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CHAPTER 6

LEGITIMATE INTERNATIONAL INSTITUTIONS: A NEO-REPUBLICAN PERSPECTIVE

PHILIP PETTIT*

I. INTRODUCTION

In Chapter 5, 'Democracy: Legitimacy and International Institutions', Thomas Christiano argues that the legitimacy of the international order requires the development of a voluntary association of representative states—an association only dimly foreshadowed in current conditions—and not anything that we might describe as a global democracy. This paper supports the position defended by Christiano, arguing to a broadly similar conclusion from a starting point provided by neo-republican ideas.¹

What follows is in three sections. Section II identifies a republican view of legitimacy as it would apply in the national and international contexts. Section III

* This is a companion paper to 'The Republican Law of Peoples', *European Journal of Political Theory*, special issue on 'Republicanism and International Relations' (forthcoming). I am grateful to the editors, Samantha Besson and John Tasioulas, for their very useful comments on an early draft of this paper.

¹ See, Pettit, P., *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997); Skinner, Q., *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998); Maynor, J., *Republicanism in the Modern World* (Cambridge: Polity Press, 2003); Laborde, C. and Maynor, J. (eds.), *Republicanism and Political Theory* (Oxford: Blackwell, 2007).

looks at how legitimacy might be attained in the rational context. And then Section IV outlines a picture of how it might be achieved in the international. I would have liked to concentrate more exclusively on the international context but the notion of legitimacy emerges in the first place with domestic regimes and, in any case, the legitimacy of the international order turns in good part on the domestic legitimacy of the states that constitute it.

II. LEGITIMACY, NATIONAL AND INTERNATIONAL

1. Freedom as Non-Domination

The main focus in neo-republican theory is on the value of freedom as non-domination. Take a given choice between alternatives, A, B, and C. You will be dominated in that choice, and lose your freedom, to the extent that others exercise non-deliberative control over what you choose; you will be free to the extent that you avoid such control.

Let others have a degree of control over your choice in so far as they can raise the probability that you choose an option they favour. Such control will be deliberative, and so no threat to freedom, if others exercise the control just by sincerely giving you advice, on a take-it-or-leave-it basis, about reasons to act one way or another; you may seek an articulation of these reasons or accept the advice on trust. Deliberative control will not affect your freedom because it does not intentionally mislead you about your options and it leaves the choice between those options up to you; it serves the role that deliberating with yourself may serve. Thus, it does not remove any options, as in the exercise of force; it does not replace any by options that have penalties attached, as in the case of coercion; it does not undermine your capacity for choice, as in manipulation; and it does not mislead you about any of those factors.²

Avoiding the non-deliberative control of others in a given choice means avoiding these kinds of force or coercion or manipulation or deception. But avoiding non-deliberative control is not ensured by avoiding the interference of others in that choice: that is, avoiding their active obstruction or coercion or manipulation or deception. Others may control you non-deliberatively without active interference, since they may stand by in a monitoring or invigilating position and only interfere on a need-for-interference basis. They let you go as you will, if you are inclined to act as they want, but they are prepared to take steps to block or inhibit or redirect your choice—or at least

² Pettit, P., 'Republican Liberty: Three Axioms, Four Theorems', in Laborde, C. and Maynor, J. (eds.), *Republicanism and Political Theory* (above, n. 1).

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to make you regret that type of choice and avoid it in the future—if your pattern of behaviour, or their pattern of preference, should change. Thus, interference may be absent while invigilating control remains in place. And interference may remain absent, if you become aware of the invigilation—or just think there is invigilation—and inhibit yourself so as not to activate any interference: say, by resorting to self-censorship or self-ingratiation.³

But not only may non-deliberative control obtain without active interference. The opposite is also true. You may undergo the active interference of others without having to endure their control. Suppose that you prefer that others exercise a certain obstruction or coercion or even manipulation in your life, say in order to cope with an addiction; you are happy to allow your spouse to lock away the whisky or the cigars for fear of your own inclination. To the extent that you can call off this interference in your life and affairs, should you change your mind, that interference will not represent a way in which you are controlled. Others figure as agents of interference in this story but they do not control you, since they operate subject to your own control; the interference they practice is non-arbitrary: it is forced to track your conscious interests, not the interests of the interferer.⁴

On this neo-republican account, the non-deliberative control that affects your freedom is identified with domination. You will be dominated by others in a given choice in the measure to which they have a power of interfering in that choice and that power is not subject to your own control: it is, in that sense, an arbitrary power in your life. The account implies that freedom in a particular choice requires the absence of an arbitrary power of interference on the part of others. But it does not require the absence of a non-arbitrary power of interference. To the extent that others interfere only non-arbitrarily, the interference practised will restrict your choice, as natural obstacles may do, but it will not make you unfree in that choice; you will be the one who is ultimately in charge.

So much for what republican freedom requires in a given choice. But people cannot be free in every possible choice, if only because some choices—say, that of exercising interference or not—may be inimical to the freedom of others. So what choices in particular should be free, on the republican approach?

The approach hails freedom as non-domination as an ideal for those choices that each can enjoy, consistently with others enjoying them equally at the same time: that is, for those choices that count as basic liberties.⁵ Freedom in this sense is a property of persons; it is a status that they enjoy to the extent that they are

³ This will remain true even if others become so well disposed—even if you prove to be so charming or amusing—that they allow you to act on whatever happens to be your preference. To the extent that they retain the power of interference, and are ready to interfere should their disposition change, they remain your masters. You operate only within their power and whatever you do is done *cum permissu*, in the old republican phrase: by their implicit or explicit leave.

⁴ Pettit, P., *Republicanism: A Theory of Freedom and Government* (above, n. 1).

⁵ Pettit, P., 'The Basic Liberties', in Kramer, M. (ed.), *Essays on H. L. A. Hart* (Oxford: Oxford University Press, 2008). The domain of choice over which the freedom is defined may not seem to be very extensive but

The first of these requirements is naturally identified as a demand of domestic justice and the second as a demand of international justice. Both prescribe that resources should be allocated according to a distributional ideal whereby individuals are given their due:⁸ their due, on the neo-republican conception, as potentially free, undominated subjects. Domestic justice would ensure that the people of a country are given their due in their individual right as citizens, global justice their due in their right as a collective citizenry.

