

Legitimacy and Justice in Republican Perspective

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Abstract: Let justice be a feature of the social order imposed by a state and legitimacy a feature of how it is imposed: one that makes the imposition acceptable. This article argues that, so understood, legitimacy is quite a distinct concern from justice; that the core concern is with showing how state coercion is consistent with people's being free citizens; that this does not require showing that the state exists by consensus or contract; that the best hope of satisfying the concern lies with arguing that state coercion need not be dominating; and that this is possible only within the republican theory that identifies freedom with the absence of domination, not interference.

Introduction

Normative thinking about legal, political, and social institutions has been dominated over the past quarter century or more by the ideal of justice, in particular social or distributive justice. This focus on justice is unfortunate, because it has suggested that there is only one basic ideal that we need to think about in our normative projects. It is unfortunate, in particular, because it puts out of the picture the very different sort of ideal to which I give the name of legitimacy—specifically, political legitimacy. In this article I offer an account of legitimacy that serves two purposes. First, it shows why the concern with legitimacy is distinct from the concern with justice. And secondly, it presents legitimacy as an ideal that is intellectually tractable and institutionally feasible and counts therefore, side by side with justice, as a deserving target of inquiry.¹

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¹ The article, which develops the text of the Inaugural Quain Lecture in Jurisprudence at University College, London in 2012, draws heavily on the ideas in Chapter 3 of my book *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012). I was enormously helped by the discussion of the lecture at a colloquium in University College, London. I am deeply indebted to John Tasioulas and George Letsas, my commentators, and to Jeff King, the editor, for their criticisms.

Terms like ‘legitimacy’ and indeed ‘justice’ are used with varying connotations in ordinary language and in the language of normative disciplines like jurisprudence and political philosophy. I do not mean to suggest that my usage in speaking of political legitimacy and social justice is in any way sacrosanct and I am happy if others choose different words to describe the two values I have in mind. My main interest is in arguing that however we describe them, the ideals are distinct and are deserving of distinct treatment.

The two ideals are associated with different questions raised by the state’s imposition of a social order. The justice question is whether the coercively imposed order is acceptable or justifiable or desirable; the legitimacy question is whether the coercive imposition of the order is acceptable or justifiable or desirable. The questions each presuppose the necessity of the coercive state. The one question asks about the credentials of the social order imposed by the state, the other about the credentials of the way in which it is imposed—if you like, about the state’s right to impose it. The ideals are distinct because it is at least logically possible for a just social order to be imposed in an illegitimate manner and for an unjust order to be imposed in a legitimate fashion.

In speaking of a social order, I have in mind the legally implemented arrangements that determine people’s rights and obligations in relation to one another and the limits that these may imply for the privileges and powers that people can individually command. I do not include the arrangements under which citizens have rights and obligations in relation to government: rights such as the right to vote or stand for office, obligations such as those of paying their taxes and making themselves available for jury service. An order will be socially just insofar as it regulates people’s horizontal relations with one another in a suitable manner, treating them as equals. And an order will be politically legitimate just insofar as it regulates their vertical relations with the state or collectivity in a suitable way, giving them an equal status in relation to the power under which they live.

This notion of a social order is distinct from John Rawls’s idea of a basic structure, since that structure is meant to determine vertical as well as horizontal rights and obligations.² Correspondingly, the ideal of a just social order is distinct from Rawls’s ideal of a just basic structure. Whereas my notion of justice is entirely social or horizontal in its compass, his is an ideal of social-cum-procedural justice, as we might call it. My reason for restricting the idea of a social order, and for casting the ideal of justice as

² J Rawls, *A Theory of Justice* (OUP 1971).

social rather than social-cum-procedural, is to underline the contrast with the ideal of legitimacy. Inflating the ideal of justice makes it all too easy to lose sight of the distinction and, in effect, to fail to register the importance of legitimacy.

My discussion in the article falls into three sections. In the first Section I explore the significance of our recognizing that the regime under which we live is just or unjust, on the one hand, legitimate or illegitimate, on the other; if there were no difference between the action-guiding implications of the two issues, the distinction between the ideals would be seriously in question. In the second Section I argue that the problem of legitimacy is an issue about how far state coercion is consistent with the freedom of citizens and that on the republican understanding of freedom as non-domination this begins to look, at least in principle, like a soluble issue. And then in the final section I provide an outline of the institutions that might serve in practice to establish the legitimacy of a state. These have a decidedly democratic cast so that the bottom line is that while democracy may not be strictly necessary for justice—or at least for distributive justice—it is certainly necessary for legitimacy.

The Significance of the Justice and Legitimacy Issues

What turns on whether a state is legitimate or not? What implications does its legitimacy have for how the citizens of the state ought to behave? And in what way do they differ from the implications of justice? As I understand the two ideals, they each impose a different set of moral obligations on citizens. The obligations imposed are *pro tanto* obligations that may not apply in special, emergency circumstances, as when the life of an innocent party is at stake. But they are none the less important for that.³

Suppose that the social order imposed by a state is just and that the state itself, by whatever criteria, is legitimate. In that case we will naturally say that in view of its legitimacy people are morally obliged to accept the regime, in some sense of acceptance, and that in view of its justice they are obliged to endorse and comply with the laws. But what does it mean to

³ That the reasons are *pro tanto* in character means that they can be overridden by countervailing considerations when alarms ring and alert you to the unusual character of a situation. But it is consistent with the reasons functioning under normal conditions—that is, in the absence of alarms—in an exclusionary manner that precludes the weighing of pros and cons. See J Raz, *The Morality of Freedom* (OUP 1986).

accept a regime? And how does such acceptance come apart, if at all, from endorsing and complying with its laws?

The answer appears once we consider a case where the regime continues to count as legitimate but certain of its laws are unjust. The injustice of those laws will mean that people are not subject to the same content-dependent obligation to endorse and comply with them, although they will certainly be subject to a fall-back, *pro tanto* obligation that applies in all half-reasonable systems of laws, just and unjust. This is the content-independent obligation to comply that derives from the fact that once social regularities are established by law people generally coordinate their activities around the expectation of mutual compliance.⁴ But the injustice of certain laws will also mean, plausibly, that people are morally permitted, perhaps even obliged, to try to change those laws. That raises the question as to what is allowed to people in their attempts to change unjust laws. And it is here that legitimacy, and the acceptance that I have associated with legitimacy, are relevant.

