Cambridge: Cambridge University Press 1997). N. Carnes, *White Collar Government* (University Of Chicago Press 2013).

by which possessing great wealth gives a greater voice in public affairs. Political power may be a positional good,¹⁸ which are inherently competitive in nature and therefore vulnerable to bidding wars favoring the affluent.

The second proposition is that the wealthy are more likely to be self-interested—and hence that their greater power would be employed to the detriment of the republic. A recent theory developed by Kraus et al.¹⁹ proposes that the greater material resources and perceived social rank have significant psychological effects. Socioeconomic variation leads to major differences in the security, opportunity, constraint, and abundance individuals enjoy. Kraus et al. argue that low socioeconomic status (SES) results in a contextual, externally oriented psychology, while high SES encourages solipsistic and individualistic behavior. Because of their greater material security and opportunity to make use of their resources, the wealthy are less likely than others to exhibit compassion or empathy or to adopt communal strategies for solving problems. Citing a large empirical literature, they suggest that the affluent are more self-interested, self-absorbed, and likely to attribute social conditions to group characteristics or individual choices. Recent empirical research supporting the Kraus approach indicates that the wealthy have a more positive attitude about greed and are more likely to engage in unethical behavior;²⁰

¹⁸ F. Hirsch, *The Social Limits to Growth* (London: Routledge & Kegan Paul 1977).

¹⁹ M. Kraus, P. Piff, R. Mendoza-Denton, M. Rheinschmidt, and D. Keltner, “Social Class, Solipsism, and Contextualism: How the Rich are Different from the Poor,” *Psychological Review* Vol. 119, n. 3 (2012): pp. 546-572.

²⁰ P. Piff, D. Stancato, S. Cote, R. Mendoza-Denton, and D. Keltner, “Higher Social Class Predicts Increased Unethical Behavior,” *Proceedings of the National Academy of Sciences* Vol. 109, n. 11 (2012): pp. 4086-4091.

that high-SES individuals display higher levels of narcissism;²¹ and that personal wealth is a significant independent predictor of behavior by elected officials.²²

Rational choice theory also suggests that the wealthy may have a greater incentive to seek self-interested rewards from political engagement. As mentioned previously, Rawls and Honohan adopt a political psychology in which individuals are pulled between other-regarding and self-regarding motivations. Because the very rich have a greater capacity to exert influence, and the rewards are potentially so great (through government subsidies, favorable regulations, lower taxes, etc.), the lure of self-interest is particularly strong. According to Riker & Ordeshook's calculus of voting,²³ the probability that a person will engage in politics (vote) is equal to the expected benefits minus the expected costs, with benefits conditioned on the probability that one's personal intervention will affect the outcome. An additional "D" term signifies civic duty or the intrinsic worth of voting.

$$V = PB - C + D$$

For most people, the costs of making an informed voting decision are quite real (e.g. time, opportunity costs, acquiring sufficient information), much less volunteering, lobbying or more intense activities. Except in small communities, the probability that one's vote will determine the outcome is effectively zero, eliminating the "B" term. This formulation suggests that it is irrational to vote—and yet people do so, probably because they

²¹ P. Piff, "Wealth and the Inflated Self: Class, Entitlement, and Narcissism," *Personality and Social Psychology Bulletin* Vol. 40, n. 1 (2014): pp. 34–43.

²² M. Kraus and B. Callaghan, "Noblesse Oblige? Social Status and Economic Inequality Maintenance Among Politicians," *PLoS ONE* Vol. 10, n. 2 (2014).

²³ W. Riker and P. Ordeshook, "A Theory of the Calculus of Voting," *American Political Science Review* Vol. 62, n. 1 (1968): pp. 25-42.

believe it is their duty to do so.²⁴ As it stands, a robust sense of civic duty is required if the citizenry is likely to participate in politics. Otherwise there is a strong possibility of general disengagement from public affairs, precisely as republicans have traditionally argued. Further, benefits can come in a variety of forms (ideological, material, group-based etc.), but I would contend that narrow, self-interested gains would likely weigh quite lightly on the average citizen because of the small chance that one's vote is decisive.

For the wealthy, however, the size of the benefits (B) is much larger, and the probability that one's actions will shape the outcome greater (P), which means that they both have a higher propensity to participate in politics (directly or through agents) and to do so on self-interested grounds.

One objection might be that, although the wealthy might be self-interested, they may focus on their rivalries with other members of their own class. The general run of citizen could throw their collective political weight behind elites favoring their interests, or play them off one another. This is Madison's argument in the Federalist Papers: that the people can act as the arbiter among factions. Setting aside the difficulties of organizing "the people" (i.e. Olson's collective action problem), there is the possibility that the elite would bury their differences if a serious attempt was made to restrict their wealth. Winters²⁵ echoes Machiavelli and Aristotle in arguing that in some respects all regimes are oligarchies, with the wealthy classes in modern democracies accepting (formal) political equality in exchange for the preservation of their personal fortunes—and the threat that they would subvert the regime if that wealth was endangered.

²⁴ A. Blais and C. Achen, "Taking Civic Duty Seriously: Political Theory and Voter Turnout," unpublished manuscript (2010).

²⁵ J. A. Winters, *Oligarchy* (Cambridge: Cambridge University Press 2011).

Political stalemate might not be enough to prevent the concentration of wealth. In times of peace and relative political calm, there appears to be a strong tendency for wealth to become concentrated in fewer hands. The stability of the Roman Empire saw a dizzying accumulation of wealth in the senatorial class. Piketty²⁶ has argued that capitalism has a similar dynamic, one concealed in the twentieth century by the destruction of private wealth from world wars, depressions, and revolutions. He argues that without policy changes, we are likely to see a return of rentier capitalism and a stratified society. According to Hacker & Pierson²⁷ political deadlock in the U.S. and the advent of “policy drift” have resulted in the failure of government policy to keep pace with economic changes—and hence to the growth of economic inequality. The result is a feedback loop, with economic inequality leading to greater political inequality and hence to even more economic inequality.

III

Strategies for Limiting the Influence of the Wealthy

Republican thinkers have proposed several approaches for constraining the political influence of the wealthy. These fall into four distinct types:

1. *Prevention.* The most straightforward mechanism for blocking the development of oligarchy is to maintain broad economic equality, such that the wealthy are small in number and lack access to massive resources. Aristotle saw this

²⁶ T. Piketty, *Capital in the Twenty-First Century* (Cambridge: Harvard University Press 2014).

²⁷ J. Hacker and P. Pierson, *Winner-Take-All Politics* (New York: Simon & Schuster 2005).

primarily as a matter of good fortune, but laws could certainly facilitate it. Examples include wealth and inheritance taxes and bans on primogeniture and entail. Property-owning democracy and anti-trust and anti-monopoly legislation are modern examples.

2. *Institutionalization.* The modern “mixed regime” differs greatly from its historical forebears, which were structured to explicitly represent the interests of different economic classes. For example the Tribune of the Plebs and the Athenian Ecclesia were both intended to serve the commons, while the Senate served the interests of the wealthy elite. Contemporary republics have multicameral institutions with a different logic, representing territories (like the U.S. Senate) or expertise (e.g. appointed judges, different term lengths). Moderns place greater reliance on electoral accountability through equal voting and regular elections. This approach has been sharply criticized by McCormick as conceding greater political weight to the wealthy.

3. *Insulation.* This approach places legal and institutional limits on the conversion of wealth into political power. It is the most popular approach in the modern period, leading to campaign finance laws, regulation of the media, and restrictions on lobbying. This strategy has the most limited pedigree in the republican tradition, being akin to laws such as public audits, formally equal access to all offices, the elimination of class-dominated social institutions such as the traditional Athenian tribes by Cleisthenes, or the shifting of legislative power from the Centuriate to the Plebian Assembly in Rome.

4. *Representation*. Often linked to the Institutionalization strategy²⁸, representation attempts to ensure that political institutions include members from a broad cross-section of society to ensure descriptive representation, and hence to prevent the wealthier segments of society from monopolizing public office. Traditionally this was accomplished by two means. The first are direct popular assemblies such as the Athenian Ecclesia, in which all citizens were encouraged to participate. The second is the use of sortition, with representatives selected by lot, resulting in a legislature containing more middle and lower-class individuals than the elite backgrounds found in contemporary assemblies. These methods have generally fallen out of favor over the last several centuries, with some exceptions. The use of multi-member districts and proportional representation increase the probability that a wider range of opinions will be represented in the halls of government, while in the U.S. electoral districts must be drawn so as to ensure the representation of certain minorities. However, these mechanisms focus on representing ethnic rather than economic diversity. No modern democracy secures descriptive legislative representation of the poor and middle classes. A second modern version is the referendum, where laws are directly voted on by the people. However, like elections, referenda may also be disproportionately influenced by a wealthy elite.

Underlying each of these approaches is an attempt to ensure equality in public deliberations—a more substantive goal than formal political equality. The insulation, representation, and

²⁸ Technically there is nothing to prevent elites in support of the poor from representing them in contestatory institutions—those institutions are characterized by an active defense of popular interests, rather than the general population actually participating in policymaking.

institutionalization strategies limit the ability of privileged interests from using public institutions to private advantage by restricting their ability to convert material into political advantage (insulation), creating populist political institutions that expressing the will of the commons (institutionalization), and ensuring that public offices are solely populated by the elite (representation). All three are essentially reactive, seeking to constrain the influence of the wealthy on public affairs. The prevention strategy is far more aggressive in trying to prevent the emergence (or weaken) a large, entrenched, wealthy class.

Insulation is one of the more popular means of promoting greater political equality among egalitarian theorists, whether from the republican or other traditions.²⁹ Even thinkers that advocate for a broader distribution of wealth³⁰ justify property-owning democracy on grounds other than political equality because they believe walling off politics from money is feasible. However, there is reason to question how easy it is to limit the influence of the wealthy no matter how strict the laws are. Dagger³¹ argued that a republican political economy would require direct limits on the distribution of wealth (the prevention strategy) in part because insulating politics is so difficult. In a capitalist society there are simply too many avenues for the market to infect public discourse. The tortured history of U.S. campaign finance, and the slow retreat of social democracy in the

²⁹ H. Brighouse, “Egalitarianism and Equal Availability of Political Influence,” *Journal of Political Philosophy* Vol. 4, n. 2 (1996): pp. 118-141; T. Christiano, *The Rule of The Many: Fundamental Issues in Democratic Theory* (Boulder: Westview Press 1996); T. Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press 2008).

