

# Does the Kantian state dominate?: Freedom and majoritarian rule

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## Abstract

Recently, scholars have criticized what they call the “Kantian-Republican” thesis of freedom as non-domination. The main complaint is that domination is unavoidable. This concern can be separated into the problem of state domination, which suggests that the state's intervening powers necessarily dominate its citizens, and the problem of majority domination, which suggests that the People necessarily dominate individual citizen as a result of the potential to form dominating majorities.

## KEYWORDS

Kant, Kolodny, majority principle, non-domination, republicanism, Simpson

## INTRODUCTION

Republican political theory has become a dominant trend in political philosophy. The main feature of republican political theory is its definition of freedom as non-domination. Neo-Republicans have continued to advance this theory of freedom as a powerful tool to explain and identify instances of unfreedom which go beyond liberal definitions of non-interference.<sup>1</sup> In addition, some Kantians and some Neo-republicans have recognized Kant's political philosophy as a brand of republicanism which similarly takes as its definition of freedom non-domination

<sup>1</sup>In this paper, I will focus on the contemporary republican tradition as exemplified by Pettit and others. Furthermore, because of the nature of the critique considered here, I will focus on a notion of *political* domination. However, opposing liberal and neo-Roman republican thinkers, radical, popular, and socialist republican authors stress the importance of accounting for domination within “civil society”, and consequently emphasize the role institutionalized private property plays in social relations and the oppressions and injustices in them. See, for instance, Leipold et al. (2020). Here the emphasis is on *social* domination. A Kantian account of social domination is very much needed, though recent work starts this work (See, Pascoe, 2022; Vrousalis, 2022). It appears the biggest obstacle for Kant is the fact that he explicitly subsumes the social condition under the legal or civil condition. Therefore, any interaction with the radical or Marxist republican tradition from a Kantian perspective would require a bit more groundwork.

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or independence.<sup>2</sup> Kant defends an innate right to freedom which Kant describes as a right to independence from the arbitrary will of another. In the state of nature, private wills dominate each other by exercising coercion through unilateral judgment. A will is private (or arbitrary) for me, insofar as it is a will that is not my own, potentially subjecting me to coercion through its own unilateral judgment.<sup>3</sup> Thus, Kant's innate right to freedom implies that to be free is to be non-dominated by private or arbitrary wills.

Recently, critics have pointed out that the Kantian-Republican notion of freedom as non-domination leads to the problematic conclusion that citizens in a state are necessarily dominated. Thomas Simpson, for instance, suggests that domination is inevitable because citizens are always potentially dominated by the forming of teams. The idea here is that if it is the case that citizens could form teams or majorities which could interfere with other citizens, then the majority will of the people could always potentially dominate individual citizens. Thus, the People, as a collective will necessarily dominates individual citizens in a state (Simpson, 2017, p. 32ff).<sup>4</sup> I call this the problem of *majority domination*. In a related vein, Nico Kolodny has argued that the will of the state, which can interfere with its citizens, cannot fail to dominate them. Kolodny particularly criticizes Kantians and Neo-republicans for not being able to give satisfying answers as to why the state has intervening powers and yet does not dominate its citizens.<sup>5</sup> I will call this the problem of *state domination*. Together, these problems suggest that domination in the civil condition is unavoidable.

In this paper, I will take both problems to be questions that Kant needs an answer in order for Kant's political philosophy to be a viable brand of republicanism. Kant must provide a reply to the problem of unavoidable domination because if he cannot then it will turn out that state power and democratic rule cannot be justified in terms of the right to freedom. By this I mean that the minimal standard of justice, the compatibility of the freedom of the individual with the legislative state, might be undermined if the state turns out to be inevitably dominating. Furthermore, Kant cannot accept that the state as an institution simply falls short of the standard of justice since he is committed to the state being a constitutive, and not merely instrumental, condition of justice.<sup>6</sup> In short, failing to answer these problems will undercut the Kantian project of providing a justification of state power over free agents through the concept of the public will.

I will argue that Kant's answer is more radical (and necessarily so) than that of some of Kant's current interpreters and contemporary neo-republicans. Kant radically advocates for the *unanimous* agreement of subjects in the legislative will. Thus, for Kant, the public will is radically dependent for its constitution on the universal consent of *all* citizens. I will explain how this is a criterion of both the hypothetical agreement in the idea of the "original contract", but also in the actual voting of citizens. Thus, Kant advocates unanimous agreement on two levels: the

<sup>2</sup>See, for some examples, Kleingeld (2020), Ripstein (2009), Hodgson (2010), Varden (2010, 2011). Pettit (2013) argues that Kant and Rousseau constitute a separate tradition which is insufficiently republican in its acceptance of an apparent absolutist picture of state legitimacy under the influence of Hobbes and Bodin. As I hope will become clear in this paper, Kant did not have an absolutist conception of state legitimacy but does have other important differences from what Pettit calls the "Atlantic-Italian" tradition of republican thought.

<sup>3</sup>Here I use "private", "arbitrary", and "unilateral" to all refer to a dominating will. Generally, "arbitrary" is used by neo-republican theorists while "private" or "unilateral" are used by Kantians. Kant himself uses both terms. For the purpose of this paper, I take these terms to all point toward the general characteristic that makes a will dominating as opposed to non-dominating. As we will see, what these terms refer to often differs, but this should not prevent us from using the terms to refer to a general phenomenon at this point.