The acceptance of the regime means, I propose, that attempts to change unjust laws should be restricted to measures that are consistent with the regime's remaining in place; they should not include extra-constitutional measures of inducing regime change. Acceptance requires you to acknowledge the state as the appropriate arbiter and decider of legal issues, rather than resisting it outright, and to campaign for change on the assumption that the state is to retain that role. Legitimacy imposes a *pro tanto* moral obligation, then, if you oppose certain laws or measures related to the laws, to oppose them in ways consistent with the system's surviving: to stop short of revolution or rebellion or, in an older word, resistance. It makes it permissible, invoking justice or some other virtue, to oppose certain laws within the system: in a word, to contest them. But it makes it impermissible to reject or resist the regime itself.

Most regimes will offer some ways of opposing its laws that are clearly within the system: appealing to the legislature, taking the government to court, speaking out in the media, demonstrating in the streets and, of course, challenging the governing party at election time. But the act of breaking the law—notwithstanding coordination-based reasons to comply—may also count as a mode of contestation, a way of opposing laws within the system.⁵ This is exemplified in campaigns of civil disobedience

⁴ See Raz *ibid.*

⁵ The fewer the means of opposing a regime within the system, of course, the less likely it is that the regime will count as legitimate: that is, the more likely it is that there are going to be some unjust laws such that the available ways of opposing them within the system are so few that people are no longer obliged to confine themselves to such opposition. But the

where, for example, campaigners break the laws—perhaps the laws they oppose, perhaps other laws—in order to display opposition. When brought before the courts, campaigners typically acknowledge the authority of the courts to penalize them, thereby displaying their acceptance of the regime itself and disavowing revolution or resistance. They invoke their willingness to accept the authorized penalty for whatever abuse they have committed to draw attention to the injustice of those laws.⁶

The legitimacy-based requirement of opposing unjust laws only within the system is not just of relevance in exceptional cases. In almost any conceivable regime people will have different conceptions of justice so that they will face the problem as to how they should respond to a social order that they take, on one or another ground, to be unjust in this or that manner.⁷ It is of decisive importance therefore to determine whether legitimacy rules, since it will have implications for how citizens should behave under conditions that almost everyone is going to face in almost every social context.

The legitimacy of a social order is often thought to correlate with the political obligation of citizens. Such political obligation, on the proposal I am making, is not the *pro tanto* obligation to obey the laws but the *pro tanto* conditional obligation, if you oppose the laws, to oppose them within the system. This conception of political obligation is independently plausible, since political obligation is traditionally taken to bind people insofar as they are citizens proper, not merely temporary or transient inhabitants. Even those passing through a society have a *pro tanto* obligation to obey the law; like others, they will have a content-dependent obligation to obey just laws, and may have a content-independent obligation to obey any law, just or unjust. But only citizens are likely to have substantive rights to oppose the law within the system and only they can be meaningfully bound to limit their opposition to intra-systemic contestation.

This comment squares with a broad conception of citizenship under which adult, able-minded, more or less permanent residents count as citizens, not just those with the right to vote and stand for office. While not all citizens in my broad sense will have electoral rights, they

availability of civil disobedience means, at least in theory, that there is always at least one way in which a regime can be opposed within the system.

⁶ For a broadly congenial—purportedly ‘republican’—account of the sort of civil disobedience that might be warranted see D Markovits, ‘Democratic Disobedience’ (2005) 114 Yale Law Journal 1897–952.

⁷ See T Nagel, ‘Moral Conflict and Political Legitimacy’ (1987) 16 Philosophy and Public Affairs 215–40.

will all have formal and informal rights to oppose the law of a kind not readily given to those merely passing through. And in effect most will have the right to seek electoral rights—and to expect to gain them—by applying for formal citizenship. They will be in a position akin to those enfranchised citizens who choose not to enrol on the voting lists, or not to take part in voting, and who thereby deny themselves the opportunity to exercise their electoral rights.

The discussion so far speaks as if it is only the state, or the social order it imposes, that counts as illegitimate. But this is for convenience only. When a state or regime is illegitimate then the laws it upholds are individually illegitimate and the branches of government that run the state are illegitimate too: they are tainted by the illegitimate routines of appointment employed. But there is also room for claiming in the same sense of the term that while a regime is generally legitimate, certain laws or appointments—including the appointment of an executive or other branch—are illegitimate: they happen to breach conditions of legitimacy that the regime generally respects. While I shall continue to concentrate on the legitimacy or illegitimacy of regimes, I do not mean to deny that there is room for invoking the concept in more local complaints as well.

Is it appropriate, however, to treat the legitimacy of a regime as an on–off matter, as in effect I have been doing? I believe that the factors that make for political legitimacy, like the factors that make for social justice, come in different degrees. But I assume that in each case we can set reasonable thresholds such that at or above those boundaries regimes are just or legitimate, in an on–off sense, while below them they are unjust or illegitimate.

I said earlier that while the justice of the laws gives people a content dependent if *pro tanto* reason to conform, there will often be a content-independent reason to conform to any reasonable system of laws, just or unjust: viz, that they serve as coordinating devices around which people build mutual expectations. Given that the laws of a legitimate regime may not themselves be legitimate, and given in particular that the regime itself may fall short of legitimacy, it is natural to ask whether there is any corresponding fall-back reason why people should still not resist the regime: any reason why they should restrict themselves to opposing it within the system.

The issue is not central to our concerns but, for the record, I think that there may be a very good reason—and not just a reason of personal prudence—to stop short of resistance to a certain sort of illegitimate regime, especially since resistance involves risks of violence and chaos. This is that however illegitimate it may be, the regime may still be capable

of being made legitimate by being treated as if it were legitimate: that is, by being opposed only within the system. Without being fully legitimate, the system may in that sense be legitimizable. And legitimizability can plausibly count as a fall-back reason to avoid outright resistance and oppose a state only from within the system.