³⁰ M. O’Neill, “Free (and Fair) Markets with Capitalism,” in Martin O’Neill and Thad Williamson, *Property-Owning Democracy: Rawls and Beyond* (Oxford: Wiley 2012) pp. 75-100.

³¹ R. Dagger, “Neo-Republicanism and the Civic Economy.”

face of neoliberalism, suggest that one way or another money will make its voice heard. Insulation may be a useful precondition for egalitarian politics, but is probably not sufficient for it.

It could be argued that the wealthy are less dangerous in modern republics because they are no longer in possession of landed estates, lacking the concentrated resource base and retainers they had in pre-capitalist eras. However, modern corporations pose a similar problem, as long-lasting institutions disposing of great financial and human resources. Corporations are generally managed and run by the wealthiest in society. Their hierarchical organization (especially where there are weak unions) is likely to cultivate dominating attitudes in management and subservience in labor.

The focus on equality in political deliberations also explains the great emphasis republicans have traditionally placed on participation:³² widespread participation is necessary to ensure political equality. Most democratic theorists embrace considerable political equality, but argue that participation should be an “option value.”³³ Citizens should have an equal opportunity to wield equal influence in public affairs (theorists differ as to what the scope of “equal influence” should be) but are not required to do so.³⁴ Every member of the community has a *right* but not necessarily an *obligation* to participate. Democratic theorists have generally accepted the importance of a division of labor in

³² L. Andronache, *Contemporary Republican Strategies for ‘Civic Virtue’ and the Notion of Political Obligation*, unpublished dissertation (2008).

³³ A. Thomas, *Value and Context*.

³⁴ J. Rawls, *Justice as Fairness: a Restatement*. H. Brighouse, “Egalitarianism and Equal Availability of Political Influence;”. T. Christiano, *The Rule of The Many*; A. Thomas, *Value and Context*.

political life,³⁵ with those more interested in devoting themselves to public service being free to do so.

Republicans, however, call for equal political functioning rather than equal capability to function in politics.³⁶ The difference lies partly in other democratic theorists' conceiving of participation in public life in individual terms, rather than as a required for the proper operation of republican institutions.³⁷ If activity in public affairs is not considered a moral duty, then the greater incentives and capabilities the affluent possess will result in a political class that is not representative of the population at large, one overly sensitive to elite interests. The outcome will be a democratic republic that fails to honor a key feature of democracy—that in public affairs each citizen's voice should be given equal weight. While hypothetically sortition could maintain a division of labor between the political classes and the population at large while maintaining descriptive representation, the selection of public officials by lot has largely fallen out of favor.³⁸

The republican model for promoting equality in public deliberations also calls for a great degree of civic virtue in the common citizen. One component of "civic virtue" would be a willingness to attend to public affairs, but the republican approach calls for much more than this. A society could enjoy

³⁵ T. Christiano, *The Rule of The Many*; J. Rawls, *Justice as Fairness: a Restatement*.

³⁶ D. Crocker, "Sen and Deliberative Democracy," in Alexander Kaufman (ed.) *Capabilities Equality: Basic Issues and Problems* (London: Routledge 2006) pp. 155-197.

³⁷ A. Francisco, "A Republican Interpretation of the Late Rawls."

³⁸ Objections to sortition include concerns that randomly selected officials would lack sufficient expertise, and that since they would not be eligible for re-election, they would lack public accountability. While I question whether these objections are decisive, there is as yet little groundswell among theorists or the general public to revive selection by lot.

massive and intense participation by citizens (voting, closely tracking political affairs in the press, attending protests and marches)—but purely in the pursuit of group advantage. For example, a mobilized population could define all political contests as a zero-sum contest between rival ethnic groups. Civic virtue also requires disinterestedness, with political deliberation focused on identifying the common good and respecting individual liberties and the limits of human reason. The challenge for republicans lies in determining how these attributes are to be encouraged. One possibility is a robust system of public education that cultivates civic virtues in future citizens.³⁹ The expectation that they will participate in public affairs may also motivate greater attention to politics, and growing up in a civic culture in which all engage in common endeavors may encourage the proper virtues through the development of social capital.⁴⁰ The influence of material conditions on political psychology is another factor that may encourage reasonableness among citizens, if a middle class with reasonable economic independence is indeed more likely to possess the requisite characteristics.⁴¹

It should be emphasized, however, that adequate civic virtue remains a serious problem. Public education, a broad middle class, and other devices can only encourage the right traits in

³⁹ V. Costa, *Rawls, Citizenship, and Education* (London: Routledge 2011). R. Curren, *Aristotle on the Necessity of Public Education* (London: Rowman & Littlefield Publishers 2000).

⁴⁰ R. Putnam, *Bowling Alone: the Collapse and Revival of American Community* (New York: Simon & Schuster 2000); R. Dagger, *Civic Virtues*.

⁴¹ Although see White (2012), who citing Tocqueville suggests that a property-owning democracy may encourage more rather than less materially motivated self-interest. White, S. (2012). "Property-Owning Democracy and Republican Citizenship." In *Property-Owning Democracy: Rawls and Beyond*. Edited by Martin O'Neill and Thad Williamson pp. 129-146.

citizens—not guarantee them. Although civic virtue remains a precondition for a stable republic, there is no certainty that this precondition will hold across generations or in the face of crises. Further, republicanism’s contention that the wealthy are especially prone to corruption means that that every democratic regime contains within it a potentially subversive force. The ones we would most like to possess the virtues of reasonability, restraint, and a commitment to political equality are the ones least likely to do so.

In this respect the republican concern for stability recognizes the fundamental fragility of popular government. Republicanism may be understood as a challenge to the possibility of full compliance or the maintenance of favorable background conditions across generations—in other words as a challenge to the possibility of ideal theory as understood by Rawls. The stability problem identified by republicans can also be viewed as part of the process of reflective equilibrium, in which the prospects for a theory must be adjusted in light of the “basic facts of society.” A democratic theory that fails to address the problem of oligarchy—and hence the questionable durability of democracies—lack an adequate grounding in political psychology and political sociology, and should be modified accordingly.

III

Pettit’s Republicanism and Democratic Stability

Pettit’s version of republicanism is founded on the conception of liberty as non-domination, contrasted with liberty as non-interference. Non-domination involves actual and potential for constraint by either a government (*imperium*) or individuals (*dominium*). Pettit rejects positive liberty (as self-rule or autonomy), although he argues that it will be encouraged in a

republican state. Political participation is instrumental, valued not for its intrinsic worth, but because it guarantees other goods. Although Pettit makes use of the common good, it is very similar to the enlightenment idea of “enlightened self-interest,” in that a proper understanding of one’s own interest will dispose one to respecting individual liberty (as non-domination) and republican government. Pettit also describes his theory as consequentialist, designed to maximize non-domination, rather than a procedural conception akin to Rawls.

By maximizing non-domination Pettit believes he can accomplish a number of goals of egalitarian and democratic theory. He thinks that maximizing non-domination will promote status equality among citizens (using an “eyeball test”). Non-domination can also ground democracy, in that popular control of government can legitimate democracy, relying on electoral accountability of representatives, mixed powers, and contestatory institutions. The coercive power of governments are consistent with individual liberty when they track the common good of citizens, which can be approximated by republican institutions and the policy-making norms likely to be fostered by democratic processes.

How does Pettit cope with the problem of regime stability in general, and McCormick’s claim that his theory is vulnerable to elite cooption? Pettit’s notion of stability is primarily oriented towards the psychological feasibility of a given political order; the degree to which persons can be realistically expected to live up to what is expected of them by republican theory. Pettit agrees with the traditional republican claim that individuals are corruptible, but not inescapably corrupt. He concentrates on the corruptibility of officeholders and the risk of imperium, but he does discuss the beliefs of regular citizens as well. In his recent work, Pettit lays out a theory of long-term democratic stability based on

agreement about the norms governing the policymaking process as a whole (akin to Rawls' public reason), with individual or group interests holding sway with regard to particular political outcomes.⁴²

Pettit clearly recognizes the threat posed by what he calls "private lobbies" in suborning the state to private interests, identifying "elitist pressure" as a serious problem for democratic government.⁴³ Along with the usual solutions to insulate public deliberations (campaign finance and lobbying laws, publicly supported media) he suggests that the legislature should include a broad range of voices and recommends contestatory institutions like ombudsmen, but not *class-based* representation. Pettit leaves limited scope for descriptively representative political institutions, citing "citizen's juries" as a supplement to the policymaking process. To prevent imperium he relies, electoral accountability and positive social norms and "honors," and the risk of rebellion. Pettit briefly mentions that preventing excessive concentration of holdings may be necessary, but in his earlier work downplays the importance of equality in material possessions. He goes further in his 2012 work, calling for equal resources to support basic liberties and public investments in infrastructure, social insurance, and education. However, these are all in the service of equal social relations, not equalization of political functioning.

Pettit certainly doesn't ignore the problem of elite co-option, and his theory has the resources to strengthen the democratic features of his neo-republicanism without fundamentally altering it. Pettit leaves open the best means for blocking elite influence.

⁴² Pettit, P. (2012). *On the People's Terms: A Republican Theory and Model of Democracy*. Cambridge University Press.

⁴³ Pettit 1997. Pettit, P. (2004). "The Common Good." In *Justice and Democracy: Essays for Brian Barry*. Edited by K. Dowding, R. Goodin, and C. Pateman. pp. 151-169. Cambridge University Press.

His best response might be to incorporate class-based elements in his system of countervailing institutions, an approach quite in line with traditional republican practice. He could give a stronger role for citizen's juries and other contestatory institutions selected by lot, and incorporate something like McCormick's tribunate (a panel of randomly selected citizens with the power to veto laws). A diverse legislature could also include representatives of different economic strata.

Further, by incorporating the political liberties in the list of basic liberties that must be equally resourced, Pettit's neorepublicanism can be made more economically egalitarian. Pettit argues that democratic legitimacy is based on equal availability of political influence: all citizens who wish to engage in politics should have an equal voice when they choose to do so. Although Pettit does not include the potential for political influence among the basic liberties, there are good reasons why he should do so. If material inequalities translate into political inequalities, the greater political influence of the wealthy could be minimized by limiting extremes of wealth. This approach would strip Pettit's theory of much of its sufficientarian character by increasing the social minimum required to achieve sufficiency, largely collapsing the difference between it and a more straightforwardly egalitarian approach.