<sup>4</sup>I do not have the space here to fully address Simpson's complex argument. My aim is only to use his as a way to signal the general criticism of non-domination.

<sup>5</sup>Kolodny (2019) and (2022, p. 445ff). Simpson, in his 2017, paper moves from the problem of majority domination to the problem of state domination. Simpson argues that we could solve the problem of majority domination by appealing to state power, but this leads directly to the problem of state domination (Simpson, 2017, p. 41ff).

<sup>6</sup>It is possible for republicans like Pettit to accept the domination of the state as simply the *best* solution, even if it is not free from domination. This is partly because Pettit seems to take institutions as only instrumentally valuable for securing non-domination as the standard of maximal justice. However, as I suggested, this answer is not open to Kant for at least two reasons. First, for Kant, the institution of the state is not instrumental but an internal necessity of just condition. Thus, the state cannot simply be the best non-ideal solution to the problem of justice. If the state is necessarily dominating, then Kant's theory of justice fails. Second, and similarly, Kant's notion of freedom as non-domination is an absolute status and not a sliding scale where one can be more or less dominated. Kantian freedom is not a concept which can be partially fulfilled or not. It constitutes the standard for a minimally just state.

idea of reason which is the unanimous agreement of all subjects in the original contract and of the actual citizens in voting. While the former agreement is “impossible as a fact”, the latter agreement is possible and serves as the highest standard for legitimate law. Indeed, Kant seems to take both levels of unanimous agreement to be a direct requirement of his definition of freedom of the citizen. However, while Kant's commitment to unanimous agreement is required by his definition of freedom, this standard, though not impossible, is unlikely. Thus, majorities are likely to form in the state. Kant then needs to justify a standard of majoritarian rule that does not give up the standard of unanimous agreement that is demanded by freedom. Kant's comments on the majority principle are limited. Yet, I will suggest that Kant has a way to justify majority rule, and so solve the problem of majority domination, that does not sacrifice his solution to the problem of state domination, namely by appealing back to the original contract.

Thus, I will proceed from the problem of state domination, which suggests that state intervening power cannot fail to be dominating, to the problem of majority domination, which suggests that majority rule cannot fail to be dominating. In finding a combined solution to these problems, I will show that the Kantian republic is not necessarily dominating.<sup>7</sup>

## FREEDOM AND STATE DOMINATION

Critics of freedom as non-domination argue that one of the problems with taking non-domination as the definition of freedom (and so freedom in a state) is that it appears this implies that the state is necessarily dominating.

Kolodny's own definition of domination seems to be in general agreement with the Kantian perspective. Kolodny takes “Levi” to dominate “Vic” when Levi is a will with the power to invade Vic, where this will is alien with respect to Vic and arbitrary or private. To invade Vic is either (i) to interfere in Vic's choice or (ii) to use or destroy Vic's body or property without Vic's consent (Kolodny, 2022, p. 468). Kolodny is here mashing up Kantian and neo-republican insights in ways that need not occupy us too much here, but it is worth noting that Kolodny's definition has all the Kantian elements with a few additional premises which require a bit more discussion. First, Kolodny points out that this definition of domination does not specify what *kind* of will can dominate. Kolodny calls this *Will-Universalism* (Kolodny, 2022, p. 471) At first, it might seem odd to attribute this to Kant given his emphasis on the distinction between private and public wills. However, as we will see, the point here is that Kant does not restrict the ability to dominate to individual wills in the state of nature, but also suggests that domination is possible between a collective will and an individual will within the state. A will is dominating, in other words, not because of the kind of will it is, but in virtue of its relation to its subject.

Secondly, Kolodny emphasizes that a will, in order to be a dominating will, need not *actually* invade. It is sufficient that the will merely has the power to invade. This, of course, is a common premise of the neo-republican and older republican tradition which suggest that a will is arbitrary for you if it has the power to invade, even if this will never actually uses this power.<sup>8</sup> Kolodny calls this the *Possibilist* dimension of non-domination (Kolodny, 2022, pp. 471–2). This is most often illustrated by the will of a kindly slave master who, while having the power to invade the will of his slaves at any time and for any reason, treats his slaves with beneficence. The slave master does not cease to dominate his slaves, and the slaves do not cease to be dominated, simply because the master does not exercise his power over them. For Kant, this seems to be equally true. In the state of nature, for instance, Kant suggests that the problem is not that persons are actually invading each other at any given time, but that it is a

<sup>7</sup>This reverses the order by which Simpson proceeds: from the problem of majority domination to the problem of state domination. This is because Simpson suggests that a solution to the problem of majority domination could be solved by state power, but this would lead to state domination. This suggests then that the problem of state domination stems from the solution to the problem of majority domination. However, one could also say that, if one seeks to justify state power by democratic rule, then the problem of majority domination can also stem from one's solution to the problem of state domination.

