Constitutional Indifferentism and Republican Freedom

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Abstract

Neo-republicans claim that Hobbes's constitutional indifferentism (the view that we have no profound reason to prefer one constitutional form over another) is driven exclusively by a reductive understanding of liberty as non-interference. This essay argues that constitutional indifferentism is grounded in an analysis of the institutional presuppositions of well-functioning government that does not depend on a conception of liberty as mere non-interference. Hence, indifferentism cannot be refuted simply by pointing out that non-domination is a distinctive ideal of freedom. This result does not suffice to defend the strong version of indifferentism put forward by Hobbes. But it does point to an important limitation of neo-republican constitutional theory: Neo-republicanism will amount to a distinctive paradigm of constitutional thought only if it is understood in a way that conflicts with Hobbes's understanding of the institutional presuppositions of well-functioning government. It is doubtful that we have good reason to embrace neo-republicanism, so understood.

Keywords

Hobbes, neo-republicanism, non-domination, democracy, legitimacy

According to neo-republican theorists of political freedom, such as Quentin Skinner and Philip Pettit, Hobbes held that our interest in freedom boils down to an interest in minimizing actual interference with our private pursuits. And

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the fact that there is no reason to think that a democratic government will necessarily be less interfering than a non-democratic government is said to provide the basis for Hobbes's provocative claim that there is no ground to prefer democracy to other constitutional forms.[1]

Hobbes overlooks, Skinner and Pettit argue, that we remain politically unfree, even if not in fact interfered with, as long as we remain subject to an authority that could arbitrarily interfere with our liberty, according to its own judgment and without being constrained to pay heed to our legitimate interests.[2] If we are subject to an authority of this kind, our enjoyment of liberty will remain dependent on the benevolence of the rulers. True political freedom, freedom from domination, exists only where people are liberated from such dependence. Only a republican constitution can give us assurance, to quote Pettit, that "power be exercised in a way that tracks, not the power-holder's personal welfare or world-view, but rather the welfare and world-view of the public" and that "acts of interference perpetrated by the state . . . be triggered by the shared interests of those affected."[3] Hobbes's constitutional indifferentism, the claim that we have no reason of liberty to prefer any one of the three traditional constitutional forms,[4] is false since it fails to take into account that only a republican constitution can realize the freedom of non-domination.

This attack on Hobbes's constitutional indifferentism assumes that the view is driven exclusively by a reductive understanding of liberty as mere non-interference. I argue in this essay that Hobbes's indifferentism has a second basis, namely, an analysis of the institutional presuppositions of well-functioning government. This analysis is independent of the understanding of liberty as mere non-interference and will lend support to indifferentism even if we grant to Skinner and Pettit that non-domination is a distinct ideal of freedom.[5]

Hobbes's analysis of the institutional presuppositions of well-functioning government does not suffice to defend the strong version of constitutional indifferentism proposed by Hobbes himself, but it illuminates important limitations of the neo-republican approach to constitutional theory. A reconstructed version of Hobbes's argument for constitutional indifferentism can be employed to show that the neo-republican conception of non-domination will either have to be defined in such a demanding way as to conflict with the presuppositions of well-functioning government or in such a modest way as to lack almost all critical power. Whichever horn of this dilemma we choose, neo-republicanism will fail to pose a fundamental challenge to liberal constitutional theory.[6]

Constitutional Indifferentism and Institutional Closure

Hobbes's constitutional indifferentism is not based exclusively on a theory of liberty as actual non-interference. The *Leviathan* contains the resources for developing an alternative argument for constitutional indifferentism. To illustrate this point, it will be helpful to take a look at how Hobbes responded to one of the several political conflicts that helped spark the English civil war: the issue of royal taxation.

The king in seventeenth-century England did not possess a standing right to direct taxation of income or wealth, but it was acknowledged that direct taxes might at times be necessary to finance policies necessary to protect the public interest, in particular to pay for the defence of the realm. It was also understood that, in cases of genuine necessity, citizens had a duty to contribute. These assumptions raised the question of who is to judge whether, in a given situation, the public interest necessitates the levy of a tax. According to the received view in Stuart England, the king had the right to propose a tax if it thought a levy necessary. But he had to call a parliament, representing those upon whom the levy would fall, and obtain its assent.[7]

Hobbes thought this scheme a recipe for disaster.[8] Even if all agree that citizens have a duty to contribute in cases of genuine necessity, we can expect disagreement between the monarch and the citizenry over whether a particular situation necessitates the imposition of a tax. Such disagreement, moreover, will often not be terminable, in due time, through open-ended deliberation between the king who demands the tax and the representatives of the citizens who are expected to pay.[9] The likely consequence will be an inability on the part of the king to levy the tax, even in cases where its claims are justified.[10]

A monarch who finds himself in this predicament can be expected to blame parliament for failing to recognize the duty of those it represents to finance the pursuit of the public interest.[11] Perhaps he will go on to argue that he ought, in cases of clear public necessity, to be allowed to levy money without parliamentary assent.[12] But he is likely to earn the retort that if the monarch's mere say-so were sufficient to establish that there is a reasonable cause for taxation, the king would, in effect, have the power to take away a citizen's property at his discretion and for completely arbitrary reasons. And it would then appear that no subject can be said to hold genuine rights of property: For me to have a right of property to a thing implies, minimally, that no one else has the power to take it away from me at his personal discretion, for any reason he sees fit.

An unaccountable royal power of taxation would be incompatible with the existence of genuine rights of property and it would assimilate the legal status of subjects to that of slaves, whose possessions can be taken by their master at his will.[13] As Skinner points out, republican contemporaries of Hobbes enthusiastically endorsed this argument, since they perceived the dependence of my rights of property on someone else's potentially arbitrary will as one of the paradigmatic instances of the form of subjection that Skinner and Pettit describe as domination.[14]

Hobbes's answer to this quandary is simple. Since we cannot count on agreement concerning the necessity of a tax, the constitutional framework just outlined raises the danger of a paralysis of the state or even of a slippage into the state of nature. These dangers outweigh the discomfort of a government endowed with the power to tax citizens without their consent. Hence, we ought to submit to the authority of an absolute sovereign entitled to take a unilateral and final decision on whether a tax is necessary. If we are to avoid the dangers of institutional paralysis, the sovereign's decision must bind even those who deny, perhaps not unreasonably, that the public interest necessitates the imposition of the tax.[15] This point, according to Hobbes, applies equally to all constitutional forms, which will all have to be interpreted as forms of absolute sovereignty in order to solve the problem. Hence, it makes no sense to argue that there is one constitutional form that does away with the danger of domination while the others do not.[16]

This argument for constitutional indifferentism assumes that any stable constitution must be committed to the principle of absolute sovereignty which, in Hobbes's view, involves not just the denial of rights of resistance but also the rejection of any separation of powers, of a firm commitment to the rule of law, and of any antecedent positive constitutional limitation of the authority of the state.[17] Given this assumption, the conclusion that there is no fundamental difference, from the perspective of freedom, between a democracy and a monarchy will trivially follow. But the assumption would appear to have been falsified by our historical experience of constitutions that practice a separation of powers and that make those who exercise governmental power formally accountable to a written constitution. If Hobbes's argument for constitutional indifferentism is to be of any value for us, we must therefore dissociate it from the principle of absolute sovereignty.[18]

Let us assume that we are subject to a state that consistently acts on the basis of general, public, and prospective laws. Our legislator is a democratically elected parliament. All executive activity, performed by a government dependent on parliament's trust, is bound to a principle of legality which is enforced by an independent judiciary. Let us assume as well that the system

provides citizens with the opportunity freely to exchange political views and debate questions of policy.