The third demand, by contrast with the first two, is one of legitimacy. It requires that the agencies whereby domestic and global justice is achieved operate on a suitable pattern in pursuit of those ends. Whatever the options taken for the distribution of resources—and however right they may seem to be—they should at least be taken on the right basis. The options will often involve interfering in the affairs of the relevant parties; this is obviously so in the case of the coercive state. The republican requirement for legitimacy is that such interference should be conducted on a non-arbitrary basis: on a basis that gives ultimate control of what happens to those on the receiving end. The interference, ideally, should resemble that whereby my partner, on my own instruction, hides the key to the whisky cabinet or the cigar box.

This demand of legitimacy divides into two, since the agency whereby justice is domestically assured is the state, and the agency whereby global justice is assured is bound to involve the actions of many states and perhaps many individuals; I describe it, for short, as the international order.

The problem of domestic legitimacy is that of ensuring that in the exercise of its public power, the domestic polity is not a dominating presence in the lives of its citizens. It is a non-dominating guardian against private domination and it is a non-dominating organizer of whatever other collective goods it seeks to advance. The problem of international legitimacy is that of ensuring that the exercises of power whereby the international regime guards against domination over national groupings, and pursues any other goods, does not itself involve the domination of any individuals or their groupings. It is a non-dominating counterpart, at the international level, of the non-dominating state.

So much for the general approach to issues of legitimacy that neo-republicanism would sponsor. In the next two sections I look at the appeal and implications of the republican criterion of legitimacy, first in the context of the domestic state, and then in the international context. I argue, though only in a sketchy manner, that the criterion makes a good deal of sense in each context and that it points us towards sensible and attractive reforms.

⁸ Rawls, J., *A Theory of Justice* (Oxford: Oxford University Press, 1971).

III. LEGITIMACY IN THE NATIONAL CONTEXT

1. The Republican Criterion of Domestic Legitimacy

According to neo-republicanism, the state can claim to be legitimate just to the extent that it exercises its role in a non-dominating way. It must discharge its functions under the ultimate control of the citizens. Specifically, it must give its citizens effective and equally shared control over how it performs.

That a state is legitimate does not necessarily mean that you as a citizen are morally obliged to obey its laws; other moral considerations might argue against obeying them in particular instances. The notion of legitimacy is tied, rather, to two distinct implications.⁹ The first is that you have to acknowledge the right of the regime to enforce the law coercively, to charge law-breakers with offences and to punish them if they are duly convicted. And related to this, the second is that you are only entitled to challenge the law by means that are available within the system.¹⁰

The republican criterion of legitimacy contrasts with more standard approaches in focusing on how the state functions, not on how it is formed. There are two formational constraints that might be suggested for legitimacy. One, associated with Hobbes and Locke, is that citizens should consent to live under the state they form. This is unappealing, since consensual entry won't mean much unless there is consensual exit; and in any case it would make all states illegitimate. The other constraint is that citizens, however they enter, should have the option of leaving a state if they wish. This is normatively more attractive, since freedom of exit would mean that anyone who continues to live under a state does so voluntarily.

The republican criterion of legitimacy will require, in accordance with this exit constraint, that the state should allow its citizens to leave if they wish; if it denied citizens this right, then its status as a non-arbitrary source of interference would surely be put in question. Giving citizens the right to exit, however, doesn't mean much in the contemporary world since there is no possibility of being able to emigrate to an area where no state rules and only a limited possibility of being able to emigrate to another state; no other state may grant the right of entry. Does that mean that no state is legitimate, then? Surely not. The fact that everyone has to live under some state, and that no one can opt for a state-free existence, is the product of natural and historical necessity, not in itself the effect of dominating interference by the local state.

⁹ Simmons, A. J., *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979).

¹⁰ Notice, however, that civil disobedience is an act of protest within the system, not without, since the protestors accept the right of the system to penalize their law-breaking; the idea, at least with overt disobedience, to display the intensity of the protest by the willingness to risk and accept such penalties.

In view of these considerations, it is more than a formational account of a state of nature from a crucial requirement, account of how a state operates on a non-arbitrary basis and how it operates under the effective control of its citizens or people.

2. Satisfying the Republican Criterion of Legitimacy

What might it mean in practice to satisfy the republican criterion of control of its citizens or people? It might mean that if two broad conditions are met, then the state is legitimate: by agents and agencies that are suitably susceptible to influence, and that this influence is channelled through mechanisms on terms that are endorsed by those who are reasonable and who are treated with respect. In a phrase, the state should be constrained by the consent of the governed. The answer to that broadly defined question is that the state should be constrained by the consent of the governed.

a. First Condition: The State Must Be Governed

Government cannot be exercised only in view of the number of individuals who in some sense are represented by the types of representatives that the people. I describe these representatives as follows.

Let us assume that the political system has already been established; we will assume that the first of our two kinds of agents or agencies is a disposition to obey the laws they specify. And they might be servants of their will. Or,

¹¹ Rousseau may seem to be the originator of this theory. But Rousseau is an innovator in the theory of the neo-Roman republican tradition (see Pettit, *Universitaires de France*, 1995).

¹² Pettit, P., 'Joining the Dots', in *Philosophical Foundations of Democracy* (Oxford: Oxford University Press, 1997).

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In view of these considerations, republican theory focuses on a functional rather than a formational account of legitimacy; thus it is generally dismissive of the idea of a state of nature from within which people would voluntarily form a state.¹¹ The crucial requirement, according to almost all versions of the approach, is that the state operates on a non-arbitrary basis: that is, as I interpret the requirement that it operate under the effective equally shared control of its citizens.