<sup>8</sup>See Pettit (1997, 24–25); (2012), ch. 1.4; Ripstein (2009), 15, 36, 42–43 for republican endorsements of this point.

state devoid of justice, which means that there is no common law that rules our external interactions and so prevents the possibility of unilateral wills to invade my choice (MM 6). Thus, the problem of the state of nature is not one of *actual* invasion of private wills by other private wills, but the fact that we are, at any time, subject to such a possibility.<sup>9</sup> Non-domination, then, would require that I am not subject to any arbitrary external will that has the power to interfere with me.

Kolodony takes the combination of freedom as non-domination, plus *Will Universalism* and *Possibilism*, to imply that the state necessarily dominates.

Of course, according to Kant, we can be in a state of external non-domination in the public state, where the state subjects us to public laws. The state does indeed have the power to coerce and interfere with us, as individual members and citizens of that state. However, Kant takes the will of the state to be a non-dominating will because it is a *public* will. Yet, as Kolodony points out, specifying what about a public will makes it non-dominating is difficult to pin down. In the rest of this section I will explicate the problem of state domination by showing how common interpretations of the public will fail to solve the problem.

Perhaps the most common interpretation of Kant's position is that the public will is one that wills in a way that the people *could* have willed it.<sup>10</sup> Indeed, Kant says just this in his earlier work, where he is more comfortable with the idea of an enlightened monarch.<sup>11</sup> Arthur Ripstein, in his influential interpretation, claims that Kant only claims that the state only needs to secure the *possible* consent of citizens. Thus, the standard for the legitimacy of the public will is only the hypothetical consent of members of the state. Ripstein suggests that the public will is one that wills "according to a public purpose" or wills "in order to secure a condition of mutual independence" (Ripstein, 2009, p. 47).

However, as Pauline Kleingeld has recently argued, scholars like Ripstein who endorse this view rely mainly on early statements of Kant and fail to recognize that Kant seems to suggest that the republican state requires the *actual* consent of the people in the form of voting through representatives in his later work (Kleingeld, 2022, pp. 10–11). Indeed, in Kant's later work, Kant seems to suggest that the legislative authority of a state is premised on the consent of citizens.

Yet, putting aside this textual point, Ripstein seems to fail to avoid the conclusion that the Kantian state dominates. If the state is a public will only because it wills according to a public purpose, then Ripstein's public will seems to share problematic parallels with the kindly slave master mentioned above. The kindly slave master can act from a public purpose; he never invades the slaves, except to prevent them from invading one another. The problem here seems to be that this account ignores the idea that the mere possibility of domination is sufficient for actual domination. Put differently, the public will might always will according to a public purpose, but the fact that it could invade my will at any time, for any interest, is enough to make it dominating.<sup>12</sup> Thus, if the public will is merely one that wills in the interest of the public, it cannot avoid being dominating.

But what if the public will cannot invade other than for the sake of public purpose (i.e. in order to secure a state of mutual independence among individuals)? Here the public will is constrained to intervene only when it is to secure a condition of mutual independence. However, if the public will is being *constrained* to act only according

<sup>9</sup>The necessity of the state might not even require the actual possibility of interference as it might be required rather by the nature of public laws which our external action must be subjected to (Friedrich, 2004; Gregory, forthcoming; Kleingeld, 2022). Here Kant is not concerned about establishing anyone's actual interference but only that persons can possibly interfere with me and so dominate me in a state of nature.

<sup>10</sup>In addition to Ripstein, see Byrd and Hruschka (2010); Hodgson (2010); Flikschuh (2012); Huber (2019); Pallikkathayil (2016). Marey (2018) points out some more specific ways in which Flikschuh misreads the connection between Kant and Hobbes. Although Marey is aimed at explaining the unity of the political body, I take her reading to be correct in its critique of Flikschuh and in its suggestion that solving the problem of political unity through an a priori idea of reason is certainly an original development in Kant and one that is relevant to the discussion here.

<sup>11</sup>This is most obvious in his 1784 essay "What is Enlightenment?" where Kant suggests that an enlightened ruler forms the state in such a way to facilitate the maximum amount of moral development in a people.

<sup>12</sup>Of course, Ripstein and others recognize that public officials must be able to be held accountable if they will in a way that the public disagrees with, but (1) It is not obvious that this is something that falls directly out of their definition of non-domination, and (2) it does not appear to fix the idea that citizens were dominated all along, given that there was nothing stopping the public will from willing against the public purpose (even if they are removed through voting, for example, shortly afterward).

to a public will, what is it that constrains it? If it is another will that constrains it to this purpose, why does not *this* will dominate us?

Perhaps a separation of powers is seen as the solution to this problem, as Kant indeed seems to endorse such a position in the Doctrine of Right (6:315–16). However, it is unclear how the separation of a public will into separate powers, who are meant to act only when all three are in agreement for a public purpose, would in fact solve the domination problem. Imagine that there are three slave masters who each hold an equal share in a slave and they can only interfere with the slaves will when they all come to an agreement about how the slave is meant to be treated. Although this may mitigate certain nasty behavior by one of the slave masters, this is beside the point. The slave is indeed still dominated by the three slave masters as they can, through their collective will, arbitrarily subject the slave to their will.