A constitutional structure of this kind would undoubtedly protect citizens from certain forms of domination. For instance, it would protect from the personal tyranny of an autocrat as well as from extra-legal executive action free from judicial oversight. However, the parliament will still have the power to levy taxes regardless of whether all who are called upon to contribute agree that the tax is required by the public interest. The system will not permit individual citizens who have been outvoted to take the view that, as citizens, they are under an obligation to make a fair contribution to financing public projects, but that it is up to them, as individual holders of property, to take the final decision on whether a law imposing a tax is based on true necessity, and hence up to them to decide whether to pay. Citizens would therefore still be subject to an official judgment of necessity that may conflict with theirs.[19]

What is more, citizens would still be subject to an official judgment the substantive soundness and impartiality of which may be open to reasonable doubt. The view of a legislative majority in our imagined polity may fail adequately to reflect the legitimate interests of some minority, for instance because the majority is driven by partiality or subject to a cognitive bias that leads it to identify its own sectional interests with the shared interests of the citizenry as a whole. Even if that is not the case, the majority's views might be based on an understanding of the public interest that some citizens reasonably reject. Shouldn't we conclude, then, that there is still a problem of domination here? Pettit, it seems, would agree. Our holdings of property are, after all, still dependent on a will that could turn out not to be triggered by interests that are seen as shared by all those affected, and that those adversely affected cannot force to pay heed to their interpretation of the public interest.[20] In Skinner's account, republicanism is committed to the view that "if you wish to maintain your liberty, you must ensure that you live under a political system in which there is no element of discretionary power" that would make rights "dependent on the goodwill of a ruler."[21] Skinner does not explain what exactly makes a power discretionary. But if discretion obtains wherever a sovereign monarch has the power to levy a tax on the basis of his judgment of public utility or necessity—and this was clearly the view of the early modern republicans whose views Skinner aims to resurrect—it is hard to see why the same power, if held by the majority of a democratic legislative assembly, should fail to be discretionary, especially under conditions of disagreement among different groups of citizens.

In order to eliminate this residual domination, one might be tempted to turn to the radical suggestion that a state should not claim the authority to impose

taxes on dissenting citizens. Perhaps a tax should not be levied unless it achieves the unanimous approval of all who are called upon to pay. Alternatively, one could adopt the rule that those who are not convinced that a tax is necessary (or that it distributes burdens equitably) will be allowed to opt out of the obligation to pay. In the *Elements of Law*, Hobbes attributes a view of this sort to his opponents, who, "when they are commanded to contribute their persons or money to the public service, . . . think they have a propriety in the same distinct from the dominion of the sovereign power; and that therefore they are not bound to contribute their goods and persons, no more than every man shall of himself think fit."[22]

The problem with such proposals is obvious. There is no reason to believe that individual exercises of opt-out or veto powers must be based on a sounder and more public-spirited judgment of necessity than legislative decisions taken by representatives of the state. Individual exercises of opt-out or veto powers may be equally biased and partial, be driven by self-interest, or be made in bad faith, so as to achieve bargaining power over substantively unrelated matters. Moreover, even well-intentioned and well-informed citizens may easily fail to converge in their judgments of necessity. As a result, the highly permissive state we imagined will likely be unable successfully to pursue the public interest. But if we think that a state is needed, we cannot want its capacity to tend to the public interest to be paralyzed by failures to reach substantive agreement or by self-interested refusals to contribute one's share. It makes no sense, therefore, to enter into a social contract unless that contract is understood to endow the organs of civil society with the authority to impose taxes on dissenting citizens.[23]

Let me try to put this point in somewhat more general terms. In order to be able to solve conflicts among the members of a civil society over potentially contentious substantive issues of public policy, such as whether it is necessary to levy a tax, civil society must have a procedural mechanism of collective decision-taking whose results are taken to replace individual judgment. This mechanism, if it is to serve its purpose, must live up to a number of characteristics that define the notion of *institutional closure*.

First, the mechanism must be comprehensive, that is, it must claim to have the authority bindingly to adjudicate all conflicts as to how to interpret the public interest or shared interest that may arise among members of a society. A legal system may lack this authority, typically for the reason that those who hold political power are in the habit of taking duty-imposing decisions that cannot plausibly be interpreted as *bona fide* attempts to interpret the public interest. But it cannot refrain from claiming it.[24]

Second, the mechanism must be such that its final outcomes are fully identifiable on the basis of procedural pedigree.[25] If a constitution were to provide that a procedurally final official decision to levy a tax will be binding only on the basis of the further, essentially substantive condition that the levy is indeed necessary, the constitution would fail to end the state of nature. To make the claim that the official decision is binding only if it meets that further, essentially substantive condition amounts to empowering individuals to decide, on the basis of their private judgment, what their legal obligations are.

Third, the mechanism must create a sufficiently intimate nexus between political responsibility and the authority to bindingly interpret the public interest in the face of continuing social disagreement.[26] A mechanism for taking collective decisions that makes it impossible for those who bear governmental responsibility to impose burdens on citizens without the approval of individuals or groups who do not themselves share in governmental responsibility will paralyze the pursuit of the public interest and unduly privilege those who have an interest in preserving the status quo.

I will refer to a constitution characterized by the features just outlined as a constitution that exhibits institutional closure. In the light of the notion of institutional closure, Hobbes's defence of absolute sovereignty can be broken down into several distinct elements.

First, Hobbes in effect claims, though of course he does not himself use the term, that institutional closure is required to end the state of nature and to terminate social disagreement over the public interest. A social contract, Hobbes demands, must create a "reall Unitie" that is "more than Consent, or Concord,"[27] in that it subjects everyone's will and judgment to an institutional will and judgment that replaces individual self-government, at least where the law does not remain silent.[28] Where such real unity does not exist, a multitude will inevitably fail to co-ordinate successfully and achieve shared public aims. If people do not "set up for right Reason, the Reason of some Arbitrator, or Judge . . . their controversie must either come to blows, or be undecided."[29]

Second, Hobbes argues that institutional closure can only be brought about by absolute sovereignty. Unless all the essential powers of sovereignty that Hobbes lists in chapter 18 of *Leviathan* are permanently united in the hand of one person or group of persons, and unless it is established that this person or group cannot be held accountable for the misuse of those rights, the state will lack the stability and unity required to achieve lasting institutional closure. "A Kingdome divided in it selfe cannot stand."[30]

Finally, Hobbes argues that the urgency of the need to end the state of nature justifies absolute sovereignty. Though absolute sovereignty makes us "obnoxious to the lusts, and other irregular passions of him, or them that have so unlimited a Power in their hands" we are to keep in mind that absolute power is less dangerous than the "miseries, and horrible calamities, that accompany a Civill Warre."[31]

I would like to suggest that one can reject the second and the third of these three claims, while being supportive of the first. Hobbes was unable to conceive of institutional closure in any other form than that of absolute sovereignty. But that Hobbes's conception of institutional closure was unduly narrow should not blind us to the fact that institutional closure can take forms not envisaged by Hobbes. A rejection of the view that every true government must possess absolute sovereignty, and of the view that subjection to absolute sovereignty is preferable to life in the state of nature, does not entail the irrelevance of institutional closure. We clearly have reason to avoid the state of nature and to provide for the efficient pursuit of our shared interests. The residual Hobbism defended here claims that the achievement of these goals requires, and therefore justifies, some form of institutional closure. Institutional closure, hence, is a necessary (though surely not a sufficient) condition of well-functioning government.