2. Satisfying the Republican Criterion of Domestic Legitimacy

What might it mean in practice for a state to operate under the effective and equal control of its citizens or people? The people will control the state in this way only if two broad conditions can be fulfilled. The first is that government is exercised by agents and agencies that are subject to effective, popular influence: they are suitably susceptible to inputs originating with the people. And the second is that this influence is channelled and organized so that it forces government to operate on terms that are endorsed across the population as a whole—or at least across those who are reasonable enough not to think that they should be given special treatment. In a phrase, the government of the non-dominating, legitimate state should be constrained by the people to operate on the people's terms; it should answer to that broadly democratic ideal.

a. First Condition: The People's Influence

Government cannot be exercised by an assembly of the citizenry as a whole, if only in view of the number of individuals involved. It must be exercised, then, via individuals who in some sense represent the people. There are broadly two different types of representatives that we can expect to be duly sensitive to the influence of the people. I describe these, respectively, as deputies and proxies.¹²

Let us assume that the popular terms on which government should operate have already been established; we return to how this might happen in a moment. To take the first of our two kinds of representative, people might find or induce in certain agents or agencies a disposition to track, within flexible boundaries, whatever terms they specify. And they might then rely on those agents or agencies as on deputies: servants of their will. Or, to take the second possible channel, they might find

¹¹ Rousseau may seem to be the great exception, since the state of nature plays such an important role in his theory. But Rousseau is an innovative thinker who draws on many sources and he is not a typical representative of the neo-Roman republican tradition that I have in mind. See Spitz, J.-F., *La Liberté politique* (Paris: Presses Universitaires de France, 1995).

¹² Pettit, P., 'Joining the Dots', in Smith, M. et al. (eds.), *Common Minds: Themes from the Philosophy of Philip Pettit* (Oxford: Oxford University Press, 2007).

and induce in certain agents or agencies a disposition to behave more or less inflexibly, out of a fixed motivational or institutional frame, in a way that happens to fit with the terms they endorse. And they might then rely on those agents or agencies as on proxies: independent centres whose operation in suitable positions of power answers to their standing will as to how power should be exercised there.

Deputies are most obviously recruited in the process of electoral appointment, as when public authorities are elected for a period on the basis of their electoral promises and then held to account for those promises when they seek re-election. Or at least that is how it works in the ideal. But election is not the only way of appointing deputies, and the desire for re-election is not the only basis on which deputies can become disposed—or be reinforced in an existing disposition—to track civic targets. Deputies may be recruited without election, as when those elected appoint other functionaries to office. And elected or unelected deputies may be given extra incentives to track civic targets on the basis of a desire to achieve certain rewards—perhaps just the good opinion of those they serve—or to avoid any of a range of penalties: the loss of office, a legal sanction, a public rebuke, or of course the bad opinion of others. Elected deputies will include most of the members of parliament or congress in all democracies and in presidential systems they will include a variety of other public officials as well, in particular the president or head of the executive. Unelected deputies will include the members of the executive in parliamentary democracies and, in all systems, the members of the executive staff: the functionaries whose job it is to carry out the wishes of the administration.

Where do proxies fit in the standard political picture? At a variety of points, I would say. Take the judge who is appointed for life, or not at least at the pleasure of the appointing executive. Or take the statutory officer—the head of an electoral commission, the head of the central bank—who is appointed on similar terms. Given such terms of appointment, these agents and the agencies will not constitute deputies who are triggered to respond to varying demands. But they may still serve the people well. Suppose that the popular terms on which government should operate require the fair and sensible application of the law, fair and sensible electoral districting, and fair and sensible decisions on interest rates. Suitably constrained and motivated, individuals and bodies of the sort mentioned should be capable of imposing those terms very effectively.

But the proxies in a democratic system are not confined to those with official appointments. Take the democracy in which there is such transparency of information, such freedom of speech, and such access to the courts and parliament—and to the press and the streets—that individual citizens and groups of citizens are enabled to make challenges to those in power, and to do so with some chance of success. Those who make such challenges within the system can be seen as proxies for the people as a whole, since the people license such contestation and may do so

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b. Second Condition:

The people in a democracy to the extent that they aggregating their efforts incentive, and constraining deputies and proxies might giving them control. The influence of the weather, as control; it would not government is conducted for specifying terms that to be recruited to implement

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There are a number of ways to breach the terms of association are some obvious possibilities

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with a view to imposing suitable terms on government. The contesters may or may not mount their challenges for public-spirited reasons—they may just be acting out of a felt, personal grievance—but in any case the actions they bring against government may help to keep the authorities on their toes, exposing their decisions to public scrutiny and assessment.

b. Second Condition: The People's Terms

The people in a democracy can have a sustained influence on how they are governed to the extent that they recruit deputies and proxies into a suitable network for aggregating their efforts and can impose a suitable framework of opportunity, incentive, and constraint on what they actually do. But such an organization of deputies and proxies might give the people a lot of influence on government without giving them control. The influence might be as wayward and directionless as the influence of the weather. And if it were, then it would not deserve to be described as control; it would not serve the imposition of any particular terms on the way government is conducted. A crucial question, then, is whether we can find a basis for specifying terms that the organization of democratic deputies and proxies might be recruited to implement.

There are broadly two classes of terms that we might expect to have popular support as terms on which government should operate. One class we might describe as terms of association, the other as terms of argument. The first directs us to those terms that have to be satisfied under any arrangement in which the members of a population can claim to share equally in the control of government. The second directs us to terms, apart from the terms of association themselves, which command popular acceptance as relevant if not conclusive considerations in arguments about what should be done by government.

There are a number of ways in which government might be conducted that would breach the terms of association required for the very possibility of legitimacy. Here are some obvious possibilities.

- Government is conducted on the basis of bargaining from unequal positions of wealth and power, with resolutions depending on the compromises that parties are willing to accept, given their beliefs about what others will accept.
- Government is conducted on the basis of debate about what is acceptable—that is, what ought to be accepted—but not about what is acceptable equally to each; some parties are given a privileged position in the exercise.
- Government is conducted on the basis of what is acceptable equally to each but those who claim a privileged position are given an equal role with others in determining whether something is acceptable.
- Government is conducted via elected or appointed representatives but outsiders do not have any access to the exercise and do not have an opportunity to contest or gain a hearing for claims about equal acceptability.