But what if the public will is in fact *no one's* will? This idea is most often seen as an expression of the Rule of Law, whereby laws, not persons rule. However, what exactly could this mean in practice? There must be something that holds the state in check, holds it in line with the law. What could this be if not a will? Furthermore, the law must be, in some sense a product of a will that exercises legislative power. Apart from practical considerations, Rainer Forst has pointed out that we could think about a machine, an AI perhaps, which perfectly wills according to the public purpose (Forst, 2018). It is a will completely detached from any particular will, dispensing laws to the people which are enforced without question. This seems to fit the criterion of a will that is no one's will, and one that wills according to the public purpose. Yet, it seems that such a will would be dominating.

Finally, we might say that a public will is one which I, in some sense, participate in as a legislator. Indeed, Kant is clear that the idea of a public will turns on the idea of members of the state being co-legislators of that will. In contemporary neo-republican literature, Phillip Pettit has suggested that the will of the state is non-dominating because of the People's effective control over the will of the state (Pettit, 2012, pp. 49–56). However, the point here is the domination of the individual citizen under the will of the state, not necessarily the People as a whole. The citizen cannot be non-dominated because a will he does not control (the People) controls a will of the state. Thus, the effective control of the People over the will of the state does not establish the non-domination of the individual citizen. In order for the citizen to be non-dominated, she must exercise effective control over the will of the people (who controls the state) or, more directly, the will of the state.

This means that the will of the state is non-dominating towards a citizen insofar as the citizen can effectively control the will of the state through voting. However, legislation through voting does not solve the problem of why the citizen himself is not dominated by the will of the state. If the voter is to have effective control over the will of the state, he can only have this control if there is a tie and his vote is decisive. Yet, this small chance of control over the will of the state does not seem to solve the domination problem. Again picture a slave owner who tells his slave that he will flip a coin. The slave owner will only treat the slave according to the slave's preferences if the coin lands on its end, in all other cases the slave owner will treat the slave however he wishes. The small possibility of control by the citizen, it seems, is not enough to secure non-domination.

Thus, these characterizations of the public will do not seem to save the public will from being a dominating will and therefore the state from being dominating. However, in the following section I will suggest that, for Kant, the problem of state non-domination can only be solved through a more radical conception of the legitimacy of the public will.

## KANT AND THE UNIVERSAL AGREEMENT

As we have seen, Kant takes the public will to be a non-dominating will, however the precise reason that it is non-dominating remains unclear. Kant seems to suggest that the public will must be understood as a will for which the members and citizens of a state are co-legislators. Here Kant comes closest to the view of Pettit that citizens must exercise control over the public will. However, Kant, more radically, takes co-legislation to mean that the public

will is constituted by the united will of the people (MM, 6:313–14). This obviously goes beyond the standard of partial control of the will, because it assumes that citizens consent to what the public will demands. Thus, the public will does not merely require some momentary or limited control of the public will, but that the citizens are in *unanimous agreement* with the public will.

In the Doctrine of Right, Kant says that “only the unanimous (*übereinstimmende*) and united will of all, insofar as *each decides the same thing for all and all for each*, and so only the general united will of the people, can be legislative.” (MM, 6:314) And, a bit later on, in the context of the right of the sovereign to go to war, “they [citizens of a state] must always be co-legislating members of a state (not merely as means, but also as ends in themselves), and *must therefore give their free assent*, through their representatives, not only to waging war in general, *but to every particular declaration of war.*” (MM, 6:346) The reference here to the Formula of Humanity is informative in that it suggests that the ruler treats the citizens as mere means by not securing their assent to certain treatment. When securing a contract, for instance, it is necessary for the legitimacy of the contract that both parties also will the end, as in Kant's example in the *Naturrecht Feyerabend* where Kant reflects on drawing up a contract with builders doing work on his house. He says that his use of the builder according to his own ends is only legitimate contingent on the consent of the builder. As he sums it up, “He must also will it” (FNL, 27:1321).

Of course, if the public will requires the universal agreement of citizens it seems that the state is only non-dominating as a regulative ideal.<sup>13</sup> Indeed, this is a move that Kant makes by insisting that the idea of the universal agreement of all people is only an *idea of reason*, called the original contract. Kant makes very clear that reference to the original contract is not a reference to any historical agreement between actual subjects at some point in time. Rather, it is an idea that reason gives to us when we think of a contract between free persons.

Not only is the idea of an original contract (the complete agreement of all members of a state) only an idea of reason but is also impossible as a fact. Kant takes the actual, historical agreement of all subjects with each other in a mutual binding contract to be an empirical impossibility. It is only practical reality is its bindingness on actual legislators (citizens) to legislate in such a way where it is *possible* that the people could have agreed to this. This criterion essentially eliminates certain types of legislation, ones that are contradictory to the rational nature of the people, from being legitimate.

If this is all that legitimate legislation requires, however, Kant's state cannot avoid dominating given that all that is required of rulers to do in legislating is to not act contradictory to the hypothetical (rational) agreement of the public. The state is legitimate insofar as the state wills according to the public purpose, according to what the subject *could possibly* agree to. As I have mentioned above, Kant cannot properly answer the problem of state domination if this is the only criterion for legitimate state power. Willing according to the public purpose of the subjects does not guarantee the non-domination of the public will. With a certain parallel to the benevolent slave master, the public will that is only willing in the public purpose fails to take into account the fact that a will is dominating by the mere possibility of its arbitrary or private intervention. Thus, that the public will does, in actuality, will in accordance with a public purpose is not sufficient to ground its status as non-dominating.