This modification of Hobbes's argument suffices to underwrite the main thrust of Hobbes's indifferentist polemic, without making appeal to a theory of liberty as non-interference. The problem of domination to which neo-republicans alert us will apparently, at least to some extent, arise in any constitution that exhibits institutional closure. We cannot, therefore, justify our preference for democracy by saying that democracy, in contrast to other constitutional systems, will automatically deliver us from all domination.[32]

Three Conceptions of Republicanism and Non-domination

Can we really dispatch of the neo-republican attack on Hobbes's constitutional indifferentism as easily as I have suggested? Is there nothing to the claim that democracy is more conducive to political freedom than other constitutional forms? I agree that democracy does make a difference for political freedom. My point is that the sense in which it is true that democracy makes a difference for freedom fails to sustain the claim that neo-republicanism is a distinctive and normatively attractive approach to constitutional theory.

There are two strategies that neo-republicans might employ to defend against the reconstruction of Hobbes's indifferentism that I have offered. First,

they might deny that there is a problem of domination in the imaginary democracy I have been talking about and argue that such a system is sufficient for the prevention of domination, though it is characterized by institutional closure. Alternatively, neo-republicans might admit the conflict between non-domination and institutional closure, but reject institutional closure in order fully to realize non-domination. In what follows, I explain why both of these strategies fail to establish that neo-republicanism is a distinct and attractive constitutional ideal. The core claim of the first strategy is either plainly false, or it must come to rest on a watered-down conception of non-domination that does not constitute a fundamental challenge to liberal constitutional thought. The second strategy, by contrast, fails for the lack of a good enough normative reason to reject institutional closure.

To substantiate these claims, I will compare three different conceptions of the contribution that democracy makes to the prevention of dominating rule. The first two represent the two different variants of the first strategy, while the third represents the second strategy. These conceptions are offered as a systematic classification of possibilities for responding to the indifferentist challenge, not as an exegesis of Skinner and Pettit. As we will see, the writings of both Skinner and Pettit contain intimations of more than one of the conceptions I outline. But this does not show that the exercise of systematic classification is irrelevant. If my argument is sound, such problems of attribution indicate that Skinner and Pettit fail to offer a coherent response to the indifferentist challenge. To offer a coherent response, neo-republicans will have to adopt one or another of the three conceptions I will describe and reject the other two, as these are mutually incompatible. That none of the conceptions will by itself sustain a novel and critical paradigm of constitutionalism might explain why Skinner and Pettit appear to vacillate between them.

Democracy as Mechanism

Skinner's and Pettit's descriptions of domination frequently echo early modern republicans who criticized monarchy by appeal to the classical understanding of tyranny, which portrays the tyrant as an autocratic ruler who turns his subjects into instruments of his private interest and thus treats them like slaves.[33] To adopt the classical language of tyranny to defend republicanism is to suggest that we should think of the relation between democracy and non-domination in terms of the prevention of an enslaving rule that bends the public interest to the private, self-interested will of an autocrat.

It is not hard to see why a democracy committed to the rule of law will appear to be a solution to the classical problem of tyranny. As long as the

public interest is understood in contrast to the private desires of a tyrant, the idea of a public interest will have a rather clear meaning. As subjects, we can all agree that we have an interest not to have our property taken away so that the tyrant can pay for more concubines, a new palace, or another ill-fated war. We can agree as well that we have an interest in the secure enjoyment of a decent amount of personal liberty as well as in non-wasteful public spending in the service of manifestly public aims: the defence of the realm against real enemies, the provision of public security and justice, the maintenance of roads and bridges, and so on. If they define their political ambitions in opposition to a monarch who could act tyrannically, citizens will therefore tend to agree on some conception of the public interest or public welfare and know that they do so.

Of course, individual citizens may be tempted by partial desires as much as any tyrant. But such motives, one might argue, would not pose a problem in a democracy. Given that legislation needs the support of a majority of the people or of a majority of its elected representatives, democratic policies are not likely to be based on purely private interests, especially where the rule of the majority is tempered by a separation of powers. Rational citizens understand that they are not going to win majority support for policies that favour only the partial interests of a narrow group to which they happen to belong. They presumably understand as well that they will be better off under a government that caters to manifestly public functions the discharge of which is clearly in everyone's interest than under a government that, due to institutional paralysis resulting in under-funding, fails to discharge such functions. Given these facts, we can expect legislative decisions in a democracy to converge on the public interest, even among citizens who act from self-interest.[34]

Note that, according to this view, we may attribute non-arbitrariness both to the democratic constitution and to the legislative decisions it creates. Let us say that a legislative decision is substantively non-arbitrary if and only if it is based on the shared interest of the citizens (and not at the private desires of the ruler or rulers). Now, there seems to be no reason to deny that a dutiful monarch could come to understand what the shared interest of his citizens requires and legislate accordingly. Kant, for instance, portrayed Frederick II in such flattering terms.[35] However, a benevolent monarch's subjects would still be dependent, for their enjoyment of substantively non-arbitrary laws, on his willingness to legislate with a view to the public interest. They will therefore enjoy non-domination only once they are no longer so dependent. And this non-dependence, according to the suggestion we are exploring, will be realized if and only if there is a republican or democratic constitution.[36] A democratic constitution is non-arbitrary, and it secures non-domination, because it

gives us assurance that legislative power will not be exercised in ways that fail to be based on the public interest.

Let me note some important features of this interpretation of the relation between non-domination and democracy. First, the view just outlined accommodates the concerns that underpin Hobbes's argument for constitutional indifferentism.[37] It recognizes the need for the state's authority to tax and it affirms the requirement of institutional closure. A procedurally valid legislative decision is not open to further questioning on the basis of a substantive standard of necessity since we have assurance that majority decisions reliably track the public interest. Given this assurance, individual objections against the decision are likely to be motivated by partial concerns that deserve no public standing. Hence, the system's closure will not raise the danger of a morally objectionable form of dependence of citizen's rights on legislative will.

What is more, the closure condition has a positive role to play. If it were possible for individuals or groups to exempt themselves from the obligation to obey a procedurally valid law merely by raising the claim that the law fails to track the public interest—a claim that may well be made for purely self-interested reasons and in bad faith—the mechanism that forces majority decisions to track the public interest, even among selfish individuals, would likely fail to work. As democratic legislators, we reliably reach agreement on policies that serve our common interests only because we understand that we have no hope of bending the laws to our private will. But the key reason why we can have no such hope is that we know that a law on which a majority of us agree will be imposed on dissenters.

The second important feature of the view that we need to note is the following. Though we distinguish between the non-arbitrariness of a constitution and the non-arbitrariness of individual political decisions, and though we take it that the existence of a non-arbitrary constitution realizes a value (non-domination or invulnerability to substantively arbitrary decisions) that wouldn't necessarily be realized if all individual legislative decisions were substantively non-arbitrary, our notion of the non-arbitrariness of a constitution (and therefore our ideal of non-domination) is still dependent on our prior understanding of what makes for substantive non-arbitrariness of legislative outcomes. We can characterize the democratic constitution as non-arbitrary and claim that it will secure non-domination only because we believe that it is a highly reliable *mechanism* for the prevention of legislative decisions that are substantively arbitrary, a mechanism that will work effectively, to quote Kant, even among a people of devils.[38] I don't see how to defend this assumption without relying on some prior, procedure-independent standard of substantive non-arbitrariness of outcome.