It is time to take stock. Justice is an ideal for the social order imposed by a state, legitimacy is an ideal for how the social order should be imposed. That a social order is just gives citizens a special, content-dependent reason for obeying the laws imposed. That a social order is legitimate—that the state imposes it legitimately—gives them a special reason to accept the regime. The difference between obeying the laws and accepting the regime comes out in the case where citizens judge that the social order imposed is unjust in various ways but recognize that nonetheless it is legitimate. The legitimacy requires citizens to oppose the laws they take to be unjust, if indeed they choose to oppose them, only within the system; it requires them to explore only the avenues that the system leaves open, where those avenues include, at the limit, civil disobedience.

Keeping the Legitimacy Issue Alive

A Short History of Legitimacy

The reason why there is an issue about the justice of any social order is that that order may assume any of a variety of forms and different individuals may take different views about the merits and demerits of those variations, particularly from the point of view of how they and their kind fare under the arrangement. The reason why there is an issue about the legitimacy with which a social order is imposed is of a different kind. It derives from the fact that every state that imposes a social order does so coercively and, on the face of it, coercion means that the state deprives its citizens of their liberty. The state enforces taxation, imposes its laws on pain of penalty, and submits citizens to punishment—perhaps even capital punishment—if they fail to obey those laws.

The problem of legitimacy is how to reconcile such political submission with personal freedom, identifying a sort of regime that can coerce citizens without depriving them of their freedom. The question, in Rousseau's words, is how 'a man can be both free and forced to conform to wills which are not his own'.⁸ Or as Frank Michelman puts it,

⁸ JJ Rousseau, *Rousseau: 'The Social Contract' and Other Later Political Writings* (Victor Gourevitch tr, CUP 1997). The sentence is from *The Social Contract*, IV.2.7.

‘How might a person be self-governing through institutional enactment of a law to which he is opposed?’⁹

So understood, the problem of legitimacy lay at the centre of concern in the tradition of associating freedom with the status of citizenship that goes back at least to the Roman republic where, as one writer puts it, ‘full *libertas* is coterminous with *civitas*’.¹⁰ In this republican tradition, as it has come to be known, the private power of others—their *dominium*—may be inimical to the freedom of individual citizens but for all citizens the common and perhaps more salient danger to their freedom is the *imperium* or public power of the state.¹¹ If freedom requires civic status, then it is important to explain why it is not compromised by the submission to coercive law that is part and parcel of civic status.

The Romans had developed institutions in which power was held in the hands of no single individual or corporate body and the common people had an important policy-making part, electoral and contestatory, under the arrangements. Polybius, who first articulated the republican philosophy that became forever associated with Rome, argued that this mixed constitution, as he called it, was what guarded Romans against the danger of public *imperium*, ensuring that their citizenship really gave them freedom.¹² Whatever of the merits of the response—we will touch on that later—the tradition gave an important and distinctive place to the problem of legitimacy. And both the problem and the response—although this was interpreted in various ways—became a hallmark of the republican tradition, as that was revived in the Renaissance period, in the 17th-century England, and more generally in the 18th century English-speaking world.¹³ In all of those periods, those who identified with the tradition held that the mixed constitution, which was differently interpreted in different places, is essential to ensuring that people are not publicly dominated by the state they live under: the state that ideally serves to protect them against private domination.

But while the legitimacy problem remained at the centre of republican concerns, it assumed a different character amongst rival traditions of thought in the 17th and 18th centuries.¹⁴ Thus, following the lead of

⁹ FI Michelman, *Brennan on Democracy* (Princeton University Press 1999) 23.

¹⁰ C Wirszubski, *Libertas as a Political Ideal at Rome* (OUP 1968) 3.

¹¹ See B Kriegel, *The State and the Rule of Law* (Princeton University Press 1995) and P Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1997) ch 1.

¹² Polybius, *The Histories* (Harvard University Press 1954) Book 6.

¹³ On the history of the tradition see JGA Pocock, *The Machiavellian Moment: Florentine Political Theory and the Atlantic Republican Tradition* (Princeton University Press 1975) and Q Skinner, *Liberty Before Liberalism* (CUP 1998).

¹⁴ See Rousseau (n 8).

absolutists like Jean Bodin and Thomas Hobbes, Jean Jacques Rousseau accepted that the mixed constitution is an unworkable mode of organizing a state. Yet unlike those absolutists he retained a deep interest in the problem of legitimacy that any coercive state would raise; to that extent he remained faithful to the republican tradition. And so he had to find a different way of explaining why state coercion, or at least the coercion of his favoured form of popular state, need not be inimical to freedom.

His argument, built on precedents in Hobbes and Locke, was that state coercion is capable of being legitimate if and only if the citizens unanimously vote to submit themselves to the rule of the state: in the popular model that he endorsed, submit themselves to the rule of the majority in a general assembly of citizens. Rousseau's idea, quite famously, is that assuming that the majority in the assembly focus only on general laws, not on measures involving particular individuals, and assuming that they think of the common good in exercising their votes, not of the interests of their particular kind, then the will supported by the unanimously endorsed assembly must count as a general will in which all have an equal share. And to the extent that people are governed by the general will, so he maintained, they are subject to a will that is a part of themselves—side by side with their particular will—so that government cannot be said to deprive them of their freedom.

However ingenious Rousseau's argument is, it does not offer any realistic chance of securing the legitimacy of a state. No states are unanimously endorsed, rule on the basis of a committee of the whole, or satisfy the conditions that might transform the majority will into a general will. And certainly none satisfy all three conditions at once. The constraints of Rousseauvian legitimacy are over-demanding and infeasible. The problem of infeasibility led Immanuel Kant, who had otherwise been deeply influenced by Rousseau, to amend the position in a way that sidelines the issue of legitimacy altogether. It is his lead, in effect, that Rawls and other contractualists follow in concentrating on the ideal of social justice and not displaying the same concern with legitimacy.

