

My aim here is to defend a view of non-domination as providing a better basis for justice than the going alternatives. I differentiate it from two kinds of alternatives: those whose proponents reject my claim that non-domination is the bedrock of justice and those who agree with me but understand non-domination differently than I do. The first group divides into partisans of equality, on the one hand, and of freedom, on the other. Their arguments concern me in the first half of the essay. Then I turn to conceptions of non-domination put forward by Jürgen Habermas, Michel Foucault, Michael Walzer, Quentin Skinner, and Philip Pettit. There is considerable overlap among these various views and between them and mine but there are also notable disagreements. I spell out what is at stake in the alternative formulations, indicating why my own conception, rooted in power-based resourcism, is preferable.

Keywords: justice, domination, non-domination, freedom, equality, resourcism

1 *Why Non-domination?*

When people experience domination they often complain of injustice, and rightly so. My aim here is to develop an account of non-domination as the bedrock of justice that makes sense of, and builds on, this common complaint. I doubt that any conception of justice could win many adherents or keep them for long, even if it snared them for a while, were it not unambiguously hostile to domination. People demand justice to escape domination. I agree with the tradition of political philosophy, stretching at least from Plato to John Rawls, in which justice is regarded as the first virtue of social institutions.¹ If I am right about the relations

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† This essay is the prolegomenon to larger work entitled *Justice against Domination* that will be published by Harvard University Press. It began life as the inaugural Brian Barry Lecture delivered at the London School of Economics in May 2010. The essay does not deal with Barry's work, and I expect that he would have disagreed with quite a bit of it. But I hope and believe that he would not have thought this disqualified it for the assigned purpose. There was nothing Brian liked more than a lively argument. Subsequent iterations have been discussed in meetings at Yale, the American Political Science Association's 2010 convention, Oxford, the University of Cape Town, Cornell Law School, and the University of Toronto Faculty of Law. Thanks to all who commented; the usual caveats apply.

1 Plato, *The Republic*, translated by GMA Grube, revised by CDC Reeve, 2d ed (Indianapolis, IN: Hackett, 1992) at 102–3, 119; John Rawls, *Theory of Justice*, 2d ed (Cambridge, MA: Harvard University Press, 1999) at 3 [Rawls, *Theory*].

between justice and non-domination, this makes non-domination in an important sense the primary political value.

I have previously made the case that the best path for pursuing justice, thus conceived, is to democratize human relationships in a particular way. This involves institutionalizing democracy as a conditioning or subordinate good that shapes the ways in which people pursue other goods. My democratic conception of justice is partly defined contextually, linked to the nature of the goods in question and the ways in which people pursue them in particular historical settings. But mine is also partly a general ideal. It implies the need for participation in decision making as well as rights of opposition as constraints on ways in which people pursue their contextually defined goals. How robust these constraints should be depends on how vulnerable to domination people are in particular settings; the more vulnerable they are, the more demanding should be the constraints.

Vulnerability to domination is operationalized, for me, principally by reference to the notion of basic interests. People have basic interests in the security, nutrition, health, and education needed to develop into, and live as, a normal adult. This includes developing the capacities needed to function effectively in the prevailing economic, technological, and institutional system, governed as a democracy, over the course of their lives.² People are more vulnerable in collective settings when their basic interests, thus conceived, are at stake than when they are not. If I control resources that you need to vindicate your basic interests, that gives me power over you. This fact legitimates more stringent democratic constraints on our collective endeavours when basic interests are at stake than when they are not.³ This power-based resourcism, as I have called it, is geared toward mitigating the most serious kinds of domination that permeate human social arrangements.⁴

My aim in this essay is to differentiate this view from two kinds of alternatives: those whose proponents reject the idea that non-domination is the bedrock of justice and those who agree with me but understand non-domination differently than I do. The first group divides into partisans of equality, on the one hand, and of freedom, on the other. The

² Ian Shapiro, *Democratic Justice* (New Haven, CT: Yale University Press, 1999) at 85–6 [Shapiro, *Democratic Justice*].

³ I say that vulnerability to domination is operationalized *principally* by reference to the notion of basic interests because domination can occur in other ways as well – as when someone threatens to blackmail a closet homosexual or someone who is having a secret affair. No doubt there are other reasons to outlaw blackmail, but a commitment to non-domination would proscribe it as well.

⁴ Ian Shapiro, *The Real World of Democratic Theory* (Princeton, NJ: Princeton University Press, 2011) at 255–6 [Shapiro, *Real World*].

egalitarians generally think of themselves, like me, as writing about justice, mostly in the wake of the ‘equality of what?’ debate spawned by Amartya Sen’s contention that debates about justice are always, at bottom, debates about some kind of equality.⁵ Proponents of freedom are sometimes less clear about their ideal’s relation to justice, or at least less explicitly so – perhaps because some of them are sceptical of the very idea of justice.⁶ Regardless of whether they see freedom as a feature of justice or an alternative to it, they treat it as the coin of the realm in judging the legitimacy of political institutions. For present purposes, I will assume that, like Robert Nozick, freedom’s partisans regard their understanding of it as the bedrock of justice.⁷ The friends of equality occupy my attention in Part II, followed by those of freedom in Part III. Having explained why non-domination is a preferable bedrock ideal to those put forward in either of these camps, I turn, in Part IV, to competing conceptions of non-domination put forward by Jürgen Habermas, Michel Foucault, Michael Walzer, Quentin Skinner, and Philip Pettit. There is considerable overlap among these various views, and between them and mine, but there are also notable disagreements. I spell out what is at stake in the alternative formulations, indicating why my own conception, rooted in power-based resourcism, is preferable.

II *Justice, equality, and non-domination*

If non-domination is the bedrock of justice, one might reasonably ask whether its appeal trades on a prior commitment to equality. On this view, non-domination’s moral pull is really the moral pull of equality. If that were true, then energy spent justifying non-domination would be better deployed in making the egalitarian case on which it ultimately depends. This approach seems to me ill-considered, however, partly because non-domination is only trivially associated with equality as a political ideal and partly because endorsing non-domination instead of

5 See Amartya Sen, ‘Inequality Reexamined’ (Occasional Paper No 2, Yale University, 1989) at 15; see also Sen’s book of the same title, Amartya Sen, *Inequality Reexamined* (Cambridge, MA: Harvard University Press, 1992). For criticism, see John Kane, ‘Justice, Impartiality, and Equality: Why the Concept of Justice Does Not Presume Equality’ (1996) 24 *Political Theory* 375. For Sen’s response, see Amartya Sen, ‘On the Status of Equality’ (1996) 24 *Political Theory* 394 [Sen, ‘Status’]; and for Kane’s rebuttal, see John Kane, ‘Basal Inequalities: Reply to Sen’ (1996) 24 *Political Theory* 401 [Kane, ‘Basal Inequalities’].

6 See Friedrich A Hayek, *The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976).

7 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) [Nozick].

equality makes it possible to avoid a number of the philosophical and political difficulties associated with egalitarianism.

When I say that egalitarianism as I conceive it is only trivially associated with non-domination, I do not mean to deny that there is an ultimate sense in which proponents of non-domination acknowledge the moral equality of persons – what Sen describes as basal equality.⁸ But it is the idea of non-domination, not that of equality, that does the heavy lifting in my argument. Nor do I deny that a commitment to non-domination has distributive implications, some of which – as we shall see – will be congenial to many who count themselves egalitarians. But I do want to deny that non-domination's *raison d'être* is to promote equality. I agree with John Kane that there is nothing in the meaning of justice that implies an egalitarian presumption.⁹ It is when egalitarian distributive arrangements serve the goal of non-domination that they are desirable from the standpoint of justice.

There has been an influential tendency among contemporary political theorists, at least since John Rawls, to deny this: to think that justice begins with a presumption in favour of equality. The nature of this alleged link turns out, on inspection, to be elusive. Sometimes Rawls writes as if it were embedded in the very meaning of justice, as teased out in his examination of our intuitions about justice via the original position in which readers are invited to speculate about justice while they were denied knowledge of their particular circumstances. A different supposed path to equality is Rawls's trenchant argument that the differences among us, whether rooted in nature or nurture, are morally arbitrary. A third potential basis for a presumption in favour of equality is Rawls's Kantian interpretation of the principles of justice as procedural expressions of the categorical imperative. A final putative path from justice to equality passes through Rawls's admonition that the state should stand neutral among permissible conceptions of the good life. I take each of these up in turn.

A THE ORIGINAL POSITION AND THE LOGIC OF JUSTICE

Rawls's device of reasoning behind a veil of ignorance does not generate a commitment to equality; rather, it presumes prior acceptance of an egalitarian presumption. His claim is that, under conditions of moderate scarcity, the principle of insufficient reason that operates behind the veil of ignorance would lead any rational person to choose equality unless an unequal distribution could be shown to operate to everyone's

8 Sen, 'Status,' supra note 5 at 395–6.

9 Kane, 'Basal Inequalities,' supra note 5 at 403–5.

advantage.¹⁰ But the original position is an expository device, not an argument for equality – or, indeed, for any other distributive principle. Rawls himself notes that it is inspired by a conception of fairness according to which the best way to divide a cake is to require the cutter to take the last slice.¹¹ Assuming rational self-interest, she will divide it equally so as to maximize the size of her slice. Granting the assumptions, *arguendo*, this does nothing to establish the desirability of an equal division. If we knew, for instance, that one of the recipients had not eaten for three days, another had three cakes in his bag, and a third was a diabetic who would be made sick by eating cake, then any intuitive appeal of ‘the cutter takes last’ rule would quickly evaporate. The cake-cutter’s rule seems attractive only in light of a prior commitment to equality. What it offers is a way for self-interest to get people there; nothing less, nothing more.

The same is true of the claim that people would endorse an egalitarian presumption behind the veil of ignorance. Rawls explicitly structures the choice situation to produce this result, so it cannot furnish an argument in favour of the desirability of the result. Had he asked them to make other assumptions behind the veil of ignorance, no doubt they could have been induced to pick a different principle. For instance, as Harsanyi noted in an early critique, had people been characterized as more risk embracing than Rawls characterizes them as being in the original position, then they would have been more apt to choose utilitarianism over his conception of justice.¹² If there is to be a presumption in favour of equality, it stands in need of a justification that is independent of an expository device which assumes that its desirability has already been established.

B MORAL ARBITRARINESS

What is Rawls’s independent argument for an egalitarian presumption? One candidate is his moral arbitrariness thesis, the claim that differences among us – whether products of nature or nurture – are accidental from a moral point of view. Rawls is right to say that distributive outcomes that

¹⁰ For the ‘veil of ignorance,’ see Rawls, *Theory*, *supra* note 1 at 118–23. In the final formulation of his principles, *ibid* at 52–6, Rawls opts for the standpoint of the worst off as the standpoint of justice, but this is only because of the assumption that if the person most adversely affected by a policy would choose it, then so would everyone else. In this way, the standpoint of the worst off functions as a proxy for the standpoint of all. Questions can be raised about the plausibility of these moves; see Ian Shapiro, *Evolution of Rights in Liberal Theory* (London: Cambridge University Press, 1986) at 226–30 [Shapiro, *Evolution*].

¹¹ Rawls, *Theory*, *supra* note 1 at 74.

¹² John Harsanyi, ‘Can the Maxim in Principle Serve as a Basis for Morality? A Critique of John Rawls’s Theory’ (1975) 69 *American Political Science Review* 594.

are shaped by those differences stand in need of justification. His argument about moral arbitrariness is persuasively subversive of any version of the thesis that losses (or gains) should lie where they fall.¹³ Indeed, I have argued elsewhere that Rawls is insufficiently thoroughgoing in his defence of this thesis. His attempt to distinguish capacities, which are said to be distributed in morally arbitrary ways, from the choices people make about how to use those capacities, which are not, fails. There is no good reason to suppose that differences in the capacity to decide to use one's capacities more or less effectively are any less arbitrary, from a moral point of view, than are differences in the capacities themselves.¹⁴ This is, to be sure, a disconcerting conclusion; it threatens to obliterate widespread convictions about ownership and personal responsibility. But that does not mean that Rawls supplies us with convincing reasons to avoid it.