However, we must distinguish between the original contract as the idea of the united will of all members of a state, and the legislative will of the citizens united for giving laws. The original contract is indeed an ideal condition on the legitimacy of a state, but Kant also clearly speaks of the agreement of those citizens gathered together for the purpose of legislation within a state. At this point Kant is speaking, not of the original contract, but rather the citizens (nevertheless bound by the idea of the original contract) to legislate through votes in the republic. These are actual citizens in actual states giving their actual consent through votes. Indeed, Kant

<sup>13</sup>Some have interpreted Kant's political ideals as regulative ideals in the sense that they are not standards for the actual legitimacy of state in the empirical world but rather ideals that should guide the shaping of the institutions in the “non-ideal” state (See Horn, 2016; Huseinzadegan, 2015).

clearly specifies in the *Metaphysics of Morals* that the freedom of the citizen (a subject with a right to vote) is not submitting to any law that they have not given their *actual* consent (6:314). Again, Kant seems to insist that in these cases of actual legislation through votes, universal agreement among citizens is required. "But *all* who have this right to vote must agree to this law of public justice; for otherwise there would be a dispute about rights *between those who do not agree* and the first, and yet another higher principle of right would be needed to decide it" (TP 8:296). Kant specifies that the citizens who unite for legislation must all agree because otherwise there would be again a dispute between those that disagree and those that agree and we would need some further principle to decide their dispute. Indeed, the problem here is that unless universal agreement is achieved, the legislative will falls back into a state of nature within itself, given that there is again a dispute of rights that can only be solved through public laws. Thus, the problem is precisely that the stability and continuation, as well as the legitimacy of public legislation to solve the problem in the state of nature, is grounded on the ability for the citizens to come to universal agreement. Indeed, unlike the original contract, Kant does not specify that this agreement is a mere idea of reason, or that it is impossible as a fact. Indeed, Kant's concern with the actual disagreement between different parties among the voting citizens suggests that Kant has in mind the actual citizens within a republic.

Thus, Kant does not end his answer to the problem of state domination with the idea of the original contract but rather adds to this criterion the further standard that actual voting citizens in the state must also agree to the legislation. This points toward a multi-level standard of legitimacy that neither diminishes the role of the original contract, and so a priori standards of legitimacy, nor reduces this standard to the actual wills of the people. While the original contract gives the actual citizens in a state an obligation to vote in a way that adheres to the hypothetical consent of all subjects, and so necessitates them to a certain standard of justice, the actual consent to the law in voting gives legitimacy to the law by securing the just *application* of the law to the citizens in a state.<sup>14</sup>

The original contract, then, restricts a priori certain forms of governance and law according to practical laws of right and so also commits the wills of citizens to certain necessary principles. This means that the standard of legitimate state power is not solely in the agreement of actual citizens. As Kant points out in his response to Justus Möser, the original contract is not there to tell us what people will actually agree to, but what they *ought* to agree to (OTB, 8:434).<sup>15</sup> Möser took Kant's arguments against hereditary aristocracy insufficient because, as a matter of practical fact, the people *could* choose to adopt a system of hereditary nobility. Yet, Möser misunderstands that the agreement of the people is not sufficient, for they are also bound by the obligation to legislate in a way that adheres to the standards of the original contract. Therefore, the agreement of the people is not a sufficient condition for the legitimacy of the law, since it also needs to take into account the a priori obligations that necessitate any lawgiving. Nevertheless, the a priori standard is also not sufficient for legitimacy, as the freedom of citizens consists in subjecting themselves to no laws to which they have not given their consent (MM, 6:314). Thus, in Kant's later republicanism, he seems to adopt the idea that a law in conformity with the standard of the original contract is also insufficient to ground legitimate law. The law must also be given its consent by the citizens to which it applies, otherwise the citizens either have no duty to obey the law or will be unfree in their obedience.

Thus, we see that Kant has a two-level approach to the legitimacy of the public will. First, there is the a priori standard which obligates all voting citizens to vote in such a way that all subjects could have unanimously consented to the law (and so vote according to universal a priori standards rather than idiosyncratic interests). Second,

<sup>14</sup>The majority of Kant scholarship has not given a democratic reading of Kant's definition of a republican constitution. A large exception is Ingeborg Maus (especially Maus 1992 and 2011) who has been an influential source for those giving a democratic reading of Kant. See Hanisch (2016) for an argument against the democratic reading of Kant and a good overview of the problematic passages.

<sup>15</sup>Möser had written a response to Kant's "Theory and Practice" essay which remained unfinished and unpublished as a result of Möser's death in 1794. Möser's essay was then published years later by the publisher, and Möser's friend, Friedrich Nicolai in order to provoke Kant. Kant responded to Möser, and Nicolai, in a letter first published as a pamphlet in 1798.

that the actual voting citizens unanimously consent to the law, such that they only obey laws to which they have consented.