Kant begins from the thought that the will imposed in the enactment of law—and so the will that sustains the social order created by law—should be 'the general (united) will of the people': the will associated with the 'original contract'.¹⁵ This looks favourable to the Rousseauvian approach from which Kant begins. But the appearance is misleading, for he insists that the original contract is 'only an idea of reason', not something 'presupposed as a fact', and argues not that the state should actually be

¹⁵ I Kant, *Practical Philosophy* (MJ Gregor tr, CUP 1996) 295 and 480.

grounded in such a will but that ‘every legislator’—in effect every state—should establish laws that ‘could have arisen from the united will of a whole people’.¹⁶ That the laws could have arisen in that way is ‘the touchstone of any public law’s conformity to right’, he says; ‘a rational principle for appraising any public rightful constitution’.¹⁷

With this shift, the issue of the legitimacy of a social order, on which Rousseau was primarily focused, is put aside in favour of the issue of the nature or quality of that social order. The fact that the laws could have been chosen in an original contract—their contractual eligibility—is now a sign of their having a certain intrinsic character, not an indication of their being sustained in a legitimate manner. It may not be surprising, then, that Kant shows scant regard for questions of legitimacy. While he favours a representative regime in which there is a separation of powers—a republic, as he calls it—he holds that even if a government should ‘proceed quite violently (tyrannically), a subject is still not permitted any resistance by way of counteracting force’.¹⁸ No established state can be illegitimate in our sense, then, since this ‘prohibition’ against ‘resistance to the supreme legislative power’ is ‘unconditional’: it applies even under the most appalling regimes.

No contemporary theories follow Kant in prohibiting resistance to any established regimes but many take his lead in making some version of contractual eligibility the criterion of whether a social order ought to be accepted, thereby downplaying the distinctness of the legitimacy concern. John Rawls does this in arguing that his two principles would have been chosen in an original position of contract where people operate under a veil of ignorance as to their own particular prospects in this or that social order.¹⁹ And he remains faithful to that same, broadly Kantian approach when he later replaces the test of contractual eligibility under a veil of ignorance with a looser, associated test of civic justifiability: the justifiability of a legal order, on the basis of reasons that ought to be publicly acceptable, to the citizens who live under it.²⁰ A concern with justifiability in this sense is a concern that that order should have a certain intrinsic character—in particular that it should be comprehensively just—and is

¹⁶ *ibid* 296.

¹⁷ *ibid* 297, 301.

¹⁸ *ibid* 298.

¹⁹ Rawls, *A Theory of Justice* (n 2).

²⁰ J Rawls, *Political Liberalism* (Columbia University Press 1993); and J Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2001). The approach that Rawls exemplifies in this later turn is shared loosely among a large range of contemporary political and moral thinkers.

distinct from the concern for whether it is appropriately supported that we find in Rousseau.

In fairness to Rawls and those who follow him, however, it is worth emphasizing that he is concerned with the justice, not only of a social order in our sense, but of a social-and-procedural order that encompasses constraints on how government should be controlled as well as constraints on how citizens should fare under the social order imposed by government. Thus the liberties that he wants to acknowledge under this order include not just the usual basic liberties of expression, association, and so on but also the political liberties of voting and standing for office. But in his encompassing theory of justice Rawls does not give these procedural constraints anything like the force that we would expect in someone focused on the issue of legitimacy. Indeed, he explicitly says at one point that they are 'subordinate to the other freedoms'.²¹

The Kantian elision of the problem of legitimacy may explain this near-exclusive focus on justice, albeit social-cum-procedural rather than just social justice. While the elision has been clearly registered by AJ Simmons, his response is to say that since legitimacy appears to require consent—this, on the model accepted by Rousseau—it is bound to be unavailable with any real-world states.²² Thus we are invited to embrace a sort of political anarchism, accepting that no contemporary states, however just they may be, are going to count as legitimate.

Can we do better than just neglecting or downplaying the issue of legitimacy, or abandoning all hope of having any state achieve legitimacy? One response that appears in the contemporary literature is to argue that while we have to accept that no coercive state is consistent with the demands of freedom, we can set a different bar—and a bar that falls short of outright justice—for when a state is to count as legitimate. Thus various contemporary authors argue that despite taking away people's freedom, a state can claim the authority that goes with legitimacy on distinct grounds. Perhaps the state is successful in epistemic terms, letting people reliably identify the requirements of justice without subjecting them to the rule of others.²³ Or perhaps it enables them to live together

²¹ Rawls, *A Theory of Justice* (n 2) 233.

²² AJ Simmons, 'Tacit Consent and Political Obligation' (1976) 5(3) *Philosophy and Public Affairs* 274–91; AJ Simmons, *Moral Principles and Political Obligations* (Princeton University Press 1979); AJ Simmons, 'Justification and Legitimacy' (1999) 109 *Ethics* 739–71.

²³ See D Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2007).

without civil war, as a pragmatic justification might suggest.²⁴ Perhaps it is the only sort of state that coheres well with an assertion of the fundamental equality of human beings.²⁵ Perhaps, to invoke a broadly Confucian approach, it puts people of virtue and talent in power; it is distinctively meritocratic.²⁶ Or perhaps, as Ronald Dworkin has recently argued, it manifestly strives to promote social and procedural justice, ‘recognizing that the fate of each citizen is of equal importance and that each has a responsibility to create his own life’.²⁷

Such theories have to count as second-best theories of legitimacy. In one way or another, they all hold that the threshold at which it becomes permissible to resist a state appears at a lower level than that at which it establishes a just order. It is set at a level where the state achieves a capacity to ensure justice better than rivals, or realizes a precondition of any system of justice, or ensures a minimum level of justice, or displays a will to pursue justice, or the like. It is certainly a good idea to set the trigger for justifying resistance at a level lower than justice, since no social order will count as just by the lights of all citizens. But no such trigger is likely to seem relevant, if it is possible to identify a threshold at which the coercive state may fail to be just without its coercion jeopardizing the freedom of its citizens. Why should people accept a freedom-denying state, whatever its other merits, when there is an alternative available that can play the role of common arbiter and decider without compromising their freedom? Thus we are returned to the freedom-centred version of the legitimacy issue. How can the citizens of a state be free and yet be subject to state coercion? We should have recourse to one of these other theories only in the event of not being able to identify a feasible, freedom-based account of legitimacy.