The more serious difficulties for Pettit's theory are his conceptions of civic virtue⁴⁴ and political participation. Pettit's places great weight on the social norms prevalent in a neo-Roman society to restrain citizens and officeholders and inculcate identification with the political community. The norm of civility is intended to create social links with other distinct groups in society. However, a reliance on social trust would seem to

⁴⁴ See also V. Costa, "Neo-republicanism, freedom and non-domination, and citizen virtue," *Politics, Philosophy, and Economics* Vol. 8, n. 4 (2009): pp. 401-419.

conflict with the grounds of political loyalty in Pettit's model. Citizens' support of the political order is based on the recognition that it is in their personal interest to support non-domination for all. Self-interest is thus an important mediator of political identification in Pettit's theory. But what happens when calculations of self-interest are not so straightforwardly in favor of supporting non-domination—for example when one has the resources to secure non-domination for oneself or one's group while safely dominating others? Pettit also emphasizes the virtue of vigilance, which has a decidedly individualist, defensive character. Yet vigilance need not be directed solely at blocking the imperium of the state in solidarity with the general body of citizens. It can easily be directed against a rival social group in solidarity with one's own group. In short, Pettit's theory is vulnerable to the "motivation problem" that adherence to the state—and to one's fellow citizens as a whole—may be less persuasive than adherence to one's subsection of society.⁴⁵ Another problem is that society's privileged may see it in their rational self-interest to defend their class interests ahead of the community as a whole. By adopting a personalized conception of political obligation based on individual self-interest, Pettit may be *facilitating* the appetite for domination among the wealthiest citizens, especially since this class will largely populate the institutions of a representative democracy. Pettit's suggestion that a desire for honor and fear of rebellion will restrain a corrupt governing class is rather weak tea given the massive opportunities for enrichment and oppression available to the managers of the modern nation-state.

Pettit's approach to political participation is also problematic. He sharply distinguishes positive liberty, i.e. freedom as self-governance, from freedom as non-domination. Instead of

⁴⁵ C. Taylor, *Philosophical Arguments*.

political participation being constitutive of freedom, Pettit calls for equal availability of political influence, treating engagement in public as an option value, not a moral obligation. For Pettit, citizens' unwillingness to participate in politics is not viewed as a serious problem:

My [political] inaction may be prompted by laziness rather than acceptance, of course, but that is my personal failure, not a failure of the system. The system may reasonably be required to provide me with the knowledge and opportunity for political action but it cannot be faulted, and cannot be held to be dominating, just because I am too lazy to be active myself.⁴⁶

What Pettit's approach neglects is the differential incentives of upper, middle, and lower class citizens to engage in public affairs. There is a presumption that involvement in politics is the product of laziness or indifference, rather than a mix of rational self-interest and civic duty. However, the greater relative influence and rewards enjoyed by the most affluent citizens gives them a far stronger incentive to participate in politics compared with other citizens, meaning that (to paraphrase E.E. Schattschneider⁴⁷) the voices heard in public deliberations will have an upper class accent. At the same time, the failure to incorporate a notion of civic duty to participate in politics will make it much *less* likely that other citizens will be politically engaged. Pettit's theory has no solution for the collective action problem of ensuring equal political functioning. Instead, many of its attributes, and in particular as its grounding of political legitimacy on individual self-interest, will likely exacerbate this problem. Pettit's republicanism therefore fails to restrain socially powerful groups

⁴⁶ J. L. Mart, and P. Pettit, *Political Philosophy in Public Life: Civic Republicanism in Zapatero's Spain* (Princeton: Princeton University Press 2010), p. 59.

⁴⁷ E.E. Schattschneider, *The Semisovereign People: A Realist's View of Democracy in America* (Boston: Holt, Rinehart and Winston 1960).

from coopting public power; that *imperium* will merge with *dominium*.

IV

Rawlsian Republicanism

My understanding of the republican concern for democratic stability is closely akin to Rawls' understanding of classical republicanism:

...unless there is widespread participation in democratic politics by a vigorous and informed citizen body moved in good part by a concern for political justice and the public good, even the best designed political institutions will eventually fall into the hands of those who hunger for power and military glory, or pursue narrow class and economic interests...⁴⁸

Rawls distinguishes classical republicanism from civic humanism, which privileges political life over other forms of the good and is therefore ruled out as a comprehensive doctrine unable to serve as the basis of an overlapping consensus. Because it is not a perfectionist doctrine, Rawls believes that classical republicanism is consistent with political liberalism.⁴⁹ A vein of research has developed a republican interpretation of Rawls work, especially in *Political Liberalism* and *Justice as Fairness*. Rawls'

⁴⁸ J. Rawls, *Justice as Fairness: a Restatement*, p. 144.

⁴⁹ Patten, Richardson, and Costa have all argued that Pettit's version of republicanism, can be assimilated into Rawls' theory. However, Pettit's focus on non-domination is distinct from the version of republicanism I have focused on in this work. T. Patten, "The Republican Critique of Liberalism," *British Journal of Political Science* Vol. 26, n. 1: pp. 25-44; H. Richardson, "Republicanism and Democratic Injustice," *Politics, Philosophy, and Economics* Vol. 5 (2006): pp. 175-200; V. Costa, "Rawls on Liberty and Domination," *Res Publica* Vol. 15 (2009): pp. 397-413.

conception of citizenship and civic virtue, the fair worth of the political liberties, his notion of political liberties and the importance of reasonability, and his advocacy of property-owning democracy are all distinctly republican themes.⁵⁰

According to Rawls, problems in his account of stability in a Theory of Justice motivated the development of political liberalism. He aims to develop principles of justice that could serve as an overlapping consensus from citizens with diverse conceptions of the personal good which would develop in a free society. Rawls' justice as fairness is also historically grounded, meant to serve as a "society as a fair system of cooperation over time, from one generation to the next."⁵¹ Rawls believes that the two principles of justice can serve as the locus of political loyalty from citizens who hold many "reasonable comprehensive doctrines." For Rawls the question of stability is whether citizens growing up in a society constructed around a given set of political principles are likely to maintain their adherence to those principles. The ideas of property owning democracy, fair worth of the political liberties, and his conception of citizenship are all in service to this overarching problem of how a regime can retain the loyalty of and cultivate the necessary political virtues in its citizens, as well as ensure that reasonably favorable background conditions are preserved. In this sense, Rawls' "political turn" could be understood as a "republican turn."

⁵⁰ N. Buttle, "Liberal Republicanism," *Politics* Vol. 17, n. 3 (1997): pp. 147-152. V. Costa, "Rawls on Liberty and Domination;" R. Dagger, "Citizenship as Fairness: John Rawls' Conception of Civic Virtue," in J. Mandle and D. Reidy (eds.), *A Companion to Rawls*; A. Francisco, "A Republican Interpretation of the Late Rawls;" H. Richardson, "Republicanism and Democratic Injustice;" A. Thomas, *Value and Context*.

⁵¹ J. Rawls, *Political Liberalism* (New York: Columbia University Press 1993), p. 15.

Rawls sees close links among guaranteeing political equality, restraining the influence of the wealthy in public deliberations, and the material conditions of a democratic society. He includes a “proviso” in the first principle of justice that only political liberties are to be guaranteed their fair worth. Given the coercive power of the state, unless political equality is maintained, all other liberties are at risk.⁵² Political equality is required because, unlike other goods, it has an intrinsically competitive aspect.⁵³ To achieve this Rawls deploys the conventional insulation strategy, with campaign finance and media access laws to prevent the well-endowed from dominating public discourse. But Rawls goes further than Pettit by advocating for a strategy of prevention as well, supporting property-owning democracy over welfare-state capitalism. Because it allows great material inequality, welfare-state capitalism will prove unable to underwrite political equality. Like other republicans⁵⁴, Rawls’ theory suggests that democratic states require a political economy that disperses holdings in order to prevent both domination in the social background⁵⁵ and preserve political equality.⁵⁶ Rawls’ position is consistent with Aristotle’s arguments for a dominant middle class and the influence of material conditions on political psychology. I differ with O’Neill,⁵⁷ who argues that Rawls erred grounding of property-owning democracy on the fair worth of the political liberties. O’Neill think that if politics were insulated from wealth,

⁵² J. Rawls, *Justice as Fairness: a Restatement*, p. 51.

⁵³ V. Costa, “Rawls on Liberty and Domination.” H. Brighouse, “Political Equality and Justice as Fairness,” *Philosophical Studies* Vol. 86, n. 2 (1997): pp. 155-184.

⁵⁴ R. Dagger, “Neo-Republicanism and the Civic Economy.”

⁵⁵ V. Costa, “Rawls on Liberty and Domination.”

⁵⁶ A. Thomas, “Property-Owning Democracy, Liberal Egalitarianism, and the Idea of an Egalitarian Ethos,” in Martin O’Neill and Thad Williamson (eds.), *Property-Owning Democracy: Rawls and Beyond*, pp. 101-128.

⁵⁷ M. O’Neill, “Free (and Fair) Markets with Capitalism.”

then welfare state capitalism could accommodate substantial economic inequality. However, while insulation is a useful auxiliary to other approaches, it is hardly adequate on its own. There are simply too many means beyond campaign contributions by which great wealth can exert political influence.

Rawls therefore gives considerable scope for the republican strategies of prevention and insulation. He effectively ignores the strategies of institutionalization or representation, giving little attention to the institutional mechanisms of political authority beyond a mandate that legislators and parties should focus on the common good over narrow constituent interests, and a preference for representative systems over plebiscites. However, these features are not integral to Rawls' larger scheme, and institutions to preserve descriptive representation could be included. Specifically class-based institutions would seem to be ruled out, however.