- Government is conducted with a view to achieving unanimity and no policy is adopted that falls short of being endorsed as acceptable on all sides; no recourse is allowed to procedures for aggregating non-unanimous views.
- Aggregation is allowed but the procedure that is used in any instance—majority voting, the use of a lottery, referral to the expert committee—is not required to be acceptable to each as a procedure to govern such cases.

Suppose that decision-making is organized in a society so that possibilities like this are avoided and plausible terms of association are implemented. There is still an abstract possibility that in arguing about what is equally acceptable to each, citizens or their representatives will find nothing to say in favour of any proposal or any procedure other than the bare claim: this is equally acceptable to each. But if this happens, then there is going to be no way beyond assertions and counter-assertions about equal acceptability. There will be a stalemate between those on different sides.

While such a stalemate is possible in principle, however, it is not the sort of thing that materializes in practice when people manage to conduct an ongoing debate about issues of acceptability. Typically, the debate will go forward, however slowly, as the parties succeed in finding considerations—terms of argument—that pass muster on all sides as evaluations that are relevant to the issues under discussion. Those considerations may not be equally weighted on all sides. And for that reason, or because of differences in related empirical beliefs, their acknowledgement may not lead to any consensus about the policy or procedure under discussion. But the dissensus that appears will be built up on the basis of an agreement, perhaps even an accumulating body of agreement, in normative presuppositions. Those presuppositions will provide emerging terms of argument in the polity. They will identify values that everyone is prepared to acknowledge as *pro tanto* grounds for explaining why a policy or procedure ought to be equally accepted by each.

I assume that the people and the representatives in any potentially legitimate state will routinely participate in deliberation and discussion about what the government should be doing and that they will frame this on the basis of considerations relevant to what each ought to accept. They will conduct a debate that radiates throughout the society, engaging citizens in their neighbourhood and workplace, in their churches and associations. They will conduct the debate, not on a sectarian or in-group basis, but on a basis that is common to more centralized, diverse forums: for example, forums like the media, the hustings, the parliament or congress. And they will give the debate particular importance in contexts, formal or informal, where it is used as a basis for publicly justifying or contesting what government has actually done or is proposing to do.

If public debate has this prominence in a society, and does not run straight into stalemate, it is bound to give rise to the sorts of common, normative presuppositions

I have in mind.¹³ When I must give some credence to premises and the conclusion of rejecting a premise or is outweighed by other considerations out a point of explicit disrelevance means that we The intended effect of the unintended side-effect will

Let one person argue health service, for example provision to the need for as they do not reject on common presupposition of service are relevant value service only because of a related matter of fact: the provision would reduce the thing to notice is how much fairness of medical treatment society.

3. Building on These

Let us suppose that government and network of deputies are suppose that there are terms endorsement in the society

¹³ See Rawls, J., *The Law of Peoples* have such normative presuppositions influenced by his discussion. I prefer made in Rawls and might even be debate; second, that they are relevant or formal; and third that the presuppositions may include some that carry no independent parties endorse them. The language Habermas (see Habermas, J., *A Theory of Communicative Action*, 1989) than Rawls (Moon, J. D., 'Rawls' (2003), 257). I am grateful to Tim Scanlon

¹⁴ Can't we put everything up for in and establish areas of agreement based on the basis of a principle of inference said to Achilles', *Mind*, 4 (1895), 278.

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I have in mind.¹³ When we find an argument relevant in any discussion then we must give some credence to the connection it posits or presupposes between the premises and the conclusion. We may not find the argument compelling, because of rejecting a premise or because the support the premises offer for the conclusion is outweighed by other considerations. But even if we reject an argument, marking out a point of explicit disagreement with our interlocutor, the fact of accepting its relevance means that we will have acknowledged an implicit point of agreement. The intended effect of the response may have been to focus on a difference but the unintended side-effect will be to mark out a common presupposition.¹⁴

Let one person argue from the value of fairness to the need for a universal health service, for example, and another argue from the value of quality in health provision to the need for keeping a private component in the system. In so far as they do not reject one another's arguments as irrelevant, they will display a common presupposition to the effect that both fairness of distribution and quality of service are relevant values. They will divide on the case for a universal health service only because of weighting those values differently or differing on some related matter of fact: they may differ, for example, on whether universal health provision would reduce the quality of service. But from our viewpoint, the important thing to notice is how much they agree on. They presuppose in common that the fairness of medical treatment and the quality of health provision both matter in the society.

3. Building on These Conditions

Let us suppose that government is organized on a representative basis—a framework and network of deputies and proxies—that allows for popular influence. And let us suppose that there are terms of association and argument available that have popular endorsement in the society. If those conditions are fulfilled, then there is room for

¹³ See Rawls, J., *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999). Rawls may often have such normative presuppositions in mind when he speaks of public reasons and my ideas have clearly been influenced by his discussion. I prefer to speak of common presuppositions, emphasizing points that are not made in Rawls and might even be rejected by him: first, that they are generated as a byproduct of ongoing debate; second, that they are relevant to such debate, no matter at what site it occurs, private or public, informal or formal; and third that the presuppositions that operate in a society, or even in the international public world, may include some that carry no independent moral force: we may think that it is a mistake that the relevant parties endorse them. The language of common presuppositions, as used here, may be more in the spirit of Habermas (see Habermas, J., *A Theory of Communicative Action*, vols. 1 and 2 (Cambridge: Polity Press, 1984, 1989) than Rawls (Moon, J. D., 'Rawls and Habermas on Public Reason', *Annual Review of Political Science*, 6 (2003), 257). I am grateful to Tim Scully for a discussion on this point.