The impulse to defend an egalitarian presumption in the literature since Rawls has been animated by fending off what G A Cohen identified in 1989 as 'the anti-egalitarian right.'¹⁵ The motivating worry was that any conception of fair distribution that ignored rewarding effort and ambition would be so implausible that no one would give it the time of day. This is, indeed, a real possibility unless some limits can be put on moral arbitrariness. It was, presumably, considerations of this sort that motivated Rawls's unsuccessful attempt to distinguish capacities from the uses to which they are put that I have just mentioned. Similar considerations lead Ronald Dworkin to propose a view of distributive justice that takes account of the Rawlsian insight about moral arbitrariness but is nonetheless 'ambition sensitive.' Dworkin's view requires a view of equality by reference to which 'people decide what sorts of lives to pursue against a background of information about the actual costs that their choices impose on other people and hence on the total stock of resources that may fairly be used by them.'¹⁶ This he tries to achieve by assigning 'tastes and ambitions' to the person, and 'physical and mental powers' to his 'circumstances,' arguing that the former, but not the

13 Rawls, *Theory*, supra note 1 at 12, 15, 72–3, 101–3, 507–11. In one of the earliest systematic statements of *laissez-faire* in torts, Oliver Wendell Holmes argued for a benchmark presumption that losses should lie where they fall; Oliver Wendell Holmes, 'Lecture III' in *The Common Law* by Oliver Wendell Holmes (Cambridge, MA: Harvard University Press, 2009).

14 Ian Shapiro, 'Justice and Workmanship in a Democracy' in *Democracy's Place* by Ian Shapiro (Ithaca and London: Cornell University Press, 1996) at 64–9; 73–5 [Shapiro, *Democracy's Place*].

15 GA Cohen, 'On the Currency of Egalitarian Justice' (1989) 99 *Ethics* 906 at 933 [Cohen, 'Egalitarian Justice'].

16 Ronald Dworkin, 'Equality of Resources,' pt 2 of 'What Is Equality?' (1981) 10 *Philosophy and Public Affairs* 283 at 288 [Dworkin].

latter, are irrelevant in deciding how resources should be distributed.¹⁷ In this way, he hopes to rescue the idea of a responsible agent.

Dworkin's strategy also fails. The ambitions that it occurs to us to develop, no less than the volitions we are able to form, are greatly shaped – perhaps even determined – by our powers and capacities. When we describe someone as ambitious, we may be describing something basic to her psychology and constitution, but do we have any good reason to believe that this is a product neither of her physical and mental powers nor her upbringing and life circumstances? To 'think big,' to 'resolve to go for broke,' to steel oneself through self-control to perform demanding acts, do these reflect ambition or capacity? There are certainly circumstances in which we would say that lack of confidence is an incapacity that prevents the formation (not just the attainment) of particular ambitions. Different people have different capacities to form different ambitions, and those different capacities must be as morally tainted from Dworkin's point of view as any other capacities. Donald Trump is able to develop more far-reaching ambitions than, say, Homer Simpson due, at least partly, to luck in the genetic pool and the circumstances of his upbringing.

The idea that we form our ambitions in some way that is independent of our resources and capacities assumes, implausibly, that we can conceive of goals independently of our understanding of our capacities and life circumstances. This should be evident to anyone who tries to perform a thought experiment in which she is required to choose her future ambitions while kept in ignorance of powers, capacities, and circumstances. The world is riddled with what I have described as empathy gaps which limit the aspirations people find conceivable, let alone plausible, as a result of their lived experiences. You can readily imagine yourself stepping over a puddle, perhaps even swimming a wide river; but will it occur to you to consider possibilities that are on the far side of an ocean?¹⁸

Similar arguments can be made about the different abilities to form (or refrain from forming) different kinds of tastes, whether expensive, compulsive, or both. Are we to say of an alcoholic, whose affliction is so severe that he cannot even form the desire not to be an alcoholic, that the preference for alcohol results from his *taste* rather than his *incapacity*? I think not.¹⁹ With all acquired tastes (not just the expensive),

¹⁷ Ibid at 302.

¹⁸ See Ian Shapiro, *The State of Democratic Theory* (Princeton, NJ: Princeton University Press, 2003) at 128–39 [Shapiro, *State*].

¹⁹ Dworkin is partly aware of this difficulty. The case he considers is one in which someone has an incapacitating obsession that he wishes he did not have. Dworkin deals with this by arguing that such cravings should be thought of as handicaps and thus

experiencing the taste is by definition conditional on the exercise of pertinent capacities. A taste for good beer or even just for beer, a taste for a particular kind of music, perhaps even for any music – these can be developed only through the exercise of relevant capacities. We would not attribute a taste for music to someone who was born deaf, although we might intelligibly say that such a person could wish she could have such a taste. Likewise with beer and someone who lacks functioning taste buds or a sense of smell. Dworkin's motivating intuition here is that people should be held responsible only for the choices they make in life, not for things over which they have no control. A variant of this thesis might be defensible, but his treatment of it is no more persuasive than Rawls's. The result is that Dworkin has not, as Cohen claims, 'performed for egalitarianism the considerable service of incorporating within it the most powerful idea in the arsenal of the anti-egalitarian right: the idea of choice and responsibility.'²⁰

Cohen himself had a go at this problem, but not with any more success than Dworkin or Rawls. Cohen tries to diminish the problem by insisting that we should not confuse the valid claim that our capacities for effort are 'influenced' by factors beyond our control with the false claim that people like Nozick mistakenly attribute to egalitarians like Rawls, that those capacities are 'determined' by factors beyond our control. Pointing to this distinction enables Cohen to say that, although not all effort deserves reward, some effort does deserve reward, so that effort is partly praiseworthy and partly not – although he concedes that, in practice, 'we cannot separate the parts.'²¹

To the extent that this is a practical problem, it is a devastatingly large one, given that the topic at hand is whether and to what extent the state should engage in redistribution or other remedial action to compensate for differences in outcomes resulting from these practically inseparable parts. But it is in any case misleading to say that it is only a practical problem. Once we concede that the very decision to choose to

handled via a hypothetical insurance scheme. Dworkin asks us to speculate about whether, *ex ante*, people with a given finite supply of resources to spend on insurance would have insured against turning out to have the handicap in question; see Dworkin, *supra* note 16 at 283–90. I have noted the difficulties with this scheme in Shapiro, *Democracy's Place*, *supra* note 14 at 70–1. It is, in any case, irrelevant to the point being made here, which is that the obsession may itself incapacitate a person from forming the relevant second-order desire to make Dworkin's hypothetical insurance solution work.

²⁰ Cohen, 'Egalitarian Justice,' *supra* note 15 at 933.

²¹ See Nozick, *supra* note 7; GA Cohen, 'Equality of What? On Welfare, Goods, and Capabilities' in Martha Nussbaum & Amartya Sen, eds, *The Quality of Life* (Oxford: Oxford University Press, 1993) at 14–5.

expend effort is influenced by morally arbitrary factors, it becomes evident that the difficulty becomes one of principle rather than practicality. Certainly, Cohen offers no account of how that component of effort meriting reward might, in principle, be singled out.

Rawls, Dworkin, and Cohen all write as if the moral-arbitrariness argument generated an egalitarian presumption that would be so radical that no one would take it seriously unless some limits could somehow be put on it. They think that this is essential in order to rescue the idea the people should be held responsible for the choices they make, so that they can fairly be said to deserve the resulting benefits or costs. Yet the ongoing attempts to articulate the limits in question fail, as I have just noted, because the moral arbitrariness noose throttles the notions of choice and responsibility if it kills anything at all.

But Rawls, Dworkin, and Cohen fail to appreciate that rescuing the ideas of choice and responsibility in order to save a suitably chastened egalitarian presumption is unnecessary if that presumption is thought to rest, in turn, on embracing Rawls's moral-arbitrariness argument. This is true for the simple reason that Rawls's moral-arbitrariness argument, while valid, generates no distributive presumption of any kind. To be sure, differences in our ambitions, tastes, and volitions depend vitally on forces beyond our control; as such, they are morally arbitrary for the same reason that differences in our capacities and circumstances are morally arbitrary. All such differences stand in need of justification. But the same is true of similarities in our ambitions, tastes, and volitions. They are morally arbitrary for the same reason that similarities in our circumstances and capacities are morally arbitrary. They, too, stand in need of justification. As Susan Hurley puts it, there is 'no more a priori reason to regard difference of position as a matter of luck than to regard sameness of position as a matter of luck: people may not be responsible for either.'²² Rawls's moral-arbitrariness argument establishes nothing more than that every distributive arrangement stands in need of a justification. There is no presumptive benchmark.

²² Susan Hurley, 'Luck and Equality' (2001) Supp 75 Proceedings of the Aristotelian Society 51 at 56. As she elaborates, '[C]onsiderations of responsibility do not direct us to take equality as the default position: they neither specify nor justify doing so. The immediate consequence of this point is that luck-neutralizing per se does not require us to neutralize only one kind of relation that is a matter of luck and not another . . . People are not responsible for equal amounts of manna, or any other particular amounts; they are not responsible for it at all'; *ibid* at 56–7. See generally Susan Hurley, *Justice, Luck, and Knowledge* (Cambridge, MA: Harvard University Press, 2003) at 146–80.

2.3. THE KANTIAN INTERPRETATION

Perhaps Rawls's most plausible candidate for an independent justification of his egalitarian presumption is the so-called Kantian interpretation of his principles as procedural expressions of the categorical imperative.²³ But a commitment to Kantian autonomy does not entail embracing any particular distributive regime any more than the commitment to moral arbitrariness does. The injunction never to use people exclusively as means to your own ends could no doubt be shown to rule out slavery, but no protagonist in the distributive justice literature of whom I am aware is advocating the establishment of slavery. The example of slavery is, in any case, instructive here inasmuch as the Kantian objection is not to the distributive dimensions of a slave economy but rather to the abnegation of a person's humanity by making them the property of another. The Kantian objection to slavery would stand even in the face of arguments showing that slaves enjoyed distributive benefits that might otherwise be denied them. 'We give our slaves more than you pay your workers' would not pass muster as a defence of slavery, even if it was true.²⁴ (Similar points could be made about Apartheid, 'separate but equal,' and related dehumanizing statuses. They are often accompanied by distributional inequity, but it is the dehumanization, not the inequity, that makes them objectionable).

There are two different objections to distinguish in considering Rawls's Kantian interpretation of the principles he promotes. The less fundamental one is to observe that, if our goal were to do our best to preserve the autonomy of all (and assuming that we could operationalize that aspiration in an intelligible fashion), what would be needed is a matter for political economists and policy wonks. How much, if any, in the way of redistribution toward equality would be effective in achieving that goal depends on complex considerations about the effectiveness and costs of different redistributive instruments, about the incentive-effects of redistribution on growth, and about the relations between the size of the economic pie and the benefits that trickle down to the least well endowed. Rawls genuflects in this direction when he declares his theory to be agnostic as between capitalism and socialism.²⁵

²³ Rawls, *Theory*, supra note 1 at 226.

²⁴ Why the case against slavery should be detached from claims about its economic benefits has been eloquently put in Robert William Fogel, *Without Consent or Contract: The Rise and Fall of American Slavery* (New York: Norton, 1994) at 388–417.

²⁵ Rawls, *Theory*, supra note 1 at 242. Kant was well aware of this, insisting that 'welfare does not have any ruling principle' because it depends 'on the will's material aspect, which is empirical and thus incapable of becoming a universal rule'; Immanuel Kant, *The Contest of Faculties* in Hans Reiss, ed, *Kant's Political Writings*, translated by HB Nisbet (London: Cambridge University Press, 1970) 176 at 183–4.

But a deeper objection rears its head when we start to wonder whether preserving everyone's autonomy is even intelligible as a distributional idea. The transition from Kantian universalism to an egalitarian presumption must involve some version of the claim that we are bound to respect the autonomy of all equally. But what can this mean when the injunction we are seeking to obey assumes that we should concede (as Kant, realistically, did) that people use one another as means all the time and merely instructs us not to use one another *exclusively* as means to our own ends? It is difficult to see how this can have any distributive dimension at all. Treat everyone with consideration? With the same *amount* of consideration? What could such an injunction actually mean? Kant's dictum seems more likely to generate aphorisms of good conduct and manners ('Don't be rude!' 'Don't be a bully!' 'Don't be gratuitously mean!') than any distributive principle. The Kantian interpretation of Rawls's principles is just not enough to generate an egalitarian presumption because it is not enough to generate any distributive presumption.

But why should we *want* to commit to an egalitarian distributive presumption? Michael Walzer pointed out over a quarter of a century ago that it is not inequality as such that people find objectionable so much as the uses people make of unequally distributed assets. In particular, it is when people use the resources in their control to dominate others that we take exception to their having those resources. It is the use of wealth to corrupt a politician or to 'buy' a place in college for an otherwise undeserving child that generates resentment.²⁶ Walzer's solution, to build barriers between the spheres in which different goods appropriately hold sway, confronts difficulties, as I note in Part IV.A below. But they do not detract from the force of his telling underlying intuition that it is domination rather than inequality that is objectionable.