But this dependence of the expectation of non-domination on a substantive conception of non-arbitrariness opens the view to an obvious criticism. The mechanism-view assumes that we can create an institutional framework that will lead people who pursue their own self-interest reliably to converge on policies that express a public or shared interest. The view holds that all citizens will want to see the same policies implemented once they realize that a policy of privileging their private interest at the expense of the public stands no chance of success. But this assumption will fail under pluralist conditions that obtain in contemporary societies. It fails, for instance, in a situation where society is divided—along lines of class, ethnicity, race, or religion—into competing groups one or more of which may stand a chance of becoming a majority and then to pursue the interest of the group or its members at the expense of the shared interest of all.[39] Moreover, citizens of modern democracies typically disagree about the scope of the legitimate functions and responsibilities of the state, and such disagreements can often not be put down to unreasonableness or to the influence of motives of self-interest. An agreed-upon and fixed standard of substantive arbitrariness, then, is not available to serve as a point of convergence among citizens, after motives of self-interest have been filtered out, for questions *de lege ferenda*.[40]

It follows from these characteristics of modern, pluralist societies that a democratic constitution will not necessarily deliver us from all of the forms of dependence that republicans appear to be concerned about. It may suffice to block the purely self-interested tyranny of an armed strongman. But citizens of a modern democracy must still expect that they will be forced to make contributions to the realization of policies they reasonably believe to fail to be based on the public interest or to show proper regard for their legitimate demands. If we take it that domination exists wherever I am, to some degree, dependent on a legislative will that may fail to track the public interest, as I reasonably understand it, or to take proper account of what I reasonably consider to be my legitimate interests, and against which there is no further appeal, this predicament would seem to qualify as domination.

Needless to say, these observations are thoroughly unoriginal. The failure of the mechanism-view was evident to perceptive observers in the nineteenth century,[41] and it would be inappropriate to suggest that neo-republicans, in echoing the early modern use of the language of tyranny in defence of republicanism, intend to signal uncritical allegiance to it. Pettit, for one, is highly sensitive to the shortcomings of majoritarian democracy and makes it clear that he does not hold to the mechanism view.[42] Skinner, however, occasionally writes as though he might be committed to it. As we have seen, Skinner thinks that to be free we have to make sure to "live under a political system in which

there is no element of discretionary power" so as to remove all dependence on an alien will.[43] He also holds that this goal can be achieved in an institutionally closed democratic republic committed to the rule of law.[44] But Skinner does not offer any explanation of how it would be possible for an institutionally closed democracy to avoid taking decisions that are discretionary in the sense of expressing interpretations of the public interest that may reasonably be challenged. I do not see how one could take this to be possible without mistakenly supposing the mechanism-view, or something rather like it, to be true. Of course, Skinner might be making a different claim here, namely, that the dependence we experience in an institutionally closed democracy does not qualify as domination. This takes us to the next conception of the relation between democracy and non-domination.

Legitimist Democracy

As I pointed out, it would be implausible, and in Pettit's case evidently wrong, to claim that neo-republicans adhere to the mechanism-view. Pettit explicitly denies the view that that there is a substantive standard of non-arbitrariness on which reasonable and public-spirited citizens could come to agree without much difficulty.[45] Rather, he puts emphasis on the idea that, given substantive disagreement about the content of the public interest, a republican constitution will protect us against arbitrary interferences by making sure that legislative decisions result from a fair process of decision making. For example, Pettit qualifies his claim that interferences, to be non-dominating, must track the public interest by saying that it suffices for citizens to agree "at the procedural level" on how to take decisions that interpret the public interest.[46] Skinner points out that early modern republicans were "not so naïve as to assume that we can always—or even very frequently—expect . . . wills and interests to converge on any one outcome." Rather, so Skinner with apparent approval, they defended majority rule on the ground that "it is hard to think of a better procedural rule for enabling bodies of people to act" without making government impossible.[47]

Perhaps, then, we should take Pettit and Skinner to claim that it is primarily a republican constitution that is non-arbitrary and that particular legislative outcomes are non-arbitrary only in a weak and derivative sense. The neo-republican view, in other words, might be that legislative decisions should be taken to be politically non-arbitrary, or legitimate, irrespective of their substantive quality, on the condition that they have been created through the use of suitably constructed democratic procedures. Let me call this position the "legitimist view." Though I hold legitimism to be the most promising way of defending our

attachment to democracy against full-blown constitutional indifferentism, I do not believe that it provides a comfortable retreat for Skinner and Pettit. Let me briefly explain why.

The legitimist does not argue that democracy reliably prevents outcomes that one might reasonably judge to be substantively mistaken. Rather, he reverses the direction of argument and claims that suitable democratic procedures give us reason, at least within certain limits, to regard their outcomes as legitimate or politically non-arbitrary irrespective of their content. A theory of legitimacy tries to justify my dependence on someone else's potentially misguided will instead of promising full deliverance from such dependence. It claims that I am obliged to accept someone else's interpretation of the public interest, since it is expressed in a democratic legislative decision, even while I can reasonably take the view that that interpretation does not fully live up to the relevant substantive standards of good legislation.[48]

This shift of perspective results from a measure of agreement with Hobbes's view that "the estate of Man can never be without some incommodity or other."[49] Legitimism concedes the impossibility of fully eliminating dependence on someone else's potentially misguided interpretation of the public interest within a political system characterized by institutional closure. It would be possible to eliminate such dependence only if there were an institutionally closed constitution that could not fail to prevent all substantive arbitrariness of outcome. If there is no such constitution, as the failure of the mechanism-view suggests, the condition of closure, which is necessary for well-functioning government, will inevitably create some measure of dependence.

To explain why we should be willing to live with that dependence, at least in a suitably constructed democracy, the legitimist might point out that a well-functioning democratic system, more than any other constitution, will hold legislators politically accountable in a way that will create strong incentives to govern with a view to the public interest. Legislators may not be able to avoid relying on contentious understandings of the public interest. But even contentious understandings of the public interest are to be distinguished from, and they are preferable to, bald-faced tyranny.[50] What is more, through public processes of deliberation and democratic decision, citizens are considerably more likely than even benevolent autocrats to arrive at policies that are substantively correct.[51] Some legitimists, moreover, emphasize that the ideal of equality is central to the legitimating force of a democratic constitutional framework. In taking legislative decisions in a way that gives each of their number an equal power in determining the general direction of policy, democratic

citizens pay a respect to one another that publicly affirms their equal moral standing.[52]

It is not my aim to pronounce on the relative merits of such legitimist arguments, or to suggest that I have given an exhaustive list of the relevant options. Undoubtedly, there is ample room for debate among legitimists over the question of how, exactly, a democratic constitution ought to be organized so as to legitimate the decisions taken under it. My point is this: Legitimists of all stripes agree that democracy is not going to free us altogether from dependence on an alien and potentially misguided will. But they hold that a suitably constructed democracy ought to reconcile citizens with what dependence remains in institutionally closed political society, while an argument that rests content to portray the horrors of an imaginary state of nature will not. Consequently, they believe that the vulnerability to legislative decisions one might reasonably see as substantively mistaken that remains in a well-ordered democracy should not be seen as an instance of domination.

Since legitimism does not hold the residual dependence to which we will be subject in a well-ordered democracy to be dominating, it does not sustain the view that there is something profoundly wrong, from the point of view of our interest in political freedom, with the kind of institutionally closed government we already practice. What is more, a legitimist conception of well-ordered democracy is likely to make appeal to values prior to non-domination, such as the value of political equality, to explain why interferences enacted through the right kind of democratic procedures are politically non-arbitrary and thus non-dominating.[53] Hence, if Skinner's and Pettit's neo-republicanism amounts to a variant of or contribution to democratic legitimism, it will neither offer a fundamental challenge to existing constitutional practices nor will it amount to a self-standing approach to constitutional theory.

The first strategy for responding to Hobbes's indifferentist challenge, to make the claim that there is no problem of domination in a well-functioning, institutionally closed democracy, thus ends in failure. The mechanism-view is plainly false, while legitimism concedes too much to indifferentism to sustain a distinctive paradigm of constitutional thought.