In both cases, the public will is the constituted by the unanimous agreement of citizens. This is what Kant means when he takes the public will, and so the state, to be non-dominating.

## KANT AND THE MAJORITY PRINCIPLE

This poses another problem for Kant. If Universal Agreement is required, not only in the ideal of the original contract but also in the actual citizens gathered to legislate in a republic, for the state to be non-dominating, then we have a standard that every actual state falls short of. It appears to be a high price to pay for answering the problem of state domination. Indeed, Kolodny could simply suggest that Kant's standard, even if it solves the problem of state domination, is too demanding to be useful as a way to justify the non-domination of any actual state.

However, in his "Theory and Practice" essay, Kant goes on to specify that if the citizens united to vote fall short of the standard of universal agreement, and all that is seen to be attainable in the voting representatives is only a majority decision, then "the principle of letting such a majority be sufficient, adopted as with universal agreement and so by contract, must be the ultimate basis on which a civil constitution is established" (TP, 8:297). Thus, Kant acknowledges that though universal agreement among voting citizens is, unlike the original contract, not impossible as a fact, it is indeed unlikely, and that the majority of votes should be seen as sufficient.

However, we still have to ask how the majority principle can be compatible with the idea that universal agreement is needed in order to save the Kantian state from being dominating. How can a citizen's freedom consist in subjecting himself only to laws to which he did consent *and* subject himself to a will he did not vote for? Indeed, Kant, does seem to acknowledge that majority rule would be dominating in his condemnation of direct democracy which "is necessarily a despotism because it establishes an executive power in which all decide for and, if need be, against one (who does not agree), so that all, who are nevertheless not all, decide; and this is a contradiction of the general will with itself and with freedom" (PP, 8: 352).<sup>16</sup> Given that the freedom of the citizen consists in him subjecting himself to no laws to which he did not consent, the possibility of a will which decides for or against one who does not agree contradicts the freedom of the citizen.

This is, of course, a question that Rousseau had already asked. Rousseau answers this question by suggesting that the outvoted citizen is not dominated by the majority because the general will is in fact discovered in the counting of votes. Therefore, the outvoted citizen was simply mistaken about what the general will, in fact, was (Rousseau, 1762/2018, p. 135ff). However, this does not seem to solve the problem as Kant understands it.<sup>17</sup> For Kant, any disagreement between different factions in the public will means that we do not, in fact, have a public legislation that can solve the problems in the state of nature. Suggesting that the general will is just that which is discovered through voting already assumes the sufficiency of majority rule for the legislative will. Rather, Kant seems to follow his other influence in political philosophy, Gottfried Achenwall (1719–1772). Achenwall suggested that the majority principle cannot be justified unless we assume a previous instance of universal agreement in which the majority principle was adopted by contract and in addition, that the majority principle is a necessary assumption for any social contract which wants to make effective decisions and survive. Therefore, for Achenwall,

<sup>16</sup>Kant seems to suggest that this is also about the non-representative nature of democracy which collapses the legislative and executive powers. On Kant's "republicanism" there is a necessary separation of legislative and executive power such that the people cannot be *both* the legislative *and* the executive will. (23:161;8:378).

<sup>17</sup>Anna Stilz argues that Kant follows Rousseau in taking the general will to be a construction of general interest in which the out-voted voter could (and should) find reason to consent to the law (Stilz, 2011, p. 77ff). As Stilz goes on to suggest, this is merely a hypothetical consent condition, one in which citizens could have, and therefore do, consent to legislation.



the majority principle was justified by its adoption in a contract, but also *must* be adopted in the contract for the survivability of the society as such (Achenwall, 1763/2020, pp. 117–118).

Indeed, Kant's suggestion is that the majority does not dominate the outvoted voter because the majority principle is adopted by universal agreement and as a foundational consideration of civil constitutions. One might interpret Kant's statement, that the majority principle is adopted with universal agreement by a contract and the ultimate basis on which a civil constitution is established, as suggesting that the majority principle is a necessary assumption of any state in the original contract. Kant here shifts Achenwall's original meaning, which was a prior agreement in the historical forming of the state, to the original contract as an idea of reason which a priori obligates citizens in a given state. Just as a state in the original contract cannot include in its constitution a right to revolution, on the grounds that such a thing would immediately undermine the authority of the public will for giving laws, it must also include the majority principle as a necessary condition of civil constitutions. Thus, the outvoted citizen is bound to respect the will of the majority because doing otherwise would undermine the very purpose of entering into a state in the first place. This principle is premised on a previous moment of universal agreement, by contract, in the fact that it is implied in the original contract that such a principle is consented to by the people, insofar as they come together for the purpose of continuous and efficient giving of public laws.

Notice that this still maintains both the idea that non-domination requires universal agreement and that non-domination requires something more than the idea of the original contract. State non-domination is still premised on the idea of universal agreement, and the idea of universal agreement both among the people in the original contract and among the voting citizens remains the ideal of a non-dominating state.