Despite Rawls' strong commitment to political equality, he still treats it as an opportunity concept. Rawls accepts a "social division of labor" in which some persons will find greater personal goods in devoting their life to public service than others. Thomas's synthesis of Rawls and republicanism similarly guarantees the equal right to have one's voice heard in public affairs.⁵⁸ However, Rawls does have greater resources than Pettit in encouraging widespread democratic participation. He argues that citizens have a "natural duty" to support just institutions, which could be interpreted as including a civic duty to participate in public life. His conceptions of reasonability and reciprocity include a recognition that each citizen is willing to take on appropriate burdens and play their fair part in social

⁵⁸ A. Thomas, *Value and Context*.

undertakings.⁵⁹ Finally, Rawls argues in his reply to Habermas that the political liberties have great intrinsic value. Although he elsewhere gives them lesser weight than private liberties and treats them as instrumental, they remain fundamental.⁶⁰

This brings us to the role of civic virtue in Rawlsian theory. Rawls' theory of stability places tremendous importance on the character of the citizenry. A well-ordered, stable, and just society requires citizens that accept the burdens of judgment: that they accept the inevitable differences in personal convictions among free and equal persons, and that they be reasonable. The notion of reasonability is closely linked to the norm of reciprocity.⁶¹ Citizens willing to abide by the terms of social cooperation, including compromise, can conceive of the democratic state as a common project among all citizens, demonstrate civility to fellow citizens, and to recognize "civic friendship." Rawls believes that these virtues will be cultivated by educational institutions,⁶² but also by the operation of justice itself. Rawls' account of democratic stability is thus based on a citizen body which possesses political virtues, and are capable of seeing themselves *as citizens* rather than simply as agents of their own individual goods.

If this conception of citizenship is viable, then Rawls will have gone a good way towards encouraging sufficient public-spirited participation to check the influence of the wealthy elite in public deliberations. The question is whether this very strong

⁵⁹ R. Dagger, "Citizenship as Fairness: John Rawls' Conception of Civic Virtue," in J. Mandle and D. Reidy (eds.), *A Companion to Rawls*.

⁶⁰ A. Francisco, "A Republican Interpretation of the Late Rawls."

⁶¹ Rasmussen, D. (2004). "Defending Reasonability." *Philosophy and Social Criticism* 30(5-6): 525-540. R. Dagger, "Citizenship as Fairness: John Rawls' Conception of Civic Virtue," in J. Mandle and D. Reidy (eds.), *A Companion to Rawls*.

⁶² Costa 2011, R. Dagger, "Citizenship as Fairness: John Rawls' Conception of Civic Virtue," in J. Mandle and D. Reidy (eds.), *A Companion to Rawls*.

conception of citizenship coheres with Rawls' reliance on electoral democracy or voluntarist approach to political participation.

V

Republicanism, Instrumental, and Perfectionist

Although Rawls' advocacy of property-owning democracy and conception of civic virtue provide a stronger base for equality in public deliberations, he shares with Pettit a voluntarist approach to political participation, a reliance on electoral accountability, and a neglect of class-based institutions that would restrict the political influence of the wealthy. This may have to do with their common commitment to an instrumental approach to political liberty.

Although Rawls never uses the term, the liberal republican and neo-Roman republican approaches both understand political participation as an option value. What both theorists overlook is that elections are an aristocratic device - most of those elected to office are quite affluent.⁶³ If not supplemented by descriptive or class-based political institutions, there is a serious risk of distortions in agenda-setting and lawmaking. Further, a reliance on electoral accountability requires a very active and informed citizenry, which is made suspect if political participation is not viewed as a duty.

I am not entirely clear why Rawls and Pettit adopt a voluntaristic conception of political liberty. If the question is whether everyone should run for office, then they might be

⁶³ B. Manin, *The Principles of Representative Government*; J. McCormick, *Machiavellian Democracy*; J. McCormick, "Republicanism and Democracy," in A. Niederberger and P. Schink (eds.), *Republican Democracy: Liberty, Law, and Politics*.

arguing that not everybody wants to devote their lives to politics. But this assumes that public service should be a lifetime profession: rotation in office or sortition could permit short-term commitments to public service. Concerns about quality of decision-making by typical citizens may be unfounded⁶⁴. On the other hand, if we are considering citizen engagement in the broader sense (attendance to public affairs, voting, etc.), then I question why as a general rule political participation cannot be treated as an affirmative duty. Such an approach would appear to jibe better with Rawls' notion of the citizen, and both thinkers' concern for political equality.

Of course, Rawls' approach is not strictly instrumental, especially in comparison with Pettit. Strengthening the place of civic virtue in Rawls' or Pettit's theory can partly address the motivation problem in those theories, but in doing so they significantly narrow the differences not just between each other but also with more perfectionist theories of republicanism. Perfectionist republicans highlight the intrinsic worth of political participation, grounding both involvement in public life (public liberty) and individual freedom (individual liberty) on the principle of autonomy.⁶⁵ A full synthesis between these approaches would be ruled out by Rawls since a full commitment to autonomy would constitute a comprehensive doctrine. However, one could instead treat the goods of public life as a *partially* comprehensive good—as a “module” in which political virtues are seen as a necessary adjunct to the pursuit of individual goods. Rather than treating public life and the as the *highest* good,

⁶⁴ T. Beierle, (2002) “The Quality of Stakeholder-Based Decisions,” *Risk Analysis* Vol. 22, n. 4 (2002): pp. 739-749.

⁶⁵ R. Dagger, *Civic Virtues*; A. Francisco, “A Republican Interpretation of the Late Rawls;” I. Honohan, *Civic Republicanism*. Also L. Andronache, *Contemporary Republican Strategies for ‘Civic Virtue’ and the Notion of Political Obligation*.

it would be treated as a necessary good—one limited to a specific sphere and constrained by a commitment to individual liberty. I do not have space to address this possibility in detail, but it might be a promising avenue for constructing a more broadly-based republicanism, integrating the neo-Roman, liberal, and perfectionist versions.

However, all of these theories still retain certain vulnerabilities from the point of view of democratic stability. First, the reliance of modern republicans of all stripes⁶⁶ on civil society to promote equality in public deliberations is problematic. The affluent sectors of society tend to exert greater influence in civil society in the absence of formal the legal barriers we often see in politics. Non-profit institutions of civil society such as churches, foundations, and charities are all quite reliant on the donations of wealthy subscribers to function. Even if this were not the case, the tremendous resources and coercive legal powers of the state make it essential that lawmaking proceed on the basis of political equality. It is because of the great powers of the state that it is so necessary to establish equality in formal political deliberations. The limited attention contemporary democratic theory gives to checking the ability of the wealthy elite to monopolize public office would (I believe) inspire sharp criticisms from republicanism's intellectual forebears.

The second problem is that both the instrumental and intrinsic approaches to political involvement fail to present a compelling reason why citizens are individually obligated to engage in politics with a view to the common good. Saying that all citizens must be

⁶⁶ L. Andronache *Contemporary Republican Strategies for 'Civic Virtue' and the Notion of Political Obligation*; P. Pettit, *Republicanism*; A. Thomas, "Property-Owning Democracy, Liberal Egalitarianism, and the Idea of an Egalitarian Ethos," in Martin O'Neill and Thad Williamson (eds.), *Property-Owning Democracy: Rawls and Beyond*.

reasonable or reciprocal presumes that they view the other members of the state as partners in a common enterprise. But it is precisely this perspective that Machiavelli and Aristotle saw as difficult to sustain. It is quite natural for persons to think first of their own good, and then of their family and friends, and last of all to the fellow resident of a state comprising millions. As with the difficulty in developing a compelling theory of political obligation to obey the law, theories of civic duty lack a persuasive account of why individuals are obligated to help make the laws in accordance with just principles.

And this is doubly true of the wealthiest segments of society, who do not experience the shared vulnerability that is one of the strongest props of civic friendship. If I as an individual have the resources to further my own good, why should I consider those who cannot as worthy of the same voice in our common affairs? It may be useful to recall that modern democratic theory is exactly that—*democratic* theory. As Aristotle noted, there is a quite different notion of political justice that does not view all persons as worthy of equal respect, one strongly encouraged by the possession of great wealth. Classical republican theory viewed just governments as quite delicate because of the fragility of the socioeconomic and psychological structures supporting them. They defined a problem and laid out general strategies for coping with it, but there was always an awareness that political stability relied in part on fortune: the acquiescence of the elite, favorable economic trends, and social harmony. Aristotle and Machiavelli's systems of shared power carried within them the potential for escalating class conflict, and the possibility that the most powerful members of society would one day reject democratic pretensions.

Michigan State University

If you need to cite this article, please use the following format:

Burroughs, Nathan, "Republicanism and Stability," *Philosophy and Public Issues (New Series)*, Vol. 5, No. 2 (2015), 135-170, edited by S. Maffettone, G. Pellegrino and M. Bocchiola

SYMPOSIUM
REPUBLICANISM BETWEEN JUSTICE AND DEMOCRACY



REPUBLICANISM,
DEMOCRATIC PARTICIPATION,
AND UNELECTED AUTHORITY

BY
SETH MAYER

[THIS PAGE INTENTIONALLY LEFT BLANK]

Republicanism, Democratic Participation, and Unelected Authority

Seth Mayer

Republican theorists, committed to realizing freedom as non-domination, have taken differing positions on the compatibility of their political ideals with democracy. In this paper, I argue that republicans should adopt a participatory democratic approach to politics. I defend this view by working through ambiguities in Philip Pettit's recent writings on democracy, popular control, and unelected authority. He suggests that, alongside participatory institutions, unelected authorities like central banks, sentencing commissions, and regulators have crucial functions in democratic government. I argue that Pettit's defense of such unelected authority requires clarification and revision. Critiquing his approach, I offer an alternate version of republican democracy. I argue that unelected authorities can only be justified on the basis of popular control and must not undermine actual public participation. As a result, Pettit should give unelected authority a less far-reaching role in his theory of democracy, while relying more extensively on popular participation.

I

Introduction

The relationship between republicanism and democracy is complex. Republican theorists, who have a firm commitment to freedom, understood as non-domination, have supported democratic governance to different extents and for different reasons. According to some republicans, democratic decisions can have deleterious consequences for citizens' freedom. In response, they restrict democratic participation to protect citizens. Other republicans see democracy as necessary to support non-domination, however. Moreover, their justifications for democracy, coupled with their views of democratic legitimacy, affect what level of political participation they aim to institutionalize. In this article, I examine the democratic theory of one of the greatest contemporary republican theorists, Philip Pettit, to evaluate his attempts to navigate these issues. Doing so reveals problems with Pettit's view, as well as the need for republicans to adopt more strongly participatory conceptions of democracy.