In arguing against an egalitarian presumption, I should not be construed as throwing my lot in with those who maintain that arguments about justice should abjure distributive considerations. Marx famously held that, to understand the dynamics of exploitation, we must forsake the realm of distribution for that of production.²⁷ More recently, such theorists as Iris Marion Young and Nancy Fraser have suggested that the distributive paradigm should give way to a focus on recognition and domination.²⁸ I am less than entirely clear about what the term

²⁶ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1984) at 3–30 [Walzer].

²⁷ Karl Marx, *Capital*, vol 1 (London: Penguin Books, 1976) at 270–82.

²⁸ Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990) at 15–65; Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Postsocialist" Age' (1995) 212 *New Left Review* 68.

‘paradigm’ means in these arguments. I think that proponents of these views are wrongheaded if they maintain that we can reason fruitfully about justice in the absence of distributive considerations or even that, in the absence of distributive considerations, we can reason fruitfully about the dimensions of justice to which the theorists in question point. Marxian exploitation is, in significant part, about the distribution of work, recognition is about the distribution of status, and domination is about the distribution of power. Moreover, as I spell out in the course of discussing Philip Pettit’s view in Part IV.E below, there are many settings in which achieving non-domination requires attention to – and sometimes redistribution of – material and other resources. Rather than conceive of non-domination as an alternative to distributive justice, we do better to think of non-domination as the essence of justice and acknowledge that it is often intimately linked to distributive considerations. To think otherwise leads down the path of symbolic victories that, at best, obscure what justice requires and often work at cross-purposes with it.

D EQUALITY AS NEUTRALITY?

Yet another Rawlsian contender for equality as the bedrock of justice piggybacks on the idea of neutrality. Rawls’s theory of justice as fairness requires the state to be neutral among competing ‘permissible’ conceptions of the good life and the comprehensive doctrines that give rise to them. For Rawls, this means guaranteeing the opportunity to pursue any such conception and prohibiting government from favouring any particular one or giving ‘greater assistance to those who pursue it.’ Instead, the state is admonished to adopt what we might think of as a disestablished stance toward permissible conceptions of the good life: it should guarantee the freedom to pursue any of them, but it should not promote one – or some – above the others.²⁹

This might seem like an unequivocal, bedrock egalitarianism, since the protections and guarantees of disestablishment are equally available to all – but this is not really so. Notice, for one thing, that Rawls is unperturbed by the unequal effects of his institutional neutrality. He acknowledges that his favoured regime would have ‘important effects and influences on which comprehensive doctrines endure and gain adherents over time’ which it would be ‘futile to try to counteract.’³⁰ Furthermore,

²⁹ See John Rawls, ‘The Priority of Right and Ideas of the Good’ [Rawls, ‘Priority’] in John Rawls, *Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999) 449 at 457–61 [Rawls, *Collected Papers*]; and Rawls, *Theory*, supra note 1 at 354–5. Rawls does invoke the idea of disestablishment in this context but, for reasons elaborated in the next paragraph, it seems to me to capture the essence of his claim.

³⁰ Rawls, ‘Priority,’ *ibid* at 460.

Rawls's neutrality rule is anti-egalitarian in a more immediate sense than is captured by this admission because different permissible comprehensive doctrines do not fare equally well under its strictures. Most obviously, someone who either has no religion or whose comprehensive doctrine includes the belief that religious practice has no place in the public square gets exactly what she wants from Rawls's scheme, whereas someone who favours an established church (not to mention a fundamentalist one) does not. The defence of Rawls's 'neutral' stance toward permissible conceptions of the good, after all, is never that all will fare equally well, but rather that all will enjoy as much freedom as it is possible to have, consistent with guaranteeing a like liberty to all.³¹ The partisan of an established church has more religious freedom in the dis-established regime than would the nonconformist in a regime with an established church, but it remains true that the former fares less well than the latter in Rawls's dis-established regime. Concededly, there is a residual sense in which this principle treats adherents to all comprehensive doctrines alike: they are all guaranteed the maximal religious freedom that is compatible with a like liberty for all. But try selling that as equal treatment to someone who favours religious establishment. Equality is not doing the contentious work here.

More important, the preceding discussion only deals with the state's appropriate stance toward comprehensive doctrines and permissible conceptions of the good. It does not touch the procedures by which Rawls classified them as permissible or impermissible to begin with. He is unequivocal that the process for doing that is not procedurally neutral. As noted in Part II.A above, procedures behind the veil of ignorance are self-consciously gerrymandered to induce the reader to embrace Rawls's conception of justice-as-fairness – including the thin theory of the good that sets the limits of permissibility. It follows that judgments about acceptability of comprehensive doctrines and conceptions of the good cannot be said to result from a neutral process. As for later formulations, Rawls remains forthright that justice as fairness cannot guarantee 'an equal opportunity to advance any conception of the good.' It allows the pursuit only of permissible conceptions, defined as 'those that respect the principles of justice.'³² The only sense in which the mature Rawls appeals to procedural neutrality is in claiming that it embodies 'a political conception that aims to be the focus of an overlapping consensus.' Famously, the overlapping consensus 'includes all the opposing philosophical and religious doctrines likely to persist and to gain adherents in a

³¹ Rawls, *Theory*, supra note 1 at 220, 266.

³² Rawls, 'Priority,' supra note 29 at 459.

more or less just constitutional democratic society.³³ The overlapping consensus ‘seeks common ground – or if one prefers, neutral ground – given the fact of pluralism.’³⁴ Whatever this means, it cannot be that the justness of a political order depends on its embodying neutrality as common ground because the defence of neutrality as common ground is that it is (said to be) compatible with a just political order. The defence of procedural neutrality is not itself procedurally neutral. A fortiori it cannot be a stalking horse for a bedrock commitment to equality.³⁵

III *Domination: A particular kind of unfreedom*

If inequalities are objectionable only to the extent that they facilitate domination, the question arises as to what domination is. How do we know it when we see it? And why should we care about its presence? This requires attending to the relations between non-domination and freedom. If we think of freedom as the *summum bonum*, as some theorists propose that we do, then non-domination would stand in the same relation to freedom as I have just been arguing equality stands to non-domination. Non-domination would be an instrumental good, when it is a good, geared to realizing freedom. I want to say something different. Non-domination is more closely related to freedom than it is to equality; indeed, it is a kind of freedom. As a result, the literature on freedom is, indeed, relevant to understanding the sources of domination and its amelioration, as we will see. But non-domination merits independent

33 John Rawls, ‘Justice as Fairness: Political Not Metaphysical’ (1985) 14 *Philosophy and Public Affairs* 223 at 225–6 [Rawls, ‘Justice as Fairness’].

34 Rawls, ‘Priority,’ supra note 29 at 459.

35 A similar difficulty arises in Charles Larmore’s defence of neutrality. He argues that when people disagree about something that is an obstacle to the agreement they are trying to reach, both should prescind from the beliefs that the other rejects to see if there is neutral common ground ‘with the hope of either resolving the dispute or bypassing it.’ He calls this ‘moral norm of equal respect’ neutral in that it is ‘compatible with a wide range of views about the good life on which reasonable people disagree’; see Charles Larmore, *Patterns of Moral Complexity* (London: Cambridge University Press, 1987) at 53, 65–6. But as James Fishkin notes, there is no reason to believe that this neutrality-as-common ground principle will yield any particular political conclusions – let alone those that Larmore claims for it – such as religious toleration or something like Rawls’s difference principle; see James Fishkin, Book Review of *Patterns of Moral Complexity* by Charles Larmore, (1989) 17 *Political Theory* 153 at 153–6. Even if it did, this would not amount to a justification of it, as Larmore concedes in his response to Fishkin, ‘Although I try to explicate the content of equal respect, I offer no justification of this norm itself. I have no idea of how such a justification would proceed . . .’; Charles Larmore, ‘Liberal Neutrality: A Reply to James Fishkin’ (1989) 17 *Political Theory* 580 at 581.

demarcation so as to avoid our being caught up in controversies that need not be resolved in order to make a compelling case for non-domination as the bedrock of justice.

Non-domination is a negative term, defined as the antithesis of domination. I will have more to say later about its negative and reactive character. Here, my focus is on the particular kind of constraints on freedom at which it is directed. That is, before focusing on non-domination, we should say something about domination. Four features of domination merit particular attention.

Domination is, first, a type of unfreedom that involves a significant human element. A natural chasm or a medical condition can limit our freedom, but we would not identify either as a source of domination. We experience domination when our freedom is curtailed because we are in the power of others, be they slaveholders, torturers, spouses, or employers. This is not to insist that domination always results from conscious human agency. Domination can be experienced as a by-product of political, social, and economic structures. Such structures are not reducible to human agency, but they could not exist without it. This human element differentiates domination from other kinds of unfreedom, and it means that appeals to eliminate sources of domination are always in some sense – however attenuated – directed at changing things that human beings do.

Domination is a distinctive kind of unfreedom also in that it is generally taken to be alterable by those who are responsible for it. A parent's freedom is curtailed by a crying infant, but this is not domination because the infant is powerless to do anything about it. When a person or state of affairs is indicted as responsible for domination, the presumption is triggered that relevant agents can behave differently in ways that would alleviate the domination – at least, in principle. People can, of course, be wrong about what will work; they may attribute their powerlessness to the vindictiveness of an angry god who can be appeased only by making a human sacrifice. Or they may correctly identify ethnic hatred as a source of their oppression and be right that, in principle, it could be eliminated; yet, no one may know how to accomplish this, in fact. Describing unfreedom as domination alludes to the possibility of its elimination; realizing that possibility is another matter.

This is not to say that all sources of domination in the world can be curtailed. Limiting the power of investment bankers might involve enhancing that of government regulators, and it is an empirical question whether the regulators are more or less prone than the bankers to engage in domination. Foucault may have been right that throwing off one domineering yoke typically creates new possibilities for domination, but it is an open question whether this is always so. Even if it is, some

kinds of domination will be more severe than others, and some kinds will be borne by people who are more vulnerable to its deleterious effects than are others. Any full-blown account of non-domination would have to investigate these differences. My power-based resourcism is intended as a step in that direction.

Domination is, third, a kind of unfreedom that carries the whiff of illicitness. Our freedom is often curtailed when we are in the power of others, but this is not domination unless that power is somehow abused or pressed into the service of an illegitimate purpose. Children are in the power of parents, students of teachers, workers of employers; in all these cases, their freedom is limited. But we only think of it as domination if those in positions of authority abuse their power in some way, as when an employer or teacher demands sexual favours as a condition for promotion or a good grade. When people accuse one another of domination, they do it in order to question the legitimacy of a power relationship. Even domination fantasies underscore this; they involve fetishizing dungeons, slavery, or other illicit forms of control. When we say someone is domineering, we express disdain; calling them powerful has no necessary negative valence. Wars of domination are not regarded as just; whereas wars to escape its yoke are seen as defensible. There are exceptions, to be sure. Sports teams can be said to dominate one another without prejudice to the dominator, and economists sometimes talk neutrally of one choice as dominating another, but these really are exceptions. Domination, as such, is seldom defended as desirable. When it is, as by Nietzsche, this is generally condemned as an amoral promotion of an übermensch syndrome – or worse.³⁶

This inevitably raises the question: who identifies illicitness, and how? I have adopted a two-pronged approach to this challenge, involving qualified deference to contextual knowledge or ‘insiders’ wisdom.’ The idea is to agree, but only up to a point, with Alasdair MacIntyre and Michael Walzer that the values guiding human social practices should be defined by the participants via procedures that have evolved over time as

³⁶ Nietzsche’s defence of the will to power is, in any case, an account of the desire not to dominate others but to behave with indifference toward them. Indeed, he blamed the advent of democracy for the political and social domination – such as barbaric criminal punishments – that he identified around him. He had contempt for the individualism of his day, but this was because he saw it as a perversion of the romantic individualism, marked by the single-minded pursuit of greatness, that he treasured; Friedrich Nietzsche, *The Genealogy of Morals in The Birth of Tragedy and the Genealogy of Morals*, translated by Francis Golffing (New York: Anchor Books, 1956) 147 at 158–229. Arguably this takes self-absorption to the point of narcissism, which is, perhaps, one reason why Nietzsche so often appeals to teenagers when they first dabble in philosophy but seems puerile to more mature minds.

appropriate for those choices.³⁷ Insiders command the relevant street-level knowledge to distinguish licit from illicit uses of authority. But our deference to them should be qualified because external judgments appropriately kick in when basic interests are at stake. So it makes sense to respect parental judgments about the medical treatment of their children, but not when the child of Christian Scientists will die as a result of being denied a blood transfusion. It makes sense to defer to managerial practices that have evolved within firms and universities, but not when they become smokescreens for perpetrating rape. And it makes sense to require schools to accommodate parents in matters of sexual mores, but not when it comes to denying children vital knowledge about sexually transmitted diseases. If basic interests are compromised or threatened, the state rightly takes an interest, though what it should do depends on the seriousness of the threat to basic interests and the availability of remedial instruments that do not create more serious forms of domination than those that they prevent.³⁸

Fourth, a distinctive kind of particularism is invoked when people speak of domination and non-domination that need not be present when they speak of freedom or the lack of it more generally. This particularism is linked to domination's rootedness in human collective arrangements. If domination is always, ultimately, because of the actions or practices of others, then any charge about domination naturally leads to pointed questions about those actions or practices. Whose? What? How do they produce control, and why is it illicit? As we will see, this means that arguments about domination involve relational claims that are invariably rooted in specifics. Perhaps people are unfree in some existential sense if determinism is true, if we are 'being towards death,' as Heidegger said,³⁹ or for some other reason unrelated to human social relations. Domination, however, is rooted in the particular.