Nevertheless, Kant's multi-level structure allows us to justify the sufficiency of the majority principle without sacrificing this standard of non-domination. The majority principle is premised on the necessary rational consent of citizens to accept majority rule for the continuation of and effectiveness of the state for solving the problem in the state of nature. This is directly connected to the idea of the public will, which, in order to be effective in giving general laws and so settling the problems in the state of nature, must be able to effectively give laws. Therefore, the original contract obligates the voting citizens to the sufficiency of majority rule a priori. This obligation is a commitment of entering into a civil condition and therefore must be adopted by rational agents in a state. Thus, citizens in the original contract necessarily consent to the majority principle.

I have used the term 'rational' to refer to the citizens in the original contract. One might reasonably ask what if the citizens are not rational, and can non-rational citizens still be bound to the consent in the original contract? Indeed, much of the pessimism about the voting public is premised on research that purports to show that the majority of citizens make irrational decisions while voting. If the state is filled with non-rational, or even irrational, voters, how can they be bound to their "rational" consent in the original contract?<sup>18</sup> A full response is beyond this paper, however, we can alleviate the worry by suggesting that Kant is using the term "rational" in a way that does not admit of degrees of rationality within the citizenry. Thus, Kant is not using the term 'rational' in the same way that critics of non-domination would. The 'rational' in "rational consent" or "rational adoption" as Kant is using it here should be understood *not* as more well-informed, consistent, and efficient versions of actual citizens. In other words, the original contract is not merely the idea of more idealized versions of citizens coming to an agreement. Rather, the original contract, and the commitments we have with respect to it, are necessary commitments we already have qua rational actors in the external world. Thus, Kant's invocation of ideal rational consent is not merely what you would agree to in a more idealized scenario, but rather what you are already committed to in your status as a rational citizen in a state. It is merely in virtue of occupying this status that you are committed to these rational norms. Citizens are bound to the conclusions in the original contract not in virtue of their actually ability to recognize the rationality of the conclusions but merely in virtue of their status as rational beings. So, the original contract is representative of those

<sup>18</sup>The classic text here is Achen and Bartels (2016) which lays out various studies of voting behavior which suggests that voters are in fact not following rational norms.

commitments that one already has by being a citizen, irrespective of that citizen's capacity to fulfill some minimal level of competence.<sup>19</sup>

However, how can this be squared with the claim that Kant needs the unanimous agreement of citizens in voting to avoid the problem of state domination? First, we should note that justifying the majority principle this way does not affect the claim that we need something more than the original contract in order to save Kant from the problem of state domination. Kant still requires that more than the obligation of the original contract is needed for a non-dominating public will. The voting citizens must actually consent to the law. This brings me to my second point. How can Kant rely on the unanimous consent of the citizens to save him from the problem of state domination while also allowing for a majority of votes to be sufficient? We need to clarify first that, as Kant suggests in his comment in the "Theory and Practice" essay, legislating according to majority rule is a sufficient option in the absence of universal agreement among citizens. The ideal of a non-dominating public will remains that of the unanimous agreement of those subjected under the law. The sufficiency of the majority is a practical necessity that must be accounted for under the possibility that unanimous agreement is unachievable and majorities form within the state. However, we must still take into account that the consent of all citizens seems to be required by Kant's definition of freedom and it therefore seems as though the outvoted citizen, in order to be non-dominated, would still need to consent to the law.

Yet, the multi-level structure that Kant uses to justify state power allows us to understand the outvoted voter as consenting, not to the law directly, but the sufficiency of the majority for legislation. As demonstrated, this is a necessary rational consent of each subject and citizen to the sufficiency of the majority principle. This is simply a requirement of being a rational agent in the civil condition. Therefore, we can understand the outvoted voter as consenting, as an individual voter, to the legislation to which he is subject because the sufficiency of the majority is necessarily consented to in the original contract.

## DOES THE KANTIAN STATE DOMINATE?

Thus, far I have presented what I take to be Kant's best answer to the problem of state domination. Yet, there is still the question whether Kant's answer to the domination problem would convince Kolodny that adopting a standard of non-domination does not necessarily lead to the conclusion that the will of the state is dominating. Recall that Kolodny took domination to be inescapable in the civil condition because the will of the state is necessarily dominating. The combination of the idea that individual or collective wills can dominate and that the mere possibility of domination is sufficient to make a will dominating results in the inevitable conclusion that the will of the state is a dominating will.

The upshot of this view is that the Kantian state is non-dominating because the will of the state is one which the members of the state unanimously agree to. Unanimous agreement is to be understood at two levels: the hypothetical rational agreement of all subjects in the original contract and the actual agreement of citizens in voting. In turn, this is compatible with majority rule because the sufficiency of the majority of votes is necessarily consented to in the original contract. Therefore, a citizen in the Kantian state is ultimately non-dominated by the

<sup>19</sup>This does not mean that competence level is not relevant to the participation of the individual in the voting process. Despite the fact that all subjects in the state are committed to rational norms in light of their rational commitments, there might also be a subset of these subjects which are not competent (for various reasons) to make decisions in voting (children, for instance). I take these two points to be compatible insofar as the question of what the citizen is committed to in being a member of a state at all abstracts from that member's particular status relation in the group. The competence of that member in voting is another question, as is the particular characteristic that makes a group (such as children) competent or incompetent for voting. Another way of saying this is in contemporary terms is that what is commonly known as the "boundary problem" in democratic theory can be separated from the initial question of what I am bound to merely by being a member of a state (See Lippert-Rasmussen & Bengtson, 2021). The former is about the way we define the voting citizenry and the latter about the set of norms which I am committed to in entering into a state in the first place. Of course, Kant seemed to separate these two things by suggesting that "citizens", who have their interests considered as members of the state, can be considered either "passive" or "active" citizens, the latter only having voting rights (See Moran, 2021).

will of the state because he consents to it, either directly in voting or indirectly in consenting to the sufficiency of majority rule.