Pettit's views on the relationship between republican freedom and democracy shift over the course of his writings. His earlier work focuses on protecting citizens' interests, supporting what he calls "depoliticization" rather than participatory forms of democracy. Many criticize this approach from a democratic perspective.¹ His later work reinterprets freedom as non-

¹ See, for example, Nicholas Southwood, "Beyond Pettit's Neo-Roman Republicanism: Towards the Deliberative Republic," *Critical Review of International Social and Political Philosophy* 5 (2002): 16-42; Henry Richardson, *Democratic Autonomy* (Oxford: Oxford University Press, 2003); Cristina Lafont, "Is the Ideal of a Deliberative Democracy Coherent?" in *Deliberative Democracy and Its Discontents* (Aldershot: Ashgate, 2006), 3-26; John McCormick, *Machiavellian Democracy* (Cambridge: Cambridge University Press, 2011).

domination as tightly connected to popular control, solidifying his commitment to democracy. This approach, which suggests that democracy furthers non-domination, is closer to those who see republicanism and democracy as allies. I argue that Pettit does not go far enough in reconciling his republicanism with participatory democracy.

To spell out his democratic commitments, Pettit outlines the degree of political participation necessary for democratic legitimacy. He argues that unelected authorities—like central banks, sentencing commissions, and regulators—have a crucial function in democracy alongside participatory forms of governance. Pettit’s arguments for such unelected authority require clarification and revision; otherwise his view will lapse into a paternalism that undermines freedom as non-domination. Critiquing his approach, I offer a revised version of republican democracy that takes participatory democracy as essential for preserving freedom as non-domination. Drawing on Pettit’s own examples, I argue that unelected authorities can only be justified on the basis of popular control and that they must incorporate actual public participation into their decision-making. This revision means that Pettit should afford unelected authority a less far-reaching role in his theory of republican democracy, and instead should rely more extensively on popular participation.

To build this argument, I will begin by laying out the aspects of Pettit’s theory that support his commitment to democratic legitimacy. Realizing a republican conception of freedom demands popular control, he suggests. Pettit does not view popular control as synonymous with participation, however. On his view, participation is instrumentally valuable as a way of realizing popular control, which means non-participatory institutions may sometimes be called for if they offer greater popular control than participatory ones. To tease out the details

of this view, I explain three different types of popular participation: elections, deliberative forums, and civil society-based participation. While Pettit has a secure place for elections in his view, he does not have as strong a commitment to the other two forms of participation. He does, however, offer strong support for unelected, non-participatory authorities in some cases. To raise concerns about this latter stance, I proceed to demonstrate that Pettit's support for unelected authority is based on ambiguous grounds. His arguments sometimes seem to fit with his commitment to popular control, but he appears to advert to other justifications at times. To determine whether Pettit's position on unelected authority is coherent, I look at different ways he might defend his position. I argue that, ultimately, he must ground his support for unelected authority on popular control. That requirement turns out to raise problems for aspects of Pettit's position, however. I look at different interpretations of popular control and conclude that hypothetical interpretations of it—which would strongly support unelected authority—fail to fit with Pettit's overall republican stance. Only an understanding of popular control based on actual participation can succeed, but that will require Pettit to give up some of his claims about the institutionalization of unelected authority in republican government. Instead, the best reading of popular control permits unelected authority, but does not require it. Even when such authority is put in place to support popular participation, the public must always be able to have a say at some point in the political process. Popular consent turns out to be crucial for Pettit's republican conception of democracy, which means he must rethink his institutional proposals to include a greater emphasis on participation.

II

From Non-Domination to Republican Democracy

Republican theorists have built novel theories of democracy grounded on the value of freedom as non-domination. Pettit's approach begins with his republican conception of freedom, prioritizes legitimacy, and then argues for a version of democracy.²

To explain how democratic law can avoid being dominating, Pettit introduces the idea of controlled interference, as exemplified in the following case. Suppose that Martin follows Barbara's instructions and refuses to hand over the key to her liquor cabinet. Martin's act, in spite of interfering with Barbara in the moment, is consistent with freedom as non-domination.³ If an agent who is interfered with controls the other person's power to interfere, such interference does not come from an "alien will" and does not count as arbitrary subjection or domination. Interference is sometimes wished for, which means it does not count as dominating. And if legal interference is wished for, then it is legitimate, much like in the liquor cabinet case.

Here is where Pettit brings democracy into his theory. He contends that legitimacy requires a form of government that can

² Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012). See especially, chapter 1. Pettit also discusses these ideas in *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997). Throughout this discussion, I focus mainly on Pettit's position in *On the People's Terms*, although I will also draw from his earlier works. This recent book takes up, revises, and synthesizes a great deal of Pettit's earlier work on democracy and legitimacy, making it the best text to focus upon for addressing the questions about democratic participation I look at here.

³ Philip Pettit, *On the People's Terms*, 58. I have added names to this example for clarity's sake.

only be realized via democratic institutions that enable a certain form of popular control over decision-making. Only then does the coercive power of the state avoid violating freedom as non-domination.⁴

At least two conditions must be in place to realize popularly controlled interference. Pettit suggests that along with paradigmatic examples of intentional controlled interference like the liquor cabinet case, non-intentional forms are also possible. As an example, Pettit adopts a case from Amartya Sen where a person lies in a coma, but family and friends carry out the patient's wishes regarding his treatment. His wishes direct treatment (treatment would be different if his wishes were otherwise), but he does nothing intentional to exert control, instead relying on others, given his state.

Pettit distinguishes such control from consent, the latter being less significant in his theory.⁵ He thinks one can exert control in situations where one does not *currently* consent to some interference, as with the aforementioned cases. While current consent may sometimes be unnecessary for non-domination, later in the paper I propose that the possibility of consent at some stage of legal interference is crucial.

Pettit sets several conditions on popular control, all of which must be satisfied to render the state legitimate.⁶ First, each citizen must have an equal share of control over the political regime. While they needn't participate equally, they must have *access* to the political system on an equal basis. Additionally, the direction imposed on state decisions must be acceptable to each citizen.⁷

⁴ Philip Pettit, *On the People's Terms*, 153.

⁵ Philip Pettit, *On the People's Terms*, 157.

⁶ Philip Pettit, *On the People's Terms*, 166-67.

⁷ He restricts the class of people to whom it must be acceptable to those willing to live on equal terms with others. See Philip Pettit, *On the People's Terms*,

While Pettit does not say much about this idea, acceptability does not seem to require that citizens find a decision to be correct, but that it falls within a range of acceptable decisions. Control must also not be conditional on the whims of the regime the people are supposed to be able to influence.⁸ Finally, popular control must be efficacious, meaning citizens should not have to relate to the government as an alien will imposed upon them. Pettit's "tough-luck test" is meant to make sure popular control is truly efficacious. The idea of this test is that individuals should be able to see state actions they disagree with as tough luck, not the product of special influence.

Pettit proposes to institutionalize a republican model of democracy to meet these stringent requirements on political legitimacy. He advocates an assembly of elected representatives responsive "at some level to what they see as the wishes of [...] constituents."⁹ While he contends there is no conceptual

170. Pettit explains that acceptability does not mean that something *ought to be accepted*. Acceptability, for Pettit, means people are disposed to accept something or find it acceptable.

⁸ Philip Pettit, *On the People's Terms*, 170-71.

⁹ Philip Pettit, *On the People's Terms*, 198. To institutionalize democratic lawmaking, he rejects forms of direct democracy like plenary assemblies and popular referenda, due to concerns about inconsistencies he believes they are liable to generate. Given the more limited numbers of decision-makers within such assemblies, as well as their deliberative nature, Pettit contends they can avoid contradictions in the laws they adopt. Pettit discusses the discursive dilemma, which is his argument for why such inconsistencies are a threat in *On the People's Terms*, 191-92. For more in depth discussion of the dilemma (which I do not have space to delve into here), see Christian List and Philip Pettit, "Aggregating Sets of Judgments: An Impossibility Result" *Economics and Philosophy* 18 (2010): 89-110. Pettit also rejects what he calls an indicative assembly, which proportionately represents various interest groups in a society. Such institutions can have a limited role in a democratic society (he mentions the British Columbia Citizens' Assembly), but he is skeptical of them as a state's main legislative body.

connection between electoral institutions and the popular control that republican legitimacy requires, he thinks that in practice, they are needed.¹⁰ To enable popular control, such representative democracy must enact an individualized system of influence, including equal voting rights, which is efficacious and not conditional on wills that are alien to the people's will.

In cases of entrenched majorities, Pettit argues that minority group members should be able to contest decisions where entrenched majorities undermine their equal individual influence. To enable such contestation, Pettit proposes non-majoritarian political institutions to counterbalance representative assemblies and protect equal influence. Besides taking certain options off the table (as in a bill of rights), Pettit mentions courts, ombudsmen, alternative modes of decision-making (like deliberative polls), impartial commissions, and giving minority opinions extra say on certain issues.¹¹

III

Participation in Pettit's Democracy

While popular control is necessary for legitimacy, Pettit distinguishes it from active public political participation. At best, such participation is instrumentally necessary to realize freedom as non-domination in some circumstances, on Pettit's view. In this section, I lay out Pettit's claims about when participatory decision-making is and is not required by legitimacy. His stance on participation will raise questions about whether his commitment to the value of popular control actually supports his claims about participation or not.

¹⁰ Philip Pettit, *On the People's Terms*, 207-8.

¹¹ Philip Pettit, *On the People's Terms*, 216-17.

There are various forms active participation can take. Citizens can participate in elections, deliberative forums, and broader public sphere debates and social movements in civil society.¹² Given Pettit's consequentialist republican commitments, any given type of participation will be evaluated according to how well it promotes popular control. When participatory institutions fail to promote popular control, which Pettit suggests sometimes occurs, he will defend non-participatory decision-making.

Voting in elections is, in Pettit's republican system, the most securely justified form of participation. Voting-based electoral systems, Pettit thinks, are contingently necessary for realizing freedom as non-domination.¹³ As a result, he supports elected legislatures as central to popular control and democratic legitimacy.

When it comes to deliberative forums and civil society-based participation, Pettit's consequentialist perspective does not permit any universally applicable conclusions about whether such forms of participation are required. It depends on the conditions in which such participation is to be instituted. Because Pettit appeals

¹² Voting is, of course, a familiar form of participation. For a description of local deliberative institutions, see Archon Fung and Erik Olin Wright's "Thinking About Empowered Participatory Governance" in *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (New York: Verso, 2003). One helpful definition of such participatory forums goes as follows: "A governing arrangement where one or more public agencies directly engage non-state stakeholders in a collective decision-making process that is formal, consensus-oriented, and deliberative and that aims to make or implement public policy or manage public programs or assets." See Chris Gansell and Alison Gash, "Collaborative Governance in Theory and Practice," *Journal of Public Administration Research and Theory* 18 (2008), 544. For a classic explanation of public sphere and social movement participation in democracy, see Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996).