Legitimacy and Freedom

One of the reasons why the legitimacy issue may generally be ignored in the contemporary literature, at least as an issue about freedom, is that the conception of freedom that has been dominant since the late 18th century casts it as non-interference and under that conception it is hard to see how

²⁴ See B Williams, *In the Beginning was the Deed: Realism and Moralism in Political Argument* (Princeton University Press 2005).

²⁵ See A Buchanan, ‘Political Legitimacy and Democracy’ (2002) 112 *Ethics* 689–719.

²⁶ D Bell, *China’s New Confucianism: Politics and Everyday Life in a Changing Society* (Princeton University Press 2010).

²⁷ R Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 321–22.

state coercion could cohere with freedom.²⁸ Interfering with a choice, on a generous interpretation, may involve intentionally replacing an option, removing an option, or misrepresenting any of the options by which the choice is defined.²⁹ Under that account, all laws take away from the freedom of subjects in at least some of their independently available choices. The point was emphasized, almost with relish, by Bentham himself. 'As against the coercion applicable by individual to individual, no liberty can be given to one man but in proportion as it is taken from another. All coercive laws, therefore . . . and in particular all laws creative of liberty, are, as far as they go, abrogative of liberty'.³⁰

This means that under the conception of freedom as non-interference, there is no way in which the subjects of the law can enjoy full freedom of choice. They will be subject to state interference, and so to a loss of freedom, insofar as the state decides what laws to put in place; enforces those laws with the threat of penalty; imposes penalties on those who offend; and taxes its subjects with a view to maintaining the system.

It is true, of course, that in a well-run society the interference that the state perpetrates in imposing laws and taxes and penalties may be less, by whatever measure is taken to be appropriate, than the interference that the state prevents. But even in that ideal event, it will remain the case that the state does indeed perpetrate interference and that in doing so it fails to preserve the freedom of citizens in their dealings with it; they are subject to its will in a way that takes from their freedom under this conception. Thus Isaiah Berlin writes, in elaboration of what he takes to be a lesson from Bentham: 'Law is always a fetter, even if it protects you from being bound in chains that are heavier than those of the law, say some more repressive law or custom, or arbitrary despotism or chaos'.³¹

But while the conception of freedom as non-interference makes it impossible to argue on grounds of freedom for the legitimacy of any likely state, the republican conception of freedom that it replaced does not make this impossible in the same manner. Indeed it is for that reason, I surmise, that legitimacy was taken in the republican tradition to be something that could be institutionally secured in a state: specifically,

²⁸ See Pettit *Republicanism* (n 11) and Skinner *Liberty before Liberalism* (n 13). While Bentham's and his associates were mainly responsible for popularizing the idea of freedom as non-interference, that idea had been adumbrated by Hobbes. See Q Skinner, *Hobbes and Republican Liberty* (CUP 2008); and P Pettit, 'Freedom in Hobbes's Ontology and Semantics: A Comment on Quentin Skinner' (2012) 73 *Journal of the History of Ideas*.

²⁹ See Pettit, *On the People's Terms* (n 1) ch 1.

³⁰ J Bentham, *The Works of Jeremy Bentham* (William Tait 1843) 503.

³¹ I Berlin, *Four Essays on Liberty* (OUP 1969) 3.

secured by the fact of the state's operating under the constraints imposed by a mixed constitution.

On the republican conception, freedom is a matter of enjoying a suitable civic status. Spelled out in greater detail, it requires, first, a freedom in the exercise of certain choices; second, a freedom in the exercise of those choices that is secured on a certain basis; and third, a freedom that is understood in a distinctive manner, requiring non-domination rather than non-interference.

Taking up the first of these three conditions, the choices in which freedom is required are what John Libourne in the 17th century described as 'the fundamental liberties': the choices, as I conceive of them, that all citizens can exercise and enjoy at one and the same time.³² These do not include choices requiring impossible abilities, as in the choice between walking on water and walking on solid ground. Nor choices in which people are in essential competition, as in the choice between winning or not winning superiority over others. Nor choices involving victims, as in the choice between attacking another or not. They are fundamentally compossible choices that may be simultaneously exercised by all and, at the same time, enjoyed by all. They may be compossible by nature, as with the choice between speaking your mind and not speaking your mind. Or they may be compossible by virtue of institutional design, as with the choice between appropriating or not appropriating something under local rules of property.

Turning now to the second of our three conditions, the basis on which the fundamental or basic liberties have to be secured for civic freedom in the republican sense is a basis in public law. As a matter of shared awareness amongst the citizenry, it has to be the case that the free person—the *liber* in early Latin usage, the 'freeman' in 17th-century English—is protected, perhaps even in some ways resourced, in the exercise of relevant choices by a law that is promulgated in public and applied equally in defence of all. It is this public entrenchment of freedom that enables free persons, in the age-old republican picture, to be able to look one another in the eye, without fear or deference: to escape not just servitude but also servility.³³ Indeed the natural criterion for what constitutes adequate entrenchment is that it is enough, by local cultural standards, to give this capacity to all citizens, or at least to those who are not excessively

³² See J Libourne, *The Legal Fundamental Liberties of the People of England, asserted, revived, and vindicated* (London, 1646). For an elaboration of the fundamental or basic liberties, understood in this way, see Pettit, *On the People's Terms* (n 1) ch 2.

³³ See Q Skinner, 'Freedom as the Absence of Arbitrary Power' in J Maynor and C Laborde (eds), *Republicanism and Political Theory* (Blackwell 2008).

timid or paranoid. In the ‘free Commonwealth’ or republic, as John Milton wrote, ‘they who are greatest . . . are not elevated above their brethren; live soberly in their families, walk the streets as other men, may be spoken to freely, familiarly, friendly, without adoration’.³⁴

We have seen that republican freedom requires freedom in the choices associated with the basic liberties and that this must be secured on the basis of public law. Turning finally to our third condition, it also equates freedom in a choice with the absence of domination, not interference. On this conception, freedom requires people not to be subject to the will of others rather than requiring, as Bentham required, that they not be subject to the interference of others. Freedom, as Algernon Sidney put it in the 17th century, consists in ‘independency upon the will of another’. ‘Liberty’, in an 18th-century variant, ‘is, to live upon one’s own terms; slavery is, to live at the mere mercy of another’.³⁵

The difference between the two conceptions comes out in a difference on two fronts between the implications that they support. It is possible to be subject to the will of another in a certain choice—it is possible to have to depend on the will of the other as to what you should choose there—without that other exercising any active interference. The classical example of such a possibility arises with the slaves who are lucky enough to have an indulgent master who gives them a great deal of latitude in the choices they may make for themselves. Even if the master allows the slaves to exercise the basic liberties of the society as they wish, still they are subject to the master’s will; they have to depend on the state of the master’s will remaining favourable if they are to be able to choose as they wish. The slaves may not suffer interference but still, on the conception of freedom as non-domination, they lack freedom. They are not their own men or women.