¹⁴ Can't we put everything up front in the premises of an argument and not allow presuppositions to sneak in and establish areas of agreement behind our backs? No, we can't. Every set of premises supports a conclusion on the basis of a principle of inference that is not itself quoted as a premise. See Carroll, L., 'What the Tortoise said to Achilles', *Mind*, 4 (1895), 278

organizing the state so that it is more or less effectively and equally controlled by the citizens: so that, in the etymological sense, it is a democracy, a regime that is subject to the power of the people. This goal will be achieved to the extent that the organization of representatives ensures that government is conducted under the discipline of those popular terms of reference.¹⁵

A suitable organization of deputies and proxies will have two aspects. Any policies that are inconsistent with the terms of reference will tend, for that very reason, to be taken off the agenda of government; they will become unthinkable options. And where a number of policies are consistent with those considerations, as many will certainly be, then the decision between those tied candidates will be made via a procedure whose use in the case at hand is supported by those considerations. The procedure may be a vote in parliament, a referral to a community or expert committee, a lottery device of some kind, or a society-wide referendum. Or it may involve a mix of such processes: think, for example, of the gamut of tests that a bill must pass under many democratic constitutions before it can become law.

I shall assume that a well-designed frameworking and networking of deputies and proxies can enable a people to regulate government for its conformity to local terms of association and argument; it can provide a constitution under which those values are reliably satisfied. The constitution, plausibly, would distribute opportunities, incentives, and constraints among officials so as to maximize the chance that they honour those values; it would require officials to justify their initiatives on the basis of such considerations; and it would enable a variety of individuals and bodies to challenge such initiatives for their conformity with the considerations.

Would this sort of organization serve to vindicate the legitimacy of the governing regime? It would control government by considerations that equally reflect the concerns of each. But would it give them effective control? I think so. The sort of control that people would have over democratic decision-making in the scenario envisaged can be compared with the control that individual agents enjoy when their values are duly empowered in their decisions. If I am to be a self-controlled agent, not just an arena where attitudes and actions form, then I must impose my values on how those states evolve, not micro-manage them. I must ensure that I judge according to the evidence or form desires that cohere with my values, not that I judge that *p* or desire that *q*.¹⁶ What the people controls for is conformity to the public values of democratic exchange, in more or less exact parallel, not for the detailed direction of policy. If the control in self-controlled agents is significant, then so is this form of democratic control.

¹⁵ Pettit, P., 'The Power of a Democratic Public', in Gotoh, R. (ed.), *Against Injustice* (Cambridge: Cambridge University Press, 2008).

¹⁶ Pettit, P., and Smith, M., 'Freedom in Belief and Desire', *Journal of Philosophy*, 93 (1996), 429. Reprinted in Jackson, F., Pettit, P., and Smith, M. (eds.), *Mind, Morality and Explanation* (Oxford: Oxford University Press, 2004).

IV. LEGITIMACY

1. Approaching the

Under the republican conception of a community will be an equally shared control of power that is forced to track the means, not the ends, of the agency means, not the ends, but that they are required to meet their own obligation, if they are to follow the guidelines.

We have now seen how, in the domestic context, requirements for people—say, by the framework of the people's terms of operation on the people's terms—lead to the discussion of international law as an ideal—that of the legitimacy of what international law is.

The issue of international law is established by states—ultimately in the international forum. It is a shared understanding of international law as a framework of international law that constitute a network in which states but seeks more or less such entities. They include regional as well as a global network of those of a global, regulatory nature.

Kingsbury, Krisch, and others have distinguished between formal treaty-based international law (such as the Organization, the Security Council, etc.); informal intergovernmental law (such as the Basel Committee of International Banking Supervisors); and emerging global regulatory law.

¹⁷ Keohane, R. O., *After Hegemony* (Princeton: Princeton University Press, 1984).

IV. LEGITIMACY IN THE INTERNATIONAL CONTEXT

1. Approaching the International Context

Under the republican conception of legitimacy an agency that interferes in the lives of a community will be legitimate to the extent that it is subject to the effective, equally shared control of the members—to the extent that it is a non-arbitrary power that is forced to track the interests they are disposed to avow. The legitimacy of the agency means, not necessarily that members are obliged to obey its dictates, but that they are required to acknowledge its right to issue those dictates and their own obligation, if they do not approve, to oppose them within given systemic guidelines.

We have now seen how this conception of legitimacy applies in the national or domestic context, requiring a legitimate government to be constrained by the people—say, by the frameworking and networking imposed on representatives—to operate on the people's terms. The discussion of national legitimacy provides a model for the discussion of international legitimacy and, as we shall see, it identifies an ideal—that of the legitimate state—that plays an important role in the specification of what international legitimacy requires.

The issue of international legitimacy is raised by the various agencies that are established by states—ultimately for the certainty and order that they confer¹⁷—in the international forum. These are organized on the basis of a more or less shared understanding of international law and its jurisdiction; they develop around a framework of international and regional agreements and treaties; and they constitute a network in which each body operates in a relatively distinct sphere but seeks more or less successfully to coordinate its actions with those of other such entities. They include military as well as more political bodies, and bodies of a regional as well as a global character. But the agencies of most pressing concern are those of a global, regulatory character.

Kingsbury, Krisch, and Stewart identify a variety of players in global regulation: formal treaty-based international organizations (such as the World Trade Organization, the Security Council, the World Bank, the Climate Change regime, etc.); informal intergovernmental networks of domestic regulatory officials (such as the Basel Committee of national bank regulators); domestic authorities implementing global regulatory law; and hybrid public-private as well as purely private

¹⁷ Keohane, R. O., *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984).

transnational regulatory regimes.¹⁸ These implement a regime of global regulation over commercial and other activities.¹⁹ They establish international networks of agencies and officials that have been said to constitute a 'new world order'.²⁰

Legitimacy in the international context raises two particularly sharp problems that do not have domestic analogues. I describe one of these as the membership problem, the other as the imbalance problem. In what follows I first sketch the membership problem and how to resolve it; then I introduce the line on international legitimacy that a republican approach would support; and after that I discuss the imbalance problem and the difficulty that it raises for republican theory.