A different tack, taken by Philip Pettit, is to treat non-domination as the political mechanism to realize the philosophical ideal of freedom. I will have more to say about Pettit's institutional arguments in Part IV.E. Here I will just say that to treat non-domination as the instrument for achieving freedom, as Pettit does, undersells non-domination's importance as a normative ideal in its own right rather than as an instrument

³⁷ Alasdair MacIntyre, *After Virtue*, 2d ed. (Notre Dame, IN: University of Notre Dame Press, 1984) at 181–203; Walzer, *supra* note 26 at 10–20.

³⁸ In this, there is a parallel with Rawls's metric of justice inasmuch as he endorses interpersonal judgments about primary goods but not about the uses people make of those goods in their life plans; see Shapiro, *Democratic Justice*, *supra* note 2 at chs 2–3.

³⁹ Martin Heidegger, *Being and Time*, translated by John Macquarrie & Edward Robinson (New York: Harper and Row, 1962).

to achieve some other benefit. Moreover, I worry about a defence of non-domination that makes it hinge on our first buying a particular contestable view of freedom. Pettit contends that non-domination is the best available instrument to realize his theory of freedom as ‘discursive control.’ Some elements of this account of freedom are appealing to me; others I find problematic.⁴⁰ I think it is a mistake to hold the case for non-domination hostage to prior resolution of these issues.⁴¹

Max Weber held that existence of domination requires ‘the actual presence of one person successfully issuing orders to others.’⁴² My conception is broader in that I think domination can (and often does) occur without explicit orders emanating from identifiable agents. Domination can result from inadvertent and unconscious actions as a by-product of the distribution of resources, and it can be embedded in structural relationships. My conception is narrower than Weber’s, however, in that I regard domination as arising only from the illicit exercise of power. Compliance is often compelled in armies, firms, sports teams, families, schools, and countless other institutions, but this is not domination unless it is deployed for an illegitimate purpose. In sum, my conception of domination differs from other types of unfreedom in that it focuses attention on particular and alterable human sources of illicit control. The difficulties inherent in generalized commitments to freedom or equality are thereby avoided. As a result, I think that the ideal of non-domination offers a superior basis for political analysis and argument. It can appeal to people who think freedom and equality the highest goods because it captures much of what motivates them to prize those ideals in the first place (I take this to be a plus). We might regard it as part of the overlapping consensus or the incompletely theorized agreement among liberals, who value freedom, and egalitarians, who value equality.⁴³

40 In particular, I am leery of any conception of freedom that requires a prior commitment to agreement and shared goals. Philip Pettit, *A Theory of Freedom* (London: Oxford University Press, 2001) at 67ff; also Pettit, *Republicanism: A Theory of Freedom and Government* (London: Oxford University Press, 1997) [Pettit, *Republicanism*], discussed in Part IV.E below.

41 In fairness to Pettit, he does not deny that there may be defences of non-domination other than the one he supplies. His argument, after all, is in the first instance a theory of freedom, not one of non-domination – so one could read him as saying that embracing his account of freedom as discursive control is sufficient to justify non-domination as he understands it but not necessary.

42 Max Weber, *Economy and Society*, ed by Guenther Roth & Claus Wittich (Berkeley, CA: University of California Press, 1968) at 53.

43 See Rawls, ‘Justice as Fairness,’ supra note 33; Cass R Sunstein, ‘Incompletely Theorized Agreements’ (1995) 108 Harv L Rev 1733.

IV *Conceptions of non-domination*

The preceding discussion suggests that non-domination is to be preferred as a bedrock political commitment either to freedom or to equality, but it does not tell us everything we need to know about non-domination. In recent decades various commentators have countenanced the idea, but they have meant different things by it. In addition to Walzer, Jürgen Habermas, Michel Foucault, Quentin Skinner, and Philip Pettit have also appealed to the ideal of non-domination in their political arguments. Each of their views has something to commend it, but each also exhibits limitations, which, I explain, combine to suggest the wisdom of embracing my alternative account of non-domination.

A HABERMAS

Habermas is well known for grounding his account of democratic politics, with its guiding normative idea of legitimacy, in what people would agree to in the absence of coercion.⁴⁴ Just how he unpacks the notion of uncoerced agreement has evolved over time, from earlier accounts of an ‘ideal speech situation’ to his more recent writings on law and democracy.⁴⁵ Running through his different formulations is the notion of uncoerced rational agreement. Habermas wants to specify procedures and constraints that would enable people to reach genuine agreement, where this means that they would neither be confused by superstition or ideology nor cowed by imperatives for subservience. People would be persuaded of the best argument because it is the best argument. In one way, his account is less ambitious than is Rawls’s: Habermas does not specify particular institutions or distributive arrangements that he believes would be selected under his ideal conditions. These are not subjects for armchair philosophy on his account; they would result from people’s uncoerced deliberations. This renders Habermas immune from the difficulties that Rawls confronts in trying to establish that the

⁴⁴ For all intents and purposes, Habermas’s use of the term ‘legitimacy’ is equivalent to what I mean by ‘justice.’

⁴⁵ On the ideal speech situation, see Jürgen Habermas, ‘Wahrheitstheorien’ in Helmut Fahrenbach, ed, *Wirklichkeit und Reflexion* (Pfullingen: Neske, 1973) at 211; and, ‘Reflections on the Linguistic Foundations of Sociology’ in *On the Pragmatics of Social Interaction* by Jürgen Habermas (Cambridge, MA: MIT Press, 2001) 1. For subsequent formulations, see Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1998); Jürgen Habermas, ‘Rightness versus Truth: On the Sense of Normative Validity in Moral Judgments and Norms’ in *Truth and Justification* by Jürgen Habermas (Cambridge, MA: MIT Press, 2003) 237.

institutions he favours would be chosen in the original position or be supported by his overlapping consensus.⁴⁶

Habermas's position is more demanding than Rawls's, however, in that there is no analogy in his evolving account to Rawls's 'political, not metaphysical' move. An Enlightenment Kantian to the core, Habermas expects not only that people can agree on the right answers to normative questions about politics but also that, if they deliberate properly and in good faith, they can also agree on why they are the right answers. Indeed, without this second-order agreement, their deliberation cannot be called authentic. And while, unlike Rawls, Habermas does not rule out religious and other sectarian motivations for their arguments, he expects people to agree that only secular reasons will be accepted as telling in formal deliberative settings such as parliamentary debates or in legislative processes.⁴⁷ His discourse ethics will not settle for mere tactical coalitions or any kind of *modus vivendi*. His ideal is deliberative agreement in a public square, modelled on his vision of the kind of engaged public intelligentsia that he believes existed in nineteenth-century Europe but in his view has been compromised by the subsequent evolution of modern economies, societies, and politics.⁴⁸

Habermas's defenders sometimes emphasize that his accounts of ideal speech and communicative ethics are not meant to describe actual deliberative settings: they embody no more than a regulative ideal that is designed to help us reason about the appropriate constraints on, and preconditions for, democratic politics.⁴⁹ Perhaps so, but his regulative ideal nonetheless rests on at least two extravagantly demanding assumptions. The first is that people are all Kantians at heart; that everyone can be brought to accept that only views that they can translate into a compelling secular idiom may legitimately hold sway in public political debate. Since there is no good empirical reason to believe this, Habermas's position amounts to unilateral privileging of secular universal views, a kind of rationalist overreaching that assumes what he needs to

46 See Shapiro, *The Moral Foundations of Politics* (Princeton, NJ: Yale University Press, 2003) at 109–41.

47 Jürgen Habermas, 'Religion in the Public Sphere: Cognitive Presuppositions for the "Use of Reason" by Religious and Secular Citizens' in *Between Naturalism and Religion: Philosophical Essays* by Jürgen Habermas (Cambridge, UK: Polity Press, 2008) 114; Jürgen Habermas, "'The Political": The Rational Sense of a Questionable Inheritance of Political Theology' in Jonathan Van Antwerpen, ed, *The Power of Religion in the Public Sphere* (New York: Columbia University Press, 2011) 15.

48 Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Boston, MA: MIT Press, 1991).

49 See Kevin Olson, 'Deliberative Democracy' in Barbara Fultner, ed, *Jürgen Habermas: Key Concepts* (Durham, NC: Acumen Press, 2011) 140.

establish. This might be congenial to people who already agree with Habermas, but it is unlikely to persuade those most in need of persuasion.⁵⁰ Imagine trying to convince a religious fundamentalist that requiring their religious views to be defensible in a secular idiom if they are to play a role in politics does not amount to bias. The goal of limiting domination should not be held hostage to the possibility, however speculative, that minds might in principle meet.

The second profligate assumption is that a set of constraints could be established that would banish the threats of power and coercion from political debate. This is needed for his venture to get off the ground because deliberation in power-laden settings is inherently suspect. Even if, per impossible, procedures could be devised to achieve this result, it is unclear what would have been established. The Habermasian enterprise consists of setting as preconditions for democratic politics the very issues that give rise to the need for them. It is just because power is endemic to human interaction that imperatives arise to manage power relations so as to mitigate the possibility of domination when it cannot be escaped. But for these imperatives to be useful they must be rooted in an understanding of how power actually operates, not in a series of speculations about what the world would be like if it were not there.⁵¹ The Habermasian gambit ignores the reality that motivates this project: that power relations are endemic to human interaction. Without them, democratic politics would be unnecessary.

B FOUCAULT

Foucault's view of domination is more appealing than is Habermas's because it is rooted in the recognition of the ineradicable character of power. In a series of histories of human social relations ranging from family life to sexuality, to insanity, to imprisonment and other forms of social control, he has exposed the dark underbelly of the Enlightenment.⁵²

⁵⁰ See Maeve Cooke, 'Violating Neutrality? Religious Validity Claims and Democratic Legitimacy' in Craig Calhoun, Eduardo Mendieta, & Jonathan Van Antwerp, eds, *Habermas and Religion* (Cambridge, UK: Polity Press) [forthcoming in 2012].

⁵¹ See Shapiro, *State*, supra note 18 at 33–4 for elaboration; see also Albenaz Azmanova, *The Scandal of Reason* (New York: Columbia University Press, 2011) at ch 2.

⁵² Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language* (New York: Pantheon, 1972); Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* (New York: Vintage Books, 1988); Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1995); Michel Foucault, *The History of Sexuality* (New York: Vintage Books, 1990); Jürgen Habermas, *Legitimation Crisis*, translated by Thomas McCarthy (Boston, MA: Beacon Press, 1975); Jürgen Habermas, *The Theory of Communicative Action*, vol 1 (Boston, MA: Beacon Press, 1984); Jürgen Habermas, 'Three Normative Models of Democracy' (2006) 1 Constellations 1.

Foucault offers riveting illustrations of the ways in which naked coercion was displaced by subtler mechanisms of control – often masquerading as instruments of liberation. Compelling as Foucault’s histories frequently are, from my point of view here, his outlook falls short in three ways.