The second difference of implication between the rival conceptions of freedom appears in the possibility, not of domination without interference, but of interference without domination. You are subject to the interference of another in your choices, even if there is an arrangement in place, perhaps set up by you, perhaps set up by a third party, under which you can control that interference; say, you can stop that interference at will or allow it to continue only on terms that you endorse. Suppose you hire someone to make certain of your decisions for you—say, your financial or social or even religious decisions—or suppose that you inherit such an arrangement from your family. The person hired may

³⁴ J Milton, *Complete Prose Works of John Milton*, vols 1–8 (Yale University Press 1953–82) 424–25.

³⁵ A Sidney, *Discourses Concerning Government* (Liberty Classics 1990) 17; J Trenchard and T Gordon, *Cato’s Letters*, vol 2 (Da Capo 1971) 249–50.

not always choose as you would choose—may even choose in a way that frustrates your current wishes—but so long as you have to the power to suspend and shape the interference, you are not subject to their will. You do not depend on their will remaining a goodwill for being able to impose your wishes on the matters they currently administer for you.

This should serve to introduce the republican view of the freedom that can go with civic status. We might describe the social order established by a state as just, in a republican rendering of the idea, insofar as it enables people to enjoy such a civic status in relation to one another. But it remains to show why we need not despair, on this view of freedom, about identifying institutional conditions under which the coercive state would not jeopardize the freedom of its citizens in imposing such an order and would count therefore as legitimate. Why does the legitimacy problem become feasible under the conception of freedom as non-domination, when it is so obviously infeasible under the conception of freedom as non-interference?

The answer, at the abstract level, is pretty straightforward. The second implication of this way of conceptualizing freedom is that interference in your choices need not be dominating and that when it is not dominating it does not impose another's will and does not jeopardize your freedom. The coercive state, as we have seen, certainly interferes in the choices of its citizens. But this coercion or interference will not jeopardize the freedom of those citizens if they exercise an appropriately effective form of control over the interference. And so the prospect of a legitimate state is nothing more or less than that of a state in which citizens exercise a suitable type of control over the coercion that the state practices in their lives. The legitimate state will be, in an etymological sense, the democratic state: the state in which the *demos* or people exercise a suitable form of *kratos* or control over those in power.

This abstract answer points us in the direction that a satisfactory theory of legitimacy has to take and identifies the ideal of a legitimate state, understood in the republican way, as a form of democratic ideal. But these indications, reassuring as they may be, are worth little unless we can say more about the sort of control that citizens must be able to achieve over the workings of their polity. Without being able to go into much detail, I turn to a consideration of this challenge in the final section.

The Institutional Requirements of Legitimacy

In the case of the interference practiced by a hired hand, there are two capacities that give you a form of control and ensure that you are not

subject to the will of such an empowered agent. The first is that you can suspend the regime under which he or she has the right to interfere in certain of your choices and the other is that you can shape the interference that they practice. This observation raises two questions in the case of the coercive state. Is there anything in the relation between citizens and state that can answer to the suspension condition? And, assuming that there is something available to be said in response to that first question, can citizens exercise the sort of shaping of government interference that would guard them against domination? I discuss the questions in turn and provide a sketch of the answers that I find appealing.³⁶ The sketch is meant to give some plausibility to the idea that when it is understood in a republican way, then legitimacy—even legitimacy understood in the demanding sense it is given here—begins to look like a feasible and relevant ideal in politics.

First Question

The answer to the first question about the possibility of suspending the regime of state coercion is that there is certainly nothing possible that corresponds closely to the possibility of suspending the interference of a hired hand. The state does not give you or anyone else discretion over whether to live in political society rather than in a state of nature and, though it can and should allow you emigration, it cannot give you or anyone else the right to live in one state rather than another. And neither does it give you or any other citizen, no matter how virtuous and compliant, discretion over whether the laws are to be coercively enforced against you; uniform coercion—with or without certain variations—is the rule of the political game. We saw earlier that it is preposterous to think that people in the past may have freely chosen to enter a regime of state coercion, as Rousseau requires for legitimacy. It would be equally preposterous to think that people in any contemporary state might be able to suspend the role of state coercion in their lives, exercising an option of exit. We are born into a political world and we have no choice but to remain part of that political world. There is no state of nature that is available as an alternative.

Does the necessity of living under state coercion mean that there is no prospect of state interference being less than dominating? Does it mean that the parallel with the hired hand does nothing to direct us to the possibility of a legitimate, freedom-consistent state? I argue that the

³⁶ For an elaboration of the answers see Pettit, *On the People's Terms* (n 1) chs 3–5.

disanalogy on this point, important though it is, does not undermine the lesson suggested and that we can keep alive the ideal of a non-dominating but coercive state. The reason is that it is not due to the domination of your state—or indeed the domination of any agency, individual or corporate—that you are subject to the necessity of living under coercive conditions. Rather it is due to inescapable constraints that do not impose an alien will but operate like the constraint that subjects you to gravity.

It is true that neither you nor anyone else has a choice over whether to live under a state or in a natural condition; that neither you nor anyone else has an assured choice over whether to live in one state or another; and that if you live in a political society you do not have any choice over whether to comply with the law on a non-coercive basis: that is, without being exposed to penalty. But these constraints on your life raise an issue of legitimacy for the state, only if they are imposed by the state itself and represent subjection to an alien will. And it turns out that they are not imposed by your state—or indeed by any other state—in the manner of a decision to interfere rather than not interfere, as if that were a voluntary choice; they materialize on an independent, unwilling basis.