I take the solution presented here to also survive Kolodny's critique of Ripstein and others that the public is one that wills with a public purpose. If this was the case for Kant's public will, then he would not be able to escape the "Mere Possibility" aspect of domination, as we have seen. However, my interpretation of Kant gives us the idea that the public is legitimate insofar as those subject to the will always and without exception agree to the will. The public will intervenes only in those cases in which the citizens' agreement is secured. In the case of Ripstein and others, the public will could legitimately will in such ways to which the people do not *actually* consent.

Notice, relatedly, that this survives Kolodny's critique of Pettit's view, whereby the citizen must "effectively control" the will for it to be non-dominating. This is for at least two reasons.

First, it requires less of the citizen. We do not need to establish that each individual citizen has effective control over the public will in order for it to be non-dominating. All that is required is that the citizen *agrees with* the public will.

Second, however, because this agreement needs to be unanimous with respect to each citizen, the public is, in this sense, dependent on the consent of each citizen. The will of the state is dependent on the consent of each individual citizen, since the only thing that secures the non-dominating power of the will of the state is each citizen's consent.

Now, at this point Kolodny can launch a seemingly powerful objection. If Kant's view only requires that citizens agree with the will of the state, and even if the will of the state is dependent on the consent of individual citizens in order to be non-dominating, the will of the state still has the power, it seems, to ignore the consent of the citizens and enforce its own will at any time. Again, think of a slaveowner who asks his slaves if they consent to his treatments before he subjects them to anything and indeed only acts insofar as the slaves consent to his treatment. Nevertheless, because of the "possibility" condition on domination, the slave owner is dominating insofar as he could *possibly* dominate his slaves by simply ignoring the consent condition. Thus, Kant's solution, like all the others, fails to escape the problem of state domination.

It seems three responses can be given here.

First, the sense of the dependence of the public will on the unanimous consent of the individuals, though not requiring direct effective control over the public will, does entail that the public will is subject to the consent of individual citizens and therefore means that the individual citizen does control the legitimacy of the public will in some sense. The public will needs to secure the consent of each citizen in order to will legitimately. The unanimous nature of the agreement makes the consent of each person a necessary condition of the legitimacy of the state and therefore makes the will of the state dependent on the agreement of each individual citizen.

Second, and relatedly, the will of the state is constituted by the unanimous consent of the citizens. Thus, the idea is not only that the will of the state is, in some sense, dependent on the citizen's consent, but that the will of the state is not authoritative until the citizens have consented to it. This is precisely Kant's point that a citizen's freedom consists in not subjecting themselves to any law to which they have not consented. Thus, the consent of the citizens to the will of the state is what establishes its authority over them. The will of the state, as a will which has the authority over the citizens of that state, is therefore constituted by the unanimous consent of citizens. Unlike the slavemaster, then, the will of the state does not retain any of its authoritative powers to obligate the citizen in the absence of his consent.

Third, Kant's two tiered approach allows us to appeal to the consent of the citizen in the original contract when majorities form in the state. One way of worrying about the mere possibility of domination is that it is always possible that teams or groups form within a people which dominate the remaining citizens. This is the problem of *majority* domination.

However, this is precisely the problem that Kant wants to solve by appealing to the original contract to justify the majority principle. Kant acknowledges that there is a possibility that a majority forms which undermines the unanimous consent of the citizens in voting. Yet, we can avoid the conclusion that the outvoted citizen is therefore

dominated by appealing to the rational consent of the citizen in the original contract. The mere possibility of majorities forming in the voting citizenry does not constitute a domination of the remaining minority precisely because all citizens have already unanimously consented to the sufficiency of a majority for the making of law. Thus, Kant's solution, precisely as a result of this two-tiered structure, is not subject to the criticism of the possibility of a majority forming within the voting public. Kant understands this possibility but secures its legitimacy through the a priori rational consent of citizens in the original contract.

These points suggest that Kant's two-tiered structure allows him to avoid the pitfalls of the other accounts of non-domination. Kant avoids the problem of non-domination by first, making the unanimous consent of the people constitutive of the public will and second, by securing the legitimacy of any majority which forms in the state by referring to a priori unanimous agreement in the original contract. The first point solves the problem of state domination, which suggests that state power is inevitably dominating, by identifying the public will with the unanimous consent of citizens. The second point solves the problem of majority domination, which suggests that the possibility of forming majorities dominates citizens in the minority, while also maintaining the standard of unanimous consent, by suggesting that the legitimacy of majority rule is premised on the universal rational agreement in the original contract. Thus, the Kantian state does not necessary dominate.

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