Contestatory Democracy

Let us now take a look at the second strategy for responding to the indifferentist challenge. To recall: a republican could respond by admitting that there is a conflict between the ideal of non-domination and institutional closure. But he might take this to show that we ought to abandon institutional closure

so as not to compromise the ideal of non-domination. Pettit's call for a contestatory democracy contains clear intimations of this view.[54]

Pettit, as we have seen, holds that exercises of political power are non-dominating if and only if they "track" the public welfare or the shared interests of all citizens.[55] But he denies that there is a method for the ex ante ascertainment of the substantive content of such a shared or public interest. In Pettit's view, the ideal of non-domination "is dynamic, because there is never a final account available of what someone's interests are or of whether certain forms of interference . . . are guided by interests that they [the citizens] share."[56] Hence, the only method to find out whether some policy arbitrarily interferes, and thus to ascertain whether the procedure by which it was enacted is dominating, "is by recourse to public discussion in which people may speak for themselves and for the groups to which they belong."[57] Pettit goes on to claim that

> every interest and every idea that guides the action of a state must be open to challenge from every corner of the society; and where there is dissent, then appropriate remedies must be taken. People must find a higher-level consensus about procedures, or they must make room for secession or conscientious objection or something of that kind.[58]

The legitimist democrat has no beef with the demand that ideas that guide state action should typically be open to public challenge and democratic revision. It is the second part of the quote, demanding remedies in case of dissent, which seems to contain an anti-legitimist flavour. A legitimist will ask why the mere fact that there is dissent to some idea that guides state action requires that "appropriate remedies must be taken." Why isn't it enough to point out that we settled upon the idea in question through a legitimate democratic process?

In order to answer this query, we need to take account of Pettit's claim that the question whether some person or group is subject to domination is a factual one, in the sense that it is not "essentially value laden." We have to establish, Pettit says, "whether people really are dominated." If it can be established that they are, Pettit suggests, it would be wrong to invoke the democratic origin of the offending norm as a reason that they should have to accept that fate. However, due to the unavailability of a fixed substantive standard of non-arbitrariness, "the identification of a certain sort of state action as arbitrary and dominating is essentially a political matter."[59] Pettit's view, then, appears to be that people are dominated or vulnerable to arbitrary interference whenever they lack the power to make sure that the ideas that guide state action conform to their own understanding of the public interest. This would explain his

presumption, incompatible with institutional closure, that the mere fact of insistent but unsuccessful dissent from some corner of society reliably signals domination and invariably requires a constitutional remedy in the form of "secession or conscientious objection or something of that kind."

Perhaps we are proceeding too quickly here. Doesn't Pettit try to accommodate institutional closure? As long as citizens have a consensus on the procedural level, Pettit suggests in the passage quoted above, they should be willing to accept the outcomes of the procedures, even if those outcomes fail to match their preferences or their personal interpretation of the public interest.[60]

Pettit, though, does not seem to understand the consensus on the procedural level as a binding consensus. In opposing consent to contestability, he argues that consent is neither a necessary nor a sufficient condition for non-domination. What matters for the non-arbitrariness of a political decision "is not the historical origin of the decisions in some form of consent but their modal or counterfactual responsiveness to the possibility of contestation."[61] Clearly, in any democratic system with institutional closure, opportunities for effective contestation will at some point come to an end, at least for those who are not able to mobilize a majority. And at this point the decisions the dissenters reject will no longer be responsive to the possibility of contestation. It would seem to follow that the dissenters, to enjoy non-domination, must have the power to terminate the consensus on the procedural level, at least if they consider an outcome to be so detrimental to what they perceive as their legitimate interests as to show that the procedure is biased against them. This leaves open the possibility, to be sure, that people who are burdened by some outcome will nevertheless respect it, since they do not consider that outcome to call into question the fairness of the procedure by which it came about and since they are attached to the scheme of co-operation secured by that procedure. But if contestability is not to suffer undue restriction, it must, so it seems, remain up to the dissenters to decide whether a disliked outcome crosses the threshold of intolerability and therefore justifies a termination of the procedural consensus on the ground that the latter has become dominating.[62]

Pettit moderates the anarchic consequences of this approach by inviting us to distinguish between different grounds of contestation. He admits that "it is in the nature of things . . . that not every contestation can be satisfied."[63] First, a contestation may be driven by partial motives of self-interest, like an interest in not paying taxes while others do. In Pettit's terminology, interests of this kind are "not politically avowable," and their official disregard does not constitute domination.[64] Second, a contestation may be driven by politically

avowable interests, like the interest in not having an airport built next to one's own neighbourhood. Here, people should respect a decision against their own interest as non-arbitrary if they acknowledge transportation as an important public aim and if the decision was taken through a procedure they can recognize as impartial.[65] Finally, a group may find that its conception of the common interest diverges from that of a majority of fellow citizens. In this case, Pettit argues, we need to distinguish further. There are situations in which "the issue is not of the greatest personal or cultural import to the party in question."[66] In this instance people should realize that one can reasonably disagree over the interpretation of the public interest and accept majority rulings as non-arbitrary. But dissenters are entitled to see themselves as dominated—and demand procedural changes, exemptions from the law, or secession—if the matter at hand is "of really pressing import, personal or cultural."[67]

Admittedly, a political society whose members conscientiously rely on these standards to guide their contestatory activity might well enjoy a fairly significant scope of de facto procedural agreement. But if there is no fixed and uncontroversial substantive understanding of the public interest, as Pettit himself argues, there will be no uncontroversial standard, in cases of serious conflict, to decide whether an interest is avowable, or to decide whether an infringement of an avowable interest was based on a fair procedure and pursued a legitimate public aim. The same will hold for the question whether a contestation expresses a "grievance of pressing personal or cultural import." Hence, Pettit's apparent attempt to distinguish sound from unsound grounds of contestation does not, at the end of the day, allow us to avoid the question of who is to decide whether some legitimate interest was unjustifiably abridged.

If we want to maintain institutional closure, we have to hold that those who are empowered to exercise legislative or judiciary powers under a suitably constructed democratic constitution can legitimately give authoritative interpretations of the public interest on the basis of their substantive view of non-arbitrariness. Given the fact of reasonable disagreement, we will then have to accept that we are saddled with a mild form of heteronomy. The only other option is to take the view that final authority to decide whether the infringement of some avowable interest concerns a matter of pressing import or lacks a justification in terms of a legitimate public aim, and should thus be considered arbitrary, must always rest with the dissenters themselves. But this is to say, in effect, that people are dominated by the constitutional framework—and therefore entitled to demand an exemption from the law, a procedural change, or even secession—whenever they say they are.[68] It is also to

reject institutional closure, since this view implies that no particular procedural system could ever justifiably claim the authority to provide binding arbitration of all social conflicts.

While the rhetorical thrust of *Republicanism* seems to veer towards the second of these two alternatives, Pettit elsewhere appears to tend toward the first. In order to enjoy non-domination, Pettit argues in *Republican Freedom and Contestatory Democratization*, people do not need a right to veto the outcomes of the process of collective decision making. Such a right would "undermine the possibility of compromise" and make public decision taking wholly infeasible.[69] Opportunities for contestation should therefore take the form of a right to "to trigger a review in a forum that . . . all endorse as an impartial court of appeal" in case one takes a legislative or administrative decision to be an unjustified abridgement of one's avowable interests.[70] And to secure non-domination, the reviewing court need not find for the complainants, at least as long as it gives due consideration to their avowable interests by showing that the infringement of the latter is necessitated by the pursuit of a legitimate public aim.[71]

I have no wish to contest the call for a robust scheme of judicial review of legislative or administrative decisions, or the more general point that we need to make constitutional provision, within institutional closure, to limit the dangers of a tyranny of the majority. I agree, moreover, that judicial review is perfectly compatible with democracy and that the ideal of non-domination may be helpful in understanding why this is so.[72] But it seems that contestability, so understood, will only make a limited contribution to constitutional theory.