It is not your state that makes political society unavoidable but the historical fact that our planet has been occupied entirely by states and that there is no remaining possibility of living in a stateless zone. It is not your state, or not necessarily your state, that stops you from living elsewhere but the political fact that as a condition of survival—and not for example as a means of dominating you—other states have to put limits on entry by outsiders. And it is not your state that decides that everyone should be coerced to obey the law. By all accounts coercion will be necessary to induce some people to comply, or to assure others of their compliance. And if your state coerces any citizens to obey the law then, by a functional necessity, it has to coerce all citizens: no state could hope to survive—and indeed no state could treat its members as equals—if it tried to enforce a distinction between coerced and un-coerced citizens.³⁷

As the force of gravity establishes the conditions under which you have to make your life, but does not subject you to an alien will, so the same is

³⁷ What is true, of course, is that if your state dissolved itself, then it would not be responsible for your living in political society, in this society rather than that, and under a regime of universal coercion; the state or states that took over the territory it vacated would then be responsible on those fronts. But this is scarcely a ground for complaint against your actual state. The fact that other states are poised to assume control of the territory in which you live, and therefore represent active threats of domination, means that you would have a reasonable complaint if your state did dissolve itself; the state's dissolution would amount to its giving up its role as a protector against such domination.

true of the historical, political, and functional constraints rehearsed in these comments. The state does not reduce your freedom as non-domination just by virtue of existing and operating in a manner that those constraints make inescapable. It would dominate you only if it had a choice in the matter of whether to let you live outside political society, or live in another state, or live under purely voluntary submission to the law. You may long for a world that is free of coercive states and lament the developments of the last couple of thousand years. But a concern with escaping domination does not justify such a hankering.

The upshot of these remarks is that despite the fact that you cannot suspend the dispensation under which you live a state-bound existence, you may still hope to enjoy interference without domination at the hands of the state. It is part of the human, historical condition that you have no choice but to live under state rule, so that does not in itself mean that you are dominated by the state. Whether you are dominated by the state will depend entirely on how far you can shape how the state behaves within the bounds where it has discretion.

Second Question

This takes us, then, to the second question. Can the citizens of a state exercise a suitable shaping influence—a suitable form of control—over the interference that any state is bound to practice? This is the interference that the state exercises in levying taxes, in imposing laws, and in exacting penalties. Whether or not government dominates you and your fellow citizens in the exercise of such interference will depend on whether or not it is suitably controlled in that exercise. But what might make for a suitable form of citizen control? What might make for the sort of democracy that would ensure the legitimacy of the state?

Whatever control you might hope to exercise over the interference of the state, you cannot expect to be able to exercise it independently of other citizens. For you are constrained by nature to live in the company of others and, by the nature of the states with which history has left us, to live under a collective form of coercion that applies as much to others as to yourself. Thus any form of control that might render state interference un-dominating has to be a multi-lateral form of control in which each participates. To yearn for unilateral control of state coercion would be to long for a world in which you did not have to live with fellow citizens. Or it would be to long for a world in which you were special and had claims to freedom unmatched by others. But any world without fellow citizens would be a world without a state. And any world in which you had

unilateral control would not provide for the freedom of all citizens, which is what legitimacy and justice require, on a republican version of the ideals. The control needed for making the state un-dominating must be a form of civic or popular control in which you participate with others, and if this gives you less than what unilateral control would provide, that is not the result of domination on anyone's part; it is a constraint imposed by having to live with others, and in particular with others who have the same claims to freedom as you.

What might make for a form of citizen control over the operations of a state that would render the state un-dominating and legitimate? I address that question briefly in the remainder of this section, looking first at what control involves and then identifying three conditions that would have to be satisfied by a system of civic control that gave legitimacy to the state.

Control = Influence + Direction

The notion of control involves two distinct elements, which I shall describe as influence and direction. To influence a process is to make a difference in how the process proceeds.³⁸ To influence a process in a way that gives it direction is to make a designed difference, a difference that answers to some preconceived or preferred pattern. Control requires influence but it also requires direction; it amounts to nothing more or less than directed influence. Control in that sense may be more or less effective, of course, depending on how far the direction imposed on the process constrains the process: depending on far into the detail of the process the constraints run.

Imagine the effect you will have on the traffic at a busy intersection if you play police officer and give hand signals in the usual manner, inviting the cars to ignore the lights. In all likelihood some cars will take their lead from your signals, others not; and among those that do not, some will try to drive quietly by, others protest with honking horns or exasperated gestures. You will certainly have an influence in such a case, making a difference to how the cars behave; you will probably create utter chaos. But will you have control? Not on the assumption that you wanted the cars to follow your signals, as they might follow the signals of a police officer. You might have made a difference to how the cars behave but not a

³⁸ Although I do not spell this out in the text, I may exert influence in the intended sense if, while being in a position to do something and thereby to have a particular effect, E, I opt to do nothing; the effect in that case will be, typically, that E does not occur.

difference that imposes any desired direction or pattern—not a difference that serves any identifiable end or goal.

What will be required in order for your influence to give direction to a process like the flow of cars in this example? The influence must give rise to a recognizable pattern in the process and that pattern must be one that you seek or are at least disposed to welcome. The influence, in other words, must control for the appearance of a desired pattern. There will be a range of ways in which you can vary your input to the process, since there are different hand-signals you can give. And for each of those inputs there will be a corresponding output: the traffic will alter in response to your signals. In the case where you take the police officer's place at the intersection this condition will not be fulfilled: there will be a more or less random correlation between how you move your hands and how the cars adjust. Were a police officer to be in your place, however, then things would certainly be different. The officer's hand-signals would reliably generate, now this sort of effect, now that; as we say, they would control for how the traffic moves.

If the *demos* or people are to participate in exercising *kratos* or control over government, and if the control they share is to ensure that the coercive laws of government are not dominating—not the imposition of an alien will—then what they exercise must involve both influence and direction. The people might have influence on government without this impressing any particular shape or pattern on the acts of government; it might be an influence as wayward and random in its effects as the influence of the weather. That the people had such an influence would not give us any reason to think that the laws and decrees passed by government are passed on terms that they dictate, as the actions of a hired hand are performed on terms that you dictate.