¹³ Philip Pettit, *On the People's Terms*, 207-8.

to both deliberative forums and civil society-based participation, however, they are clearly permitted by his theory and will be required if necessary for maximizing popular control.

While deliberative forums—institutions where unelected citizens meet to deliberate over political issues—have a place in Pettit’s democracy, he does not think they can be the sole form of representation in a political regime.¹⁴ Pettit suggests such deliberative forums should focus on particular issues, not adopt the broad agenda parliaments do. These forums’ role in republican democracy may largely be advisory, as with the British Columbia Citizens’ Assembly. That is, on particular issues, deliberation may be farmed out to forums whose conclusions are then subject to some form of public approval via representative bodies or referenda.¹⁵ As we shall see, Pettit also considers using deliberative forums to resist popular participation.

Civil society-based participation—broad engagement in public sphere debates and social movements—has a much broader role to play in democracy, as Pettit describes it. Pettit suggests that the type of representative assembly he supports will be concerned about reelection, making them responsive to such civil society advocacy. He doubts representatives will vote precisely as citizens would, but suggests that legislators will, at least, be affected by the demands of the public sphere.¹⁶

¹⁴ Philip Pettit, *On the People’s Terms*, 201. He considers a variety of types of such forums, not just the localized variety some theorists advocate. See, e.g., Joshua Cohen, *Philosophy, Politics, Democracy: Selected Essays* (Cambridge, MA: Harvard University Press, 2010), especially “Directly Deliberative Polyarchy” (co-authored with Charles Sabel) and “Reflections on Deliberative Democracy.”

¹⁵ Philip Pettit, *On the People’s Terms*, 205.

¹⁶ In Chapter 5 of *On the People’s Terms*, Pettit also articulates a “dual-aspect model” of democracy where political influence is organized so everyday

While Pettit allows both deliberative forums and civil society as means of participatory control, his consequentialism also permits much less participatory forms of decision-making. For some political issues, Pettit will not rely on deliberative forums or civil society if a different process better supports popular control. More conventional judicial processes and rights protections can play this role, but he also mentions special commissions and procedures that give greater weight to minority viewpoints.¹⁷ Moreover, he thinks public participation—especially through civil society—can be acted upon legislatively in a variety of permissible ways. Judicial bodies, legislatures, and even lotteries are some methods he suggests for making public influence determinate.¹⁸

IV

Unelected Authorities in Pettit’s Democracy

Pettit’s defense of unelected, non-participatory authority in certain political contexts poses problems for his view. If we start from the most attractive interpretation of the republican values of non-domination and public control, Pettit cannot justify instituting unelected authority in all the instances he recommends. One central problem is Pettit’s failure to adequately confront the problem of determining who decides when decision-making power should be non-participatory. While surely participation can undermine popular control, Pettit does not sufficiently explain how to determine if threats exist and how to confront them in a

political contestation leads to the formation of background norms that influence policy-making. This short-term give-and-take is meant to develop into a long-term process where certain generally acceptable considerations gain public sway, strongly influencing policymaking.

¹⁷ Philip Pettit, *On the People’s Terms*, 216.

¹⁸ Philip Pettit, *On the People’s Terms*, 175.

manner consistent with democratic legitimacy. A concern for non-domination creates pressure to allow wider-ranging participation. Thus, the most consistent and attractive institutionalization of republican democracy has a stronger presumption in favor of participation than Pettit's stated position suggests.

Pettit's stated position requires unelected authorities to limit participation. He has defended this commitment in the past.¹⁹ In previous discussions of those issues, Pettit appealed mainly to maximizing the protection of people's interests through taking certain decisions out of their hands. In his most recent formulations, however, he has begun to justify unelected authority on the basis of the democratic value of popular control. To support popular control over certain issues, Pettit suggests that participation must sometimes be restricted. The threats to popular control he names are elected politicians, private lobbying groups, and unelected government authorities themselves. To deal with these threats, Pettit proposes some conventional measures, while also considering some less familiar remedies. As we will see, his approach to unelected authority is ultimately in tension with public control.

With respect to politicians, Pettit recommends taking issues related to their re-elections out of their hands, in addition to making sure that independent authorities are in charge of collecting economic and statistical data. He is also concerned that politicians interested in reelection will focus on voters' short term, rather than long-term concerns. As a result, he suggests that

¹⁹ For his evolving discussion on these matters, see Philip Pettit, "Deliberative Democracy, the Discursive Dilemma, and Republican Theory," *Philosophy, Politics, and Society* 7 (2003): 138-62; Philip Pettit, "Depoliticizing Democracy," *Ratio Juris* 17 (2004): 52-65; Philip Pettit, "Three Conceptions of Democratic Control," *Constellations* 15 (2008): 46-55.

certain policy areas be taken out of politicians' hands and handled by bodies that need not worry about reelection. "Politicians, being focused on the electoral short-term, are always likely to favour lower interest rates, easier energy and environmental demands, and tougher, retributively satisfying sentences," he contends.²⁰ They are tempted to legislate based on their electoral interests in these policy areas, rather than considering public influence or the conditions for its expression.

Pettit suggests that various unelected bodies (citizens' assemblies, central banks, etc.) can take over these (and perhaps other) areas from politicians and administer them more effectively. Some unelected bodies constitute forms of (often limited) public participation, while others are quite the opposite. His proposals for dealing with private interest groups usurping the political process are more conventional: ridding campaigns of pernicious monetary influences and making space for independent public media.

When it comes to the unelected authorities that he promotes, however, he recognizes that they may also present a threat to popular control. To address this concern, he suggests that some independent body should police unelected authorities. Pettit also thinks such authorities must have certain qualifications, be held to professional reputational standards, have a mission with presumptive popular support, and be made transparent and open to contestation. While he does not provide copious detail, he sees these conditions, when suitably imposed, as sufficient to undercut domination from unelected authorities in government.

There is some lack of clarity in Pettit's advocacy of unelected authorities here, at least in the cases he invokes. While his overt justification for relying upon unelected authorities is to make sure

²⁰ Philip Pettit, *On the People's Terms*, 232.

popular control is preserved, his arguments sometimes seem to rely upon other grounds. This ambiguity about the relationship between popular control and unelected authority is taken up in the next section. According to Pettit, certain sorts of issues—for whatever reason—tempt elected politicians into making problematic decisions.²¹

V

Evaluating Potential Justifications for Unelected Authority

Since our focus here is legitimacy, we should focus on the value of popular control when deciding on institutions. Whether all of Pettit's claims about unelected authority can be supported in terms of popular control, rather than other values, is unclear. While it makes sense to think electoral issues would tempt politicians, Pettit's special mention of issues like environmental regulation and criminal sentencing are not as easy to support. If the public wants to kick a politician out of office through elections, it is in that politician's interests to manipulate elections to maintain power. If the public judges some environmental or sentencing policy as the correct one to adopt, it is unclear what would tempt a politician to act otherwise on these issues, in particular.²² While Pettit may be right that politicians sometimes follow people's tendency to focus on short-term interests at the cost of their long-term interests regarding these issues, this

²¹ There are, he says, "areas of policy-making in which elected politicians would have to be saintly not to be moved by their own interests, regardless of what popular influence supports—or indeed of what the preconditions for popular influence require." (Philip Pettit, *On the People's Terms*, 232)

²² There may be countervailing influences like the money and power of certain individuals or groups, but Pettit is clear that these factors cannot permissibly be in play. So to speak more exactly: absent problematic, external influences, politicians concerned with reelection lack reasons to buck public opinion.

possibility does not relate to popular control in any obvious way.

There may be powerful arguments for thinking that long, retributive sentencing laws are socially harmful, but that is not to say that the public does not actually judge them desirable. They may wish to influence government in the direction of lengthening certain sentences, based upon reasons that all find acceptable. In order to set aside certain policy arenas from elected officials, Pettit's criteria of legitimacy require him to appeal to popular control, not the goodness or badness of particular policies. That, however, is precisely what Pettit seems to do. He appears to make his argument for unelected officials taking control of certain non-electoral issues on substantive, non-legitimacy-based grounds, adding some new dimension besides popular control into the equation. In the past, he discussed these issues in a similar fashion, making his argument based on his views about the bad consequences of publicly supported policies regarding sentencing.²³

Republicans must explain how institutionalized decision-making processes should be established and altered without undermining non-domination and public control. From a republican perspective, there are better and worse ways to organize institutions for political decision-making. Given the ambiguities in Pettit's argument for unelected authorities, I will evaluate several different ways Pettit could justify institutionalizing unelected authority in his theory of republican democracy. The most attractive one constitutes a more participatory version of republicanism than Pettit's stated view.

²³ See Philip Pettit, "Depoliticizing Democracy," especially. For an earlier discussion of his view of when interference is appropriate, see Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Oxford: Oxford University Press, 2001).

Pettit could plausibly rely on three potential justifications for unelected authority, falling into two broad categories: those that do not appeal to popular control and those that do. First, I suggest that justifications for unelected authority that do not appeal to popular control have no place in Pettit's republican theory of democracy. Next, I look at two other options that do appeal to popular control. One is based on hypothetical agreement and the other is based on actual participation, each of which constitutes a competing interpretation of popular control. I ultimately defend the actual participation-based approach, as well as the institutions it demands, as the most attractive formulation of republican democracy. The best interpretation of popular control will not support unelected authority in as many cases as Pettit thinks. Instead, it creates presumptive warrant for participatory institutions and, in most cases, demands that the public controls whether unelected authority is established.

A. Non-Popular Control-Based Justifications

One possible justification for unelected authorities is that they can promote certain goods that trump whatever value popular control has. In the past, Pettit defended the view that such non-participatory institutions can correct failures of public judgment.²⁴ Insofar as Pettit aims to circumvent public judgment for the sake of citizens' long-term interests, he relies on a rationale other than popular control.