Undoubtedly, a robust scheme of judicial review will reduce a minority's vulnerability to interferences that flagrantly disregard its manifestly avowable interests. But we should acknowledge that judicial review will not deliver us from vulnerability to policies that interfere with interests we reasonably deem to be avowable and that restrict those interests in ways we reasonably deem not to be justified by the pursuit of legitimate public aims. After all, the members of an impartial tribunal of review may disagree with us, reasonably and in good faith, as to which of our interests are avowable, as to which aims are legitimate public aims, and as to how to ensure that infringements of avowable interests in the pursuit of those aims distribute burdens equitably.[73] If the shift to contestatory democracy involves nothing more than the installation of a robust scheme of judicial review, a significant measure of dependence on alien judgment is bound to remain, as the legitimist claims, whether we care to call it domination or not.

A second limitation concerns the standards of review. Pettit emphasizes that procedures of review must be impartial to provide the status of non-domination

to those who can initiate them. A procedure of review, in turn, is to be considered impartial if and only if it ensures that any decision to restrict an avowable interest in order to pursue a shared public aim will be "made just on the basis of what course of action would best promote the shared goal." In that case, people who are disadvantaged by a decision "are unlucky but they are not subject to interference on an arbitrary basis"[74] since the procedure cannot be held to be unfairly biased against their avowable interests.

But what does it mean to say that some policy "best promotes" a shared goal? From the point of view of a political theory that aims to protect individuals against arbitrary interference, considerations of technical efficiency, one would think, cannot possibly be the sole ground for choosing between alternative ways of pursuing a public aim, at least not if some of those ways would impose disproportionate burdens on some citizens. What is more, public aims are not pursued in isolation but as a package. It will often be necessary to assess their relative importance to determine how best to pursue some particular aim. The reference to the best policy, then, will only be meaningful once we presuppose a fairly sophisticated substantive theory of the relative weight of legitimate public aims and of the requisite side constraints on their pursuit. Moreover, if the courts are to guarantee the status of non-domination, by striking down policies that are not best, they will have to be given the power to develop that theory, and it is hard to see how the courts could do so without appealing to substantive values other than non-domination. It thus begins to look as though non-domination can only result from the judicial enforcement of some more fundamental value or set of values. The obvious candidates here are precisely the liberal principles of equal concern and respect that the ideal of non-domination was supposed to supplant.[75]

If the ideal of non-domination is to ground a profound challenge to mainstream liberal-democratic constitutional thought, it must, I conclude, be made strong enough to imply a rejection of institutional closure. But a rejection of institutional closure, and adoption of the maxim that constitutional changes must be made whenever some group claims to perceive itself to be subject to arbitrary interference, is normatively unattractive, for reasons already discussed. Let me just add one consideration that is more openly moral than the concern with the smooth functioning of government that I emphasized in reconstructing Hobbes: Even within an open structure of governance that has rejected institutional closure the need to reach and to maintain working agreement on important issues will continually reassert itself. And given this pressure, some social groups will be in a much better position than others to protect their interests by demanding exemptions or procedural changes because some morally arbitrary constellation has given them disproportionate

leverage. A rejection of institutional closure may therefore reinforce unjust differences in social power among different groups, while failing to offer sufficient protection to social groups who lack the clout to harm their adversaries by withholding their consent. There is good normative reason, then, to reject the rejection of institutional closure. To do so, however, is to embrace a variant of legitimism and to give up on the second strategy for responding to the indifferentist challenge.

Conclusion

Let me try to summarize my argument with a reflection on the political language employed by neo-republicans. That language describes political freedom by contrasting it with slavery. We languish in a status comparable to that of a slave, Skinner and Pettit argue, when our government is potentially tyrannical, capable of interfering with our liberty on arbitrary grounds.

Such complaints are at home, historically, in the fight against monarchic absolutism, and they make good sense in that context. An absolute monarch, after all, will be in a position to pursue his private interests at the expense of the public interest, and he is going to rely on resources taken from citizens, against their will, should he choose to do so. This possibility of open abuse clearly makes the analogy to slavery meaningful. But the language of slavery, tyranny, and domination is not well adapted to the constitutional context of a modern democracy that is committed to the rule of law and typically equipped with some counter-majoritarian protections. In such a political system, we will continue to suffer dependence on another's will, since there will be reasonable disagreement about the public interest and since, to put it crudely, someone will have to have the power bindingly to interpret it. But it would clearly be implausible to claim that this residual dependence is straightforwardly assimilable to slavery.

The republican language resurrected by Skinner and Pettit will therefore only have a limited relevance for contemporary constitutional thought. Insofar as that language is obviously meaningful, as a complaint against brute tyrannical rule, its demands have mostly been met by modern liberal and constitutional democracies. Of course, modern democratic societies all face the challenge of profound and reasonable substantive disagreement about the public interest. As a result, they all need to find a basis on which to produce legitimate arbitrations of such substantive disagreement. But the language of non-domination, on its own, is going to be rather unhelpful for addressing this problem. It will either tend to tell us that no modern constitutional democracy is dominating, since any such system will suffice to free us from the cruder

forms of tyranny, or that all are, since there will always be some, under any procedural framework, who will perceive their legitimate interests to have been interfered with in ways not warranted by their own understanding of the common good.

A language well adapted to the constitutional context of modern democracy therefore cannot remain content for long to talk only about non-domination. It will have to include concepts of equality, fraternity, and mutual respect. But in that case, it will be the language, for the most part, that liberal democrats already try to speak.[76]

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Notes

1. See Philip Pettit, *Republicanism. A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), 41-50, and Philip Pettit, "Liberty and Leviathan," *Politics, Philosophy, and Economics* 4 (2005): 131-51; Quentin Skinner, *Liberty before Liberalism* (Cambridge: Cambridge University Press, 1998), Quentin Skinner, "Hobbes on the Proper Signification of Liberty," in *Visions of Politics, Volume III: Hobbes and Civil Science* (Cambridge: Cambridge University Press, 2002), 209-37; Quentin Skinner, *Hobbes and Republican Liberty* (Cambridge: Cambridge University Press, 2008).
2. See Pettit, *Republicanism*, 21-27 and 52-58; Skinner, *Liberty before Liberalism*, 69-70.
3. Pettit, *Republicanism*, 56. See also Skinner, *Liberty before Liberalism*, 68-77.
4. See Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), 129-38; Thomas Hobbes, *On the Citizen*, ed. and trans. Richard Tuck and Michael Silverthorne (Cambridge: Cambridge University Press, 1997), 115-26.