It is, first, too reductionist. I am enough of a Foucauldian to believe that speculating about what politics would be like in the absence of domination is a fool’s errand, but I differ in thinking that there is more to human interaction than the power relations that suffuse it. Put this way, Foucault might not have dissented from my claim, but he never said anything to suggest that the power dimensions of human interaction were importantly distinguishable from its other features. Power, surely, is exercised in classrooms, firms, families, and churches in the normal course of events, but much else happens in them as well: enlightenment, production, love, and worship. Reducing these activities to the power relations that permeate them misses the basic challenge from the standpoint of non-domination: to enable people, as much as possible, to pursue the activities that give life its meaning and purpose while limiting the potential for domination that accompanies those activities. It was this that led me to develop the notion of democracy as a conditioning or subordinate good, aimed at domesticating the power dimensions of human interaction while leaving the other goods people pursue as unfettered as possible.

Foucault’s outlook lacks the tools, moreover, to distinguish licit from illicit exercises of power. The pursuit of goods inevitably involves exercising power – if only because so much of human social life is hierarchically ordered. But hierarchies are not intrinsically objectionable. As I noted in Part II.C, it is the abuse of hierarchies for illicit purposes that is objectionable. To be sure, whether or not a hierarchy is being thus abused will – and should – often be in contention. This is why I argue for mechanisms to facilitate that contention and for a series of interrogatories about hierarchies that are designed to flush out illicit uses and prevent the atrophy of legitimate hierarchies into systems of domination. These interrogatories concern the extent to which particular hierarchies are inevitable, escapable, chosen, insular, or self-liquidating.⁵³

A third, concomitant, failure is that Foucault’s work fails to differentiate among illicit uses of power. In his terms, he does nothing to help us distinguish among more and less malevolent forms of domination. On my account, by contrast, domination that involves peoples’ basic interests is worse than that which does not. A billionaire may be in a position to dominate a spouse who knows that she stands to lose millions in the

⁵³ See Shapiro, *Democratic Justice*, supra note 2 at ch 3 for elaboration.

event of a divorce due to a prenuptial agreement, but this warrants less concern than a spouse who faces destitution in the event of divorce if she is not guaranteed the basic necessities for survival. Both are relationships of domination, but one is worse. Just *because* ubiquitous power relations make the potential for domination ever-present, it matters to be able to decide which are the most important from the standpoint of justice. My power-based resourcism facilitates the relevant comparative judgments.

C WALZER

Walzer's view has the merit of focusing on the ways in which people deploy the resources they control to dominate one another. He is right, moreover, that using resources germane to one sphere of human activity to achieve influence in another can be a source of domination because it is often a source of illicitness. Yet while he makes a good case for resisting this kind of domination, he has surprisingly little to say about how such resistance can be made effective – about how the boundaries between spheres should be kept robust. Nor does he have anything to say about how disagreements over what the goods germane to different spheres should be settled.⁵⁴ In contrast, I maintain that every domain of human interaction should be subject to democratic conditioning constraints. These vary with time and circumstance, but they always include mechanisms to participate in decision making about the nature of the goods in question and rights of opposition to try to get them changed.

Walzer is also wrong to think that transgressing the boundaries he describes is the only, or even the principal, source of domination in the world. As recently as the 1950s, in most American states, there was no such thing as marital rape by conclusive legal presumption and the doctrine of interspousal tort immunity shielded husbands from liability for assault and other forms of harm perpetrated on their wives. After decades of opposition from the women's movement, both the marital-rape exception and interspousal tort immunity have been abolished – but this had nothing to do with insulating the sphere of domestic life from the norms outside it. On the contrary, it required a frontal assault on the accepted values governing the definition of marriage and actively transgressing the boundaries that protected the 'integrity' of the family from egalitarian values that prevailed outside.⁵⁵ My notion of democracy as

⁵⁴ For elaboration see Ian Shapiro, *Political Criticism* (Berkeley, CA: University of California Press, 1990) at ch 3.

⁵⁵ On the changing laws of marital rape in the United States, see Diana EH Russell, *Rape in Marriage*, 2d ed (Bloomington, IN: Indiana University Press, 1990); Rebecca M

a conditioning good involves deference to prevailing values but only to the extent that this does not render people vulnerable to domination by compromising their basic interests. Being vulnerable to someone who can rape or assault you with impunity compromises your basic interests.

D SKINNER

Quentin Skinner approaches non-domination through the lens of what he calls the ‘neo-Roman’ or republican conception of freedom. In his view, the neo-Roman account captures the best understanding of the negative libertarian tradition which he hopes to rescue from Hobbes and his successors. Although the Hobbesians might have ‘won the battle,’ Skinner is not ready to throw in the towel and admit defeat in the longer war. His project is to make a compelling case that the republican tradition offers a version of negative liberty that is superior to the Hobbesian one, a version that appeals to the idea of an independent status that is marked by the absence of domination.⁵⁶

As Skinner notes in *Hobbes and Republican Liberty*, while there is some variation in how Hobbes defined liberty in various writings, in *Leviathan* he seems clearly to be operating with a prototype of the negative liberty view. By defining liberty in terms of the absence of external impediments, describing the liberty of the subject by reference to ‘the Silence of the Law and what the Sovereign hath praetermitted: such as is the Liberty to buy, and sell, and otherwise contract with one another; to choose their own aboad, their own diet, their own trade of life, and institute their children as they themselves think fit; & the like,’⁵⁷ Hobbes seems clearly to be thinking of individual freedom as connoting a zone of action in which the individual is left alone by the state to do as she or he pleases. Despite his soon-to-be-anachronistic absolutism, then, Hobbes won the historical battle, on this reading, by advancing the negative libertarian view of freedom.

I have noted elsewhere that there is some plausibility to this account,⁵⁸ but, by failing to appreciate what is problematic in the distinction between negative and positive freedom, Skinner draws the wrong moral and political conclusions. The difference between negative and positive freedom is usually seen as residing in the fact that, whereas negative

Ryan, ‘The Sex Right: A Legal History of the Marital Rape Exception’ (1995) 20 *Law and Social Inquiry* 941.

⁵⁶ Quentin Skinner, *Hobbes and Republican Liberty* (London: Cambridge University Press, 2008) at 216.

⁵⁷ Hobbes, *Leviathan*, ed by Ian Shapiro (Princeton, NJ: Yale University Press, 2010) at 133, 129.

⁵⁸ Shapiro, *Evolution*, supra note 10 at 39–40, 276–7.

libertarians focus primarily on impediments to action, positive libertarians are centrally concerned with what the agent is able to do. Writers like Rousseau and Hegel are seen as positive libertarians because they conceive freedom as what Charles Taylor has described as an ‘exercise’ concept rather than an ‘opportunity’ concept. For positive libertarians, freedom consists in exercising human capacities to achieve our characteristic potential, and we are unfree to the extent that this possibility is attenuated or blocked by deleterious social arrangements.⁵⁹ Positive libertarians generally link individual freedom to participation in social and political institutions – participation in ways that will lead people to realize their potential.

It has been conventional since Berlin wrote to criticize positive libertarians on the grounds that their doctrine wrongly assumes that we can know what people’s potential is, so that we can then design collective arrangements to facilitate their attaining it.⁶⁰ The limiting case of this difficulty is embodied in Rousseau’s slogan that, by being required to obey the general will, people can be ‘forced to be free.’⁶¹ If people are coerced into certain types of collective participation in order to achieve a particular goal or conception of the good life, then it is hard to see in what meaningful sense they can be said to be free. As a result, Berlin and his followers are often taken to be right in maintaining that the positive conception of freedom is incoherent.

Skinner wants to go part of the way with Berlin, agreeing that the positive conception is problematic. Yet Skinner believes that the Machiavelian, or neo-Roman, conception of freedom that he champions has been misclassified as a positive one on the grounds that it requires active participation of citizens – in the military as well as in the civic life of the republic. But, for Skinner, Machiavelli’s requirement of civic service is an instrumental requirement of freedom for republican citizens. It is necessary so that they can protect themselves from the external domination of aggressive neighbours and the internal domination of power-hungry domestic elites. As a result, Skinner resists the suggestion that a negative conception of freedom cannot include requirements of civic service, holding that it is, indeed, superior to the Hobbesian negative conception.⁶² Freedom is the antithesis of slavery on this account; we are

59 Charles Taylor, ‘What’s Wrong with Negative Liberty’ in Alan Ryan, ed, *The Idea of Freedom* (Oxford: Oxford University Press, 1979) at 179.

60 Isaiah Berlin, ‘Two Concepts of Liberty’ in *Four Essays on Liberty* by Isaiah Berlin (Oxford: Oxford University Press, 1990) 118.

61 Jean-Jacques Rousseau, *The Social Contract* (New York: Penguin Classics, 1968) at 64.

62 Quentin Skinner, ‘The Idea of Negative Liberty: Philosophical and Historical Perspectives’ in Richard Rorty, J B Schneewind, & Quentin Skinner, eds, *Philosophy in History* (London: Cambridge University Press, 1984) 204 [Skinner, ‘Negative Liberty’].

free when we are independent beings and virtuous acts of public service are necessary to secure that status. As Skinner puts it, '[T]he paramount distinction in civil association is between those who enjoy the status of *liberi homines* or "freemen" and those who live in servitude.'⁶³

Skinner's focus on domination as the relevant source of unfreedom for politics is appealing. But by buying into the negative/positive liberty dichotomy in order to rescue the negative view from Hobbes and his successors, Skinner misses what is at issue in the debate and what is most objectionable about the Hobbesian account of freedom. In my view, we should agree with Gerald MacCallum that the debate between negative and positive libertarians diverts attention from what matters most in arguments about freedom and domination and perpetuates arguments that cannot be resolved because protagonists on both sides are right about the demerits of each other's arguments.⁶⁴

MacCallum points out that any assertion about freedom minimally involves reference to agents, restraining (or enabling) conditions, and action. It always makes sense to ask of any use of the term: *who is free, from what restraint (or because of what enabling condition) to perform which action?* My suggestion is that we endorse MacCallum's account but modify it by noting that, when we talk about *political* freedom, a fourth term enters, having to do with legitimacy; it may be thought of by reference to the question *why*, in virtue of what authority, is the agent free? Whereas freedom as MacCallum describes it is a triadic relation ranging over agents, restraining (or enabling) conditions, and actions; I supplement his account by arguing that political freedom or liberty is best thought of as a quadratic relation in that it ranges over each of these three and authorizing conditions as well.⁶⁵ This reference to authorizing conditions is vital to my account of non-domination, as it provides both the invitation and the basis to distinguish licit from illicit constraints on, or exercises of, freedom.

⁶³ A comparable conception informs the picture affirmed by JGA Pocock and others, who offer 'civic humanist' readings of the motivations of the American revolutionaries, one that embodies the ideal of the independent yeoman farmer; see JGA Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 1975); also Gordon Wood, *The Radicalism of the American Revolution* (New York: AA Knopf, 1992); Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Belknap Press of Harvard University Press, 1967).

⁶⁴ Gerald MacCallum, Jr, 'Negative and Positive Freedom' in Peter Laslett, WG Runciman, & Quentin Skinner, eds, *Philosophy, Politics and Society*, 4th series (Oxford: Basil Blackwell, 1972) [MacCallum]; Ian Shapiro, 'Gross Concepts in Political Argument' in *The Flight from Reality in the Human Sciences* by Ian Shapiro (Princeton, NJ: Princeton University Press, 2005) 152.

⁶⁵ Shapiro, *Evolution*, supra note 10 at 14–9.

Skinner contends that, claims to the contrary notwithstanding, MacCallum's account is really a version of the doctrine of negative liberty: '[I]nsofar as MacCallum's analysis suggests a negative understanding of freedom as the absence of constraints upon an agent's options (which it does), this ['that the only coherent account that can possibly be given of the concept of liberty is the negative one'] is also the implication of his account and of those that depend on it.'⁶⁶ But this claim misses MacCallum's point. His argument is that all accounts of liberty contain both negative and positive elements, some of which are usually implicit, that negative libertarians focus mainly on constraints while positive libertarians concern themselves with enabling conditions.

To be sure, MacCallum acknowledges that all intelligible concepts of freedom or liberty involve some notion of constraints or their absence, but just because this element could never amount to an account of freedom, talk of freedom from constraint or restraint does not make an account 'negative.' The opposition itself should be eschewed, on his account, because constraints and enabling conditions can easily be re-described as one another. In effect, arguments between negative and positive libertarians are analogous to arguments over whether a prisoner is unfree because of the presence of a locked door or the absence of a key. It is thus, in MacCallum's view, misleading to think of negative or positive language as indicative of any significant conceptual difference.⁶⁷

Skinner's discussion in *Hobbes and Republican Liberty* builds on his earlier discussion of MacCallum, and what he says there about republican liberty makes it clear that he has not appreciated the force of MacCallum's thesis. In terms of my modified version of MacCallum's schema, by focusing centrally on the independent status of the agent, Skinner wants to reduce liberty to the first and fourth terms in the quadratic relation, inasmuch as the status of the agent as a freeman or slave depends on the prevailing legitimating authority. That this is a partial account of freedom becomes evident when we reflect on the fact that it is silent about the second and third terms in the relation – the actions to be performed and the restraints (or enabling conditions) that hamper (or facilitate) their performance.