This approach to determining when unelected authority should replace participation conflicts with the overall thrust of Pettit's theory in its most recent form. Restricting citizens' electoral or participatory influence solely for the sake of

²⁴ See Pettit's *A Theory of Freedom*, "Depoliticizing Democracy," and *Republicanism*.

protecting their interests is insufficient. Arguments for unelected authority based on “costs that electors may be presumed to care about” not considerations the public *actually* avows, threatens to lapse into paternalism, which he expressly wants to avoid.²⁵ Recognizing that interests must be interpreted, Pettit sees paternalism as imposing one’s own interpretation on another’s interests and intervening in that person’s choice on the basis of interpretations of their interests that are alien to them. The intervener discounts the self-interpretation of the person who is interfered with. To avoid paternalism, a person may only interfere based on “interests that [person is] disposed or ready to avow, where that readiness is easily tested and established.”²⁶ That is, an outside interpretation of the public’s interests cannot be allowed to usurp citizens’ control over when and how they are interfered with. If Pettit claims that some “objective” interpretation of citizens’ long-term interests justifies restraint on participation, he will have to give up a core aspect of his republican commitment to non-domination: anti-paternalism. Pettit’s proposals for unelected authority in contested arenas like fiscal policy, environmental regulation, and criminal sentencing cannot rely on interest-based justifications, then.

B. Popular Control-Based Justifications

Beyond the non-popular control-based approach, there are two rationales for unelected authority that appeal to popular control, but interpret that concept differently.²⁷ Popular control

²⁵ Philip Pettit, *On the People’s Terms*, 232.

²⁶ Philip Pettit, *On the People’s Terms*, 59.

²⁷ The distinction I apply here—between hypothetical agreement and actual consent—is drawn from Cristina Lafont, “Agreement and Consent in Kant and Habermas: Can Kantian Constructivism Be Fruitful for Democratic Theory?” *The Philosophical Forum* 43 (2012): 277-95.

might be fleshed out from the third person standpoint as the hypothetical agreement of a properly constituted public. This option understands popular control in terms of what an ideally constituted public would decide and determines when unelected authority is warranted accordingly. As an alternative to this approach, popular control might be understood as something that requires the actual participation and consent of the public. That would mean that a third party like a political philosopher could not determine when decisions ought to be taken out of the public's hands. These two interpretations of popular control differ over when unelected authority can be instituted. I argue that the approach based on actual participation is superior.

1. Hypothetical Popular Control

In justifying unelected authority, Pettit could argue that the public *would* agree to be governed by such an institution if they engaged in idealized discussion about what kind of decision procedure ought to be in place. That is, a hypothetical decision-making ideal can be articulated and applied to potential institutions to evaluate whether they promote popular control. This hypothetical agreement approach asks whether a procedure would be adopted under particular ideal conditions. If it could be agreed to in such conditions, then it is an expression of popular control, even if actual citizens did not agree to the proposed institution.

In taking this approach, Pettit could support many, if not all, of his specific claims about when unelected authority is justified. That is, this way of understanding popular control is consistent with his claims about the need for unelected authority to decide issues in monetary policy, energy policy, and criminal sentencing policy. In the last section, we saw that justifying such authority

based on objective interests fails, since this approach leads to a paternalism that Pettit wants to avoid. By taking a hypothetical agreement approach instead, Pettit can justify these proposals on the basis of popular control, albeit an idealized non-actual sort. He can suggest that citizens, in suitable conditions, *would* agree to remove certain issues from the control of elected authorities.

In the case of sentencing policy, Pettit could argue that the public, provided with equal influence under the right conditions, would arrive at an equally acceptable conclusion that an unelected authority should decide sentencing policies. This argument describes a hypothetical, improved version of the public, modeling what it would do if it took into account all relevant considerations, including the likelihood that elected officials would focus on the public's short, rather than their long-term interests.

While an apparent improvement upon justifications for unelected authority, this hypothetical model faces serious issues, as well. Although the hypothetical agreement view is meant to provide an interpretation of popular control, its justification of unelected institutions doesn't seem to involve control at all. Rather than controlling a decision or making the choice to give up their rights of participation, the actual public is bound by an idealized version of themselves. A third-personally articulated model of decision-making ends up replacing actual public sphere control over politics. Although the hypothetical model may help outline the content of ideal democratic public reasoning, it is problematic as a ground for the enactment and enforcement of particular political decisions.

Such a hypothetical reading of popular control becomes far too similar to the non-popular control-based view when used to defend unelected authority. This hypothetical approach offers reasons for establishing unelected authority that the public could

accept *if* the public was an ideal version of itself. However, actual public opinion may come to a quite different conclusion from a theorist or public official's judgment of what an idealized public would decide. Moreover, what constitutes ideal conditions for public deliberation is itself something that can be subject to contestation. The fact that there can be such disagreements is not, itself, concerning. The issue is that unelected authority cannot be defended under the banner of public control while downplaying such disagreements. Such arguments are especially problematic when coupled with the assertion of a privileged understanding of ideal deliberative conditions and what conclusions would be decided under them. Just as the non-popular control-based view constrains the public based on an objective conception of their interests, the hypothetical consent view constrains the public based on an idealization of intersubjective processes. In both cases, there is interference without direct public control over that interference. Actual public control requires creating institutions that allow people to effectively voice and work through disagreement, while moving political decision-making in a particular direction. Unelected authority, justified on the basis of philosophical idealizations, threatens to foreclose that possibility.

In addition, it's not just a particular policy decision being legitimated through the claim that a hypothetical public would agree to it, but the very form of governmental decision-making. Moreover, the form of governmental authority at issue is explicitly formulated to render decision-making about some set of issues non-participatory. As a result, an entire sphere of policy-making is taken out of the public and their representatives' hands. This move is justified on the basis of a philosophical model that questions electoral authorities' ability to achieve a substantively correct result of the sort that the hypothetical model demands. A hypothetical, non-existent public ends up permanently binding and controlling the actual one.

While I have made a general argument that hypothetical agreement views do not support freedom as non-domination, Pettit offers other arguments that may undermine my criticisms. To evaluate these potential counterpoints, I begin by pointing to some evidence that Pettit might hold a hypothetical agreement view. Next, I look at two cases he offers, which might be used to support a hypothetical approach. I argue that this defense of the hypothetical approach fails, however. Finally, I look at how Pettit might argue for the hypothetical view based on the concept of public valuation. I suggest that this approach is also unsuccessful. Insofar as his use of the concept of popular control is ambiguous, it should be clarified to avoid hypothetical agreement-based interpretations.

While I have argued that the hypothetical agreement view of popular control is problematic, it remains to be seen whether what Pettit says is actually consistent with such a view or not. Where he stands is not clear-cut. At one point Pettit suggests that unelected authorities ought to have “presumptive popular support.”²⁸ The use of “presumptive” raises the question of *who* presumes to determine what is publicly supported. It might be presumed by philosophers on the basis of hypothetical models or on the basis of some actual avowal on the part of the public, potentially expressed through electoral institutions or other public forums. When Pettit discusses the coma patient case and the liquor cabinet key case, he seems to lean in the direction of presuming popular support without actual public avowal.

To see how Pettit might defend a hypothetical approach, we can reexamine his discussion of Amartya Sen’s example of a coma patient whose wishes are carried out by his family.²⁹ Though the

²⁸ Philip Pettit, *On the People’s Terms*, 236.

²⁹ Amartya Sen, “Liberty and Social Choice,” *Journal of Philosophy* 80 (1983): 5-28.

patient cannot communicate, Sen says his indirect liberty is protected insofar as his wishes are fulfilled. Pettit sees the case as an instance of control, despite the lack of current input from the patient. One reading of this case suggests that if it is legitimate for the patient's family to carry out his wishes without his avowal, it is legitimate for unelected authority to be put in place without the public's avowed consent. Instituting such authority may be done on the basis of a hypothetical judgment, just like those that are made on behalf of a patient who is unable to consent.

There are serious worries about relying on this case to support unelected authority. The unconscious patient cannot communicate his wishes. As a result, his lack of consent appears less problematic; having his family make decisions seems like the best alternative available. For this argument to work, we must presume that his family knows his wishes, in spite of his inability to communicate them. The combination of these circumstances explains why the family's action seem like an appropriate solution to a terrible problem.

In politics, however, the public, whose participation in decision-making would be restricted by unelected institutions, is not analogous to the unconscious patient. Crucially, the public is capable of expressing its wishes through political activity, assuming the appropriate social and institutional conditions are in place. If we imagine that the patient could communicate like the democratic public, then his family's actions would be paternalistic, absent his consent. Because of the patient's unconscious state, this case cannot support the legitimacy of unelected authorities that lack the consent of the public.³⁰ The

³⁰ As I have suggested above, there are cases where unelected institutions are necessary to protect popular control from elected officials and entrenched majorities. This intuition can be supported by a modulation of the patient case.

cases are simply not analogous; any inferences about politics that might be drawn from the example are questionable.

The same point can be made about the liquor cabinet case. If we look at it carefully, it does not support a hypothetical agreement view. Although Barbara does not currently consent to have her liquor cabinet kept out of reach, she initially consented to this arrangement. Martin was asked to hold onto the key in order to keep it out of her reach. If we imagine this case without Barbara's initial request, then Martin does something illegitimate, as well as paternalistic. Suppose he collects a list of alcoholics, systematically locks their liquor up, and refuses to give them back their keys. Even if Martin has the best of intentions, he imposes an interpretation of another person's interests upon them and restricts their choice on this basis. Without actual consent at the outset, this arrangement is clearly not under the control of the person being interfered with. Participation and consent seem required at some point in the decision-making process, as I will argue in the next section.

There is one last move available to defend the hypothetical approach based on Pettit's stated views. In the past, Pettit has also relied on considerations the public agrees are relevant—what he calls “public valuation”—to justify unelected authority in certain policy areas.³¹ These arguments suggest that if publicly accepted considerations can justify a policy, it is democratically legitimate. Perhaps hypothetical agreements to unelected

Just as it is appropriate for unelected authorities to support public participation, the family may sometimes decide on the patient's behalf to enable him to communicate his wishes other times. Unconsented-to authority may support participation and the expression of consent in other cases, both in politics and in the case of the patient. As I argue, though, eventual consent to unelected authority is always desirable.

³¹ Philip Pettit, “Depoliticizing Democracy,” 58.

authority are constrained by which considerations are actually seen as valid for use in public discussion, then.