2. The Membership Problem

By analogy with domestic legitimacy, the legitimacy of the international order is going to depend on the extent to which that order is subject to the effective, equally shared control of the members of the order. But in the domestic case there is little or no question as to who should be the relevant members. Membership is individual and inclusive; it extends at least to all adult, able-minded, and more or less permanent residents of the state's territory. In the international context, however, the analogous question of membership is naturally subject to dispute. Should the parties who are to exercise effective, equally shared control be all individuals on earth, or all the states under which such individuals live, or perhaps all 'peoples', in John Rawls's preferred term?

There are difficulties with taking all actual individuals to be the relevant parties to international legitimacy. One problem with the proposal is that there is no such thing as an international discourse, analogous to the discourse in a deliberative democracy, which would identify considerations that all individuals understand, regard as relevant, and would want to be empowered. Christiano emphasizes perhaps the most important aspect of this problem when he says that international civil society—the society of vigilant citizens and civic movements—is not nearly as dense as the civil society that keeps domestic governments on their toes.²¹

A further problem with the idea that individuals should be taken as the parties to international legitimacy is that if people form domestic states, and if those states are legitimate in the sense explained, then it is hard to see why they would want the international order to be controlled by them in an individual capacity rather than via the states that they form. 'The democratic state is a reasonably successful

¹⁸ Kingsbury, B., Krisch, N., and Stewart, R., 'The Emergence of Global Administrative Law', *Law and Contemporary Problems*, 68 (2005), 15.

¹⁹ Braithwaite, J., and Drahos, P., *Global Business Regulation* (Cambridge: Cambridge University Press, 2000).

²⁰ Slaughter, A.-M., 'The Real New World Order' *Foreign Affairs*, 76 (1997), 183; Slaughter, A.-M., *A New World Order* (Princeton: Princeton University Press, 2004).

²¹ Christiano, T., in this volume, 134–5.

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²² Ibid. 136.

²³ Kukathas, C. and Pettit, P., *Rawls and Republicanism* (Cambridge: Cambridge University Press, 2002).

mechanism', as Tom Christiano says, 'for accommodating and representing the interests and concerns of its members'.²² And that being the case, it is hard to see why the members of such a state should not prefer to rely on the states to police the international order.

So should we say that an international order will be legitimate to the extent that it is effectively and equally controlled by all states? That doesn't appeal as a way to go either, since there is no persuasive ground for wanting states to exercise such control over the international order; if those states include some that are undemocratic and domestically illegitimate; if they include some that oppress their peoples or some that do not have the capacity to serve them appropriately. We have to condemn the exercise of dominating control over legitimate states that speak and act for their peoples; dominating those states means dominating the individuals who form them. But we may applaud certain exercises of dominating control over illegitimate states: those that fail to serve the interests of the individuals who live within their boundaries. Certainly we will take this line if we are normative individualists: that is, if we hold, plausibly, that a treatment given to an institutional entity like a state counts as good or bad just in so far as the effects are good or bad for individuals.²³

Christiano effectively raises the same problem when he says that while democratic states might do very well at policing the international order on behalf of their members, this is not so with what he describes as non-representative states. These include states that act primarily for an elite or a preferred majority, or that do their business in such secrecy that there is no possibility of holding officials to popular account.

Might we avoid these problems by claiming that the international order will be legitimate in so far as it is effectively and equally controlled by legitimate, democratic states? The difficulty with that approach is that it gives no role, as intuitively it should do, to those individuals who live under illegitimate states: that is, under oppressive, ill-ordered states that only serve a minority or under poor, disordered states that serve few if anyone. There would be no problem if all states on earth were more or less legitimate; for giving such states equal and effective control over the international order would be consistent with normative individualism. But the difficulty is that not all states are of that kind.

These observations irresistibly push towards the conclusion that a legitimate international order must, ideally, discharge two separate tasks: first, establish conditions under which all populations can form legitimate states to speak and act for them as peoples; and second, set up a suitable international order that is effectively and equally controlled by such states. That conclusion takes us into ideal-world theory, of course, but it gives guidance on what should be attempted

²² Ibid. 136.

²³ Kukathas, C. and Pettit, P., *Rawls: A Theory of Justice and its Critics* (Cambridge and Stanford, Calif.: Polity Press and Stanford University Press, 1990).

by the international order in the real, deeply imperfect world. It suggests that while the international order should be maintained by states that are more or less legitimate—and maintained on terms that those states accept—it should be committed as a first priority to trying to establish legitimate states for peoples who are denied them.

This policy would argue for international steps to help relieve suffering and deprivation in disordered states and to take suitable, if proportional measures to replace or reform oppressive regimes. The international order would be primarily an arrangement among domestically legitimate states—in effect, well-ordered democracies—but it would be committed to enabling more and more states to become legitimate in that sense.

If we adopt this approach to international legitimacy, then we effectively take sides with John Rawls when he argues for an international order of peoples rather than states. A people exists and operates, on his view, just in so far as its government is a 'representative and effective agent',²⁴ so that the state counts as 'the political organization of the people'.²⁵ A people exists and operates when the state it forms is a liberal one, in Rawls's terminology: in effect, a state that conforms to our requirements for domestic legitimacy. To take the line suggested here, then, is precisely to give priority to peoples in Rawls's sense.

Rawls's insistence that a people properly exists and functions only in the presence of a fully liberal state represents his ideal-world theory. Famously, however, he allows that in the real, imperfect world peoples may also be taken to form and act—and should gain recognition in the international order—under what he calls 'decent' regimes. In these regimes, everyone will have a say but some may have a less direct say than others. As the members of a religious or other minority, for example, they may have the collective voice provided by a minority spokesperson: they may not have a vote in their own right or they may not be able to contest government decisions in their own right.

Rawls's line is attractive to the extent that it guards against the danger that only a relatively small, culturally homogeneous group of states might count as the primary units in the international order. But it lowers the standards for when a state is legitimate or representative, and it may make the line taken here seem to be less normatively commanding. What should we say on the issue?

I think that the line taken by Rawls is quite reasonable but for reasons other than any that he canvases. There are grounds for thinking that treating less than properly legitimate and representative states as if they commanded such a status, giving them full membership in the international order, will sometimes be the best way of achieving the first priority mentioned above: that of enabling a maximum number of peoples to live under legitimate states. This is because the best way to

²⁴ Rawls, J., *The Law of Peoples* (above, n. 13), 38.