Why does it matter? The answer that motivated MacCallum and motivates me is that what is consequential in discussions about freedom is not which vocabulary is used but rather what different people are actually able to do or are prevented from doing in the world. Skinner would be correct to say that a slave is unfree even if a comparatively benign

⁶⁶ Skinner, 'Negative Liberty,' supra note 62 at 196, n 8.

⁶⁷ MacCallum, supra note 64 at 182, n 9.

slave-owner allowed him or her some discretionary resources and a range of choice because of the slave's compromised status as a person.⁶⁸ But as I noted in Part II.C, virtually every political theory on offer today condemns slavery, so that establishing Skinner's case does not settle much that is at stake among the various contending views. To this, Skinner might respond that his neo-Roman ideal rules out other subservient statuses as well, such as serfdom, apartheid, patriarchy, and caste systems. I am happy to concede this as well but continue to wonder who the serious protagonist is on the other side.

Anatole France famously mocked 'la majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain.'⁶⁹ The elimination of formal subservience is surely consequential from the standpoint of non-domination – when status hierarchies are present, they invariably become a focus of contention – but eliminating them is seldom sufficient to undermine domination. Someone with the *status* of a free citizen might confront such enormous obstacles to performing a range of actions routinely enjoyed by others that we would be disinclined to regard him as immune from domination. In recent decades, many corporations have fired employees and then rehired them as independent contractors at reduced salaries and without employment benefits to do the same jobs that they were doing before. Their *status* as independent persons has been enhanced, but it would be hard to make a convincing case that they are less vulnerable to domination than they were previously.

This is MacCallum's point: instead of trying to reduce freedom to one or another of its relational components we should embrace his antireductionist account. The schema itself is formal and empty, reflecting what we might describe the analytical grammar of freedom. MacCallum's hope is that, rather than continue to engage in endless debates about 'kinds' of freedom, by embracing his account we can change the subject and focus instead on the conditions in the world that shape not only the status of agents but also the actions they might aspire to perform and the resources and constraints affecting those aspirations. Hobbes's nascent negative libertarian view is surely impeachable from this perspective, but the deficiency is not remedied by counterposing to it a neo-Roman view that reduces claims about freedom to claims about the status of agents.

68 This is not an exact analogue of the Hobbesian account, in which the subject, though dependent for his freedom on the sovereign's silence, is not owned by him.

69 Anatole France, *Le Lys Rouge* (Paris: Calmann-Lévy, 1992 [1894]) at 118.

E PETTIT

Considered from the standpoint of actual institutional arrangements, Skinner's account is conducted at a pretty high altitude. Pettit's discussion in his book on *Republicanism: A Theory of Freedom and Government* and subsequent writings has the advantage of engaging with institutional arrangements more directly. And there is much in what he has to say that is congenial from the perspective of my institutional arguments. I agree with his contention that democratizing power relations is generally the best path to mitigating domination. More particularly, I agree with his claim that this implies not only a presumption in favour of inclusive participation in decisions by which one is affected but also a presumption that people should always be free to oppose decisions ('contestation' is his term) with which they disagree – even when these decisions have been arrived at by legitimate democratic means.⁷⁰ I also agree that it is the capacity to interfere with someone, rather than actual interference, that is often key to having power over them and that needs institutional managing with an eye to preventing domination.⁷¹

Despite these points of agreement, Pettit and I have substantial disagreements. These derive from the fact that Pettit's discussion pays surprisingly little attention to the relative seriousness of different kinds of domination, that his definition of domination blinds him to the ways in which power can be used to undermine domination as well as to cause it, (conversely) that his account of social movements and civic associations underestimates the ways in which they can operate to foster domination rather than undermine it, and that his account of the democratic state as the principal instrument for resisting domination is, in reality, hamstrung to the point of impotence by his republican theory of institutions.

The first set of disagreements is rooted in Pettit's decision to define domination exclusively by reference to the capacity for arbitrary interference in the choices of another, without attending to the nature or importance of those choices. At the outset of his discussion, he doffs a genuflecting cap to the proposition that 'domination in some areas is likely to be considered more damaging than it is in others; better be dominated in less central activities, for example, rather than in more central ones.'⁷² But he never defines centrality, and considerations

⁷⁰ It is not entirely clear to me what the ultimate basis for this presumption is, in Pettit's account. On my view, it derives from the fact that there is no perfect democratic decision rule, which carries the implication that even the best democratic procedures will leave some people not only feeling aggrieved but legitimately aggrieved.

⁷¹ Pettit holds that having the power to interfere arbitrarily with another is by itself domination, whereas I say that it creates the possibility for domination. As I explain below, this difference partly accounts for Pettit's schizoid attitude toward the state.

⁷² Pettit, *Republicanism*, supra note 40 at 58.

having to do with it play no role in his institutional recommendations, as we shall see. He talks briefly about how ‘extensive’ domination is, by which he means the number of issues over which people are free to choose, and at greater length about the ‘intensity’ of domination.⁷³ It is less than entirely clear just what this means, but it has to do with the degree to which those with power can act with impunity. Absolute tyrants exercise domination with greater intensity than opportunistic spouse batterers who figure they can count on lax enforcement of the laws against spouse-beating.⁷⁴ But neither the number of choices nor the intensity of domination goes to the importance of the choice in question, about which Pettit has virtually nothing to say.

The implications of this omission become clear in his discussion of egalitarianism. He distinguishes ‘material’ from ‘structural’ egalitarianism. By ‘structural,’ Pettit means the ‘powers’ which ‘include all those factors that are liable to affect political, legal, financial, and social clout.’⁷⁵ He thinks both relative and absolute equality with respect to these things is important because whether or not someone is a potential victim of domination depends not only his or her own powers, but also on the powers of others. ‘In the land of the blind,’ as he says, ‘the one-eyed man is king.’⁷⁶ Because a person’s ‘absolute score in relation to the intensity of non-domination is a function of their relative score in regard to powers,’ attending to the ‘power-ratio in the society as a whole’ is essential to Pettit’s non-domination project.⁷⁷ With respect to these power ratios, Pettit argues, accordingly, that increasing inequality is presumptively a bad idea because there is what he calls ‘diminishing marginal productivity’ to increasing your relative power, whereas moves toward equality are desirable.⁷⁸

Leaving the plausibility of these claims to one side,⁷⁹ Pettit distinguishes them from what he has to say about ‘material’ inequities, where

⁷³ *Ibid* at 113.

⁷⁴ *Ibid* at 57.

⁷⁵ *Ibid* at 113.

⁷⁶ *Ibid* at 113.

⁷⁷ *Ibid* at 113–4.

⁷⁸ *Ibid* at 115.

⁷⁹ I doubt that they are true, at least not without very substantial qualifications of what Pettit says here. It is far from obvious, for example, that countries lacking nuclear weapons would become more secure if every other country got them. If Iran develops nuclear weapons, it might be more likely to be attacked by Israel than if it does not, and the likelihood of attack would not decrease at a diminishing marginal rate with the number of weapons it creates. It is more likely to be a step function. Analogous considerations often apply to the dealings among individuals within countries, where arms races can be counterproductive in defusing potential conflicts. Nozick, *supra* note 7, might have been too quick to assume that power is a natural monopoly, as I

there is no egalitarian presumption. The reason is that attempts to impose egalitarian redistribution may themselves involve domination on the part of the state, and this is not offset by the same kind of diminishing marginal productivity as holds with respect to powers. ‘The money that will enable me to do something, poor as I am, will enable you to do exactly the same things.’⁸⁰ Pettit concedes that the utility derived from money might be of diminishing marginal value, ‘but the capacity to buy things, and its capacity therefore to extend undominated choice, does not.’ As a result, while his non-domination project is committed to ‘structural egalitarianism,’ it is ‘not essentially committed to any sort of material egalitarianism.’⁸¹

This myopic focus on the number of choices ignores how important the choices are from the point of view of avoiding domination, and it is also innocent of the ways in which material resources are often integral to resisting domination. Funding health insurance through the tax system reduces the exit costs for those who must otherwise obtain that insurance from employers and spouses and in this way limits their vulnerability to being dominated by the people they depend on. This is why I argue in *Democratic Justice* that, when the social wage is low, stringent democratic controls of domestic and work life are warranted from the standpoint of non-domination, though I also argue that the unappealing intrusiveness of stringent controls suggests that a high social-wage regime, with fewer intrusive controls, is preferable.⁸² The less my ability to vindicate my basic interests depends on my relations with you, the less power you have over me – and hence the less capacity to dominate me.⁸³ Pettit does, at one point, describe non-domination as a primary good.⁸⁴ This makes it odd that he ignores its evident connections to material resources. Locke says that ‘a man can no more justly make use of another’s

have argued elsewhere that he was (see Shapiro, *Real World*, supra note 4 at 159–62), but he was surely right that it exhibits some properties of a natural monopoly. I suspect that the relationship between relative power and security is sometimes U-shaped and that it becomes indecipherably complex once we move from the kind of two-player situations Pettit analyses here (Pettit, *Republicanism*, supra note 40 at 114–7) to interactions among multiple players who are engaged in numerous overlapping bilateral as well as multilateral power relations.

⁸⁰ Pettit, *Republicanism*, *ibid* at 118.

⁸¹ *Ibid* at 118–9.

⁸² See Shapiro, *Democratic Justice*, supra note 2 at chs 5–6.

⁸³ This power-based resourcism puts my argument squarely into the resourcist camp of Rawls, Dworkin, and Sen and others, but my focus differs from theirs in that I think the resources needed to vindicate basic interests should be guaranteed to people not so as to enable them to achieve some conception of welfare or the good life, but rather to protect them from vulnerability to domination by others.

⁸⁴ Pettit, *Republicanism*, supra note 40 at 90–1.

necessity, to force him to become his vassal,' than can he 'with a dagger at his throat offer him death or slavery.'⁸⁵ If we agree with Pettit, as I think that we should, that the capacity to exert power (rather than its actually being asserted) is often key to domination, then we should resist his attempt to banish the material resources needed to vindicate people's basic interests from the theory of non-domination.

A second disagreement between us concerns Pettit's insistence that having the capacity for arbitrary interference in the lives of others constitutes domination of them, whereas, on my account, having that capacity does not itself constitute domination; rather it creates the potential for domination. This distinction might sound semantic, but it has significant consequences. The playground bully may have the capacity to beat up any of the smaller children, but may be widely known only to beat up black children. Does he dominate the children who are not black?⁸⁶ Senator Joseph McCarthy had the capacity to interfere arbitrarily in the lives of many Americans, but those on the political left plausibly lived in fear of him in a way that others did not. To say that McCarthy dominated all Americans whom he could have interfered with misses this, trivializing the plight of those who had good reasons to live in fear of him. Today, the United States has the capacity for arbitrary interference in Cuba, Mexico, Canada, and Fiji, but it stands in very different relations to them from the standpoint of domination. Cuba has endured explicit coercive interference for decades; Mexico periodically feels the pressure of American 'soft power'; Canada is subject to the influence of a stronger but largely like-minded ally; and Fiji is unaffected by American power in any of the ways that are relevant to the other three.

Moreover, Pettit's position diverts attention from the ways in which interference can mitigate domination. The strongest child in the playground can be a bully, but he may instead be the person who protects weaker children from bullies. If this is common knowledge, then the mere fact that the strongest child has that inclination might deter the bully or embolden the weaker children to resist or report him. When Saddam Hussein's forces invaded Kuwait in 1990, US President George H W Bush led a coalition of forces to eject him. Bush saw this as an opportunity to institutionalize a new post-Cold-War world order geared to facing down international aggression and fostering expectations and incentives to minimize it in the future. He deployed American might in the service of that goal. This involved creating norms of international

⁸⁵ John Locke, *First Treatise of Government* in Ian Shapiro, ed, *Two Treatises of Government and A Letter Concerning Toleration* (Princeton, NJ: Yale University Press, 2003) 1 at §42.