At times, Pettit offers very optimistic claims about how much public agreement there is about the considerations that can ground the mandate of unelected authorities, including those focused on criminal sentencing, electoral districting, and more.³² There is reason to be skeptical of his confident claims about the consensus around the institutional goals he mentions, however. Take deterrence through punishment, one institutional goal he refers to. Not only are there competing punishment goals that would have to be weighed against deterrence, but there are abolitionist groups that contest the goals of the criminal justice system generally. Pettit glosses over the significant disagreements over sentencing, monetary, and food policy, all of which he refers to as candidates for control through unelected authority.

In addition, the public valuation constraint on hypothetical agreement is too weak. Even *if* there is agreement on policy goals, how to put that agreement into practice is, itself, something that must be subject to at least some degree of public control. Given public disagreement about how to weigh public valuations in various cases, it is difficult to see at what point citizens have control over such a process. The point where one stops appealing to the public's valuations and starts advertent to a politician, judge, or theorist's judgments is hard to identify. Popular control, on such a reading, amounts only to utilizing some generally accepted set of reasons, not paying heed to actual public judgments and participatory control. When the public's actual judgments conflict with those of a theorist, it is hard to see why we would side with the latter for the sake of legitimacy. If Pettit adopts a public valuation-based view, he will be vulnerable to the

³² See Philip Pettit, "Meritocratic Representation" in *The East Asian Challenge for Democracy* (Cambridge: Cambridge University Press, 2013), 148-49.

objections I levied against hypothetical agreement-based views. Although some elements of Pettit's arguments lean toward versions of a hypothetical agreement view, he should abandon the view insofar as he holds it, given its shortcomings.

2. Actual Participation as Popular Control

To develop a consistent and attractive version of republican democracy, Pettit ought to eschew reliance on hypothetical agreement as an interpretation of popular control. Instead, an alternative view would require actual participation before unelected authority could be instituted. Even if a theoretical model suggested that an idealized, hypothetical public would accept such institutions, a view based on actual participation would require “*actual* consent of citizens through a democratic procedure.”³³ While not every single political decision requires participation, this view requires input *at some point* in decision-making, especially when unelected authority is to be established. My reading of the unconscious patient and liquor cabinet cases in the last section supports this requirement. Through things like voting in elections and referenda, a non-hypothetical popular control is to be maintained, insofar as the choice to make certain decisions non-participatory is itself determined through participation. This view allows the actual public to bind itself, but does not allow it to be bound on the basis of a hypothetical model alone.

Actual participation-based approaches fit well with Pettit's description of public control in some respects. He indicates that control involves “systematically shaped inputs that control for the form of corresponding outputs.”³⁴ Input into a system, which

³³ Cristina Lafont, “Agreement and Consent,” 279.

³⁴ Philip Pettit, *On the People's Terms*, 155.

Pettit calls influence, can take several forms. Some forms of influence are active, entailing intervention in the relevant system, but others involve a disposition to actively intervene. Either way, a requirement of popular control is the *possibility* of intervention through some available route at some point during decision-making. This requirement pressures republicanism to incorporate popular participation through elections, deliberative forums, and civil society deliberation, since these enable citizens to intervene in state interference.

Because Pettit thinks popular control is consistent with the public not actively exercising control over government, but merely being ready to do so, it might create the impression that he must adopt a hypothetical agreement account of popular control. This suggestion is mistaken, however. The notion that the public must be ready to intervene indicates that they really have such a disposition, not that a hypothetical version of them does. That is, although the disposition itself needn't be activated, it must exist and have an outlet for its expression if public control is to be possible. As a result, democratic institutions must incorporate various means of exercising these dispositions in order to exert influence, if the public decides to do so. This republican commitment is equivalent to a general demand for avenues of popular participation.

Actual participation-based interpretations of popular control avoid hypothetical agreement theories' paternalism, but require Pettit to abandon some of his claims about when unelected authority is warranted. On this view, Pettit's argument that certain issues should be taken out of electoral control must be modulated. In particular, he suggests that democracies are

obligated to enact such unelected authorities.³⁵ This obligation must be made conditional in many of the cases that Pettit mentions, such as interest rates, environmental regulation, and criminal sentencing. The condition of these unelected authorities' legitimacy is that the public consents through some sort of actually realized democratic procedure.³⁶ Only on the basis of such participatory avowal will the actual participation view say that popular control and, hence, legitimacy have been achieved. The public can decide to restrict its own participation in certain policy areas, but only based on their own choice, rather than the judgment of a philosopher. Treating these issues in a non-participatory manner is not a condition of popular control and democratic legitimacy on this view. Pettit has merely shown that it is permissible for the public to bind itself with regard to certain issues; instituting unelected authority over certain issues does not have the obligatory character Pettit suggests.

Somewhat paradoxically, though, the actual participation view can sometimes support the democratic legitimacy of establishing unelected institutions in the absence of actual consent. My previous criticisms focus on cases where Pettit seems to propose restricting electoral authority without public consent, basing his claims on grounds other than actual popular control. Not all of his arguments for unelected authority have this structure, however. He also suggests that electoral authority can be structured not just in ways that run counter to some interpretation of the public's interests, but in ways that undermine participation. This point underpins an argument for unelected

³⁵ "...I have been suggesting that there *must* be unelected authorities established in political life..." (emphasis added). See Philip Pettit, *On the People's Terms*, 235.

³⁶ Pettit seems to hint at going in this direction without fully committing to it in "Meritocratic Representation," 153-54.

authority that is consistent with an understanding of popular control as actual participation.

Pettit rightly worries that elected officials may manipulate electoral law and data collection in ways that subvert the public's desire to exert control over its political destiny.³⁷ He also indicates that the results of majoritarian decision-making procedures can undermine the equal influence of citizens.³⁸ If politicians manipulate the structure of elections (via gerrymandering, for instance), then the meaning of popular participation through voting will be distorted. Similarly, public deliberation and decision-making on the basis of manipulated data is not an authentic expression of popular control. And if the public makes decisions that abridge the right of individuals to participate in public decision-making, then popular control is not truly realized, either.

In such cases, Pettit suggests that unelected authority is warranted to preserve popular control. This move is plausible even when popular control is understood in terms of actual participation. To keep participatory mechanisms from undermining their own point—enacting popular control—they must be constrained. This claim fits the cases of electoral law, data collection, and majoritarian domination, which directly affect the public's ability to exert control over political decisions. Pettit's arguments for constraint in cases related to monetary policy, sentencing, and so on do not fit with preserving popular control like the previously mentioned ones do, though.³⁹ There may, then,

³⁷ Philip Pettit, *On the People's Terms*, 232.

³⁸ Philip Pettit, *On the People's Terms*, 216-17.

³⁹ It is, of course, possible that policy decisions in these areas might contingently undermine popular control. If so, then there are several options available to deal with the problem besides putting decisions in a particular realm under unelected authority. Courts could strike down particular, anti-

be times where unelected authority can legitimately be put in place to protect public participation. Imposing such authority will only be warranted if it is the most effective way to protect popular control in a given instance.⁴⁰ Doing so is not paternalistic, but preserves freedom as non-domination.

Yet even if the actual participation interpretation of popular control supports certain constraints, there may still be strong reason to incorporate consent at some stage of the overall political process. In cases like electoral law and data collection, constraints on the actions of elected officials could easily be subject to public consent through referenda or other mechanisms. Institutions meant to avoid majoritarian domination are trickier, though. If institutional rights protections are subject to popular will, majority biases may be allowed to dominate certain groups and individuals, ultimately undermining the necessary conditions for democratic popular control. All of these cases are difficult and require more discussion than I can provide here. Nonetheless, even if unelected institutions are put in place to preserve popular control, we should not presume that actual participation and consent play no role in their validation.

popular control laws (rather than taking over an entire policy area) or legislatures could reverse bad laws. Instituting non-participatory institutions is not the only option. As a result, the actual participation view will support alternatives that preserve participatory decision-making. Thanks to Mark Schranz and Carlos Pereira Di Salvo for discussion of this issue.

⁴⁰ For an argument in favor of dealing with such issues via participation and legislatures rather than unelected authorities like judges, see Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999).

VI

Conclusion

Although interpreting popular control as actual participation requires Pettit to modulate his claims about when certain unelected forms of authority are called for, it is still superior to hypothetical agreement and non-popular control-based views. These other two views articulate a third-personal interpretation of the public's interests or of an idealized, intersubjective public decision-making process. Actual participation views take a different approach, successfully avoiding paternalism by understanding popular control as realizable only through public participation, expressed under certain conditions. Moreover, these conditions cannot only be hypothetical, but must actually be in place for a political system to be under popular control. On the one hand, this view understands legitimacy to be a demanding ideal. Pettit's various requirements, such as equally accessible influence, must actually be met for political decisions to be made properly. On the other hand, the actually existing public is enabled to express their will and interpret their own interests.

Although the actual participation interpretation of popular control requires revisions to Pettit's discussion of unelected authority, this approach is more in the spirit of republicanism than its competitors. This normative advantage justifies revising Pettit's claims about when unelected authority is needed, as well as rethinking the significance of the liquor cabinet and coma patient cases.

Pettit's view is meant to promote non-domination in political decision-making. The concept of popular control is central to this goal, so avoiding the incorporation of paternalist domination is especially important. The actual participation view can do so. Moreover it does not rule out the institution of unelected

authority, but suggests that it is most appropriate for the sake of preserving popular control through political participation. The view also suggests that securing consent for even these kinds of institutions is an important aspect of supporting popular control.

By connecting non-domination to popular control, Pettit offers a way to link republican conceptions of freedom to democratic politics. His discussion of unelected authority does not go far enough in this direction, however. The republican commitment to popular control creates a strong presumption in favor of popular participation. While unelected authority may sometimes support participation, in most instances the public's actual avowals should guide decisions about unelected authority's role in democracy. Republicans ought to view participatory democratic institutions as a crucial basis for realizing freedom as non-domination.⁴¹

Manchester University, Indiana

⁴¹ For their comments and suggestions on this article, I am grateful to Kyla Ebels-Duggan, Richard Kraut, Cristina Lafont, Morganna Lambeth, Charles Mills, Italia Patti, Carlos Pereira Di Salvo, Mark Schranz, and an anonymous reviewer.

If you need to cite this article, please use the following format:

Mayer, Seth, "Republicanism, Democratic Participation, and Unelected Authority,"
Philosophy and Public Issues (New Series), Vol. 5, No. 2 (2015), 171-201, edited by S.
Maffettone, G. Pellegrino and M. Bocchiola