5. Hence, I will not address the question whether non-domination is conceptually distinct from non-interference or whether it has a value that cannot be expressed in the language of negative liberty. For recent discussion see the contributions of Ian Carter, Matthew Kramer, Quentin Skinner, and Philip Pettit to *Republicanism and Political Theory*, ed. Cécile Laborde and John Maynor (Oxford: Blackwell, 2008).
6. For a similar perspective, see David Dyzenhaus, "How Hobbes Met the 'Hobbes Challenge,'" *Modern Law Review* 72 (2009): 488-506.
7. See Mark Kishlansky, *A Monarchy Transformed: Britain 1603-1714* (London: Penguin, 1996), 61-62; J. P. Sommerville, "Absolutism and Royalism," in *The Cambridge History of Political Thought, 1450-1700*, ed. J. H. Burns (Cambridge: Cambridge University Press, 1991), 347-73, at 367-73.
8. Hobbes argued that the right to levy taxes is an essential power of sovereignty. See Hobbes, *Leviathan*, 234; Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England*, ed. Joseph Cropsey (Chicago: University of Chicago Press, 1971), 63-64; Thomas Hobbes, *Behemoth or the Long Parliament*, ed. Ferdinand Tönnies, with an introduction by Stephen Holmes (Chicago: University of Chicago Press, 1990), 27; Thomas Hobbes, *The Elements of Law*, ed. J. C. A. Gaskin (Oxford: Oxford University Press, 1994), 136-38.
9. For the problem of disagreement and the perceived need for authoritative decision taking in Hobbes, see *Leviathan*, 32-33, 118-21, and 225-27; Philip Pettit, *Made with Words: Hobbes on Language, Mind, and Politics* (Princeton, NJ: Princeton University Press, 2008), 84-97.
10. See Conrad Russell, *The Causes of the English Civil War* (Oxford: Oxford University Press, 1990), 161-84; Conrad Russell, "Parliament and the King's Finances," in *The Origins of the English Civil War*, ed. Conrad Russell (London: Macmillan, 1973), 91-116. Ibid. at 115 Russell speaks of the "rock-like obstinacy of country members' refusal to accept the real cost of government."
11. See "The King's Declaration Showing the Causes of the Late Dissolution," in *The Constitutional Documents of the Puritan Revolution*, ed. Samuel R. Gardiner (Oxford: Clarendon Press, 1906), 83-99.
12. When Charles I attempted to levy ship money he argued that "when the good and safety of the kingdom in general is concerned," a king must have the power to "command all the subjects of our kingdom at their charge to provide and furnish such a number of ships . . . as we shall think necessary for the defence and safeguard of the kingdom" and he asked "whether in such a case is not the King the sole judge both of the danger, and when and how the same is to be prevented and avoided?" (Gardiner, *Constitutional Documents*, 108.)
13. See, e.g., Algernon Sidney, *Discourses Concerning Government*, ed. Thomas G. West (Indianapolis, IN: Liberty Classics, 1990), at 17 and at 349. The argument,

it should be noted, has a medieval prehistory. See William of Ockham, III *Dialogus* II ii, c. 20. (In *Wilhelm von Ockham. Texte zur politischen Theorie*, ed. and trans. Jürgen Miethke [Stuttgart: Philipp Reclam, 1995)], 310-18.) Medieval lawyers debated at length whether a prince has rights of property over the goods of his subjects, and this debate was still well known in the seventeenth century. See Kenneth R. Pennington, *The Prince and the Law: Sovereignty and Rights in the Western Legal Tradition, 1200-1600* (Berkeley: University of California Press, 1993), 8-37 and 269-90. Medieval authors tended to deny the question and to emphasize that takings of property had to serve public utility or necessity to be legitimate. But this left open the question of who was to be the judge of public utility and necessity, a question that Hobbes would insistently press on his opponents. For Hobbes's most detailed discussion of the issue, see Hobbes, *Dialogue between a Philosopher and a Student*, 58-66.

14. See Skinner, *Liberty before Liberalism*, 68-69, 84-87; Skinner, *Hobbes and Republican Liberty*, 57-60, 82-89. Skinner is surely right that these authors were complaining about a problem of domination. It is therefore not anachronistic to rely on Hobbes's response to the argument about taxation to address neo-republican views. But this does not automatically support Skinner's historical claim, defended in *Hobbes and Republican Liberty*, that the development of Hobbes's political thought should primarily be understood as a series of responses to peculiarly "neo-Roman" challenges. The argument linking arbitrary takings of property to slavery had been a focal point of debates about the state's powers for centuries and simply couldn't be avoided by Hobbes. Neither, of course, was taxation (or the problem of domination in general) the only issue dividing Hobbes and his opponents. For a convincing criticism of Skinner's attempt to reduce the development of Hobbes's political theory to a struggle against republican conceptions of liberty, see Jeffrey R. Collins, "Quentin Skinner's Hobbes and the Neo-Republican Project," *Modern Intellectual History* 6 (2009): 343-67.
15. See Hobbes, *Leviathan*, 232-35, 238, 224-25, and 228-29; Hobbes, *Dialogue between a Philosopher and a Student*, 58-68; Hobbes, *The Elements of Law*, 136-38.
16. Hobbes, *Leviathan*, 128.
17. See Hobbes, *Leviathan*, chap. 18. Hobbes stresses repeatedly that the powers of sovereignty are "inseparable" and "incommunicable," and he argues that the sovereign must have the power to do "whatsoever he shall think necessary to be done" to preserve peace and security (ibid., 124, 127-28).
18. The term *absolute sovereignty* can admittedly be understood in a less specific sense, as applying to all systems of government that claim the authority to take final decisions enforceable on dissenting citizens. To those who prefer this usage, my argument might appear to be a defense of absolute sovereignty. But I believe

there is good reason to reject it. It implies, for example, that there is no difference between the constitutional theories of Hobbes and Kant and it seems to entail that most of us live in absolutist political systems. A conception of absolutism that has such implications is surely too broad to be very meaningful.

19. Ironically, parliaments in revolutionary England imposed burdens they had formerly denounced as tyrannical. See Hobbes, *Behemoth*, 158, 161.
20. Compare Pettit, *Republicanism*, 22-25, 55-56, and see ibid., 62.
21. Skinner, *Liberty before Liberalism*, 74.
22. Hobbes, *The Elements of Law*, 165.
23. See *Leviathan*, 232-33; Hobbes, *Dialogue between a Philosopher and a Student*, 58-66.
24. See Joseph Raz, "The Claims of the Law," in *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 2009), 28-33.
25. See Joseph Raz, "Authority, Law, and Morality," in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1995), 195-209.
26. See Hobbes, *Behemoth*, 37.
27. Hobbes, *Leviathan*, 120.
28. See also ibid., 32-33 and 118-19.
29. Ibid., 32-33.
30. Ibid., 127. See also ibid. 121-29, 221-30.
31. Ibid., 128.
32. I do not wish to deny that Hobbes deployed a conception of liberty as noninterference against republicanism. My claim is that this conception is not the sole ground of Hobbes's constitutional indifferentism. Hence, a dismissal of Hobbes's conception of freedom is not going to justify a wholesale dismissal of his constitutional theory.
33. See Pettit, *Republicanism*, 56; Skinner, *Liberty before Liberalism*, 47-49, 75-76. Aristotle defined tyranny as "monarchy for the benefit of the monarch" (1279b4). It is "like the rule of master over slave" (1279a16) and "no one willingly submits to such rule if he is a free man" (1295a17) (*Aristotle's Politics*, ed. and trans. T. E. Sinclair and Trevor J. Saunders [London: Penguin, 1981], 189-90, 264.) See also Thomas Aquinas, "De regimine principum," in *Aquinas: Political Writings*, ed. and trans. R. W. Dyson (Cambridge: Cambridge University Press, 2002), 5-52, at 8.
34. The idea of a constitutional mechanism that will unfailingly lead self-interested individuals to converge on the public good is clearly central to early modern republicanism. See e.g. the fable of the two girls dividing a cake in James Harrington, *The Commonwealth of Oceana* and *A System of Politics*, ed. J. G. A. Pocock (Cambridge: Cambridge University Press, 1992), 20-25. Harrington's views are

inspired by Machiavelli's *Discourses*, and Skinner himself once attributed the mechanism-view to Machiavelli. See Quentin Skinner, "The Republican Ideal of Political Liberty," in *Machiavelli and Republicanism*, ed. Gisela Bock, Quentin Skinner, and Maurizio Viroli (Cambridge: Cambridge University Press, 1990), 293-309, at 305-6. Kant described republicanism as the project of finding a way "so to order this multitude and establish their constitution that, although in their private dispositions they strive against one another, these yet so check one another that in their public conduct the result is the same as if they had no such evil dispositions." He held that this problem "must be soluble" by a constitution that employs the "mechanism of nature" in the right way. Immanuel Kant, "Toward Perpetual Peace," in *Practical Philosophy*, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), 317-51, at 335.