⁸⁶ I am indebted to Rebecca Trupin for this example.

authorization and regional participation in the containment effort and going no further than was necessary to block Saddam Hussein's aggression. In effect, Bush stopped the bully without himself becoming a bully.⁸⁷ Unfortunately, his son undermined those norms twelve years later by his unilateral invasion of Iraq to topple the regime – a rogue action of the sort that his father's policy had sought to forestall. Pettit's formulation is insensible to these distinctions and therefore also to the significance of the Obama administration's decision to revert to Bush elder's pursuit of multilateral containment in his approach to Muammar Qaddafi's aggression toward his opponents during the 2011 Libyan civil war.⁸⁸

A third set of worries about Pettit's institutional arguments concerns the degree to which he believes that empowering social movements and other forms of civic association to resist majoritarian politics is advantageous from the standpoint of non-domination. In Pettit's vision of democracy, it is essential that people be 'able to contest decisions at will and, if the contest establishes a mismatch with their relevant interests or opinions, [be] able to force an amendment.'⁸⁹ His vision is one in which civic associations and social movements serve as oppositional buffers against majority tyranny, fielding complaints and organizing them into

87 This is not to defend everything Bush senior did in Iraq in 1991. In particular, his decision to encourage the Shiite uprising in the south then abandon it was at a minimum a tragic lapse of judgment that led to the avoidable slaughter of countless thousands of Iraqis; see 'War in the Gulf: Bush Statement' *The New York Times* (16 February 1991), online: <<http://www.nytimes.com/1991/02/16/world/war-gulf-bush-statement-excerpts-2-statements-bush-iraq-s-proposal-for-ending.html>>, and the April 1991 news conference in which Bush indicated that the US would not support the rebels: Dian McDonald, Wireless File, 179249, 'US Forces Won't Intervene in Iraq's Civil War' (4 April 1991), online: <<http://webcache.googleusercontent.com/search?q=cache:6Fik-lFWW34J:www.fas.org/news/iraq/1991/910404-179249.htm+US+Forces+Won't+Intervene+in+Iraq's+Civil+War.%22+President+Bush+firmly+reiterated+that+he+does+not&cd=1&hl=en&ct=clnk&gl=us&source=www.google.com>>.

88 This is not to defend all aspects of the Obama administration's policy toward Libya. Sometimes the moral urgency of a situation merits rapid intervention on the grounds that it is better to ask for forgiveness than permission; see Shapiro, *Real World*, supra note 4 at 25, 156–79. That situation arguably prevailed in Libya in March of 2011 when the Qaddafi regime was threatening mass extermination of opponents, but the mission evolved considerably thereafter. The policy of enforcing the 'no-fly' zones authorized by the UN Security Council morphed into an unauthorized campaign to achieve regime change. Among the necessary conditions for that high stakes gambit is a plausible belief that an indigenous democratic opposition exists that can take power and will be an improvement. As with the 2003 regime-change effort in Iraq, there was little evidence to support such a belief when the mission-creep got under way in Libya in the summer of 2011. When the Qaddafi regime crumbled in late August of 2011, the prospects for democracy in Libya's future remained unclear at best.

89 Pettit, *Republicanism*, supra note 40 at 186.

effective contestatory politics in support of progressive change. The image that ‘suggests itself,’ he tells us, ‘is that of popular movement, widespread controversy and debate, and progressive, legislative adjustment.’⁹⁰ As examples he cites the women’s movement, the green movement, the gay rights movement, and the movements in support of ethnic minorities and Indigenous peoples. ‘Any democracy that is going to serve republican purposes has to be able to give a hearing to evolving allegiances and commitments,’ Pettit insists. It must be open to ‘deep and wide-ranging transformations.’⁹¹

One difficulty with this is Pettit’s manifest assumption that social movements and civic associations will, in fact, be organized in support of change that Pettit regards as progressive. Opposition movements have, indeed, organized to advance the goals he enumerates, but they also organized to enact Proposition 13 in California to force repeal of the federal estate tax on multi-millionaires and to outlaw gay marriage and affirmative action. Perhaps the most effective such movement in the United States since 2009 has been the Tea Party movement that emerged to resist Barack Obama’s agenda on health care reform, environmental legislation, and financial regulation. As these examples suggest, there is no particular reason to suppose that empowering social movements to resist democratic government will, on balance, lead to progressive change as Pettit supposes. He implicitly acknowledges as much in his endorsement of gag rules designed to depoliticize debates about criminal penalties, when he notes that ‘challenges to criminal-justice practice are generally heard in a public, politicized forum, with a variety of bad effects.’⁹² By this he means harsh sentences that experts know to be ineffective deterrents.⁹³ But perhaps people care more about retribution than they do about deterrence.⁹⁴ Who is Pettit to decide which issues should be subject to empowered civic contestation and which be taken off the political table by gag rules? His *Republicanism* might be an appealing manifesto for the Sensible Chaps Party. Whether it supplies a sound political basis for limiting domination is dubious.

Pettit underestimates the difficulties of his position, I think, partly because of his faith in deliberation to push politics in what he takes to be felicitous directions. He supposes that, following an appropriate round

⁹⁰ Ibid at 195.

⁹¹ Ibid at 195.

⁹² Ibid at 196.

⁹³ Ibid at 196–7.

⁹⁴ See e.g. Walter Berns, ‘The Morality of Anger’ in Glenn H Stassen, ed, *Capital Punishment: A Reader* (Cleveland: Pilgrim Press, 1998) 15.

of deliberation or appeal, people will accept outcomes that go against them if they are in the general interest. 'All that is necessary is that they be assured that the judgment is made according to their ideas about proper procedures and that it is dictated, ultimately, by an interest that they share with others.'⁹⁵ Pettit's contestatory vision of the democratic process is one that 'is designed to let the requirements of reason materialize and impose themselves.'⁹⁶ This confident deployment of the passive voice can be encouraging only to the extent that we share Pettit's faith that losers in the contestatory process will accept the legitimacy of their defeat. One does not have to spend much time listening to Rush Limbaugh, Sean Hannity, Glen Beck, and the leaders of the Tea Party Movement to realize that they never had any intention of conceding the legitimacy of any aspect of the Obama administration's agenda and that they deployed every resource they could muster to derail as much of it as they could. To the extent that they have been successful, they see themselves as effective resisters of domination, and on Pettit's account, they are right. On my account, by contrast, we should have preferred them to fail because they did not have basic interests at stake, whereas those who stood to lose (or not to get) health insurance, unemployment insurance, or their pensions did.

Pettit defends deliberative contestatory forums partly because he thinks them superior to an account of political contestation based on bargaining. He is inspired by the vision of the eighteenth-century American founders, according to which 'citizens have equal claims and powers' and 'public matters are decided by deliberation on the basis of considerations that have common appeal – they are not biased in favor of any group, or even in favor of the status quo – and agreement serves as a regulative ideal as to how things should be decided.'⁹⁷ Like Joshua Cohen and Habermas (whom he cites approvingly in this regard), he thinks that engaging in deliberation will cause people to discover, and perhaps even manufacture, the requisite common ground. 'The trouble with bargaining contestations,' by contrast, is that 'they are only available to those who have sufficient negotiating power to be able to threaten other parties effectively; if you want to force a change of bargain, then you had better represent an interest group which pulls some weight.'⁹⁸

This is a non-sequitur as a defence of deliberation in the real world. It may be that deliberation will lead people to discern and then move toward areas of agreement, although I have adduced reasons for

⁹⁵ Pettit, *Republicanism*, supra note 40 at 198.

⁹⁶ *Ibid* at 201.

⁹⁷ *Ibid* at 189.

⁹⁸ *Ibid* at 188.

scepticism about this proposition elsewhere.⁹⁹ But in arguing for deliberation's superiority to bargaining, Pettit never confronts the reality that people cannot be forced to deliberate and that those who are not inclined to do so can and do press deliberative mechanisms into the service of stonewalling change – in effect, bargaining. This is why I have argued that, if we want to press deliberation into the service of reducing the kinds of domination that should concern us, then rights to insist on deliberation should be limited to those who have basic interests at stake. To be sure, they may deploy those rights to bargain instead of to deliberate, but at least in that instance, it is those who are vulnerable in ways that we should care about whose interests are being protected.¹⁰⁰

For a stark illustration of what can be at stake here, consider Pettit's closely related contention that losers in the legislative process should enjoy access to forums in which they can limit what they take to be the deleterious effects of a policy enacted by the majority by 'editing' it in the application.¹⁰¹ During 2009 and 2010, the investment-banking lobby in the United States engaged in a huge lobbying effort, which almost succeeded, designed to scuttle the Obama administration's plans for investment-banking regulation in the wake of the 2008 worldwide banking crisis. They failed to derail it entirely though they weakened it considerably, ensuring, among other things, that many of the most contentious matters having to do with systemically risky behaviour by banks deemed too big to fail would be determined later by regulators.¹⁰² It does not require giant leaps of imaginative foresight to predict that these regulators will become objects of relentless campaigns to de-fang the legislation further by 'editing' it in the application. After the 2010 banking regulation bill passed in Congress, I asked a partner at one of the largest investment banks whether they would now be out of the proprietary trading business. His answer was, 'It will be five years before it will be clear whether we can kill that part,' but he thought it a pretty good bet that they would. This is editing in the application in the real world.

⁹⁹ Shapiro, *State*, supra note 18 at 21–34.

¹⁰⁰ *Ibid* at 48–9.

¹⁰¹ Pettit, 'Democracy, Electoral and Contestatory' in Ian Shapiro & Stephen Macedo, eds, *Designing Democratic Institutions* (New York: New York University Press, 2000) 195 [Pettit, 'Democracy'].

¹⁰² See Nathaniel Popper, 'Banks Step Up Spending on Lobbying to Fight Proposed Stiffer Regulations' *Los Angeles Times* (16 February 2010), online: Los Angeles Times <<http://articles.latimes.com/2010/feb/16/business/la-fi-bank-lobbying16-2010feb16>>; Brady Dennis & Stephen Mufson, 'Banks Lobby against Financial Regulatory Overhaul' *The Washington Post* (18 March 2010), online: The Washington Post <<http://www.washingtonpost.com/wp-dyn/content/article/2010/03/18/AR2010031805370.html>>.

A final disquieting feature of Pettit's institutional stance is the assumption running through his writing that the power wielded by governments is more malevolent than the power wielded by other actors – whether powerful individuals or other corporate agents. Because the government establishes itself as a collective agent with the capacity to interfere arbitrarily in the affairs of any individual, it is potentially a threat to everyone. This means that, although proponents of non-domination should look to the state as an instrument to limit the malevolent effects of private *dominium*, 'they will remain alert to the danger of giving the state the sort of license that would introduce a dominating form of public *imperium*.'¹⁰³ If its capacity for action 'is insufficiently fettered or its range of responsibilities too large, the government is liable to become a domineering presence in its own right.'¹⁰⁴

This worry leads Pettit to embrace an exceedingly long list of constraints on majoritarian politics. In addition to the deliberative and other contestatory rights already discussed, he is a fan of multiplying checks on collective action through bicameralism, supermajority requirements, separation of powers, judicial review, federalism, appeals processes against administrative decisions, ex-ante measures to limit their effects, independence for national banks, exemptions and special treatment for minority cultures, turning politically charged matters over to 'professionally informed bodies,' and using gag rules otherwise to limit the writ of electoral politics. Despite his acknowledgement that vetoes can block legitimate change,¹⁰⁵ Pettit's discussion of these matters seems to be entirely innocent of the literature on veto points from Brian Barry to George Tsebelis, which has made it clear that, as veto players become stronger and veto points multiply, so does protection of the status quo and those who have the resources to wait out opponents.¹⁰⁶

There is a curious paradox to Pettit's view here. On the one hand, he expresses considerable scepticism that non-state actors are powerful enough effectively to reduce domination in modern societies. This he describes as the strategy of 'reciprocal power' – in effect, relying on private and other decentralized resources as means for combating domination. Pettit notes that the trade-union movement 'almost certainly advanced the non-domination of workers in the industrial world of the nineteenth century; yet he insists that there is 'very little reason' to be attracted to

¹⁰³ Pettit, *Republicanism*, supra note 40 at 150

¹⁰⁴ Ibid at 150.

¹⁰⁵ Pettit, 'Democracy,' supra note 101 at 118–9.

¹⁰⁶ Brian Barry, *Political Argument* (London: Routledge & Kegan Paul, 1965); George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton, NJ: Princeton University Press, 2002).

their strategy of direct action which confronts ‘too many problems to be taken seriously.’ Instead he argues that ‘the strategy of having recourse to a state looks by far the more attractive option.’¹⁰⁷ On the other hand, we have seen that his list of preferred institutional devices to separate, disperse, check, and veto state action is so extensive that it is unlikely to have a meaningful impact on private domination.