²⁵ *Ibid.* 24.

push a state towards greater legitimacy by incorporating it fully into the international order.

Treating immature or illiberal states as if they were fully legitimate, as David Garland suggests, provides an extra incentive to prove themselves worthy, thereby helping to give them the moral credit fit to be held responsible.

Few states are likely to be fully legitimate, as discussed in an earlier discussion, and it may be more useful to serve to increase or sustain legitimacy indirectly, by pressing states to become legitimate. They are led to endorse the international order, second, directly, by enabling them to demand of other states to internationalize their policies to respecting.²⁸ This thought is developed further here. It suggests that the international order, partly developmental rather than distributive, between states that facilitates the development of states that help to promote and sustain the international order that are incorporated as full members.

3. The Republican

Suppose we adopt the view that a state is legitimate in so far as two conditions are fulfilled: that it is the voice of peoples who live under it, and that it is engaged in the business of protecting and promoting the collective benefits, in a manner that is fair, over how it operates. The state is legitimate, in other words, if it has equal, effective control and if it is subject to the rule of law. Can it be suitably controlled?

Taking the issue of form seriously, if, say, a federal state under a unitary government should it assume a less democratic form, should it secede from any arrangement?

²⁶ I have benefited from discussions with David Held, 'Democracy-enhancing Multilateralism', in *idem* (ed.), *Democracy and Its Critics* (Cambridge, 1996), 107–12.

²⁷ Pettit, P., *A Theory of Freedom* (New York: Polity and Oxford Press, 2001).

²⁸ I have benefited from a number of discussions. Some institutions can bolster and improve the international order.

push a state towards greater legitimacy may be by treating it as if it were legitimate, incorporating it fully into the international order.

Treating immature or irresponsible individuals as responsible may 'responsibilize' them, as David Garland argues.²⁶ This is because it may offer those individuals an extra incentive to prove worthy of being held to the relevant standards and it may thereby help to give them the capacity to live up to the standards; it may make them fit to be held responsible.²⁷ Something similar is true, I suspect, of state legitimacy.

Few states are likely to be fully or unfailingly legitimate, in the terms of our earlier discussion, and incorporation into an international order may actually serve to increase or sustain domestic legitimacy. It can do this in two ways. First, indirectly, by pressing states to recognize in their domestic practice principles that they are led to endorse within international covenants and organizations. And second, directly, by enabling individuals to launch an appeal against their own states to international bodies that states are diplomatically or formally committed to respecting.²⁸ This thought is worthy of further exploration but cannot be pursued further here. It suggests that the international order should be seen as having a partly developmental rationale. Not only can it establish a mode of relationship between states that facilitates the achievement of shared, global goals. It can also help to promote and sustain the attainment of domestic legitimacy in those states that are incorporated as full members.

3. The Republican Line

Suppose we adopt the view, then, that the international order will be legitimate in so far as two conditions are fulfilled: it is designed at any time to maximize the number of peoples who live under domestically legitimate governments; and it conducts the business of protecting legitimate states against domination, and securing other collective benefits, in a manner that gives legitimate states equal and effective control over how it operates. The central question bears, then, on how the condition of equal, effective control can be fulfilled. What form should the international order take, if it is to be subject to such control? And what means are available whereby it can be suitably controlled?

Taking the issue of form first, should the international order function like a state: say, a federal state under which existing states are incorporated irrevocably? Or should it assume a less demanding shape: one, in particular, that allows states to secede from any arrangements that it puts in place?

²⁶ I have benefited from discussion with the authors of R. E. Keohane, S. Macedo, and A. Moravcsik 'Democracy-enhancing Multilateralism', *International Organization* vol. 63, 2009, 1–31.

²⁷ Pettit, P., *A Theory of Freedom: From the Psychology to the Politics of Agency* (Cambridge and New York: Polity and Oxford Press, 2001).

²⁸ I have benefited from a number of discussions with Bob Keohane, and Steve Macedo on how international institutions can bolster and improve the domestic democracies of those states that are party to them.

freedom of entry—though even this is not certain, in view of the pressures to join that other states may impose—but they will not have a fully effective freedom of exit. And freedom of entry does not do much for securing legitimacy in the absence of a corresponding freedom of exit; it may be just the freedom to suffer for a past mistake.

How can states impose an equal, effective control on international bodies, then, thereby establishing the republican legitimacy of the order that those bodies constitute? I see only one plausible path: by frameworking and networking those organizations so that they are more or less forced in their decisions to honour terms of association and argument that command allegiance on all sides.

If this is right, then there has to be an international discourse among states that parallels the discourse of a domestic democracy. That discourse has to give rise to a currency of considerations that are recognized as relevant considerations that any state may reasonably invoke in assessing one or another international initiative.³⁰ And those considerations have to be empowered by the ways in which international agencies and their officials are frameworked and networked with each other. Plausibly, the agencies will be subject to conditions that favour acting on such considerations; they will have to justify their decisions on the basis of the considerations; and those justifications will be exposed to public, potentially effective challenges from non-states as well as states: say, from the non-governmental organizations that operate in a global context.

Is it plausible to expect relatively egalitarian terms of association to be established amongst states in the international arena and more or less universally endorsed terms of argument to get endorsed there? Many will say that what we should expect to find, rather, is a pure power play in which states bargain with one another, each seeking to make only the minimal concession required to elicit the cooperation of others. Given the power differentials between states, it may be said, nothing else would be compatible with the self-seeking incentives of states and their representatives.

Incentive-compatibility is not the only constraint, however, on what may emerge in the dealings of states or indeed any agents with one another. Equally important, or important in only a slightly reduced degree, is something that we might describe as constraints of discourse-compatibility.³¹ A proposal or ideal will fail to be discourse-compatible to the extent that it is not one that can be supported in a deliberative forum by reasons that are accepted on all sides as relevant to the issue. The most egregious examples would present one side in the deliberations as unequal in some significant manner to the other. Consider in this connection the memo by Lawrence Summers, then chief economist to the World Bank, which was leaked in 1991.