Three Conditions on Suitable Control

In order for a system of civic control—a system of civic influence and direction—to establish the legitimacy of a state there are three conditions that it has to fulfil. It must be individualized, unconditioned, and efficacious.

The system must be individualized in the sense of giving each citizen an equal share in this control. Did some individuals not have an equal share in exercising control over government, then they would be subject to a state that is not constrained to take account of them in the way in which it is constrained to take account of others. Such a limitation on their control over the state is different in kind from the common limitation that derives

from the necessity of sharing. It would expose the disadvantaged individuals in a way that it does not expose others to a power of interference on the part of the state. It would allow them to be dominated.

What might it mean to share equally in the civic control of the people over the state? On the side of influence, it would mean having access to the same channels of influence as others, whether influence exercised in voting for government or in contesting what government does or plans to do. Contestation of this kind may be conducted individually or via public-interest groups and it may be formal or informal in character, involving the use of court or tribunal or parliament, or recourse to the media or the streets. Equal access to influence requires the provision of such electoral and contestatory rights for all and a restriction, of course, on the influence that may be wielded on the basis of great wealth or special connections.

Equally shared control requires, not just equal access to the channels of influence on government, but also access to a system of influence that imposes an equally acceptable direction on what government does. In the republican tradition, this is taken to mean that the influence of the people pushes government towards the realization of the public good—in particular, the public good as that is registered on all sides of the population. This raises a serious problem, which is to explain how such a recognized public good could emerge in a complex society of the kind in which most of us live. For present purposes, however, I must assume that there is some candidate available to fill the required slot, as indeed many philosophies of politics postulate. I have explored the topic at length elsewhere.³⁹

Apart from being equally shared, any system of civic control that establishes the legitimacy of the state would have to satisfy two other conditions. The second condition is that the system should be unconditioned in character and the third that it should be suitably efficacious. Assuming that the system imposes an equally acceptable direction on government, these conditions apply in the first place to the system of influence that it involves. The unconditioned requirement is that people have an influence on government that is not conditioned on the willingness of government, or of any third party, to play along. The efficacious requirement is that people have a sufficiently high degree of influence, and a sufficiently effective form of control, to guard them intuitively against the spectre of domination.

Suppose that you exercise influence over me—directive influence, as we assume—but, without being aware of it, you do so only because I am

³⁹ Pettit, *On the People's Terms* (n 1).

happy to follow your instructions: I have enough goodwill to want to go along, in relevant domains, with anything that you propose. Or suppose that you enjoy influence over me but, again without being aware of it, you do so only because a third party forces me to follow your lead in relevant areas. Such a combination of influence and direction might constitute control in a certain limited sense. But the mediating influence would be too conditioned to count intuitively as enough for interpersonal control. In the first case, I would remain in control to the extent that I could change my will at any point and refuse to follow your lead. In the second case, the ultimate, interpersonal control would lie, not with you, but with the third party that forces me to accept your lead.

The lesson for legitimacy is clear. If people are to exercise a form of control that is capable of establishing the legitimacy of the state, then the influence they enjoy must not be conditioned on the willingness of the state to play along. And equally it must not be conditioned on the willingness of a third party—an elite or army or foreign power—to force the state to submit to the directive influence of the citizenry. The citizens themselves must retain ultimate power, with the government being forced by fear of the people to submit to their demands. As the 18th-century republican, Richard Price, put it: the freedom of the people cannot depend on an ‘indulgence’ or an ‘accidental mildness’ on the part of the state.⁴⁰ It must be grounded in their own shared power.

Turning to our third condition, it should be clear that a system of equally accessible and unconditioned influence might fail to deny government a dominating capacity, because of not being of a sufficiently intense degree: because of not being suitably effective or efficacious. It might not even be suitably efficacious if it reached the maximum level consistent with being equally accessible to all. So what level of directive influence is going to be required to make the system of control appropriate?

Imagine that the party or personnel in government do not meet with your approval. What are you to think if they are manifestly appointed under a suitably efficacious form of popular influence and direction, in which you have an equal share? You can only think that it was just tough luck that those appointed are not to your taste; it was not the work of a dominating will, as it would be for example under a colonial administration. Or imagine that the government passes legislation of which you disapprove: say, legislation requiring the construction of new prisons. What are you to think if it does so, again manifestly, under the equally

⁴⁰ R Price, *Political Writings* (CUP 1991) 26.

shared, suitably efficacious control of the people? You can only think that it was just tough luck for you that the decision went that way; it was not the result of a will at work in the public sphere that you do not equally share in controlling. Or imagine, finally, that in implementing the legislation, the government decides to your dismay that one of the prisons should be located in your neighbourhood—in your back yard. What are you to think if it manifestly makes this decision under a suitably efficacious form of control in which you and those in your area equally share? Again you can only think that it was just tough luck that the decision went against you; it was not due to the special influence of those who are richer or electorally better placed or closer to the corridors of power.

These observations suggest that a good test of when a system of popular control is efficacious enough in controlling the state is that it allows you and your fellow citizens to think of unwelcome decisions on the part of government as products of tough luck, not signs of a malignly exercised power of domination. Assuming that it is appropriately directive, then, the influence of a people within a legitimate state must not only be equally accessible and unconditioned; it must also be efficacious at a level that ensures the satisfaction of that test.

Conclusion

In the first section of this article, we saw that it is perfectly natural to distinguish between the justice question as to whether the social order imposed by a state is desirable and the legitimacy question as to whether the way in which the order is imposed is desirable. In the second section, we looked at how the question of legitimacy came to be neglected or downplayed in favour of a single focus on justice, particularly under the influence of the modern ideal of freedom as non-interference. And then, arguing that no such elision is supported by the older ideal of freedom as non-domination, we saw in principle how the imposition of a social order might be consistent with the freedom of the people on whom it is imposed—in this republican sense of freedom—and might in that sense count as legitimate. The article does not offer a full account of how a state might be organized so as to achieve legitimacy of this kind but I hope it may do enough to raise a serious challenge for the many current approaches in legal or political philosophy that effectively ignore or downgrade the ideal of political legitimacy.