Trade unions are a case in point. Organized and widely supported as they were in Britain and the United States in the middle part of the last century, they could not possibly have enjoyed the success that they did without strongly supportive legislation from successive Labour governments in Britain and the passage of the Wagner Act in the United States in 1935. Yet it was the whittling away at those protections at the behest of business-oriented interest groups and their supporters through exactly the kinds of ‘contestatory politics’ Pettit champions that led to the evisceration of organized labour in both countries that began in the United States in the 1950s and took off in both countries the 1980s.

Pettit seems to be at cross-purposes with himself. On the one hand, he agrees that efficacious action by democratic governments is likely essential to any project of rooting out entrenched systems of domination. On the other, he seems to be so fearful of democratic politics and government that he wants to hem them in at every turn, insisting that ‘[e]very 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.’¹⁰⁸ Given the many opportunities for special pleading, forum shopping, and delay that are disproportionately afforded to those with time and resources on their side by Pettit’s model of dispersed power and institutional checks, it is hard to imagine governments in the world as he envisages it doing much of anything at all – let alone tackling entrenched systems of domination. This tension is puzzling. It is as if, for all his attention to the centrality of domination in his theory, Pettit fails to notice much domination in the world around him. He also seems, generously, to attribute his own sunny disposition to all mankind. His is a world in which progressive contestatory pressure, combined with faltering prodding from a semi-incapacitated state, can be expected to get people to give up domineering positions as they are persuaded that this is in the general interest.

I am inclined to a darker view of the human social condition. It assumes that people in positions of advantage seldom give this up unless the status quo becomes costly to them and that among the things a

¹⁰⁷ Pettit, *Republicanism*, supra note 40 at 95.

¹⁰⁸ *Ibid* at 56.

government committed to non-domination must do is increase the relevant costs of the status-quo to the powerful when the basic interests of those who are vulnerable to them are at stake. Most people in poor and middle-income countries and most poor and middle-income people in rich countries are vulnerable to serious domination in many situations because their basic interests are either compromised or so precariously met that their dealings with others are inevitably laden with the possibility of domination. Tackling that reality seems to me the starting point for any plausible theory of the distributional and institutional arrangements needed by a principled commitment to non-domination. Pettit's focusing on the number of choices people have without reference to their import misses this, and his faith in civic-minded deliberation to encourage progressive social action is insufficient. His account of public institutions is a recipe for protecting the status quo, which could only be appealing from the point of view we share if one did not perceive it as heavily laden with domination. In this respect, our disagreement has less to do with the meaning of domination than it does with our perceptions of how power is distributed in the world and how politics works.

Pettit's fulsome embrace of institutional sclerosis has been conventional among republican thinkers since the American founders wrote *The Federalist*. Fear of majority tyranny prompted them to build many of the institutional features Pettit finds so appealing into the American constitutional model, partly because there was no other way to get the constitution ratified and partly out of what turned out to be the mistaken conviction that it would prevent civil war. It has become clear, since then, that consociational institutions contribute little, if anything, to democratic stability; nor do they limit the propensity for majority tyranny. The evidence strongly suggests that economic development is the best predictor of democracy's survival and that different kinds of institutional arrangements appear to have a negligible impact – though presidential systems are somewhat less stable than parliamentary ones.¹⁰⁹ That is scarcely an advertisement for the beneficent effects of the separation of powers. As far as majority tyranny is concerned, there is no evidence that adding bills of rights and constitutional courts to democratic systems makes any difference as far as the protection of minorities is concerned.¹¹⁰ Imperfect as competitive parliamentary systems might be, they turn out to be the stablest democracies and at least as good as any other from the standpoint of protecting vulnerable minorities. Given the

109 See Adam Przeworski et al, *Democracy and Development* (Cambridge, UK: Cambridge University Press, 2000) at 78–186.

110 See Ian Shapiro, *State*, supra note 18 at 86–103; Ian Shapiro, 'Tyranny and Democracy: Reflections on Some Recent Literature' (2008) 43 *Government and Opposition* 486.

propensity of republican arrangements to protect entrenched systems of domination and powerful minorities, the reasons to reject them in favour of parliamentary systems seem to me to be decisive.

V *Non-domination revisited*

Non-domination is the bedrock of justice. Though it is often connected to egalitarian considerations and appeals to a kind of freedom, I have made the case that it should be differentiated from both. Egalitarians might still resist this case arguing, in the spirit of the ‘equality of what?’ literature that my argument commits me to a principle of equality of non-domination. But that is not my view, because domination ranges from the trivial to the momentous, and I have argued that only the most serious forms of domination merit government’s attention. This might provoke the retort that I really favour equality of non-domination where basic interests are at stake. But I resist that characterization too, because even within the realm of basic interests some violations are worse than others, and I agree with Judith Shklar and Casiano Hacker-Cordón that preventing the most extreme forms of cruelty and deprivation should trump remediation of other kinds of domination involving basic interests.¹¹¹

This might provoke the further retort that my implicit principle is to equalize elimination of the most egregious sorts of domination, but this seems to me to be trivially egalitarian at best. It strains ordinary usage, and most people who count themselves egalitarians would not recognize it as such. Moreover, it belies the extent to which comparing extreme cases of domination often involves judgments that verge on the incommensurable – if they are not, in fact, impossible to make. During the 1970s, defenders of the National Party in South Africa would sometimes deflect criticism by asking: why are you attacking Apartheid when worse things are going on in Uganda? It was not clear to me then, nor is it now, that it was possible to evaluate the assertion embedded in this question and intended to supply its rhetorical force. A dispositive comparison of the two cases would surely involve many complex judgments, some of them counterfactual, that made it difficult to know where to begin.

Allowing oneself to be drawn into the comparative debate seemed to me in any case to be worse than a waste of time. Unlike the trolley-bus examples that sometimes give moral philosophy a bad name, these cases

¹¹¹ Judith Shklar, *Ordinary Vices* (Cambridge, MA: Harvard University Press, 1985); Casiano Hacker-Cordón, *Global Injustice and Human Malware* (PhD dissertation, Yale University, 2002) [unpublished].

were unconnected – at least, from the perspective of the perpetrators.¹¹² The evils of Apartheid bore no relation to the domination then being committed, to the north, by Idi Amin. Opponents of both regimes might face choices about where best to deploy their efforts, but they would likely have at least as much to do with judgments about the chances of success in either place as with a determination of which was ultimately worse. Arguments about those choices could never, in any case, furnish a justification for the evils being perpetrated in either place. Rather than allow oneself to be manipulated by disingenuous demands for an egalitarian metric of moral equivalency, the better course was to confront those evils on their own terms – showing why and how they could be stamped out.

Nor are my prescriptions egalitarian – at least not conventionally so. Rather, I view the power dimensions of human interaction through a Hirschmanesque lens in which there is a trade-off between the importance of enhancing democratic voice and that of reducing the costs of exit for the vulnerable.¹¹³ In employment relations, for instance, I argue that where exit costs for the vulnerable are high due to the lack of a robust social wage, then government should insist on more voice within the firm: stronger safeguards for unions and other protections for workers. Likewise, in the domestic context, I argue that a divorce-law regime that protects the vulnerable at the dissolution of a marriage legitimates greater laissez-faire with respect to what goes on within marriage than would otherwise be the case.¹¹⁴ True, I argue that a low exit cost / low-regulation regime is better than a high exit cost / high-regulation one, which leads to my defence of a comparatively robust social wage. But this flows from two considerations, neither of which is egalitarian: my power-based resourcism and my general presumption that, while it is important to vindicate people's basic interests, it is always best to do this in ways

112 Trolley-bus problems involve hypothetical examples of tragic choices, designed to provoke reflection on our moral intuitions. Typically, they involve forced Hobson's choices – as when the only way in which passengers in an out-of-control trolley bus can be saved is by diverting it in such a way that it will kill a pedestrian. The examples are sometimes contrived to the point that it is hard to see their relevance to the moral dilemmas that people actually confront. See Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect in Virtues and Vices* (Oxford: Basil Blackwell, 1978); Judith Jarvis Thomson, 'Killing, Letting Die, and the Trolley Problem' (1976) 59 *Monist* 204; Judith Jarvis Thomson, 'The Trolley Problem' (1985) 94 *Yale LJ* 1395; Peter Unger, *Living High and Letting Die* (Oxford University Press, 1996); Francis Kamm, 'Harming Some to Save Others' (1989) 57 *Philosophical Studies* 227.

113 Albert O Hirschman, *Exit, Voice, and Loyalty* (Cambridge, MA: Harvard University Press, 1970).

114 Shapiro, *Democratic Justice*, supra note 2 at chs 5–6.

that interfere as little as possible with what goes on within civil institutions and practices.¹¹⁵

To appeal to non-domination is to appeal to a certain kind of political freedom that human beings have the power to withhold or supply. Though not constitutionally hostile to all hierarchies in human affairs, non-domination as I understand it is sensitive to the reality that legitimate hierarchies often atrophy into illicit systems of domination. The institutional challenge is to police the potential for domination via democratic constraints but to do this as unobtrusively as possible. This view of non-domination is political all the way down, and it takes no position on larger metaphysical debates about the possibility and meaning of human freedom. Nor does it treat freedom as the summum bonum for which people can strive. My account takes a minimalist tack on identifying common human interests and on the possibility that those interests can meaningfully be tracked by political institutions. It is a reactive ideal that appeals to human ingenuity to design and implement practices that can ameliorate sources of domination as and when they arise. As a result, it always operates at the margin – eschewing the project of designing a basic structure for society as a whole.

Non-domination as I have defended it is Foucauldian in recognizing that power relations are ubiquitous to human interaction, but I demur from Foucault's refusal to discriminate among kinds of domination or to address questions about what to do about it. Doing that seems to me to be the central constructive project suggested by Foucault's central insight. Non-domination as I defend it involves threading the needle of institutional design without depending on large assumptions about human communication and deliberation that infect the arguments set forth by Habermas and Pettit. It depends on a view of freedom which, like Skinner's, involves abjuring the negative libertarian account we have inherited from Hobbes. But rather than try to replace it with the status-based negative liberty view that Skinner finds congenial, I reject the negative/positive dichotomy in favour of a relational view which involves thinking about unfreedom as it relates to agents, restraining and enabling conditions, actions, and systems of authorization. This buttresses the reactive character of my account because, rather than push us in the direction of general theories of freedom, it directs us to focus on specific people, circumstances, possibilities, and authorizing institutions to get at the contours of domination and what to do about it.

To the extent that general presumptions are warranted, I agree with Pettit that democratizing the power dimensions of human interaction is

the best way to go and that this means creating mechanisms for inclusive participation and opposition. But I differ from him in holding that their form and intrusiveness should depend on the nature of the interests at stake, with basic interests operating as the benchmark for enfranchisement. And because I agree with Pettit's claim that rooting out systems of entrenched domination will typically require efficacious action by governments, I dissent from his embrace of republican institutions that are replete with veto points and other consociational elements. These can make it all too easy for those controlling entrenched systems of domination to stonewall change, and they do not – in any case – deliver the benefits of protecting vulnerable minorities from majority tyranny that are often claimed for republican institutions.

It is well known that James Madison offered a trenchant defence of these institutions in *The Federalist*. At the time he was thirty-six years old, and the bulk of his political experience lay ahead of him. Perhaps this is why much of what he wrote about political parties and competition in *The Federalist* reads like someone who is trying to learn to swim by walking up and down next to a lake while discussing the theory of swimming. What is less well known is that the mature Madison rejected the republican thinking that is famously attributed to him and to which Pettit and other contemporary republicans appeal. His years in the rough and tumble of politics in Congress, as secretary of state, and as the fourth president of the United States convinced Madison that democratic competition is the best available guarantor of the values that republicans seek to protect. In 1833, three years before his death, he was unequivocal that 'if majority governments . . . be the worst of Governments those who think and say so cannot be within the pale of republican faith. They must either join the avowed disciples of aristocracy, oligarchy or monarchy, or look for a Utopia exhibiting a perfect homogeneousness of interests, opinions and feelings nowhere yet found in civilized communities.'¹¹⁶ Subsequent evidence suggests that the mature Madison was right that democratic competition offers the best hope for mitigating domination. As a result, working to protect and expand it is the best path forward for those who regard non-domination as the bedrock of justice.

¹¹⁶ James Madison, 'Majority Governments' in *Letters and Other Writings of James Madison*, vol 4 (Philadelphia, PA: J P Lippincott, 1865) 326 at 332. For additional discussion see Shapiro, *Real World*, supra note 4 at 38–67.

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