³⁰ For an extension of the Rawlsian idea of public reasons to the international forum see Cohen, J., 'Minimalism about Human rights: The Most We Can Hope For', *Journal of Political Philosophy*, 12 (2004), 190.

³¹ Pettit, P., *Rules, Reasons, and Norms: Selected Essays* (Oxford: Oxford University Press, 2002), 276.

This made a case for exporting heavy polluting industries to the third world on the ground, roughly, that the anti-pollution preferences of poorer, shorter-lived individuals would not be as strong as those of the richer and longer-lived. The memo caused indignation world-wide, precisely because the proposal was incompatible with the assumptions of equality that underpin deliberation. A Brazilian official wrote in understandable incredulity that the reasoning was 'perfectly logical and totally insane'.³²

If discourse-compatibility plays an important role in the relations between states, it need not be excessively optimistic to expect that relatively egalitarian terms of association will be recognized in international forums and that universally endorsed terms of argument will tend to get established there. But is it plausible to think that international agencies might be capable of being forced to implement such terms of reference, thereby allowing legitimating control of their operations to member states? At this point we confront what I called the problem of imbalance. This is closely related to the problem that Christiano describes as one of 'asymmetrical bargaining'.³³

4. The Imbalance Problem

We confront a striking dilemma when we think about how to appoint to international bodies and how to police those appointed authorities—those deputies or proxies—so that they reliably act on suitable terms of association and argument. Either the distribution of appointments and the organization of offices will reflect the greater power of some countries, where that power may depend on population, territory, resources, or wealth. Or it will not reflect such inequalities of power but be devised on an egalitarian basis. But in the first event, won't the arrangements tend to favour the fewer, more powerful countries; and in the second, the more numerous and less powerful? And isn't any such favouritism inconsistent with legitimacy?

The first point to make in response is that there are some ways in which it is reasonable that the stronger or the weaker be favoured, on plausible terms of reference, and that these should be distinguished from modes of favouritism that are indefensible. It is hard to imagine an international forum of discussion in which there was no agreement that those with larger populations should get greater access to some common benefit—say, a vaccine that is distributed by international agencies—and that those with more natural resources should be enabled to use them to their commercial advantage. And, equally, it is hard to imagine that there might not be agreement that those with lesser wealth should not have to pay the

³² For the content of the memo and criticism of it, including mention of this response, see <<http://www.counterpunch.org/summers.html>>.

³³ Christiano, T., this volume, 126.

same as those with greater smaller populations should international bodies.

Let such positions on d and they may have an imp agencies and bodies, but to control and on the mo allowable asymmetries wi tend to facilitate unwarra towards the less powerfu response to the general pr however difficult it may b

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Stronger countries may in multilateral, egalitarian appears, for example, in t one forum proves disadvan discussions altogether in f states.³⁵ But it is by no m always get away with these can only hold together, ma constraints of discourse-co

But is it possible, in that to implement a regime that reasons. First of all, the cor such favouritism on the san the strong. And secondly, international arrangements out of any organizations in towards coalitions of the w

International forums are brute power, of course, but

³⁴ Brennan, G. and Pettit, P., *The University Press*, 2004).

³⁵ Braithwaite, J. and Drahos, P.,

same as those with greater wealth into international agencies and that those with smaller populations should not be subject to unconstrained, majority control in international bodies.

Let such positions on differential treatment be accepted in international discourse, and they may have an impact, not just on how argument is conducted in international agencies and bodies, but on the appointments that different countries are allowed to control and on the modes in which appointees operate. They will support certain allowable asymmetries within those agencies and bodies. But won't any asymmetries tend to facilitate unwarranted favouritism, whether towards the more powerful or towards the less powerful? Not necessarily, I think. The second point to make in response to the general problem of imbalance is that this is not an inevitable effect, however difficult it may be to avoid it.

Many international authorities and agencies will be proxies who are subjected to incentives, opportunities, and constraints that support decision-making according to accepted terms of reference; the very reputation of the individuals and bodies involved may depend on the display of such impartiality.³⁴ And while there will certainly be many decisions that are up for negotiation between countries of different levels of power, the asymmetry can be muted by the capacity of weaker countries to make common cause with one another.

Stronger countries may always seek advantages that would be hard to support in multilateral, egalitarian discussion of what ought to be accepted by each. This appears, for example, in their tendency to shift to another forum of debate when one forum proves disadvantageous, and in their attempts to opt out of multilateral discussions altogether in favour of bilateral, one-by-one arrangements with other states.³⁵ But it is by no means assured, and by no means evident, that they can always get away with these initiatives. Coalitions among weaker countries, if they can only hold together, may often be able to drag them back to the table and exploit constraints of discourse-compatibility in their own favour.

But is it possible, in that case, that the coalitions of weaker countries will be able to implement a regime that is unduly favourable to them? I do not think so, for two reasons. First of all, the constraints of discourse-compatibility will militate against such favouritism on the same grounds that they militate against favouritism towards the strong. And secondly, stronger countries will inevitably be able to exit from international arrangements at a lesser cost than others; thus they will be able to bail out of any organizations in which the balance of power has shifted uncomfortably towards coalitions of the weaker.

International forums are always in danger of becoming sites for the exercise of brute power, of course, but there is no necessity attaching to that result. If the power

³⁴ Brennan, G. and Pettit, P., *The Economy of Esteem: An Essay on Civil and Political Society* (Oxford: Oxford University Press, 2004).

³⁵ Braithwaite, J. and Drahos, P., *Global Business Regulation* (above, n. 19).

on different sides looks to be even roughly balanced, then that may create a space where the international order can interfere in the affairs of different states under the equal and effective control of terms that are accepted on all sides. It may constitute a regime of global regulation that has a good claim to legitimacy. We may be very far from that ideal, as things currently stand, but there are no blocks in evidence that good institutional design might not prove capable of removing.

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SECTION IV

SOURCES OF INTERNATIONAL LAW