35. See Kant, "Toward Perpetual Peace," 324-25.
36. See ibid., 325.
37. This may explain why so many self-declared early modern republicans endorsed recognizably Hobbesian conceptions of sovereignty. See e.g. Baruch Spinoza, "Tractatus Theologico-Politicus," in *Complete Works*, trans. Samuel Shirley, ed. Michael L. Morgan (Indianapolis, IN: Hackett, 2002), chap. XVI, 526-35, and "Tractatus Politicus," ibid., chaps. 3-4, 689-98; Jean-Jacques Rousseau, "On the Social Contract," in *Rousseau's Political Writings*, ed. Alan Ritter and Julia Conaway Bondanella (New York: Norton, 1988), chaps. II.1-II.4, 98-104; Immanuel Kant, "On the Common Saying," in *Political Writings*, ed. H. S. Reiss (Cambridge: Cambridge University Press, 1970), 61-92, at 73-87.
38. Kant, "Perpetual Peace," 335. In Rawls's terms, the view holds that a democratic constitution realizes "perfect procedural justice." See John Rawls, *A Theory of Justice: Revised Edition* (Cambridge, MA: Harvard University Press, 1999), 74.
39. See Carl Schmitt, *The Crisis of Parliamentary Democracy*, ed. and trans. Ellen Kennedy (Cambridge, MA: MIT Press, 1988), 1-50; Carl Schmitt, *Legality and Legitimacy*, ed. and trans. Jeffrey Seitzer (Durham, NC: Duke University Press, 2004).
40. See Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999); Charles Larmore, *The Morals of Modernity* (Cambridge: Cambridge University Press, 1996), 152-74.
41. See John Stuart Mill, "On Liberty," in *On Liberty and Other Essays*, ed. John Gray (Oxford: Oxford University Press, 1991), 5-128, at 5-9.
42. See Pettit, *Republicanism*, 61-63; Philip Pettit, "Republican Freedom and Contestatory Democratization," in *Democracy's Value*, ed. Ian Shapiro and Casiano Hacker-Cordón (Cambridge: Cambridge University Press, 1999), 163-90, at 173-8.
43. Skinner, *Liberty before Liberalism*, 74.

44. See ibid., 29, 74-75.
45. See Pettit, *Republicanism*, 146-47; See also Richard Bellamy, *Political Constitutionalism. A Republican Defence of the Constitutionalism of Democracy* (Cambridge: Cambridge University Press, 2007), 20-26.
46. Pettit, *Republicanism*, 56.
47. Skinner, *Liberty before Liberalism*, 29.
48. For clear statements of this approach, see Jeremy Waldron, "The Core of the Case against Judicial Review," *Yale Law Journal* 115 (2006): 1346-406, at 1386-87; Bellamy, *Political Constitutionalism*, 26; David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, NJ: Princeton University Press, 2008), 5-9.
49. Hobbes, *Leviathan*, 128.
50. See Pettit, "Republican Freedom and Contestatory Democratization," 172-73.
51. See Estlund, *Democratic Authority.*
52. See, e.g., Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford: Oxford University Press, 2008); Charles R. Beitz, *Political Equality. An Essay in Democratic Theory* (Princeton, NJ: Princeton University Press, 1989); Wojciech Sadurski, *Equality and Legitimacy* (Oxford: Oxford University Press, 2008).
53. For a telling example see Bellamy's attack on judicial review in *Political Constitutionalism*, 145-75. Bellamy argues that judicial review is inherently dominating and thus should be rejected on neo-republican grounds. But this conclusion is based on the claim that judicial review conflicts with the ideal of democratic equality.
54. See Pettit, *Republicanism*, 63, 197-200. For an explicit argument against institutional closure see James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).
55. See Pettit, *Republicanism*, 56, 184-85.
56. Ibid., 146.
57. Ibid., 56.
58. Ibid., 56.
59. Ibid., 56-57.
60. See also ibid., 198.
61. Ibid., 185. Pettit adds that the possibility of contestation must involve more than just the opportunity to complain or to lobby for repeal. People must have the power to effectively contest decisions, in a way that is liable to bring about a change in the law. (See ibid., 190.)
62. This is affirmed explicitly in Pettit, *Republicanism*, 63, 197-200. See also Pettit, "Republican Freedom and Contestatory Democratization," 182.
63. Pettit, *Republicanism*, 197. See for what follows ibid., 197-200.

64. See Pettit, "Republican Freedom and Contestatory Democratization," 176, where avowable interests are defined as interests that are "consistent with the desire to live under a shared scheme that treats no one as special." For an important discussion of Pettit's notion of avowable interests, see Patchen Markell, "The Insufficiency of Non-Domination," *Political Theory* 36 (2008): 9-36. Markell agrees that Pettit's notion of avowability apparently serves to restrict "the whim or caprice of the interferee" (ibid., 15) in contesting public decisions. He goes on to argue that this restriction creates a blind spot in Pettit's critique of power, as it will allow certain forms of purportedly "civilizing" or "educational" interference to go unchecked. The remedy for this problem, it seems to me, is to recognize that the attempt to draw a distinction between avowable and non-avowable interests will give rise to reasonable disagreement and to subject it, as far as feasible, to the democratic process. If I understand correctly, this demand is in line with Markell's call for a prevention of "usurpation." See ibid., 24-31.
65. See Pettit, *Republicanism*, 198; Pettit, "Republican Freedom and Contestatory Democratization," 178-80.
66. Pettit, *Republicanism*, 198.
67. Ibid., 199
68. Put differently: What makes some interference arbitrary and dominating, according to this view, is the perception, on the part of the affected, that its substantive wrongness defeats its procedural legitimacy. But this standard makes the dissenters judges in their own cause. They can establish that they are dominated simply by claiming that, in their perception, the decision's substantive flaws defeat its procedural legitimacy.
69. Pettit, "Republican Freedom and Contestatory Democratization," 178-79.
70. Ibid., 179.
71. Ibid., 179.
72. See Pettit, "Republican Freedom and Contestatory Democratization," 185-88; Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford: Oxford University Press, 2007), 145-75.
73. One might argue that a complainant who finds himself in this situation need no longer recognize the tribunal as impartial and must be entitled to reject the procedural framework that authorizes the tribunal as dominating. See Pettit, "Republican Freedom and Contestatory Democratization," 182. If this is Pettit's considered view, he rejects institutional closure, after all. And if people are entitled to dismiss a tribunal's claim to impartiality on such grounds, few conflicts will be arbitrable by courts.
74. Pettit, "Republican Freedom and Contestatory Democratization," 179.
75. For fuller statements of this point see Charles Larmore, "A Critique of Philip Pettit's Republicanism," *Philosophical Issues* 11 (2001): 229-41; Christopher

McMahon, "The Indeterminacy of Republican Policy," *Philosophy and Public Affairs* 33 (2005): 67-93.

76. According to J. G. A. Pocock, that language was also more prominent among early modern republicans than Skinner suggests. See J. G. A. Pocock, "Foundations and Moments," in *Rethinking the Foundations of Modern Political Thought*, ed. Annabel Brett and James Tully (Cambridge: Cambridge University Press, 2006), 37-49, at 46-47.

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