

P1 Part One

THEORY OF LEGITIMACY

This chapter addresses the problem of legitimacy (that of morally justifying the way a state exercises monopoly power over its adult, able-minded, more or less permanently resident members) that every state poses and looks at different grounds on which a state might be thought to be legitimate. It considers benefit-based, merit-based, and will-based theories of state legitimacy. It suggests that theories of the third type, according to which the will of the state must not be dominating, are best from a republican perspective. It then considers three will-based approaches. Of these, it argues, only the 'control' approach ensures that individuals are not dominated. legitimacy, authority, political obligation, state, republicanism, consent, command, non-domination

C9 I

The Control Theory of Legitimacy

Philip Pettit\*

C9.P1 This chapter addresses the problem of legitimacy that every state poses and looks at different grounds on which a state might be thought to be legitimate. As I use the

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\* I was greatly helped in revising this chapter by discussion at the conference in Sydney Law School in which the volume originated. I learned in particular from the many astute observations of my commentator, Paul Patton.

term, the problem of legitimacy is that of morally justifying the way a state exercises monopoly power over its adult, able-minded, more or less permanently resident members: in short, its citizens.<sup>1</sup> It may be that this exercise of power cannot be justified, of course, in which case we can only view the state in question, despite any good qualities it may possess, as an organization on a moral par with a mafia-like agency. But most of us think that it is at least possible for states to wield political power in a more or less legitimate or justifiable way and the challenge is to identify what would make for their legitimacy.

In focusing on this problem, the chapter assumes that there is no issue about whether or not the system under which the world is divided into states is itself justified. History has left us with that system, which is now close to irreversible. Individual states might choose in principle to renounce their power, but in practice

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<sup>1</sup> I put aside here the difficult issues as to how the citizenry ought to be determined, how those who are not adult or able-minded should be identified, and how the state ought to behave towards them.

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none dares to do so, for fear that others would take over its population and territory.<sup>2</sup>

They might choose to fuse into larger states, of course—at an unlikely limit, a single world-state—or divide into smaller. But those choices would still preserve the system. That system would cease to obtain only in the vanishingly unlikely event that existing states could agree and entrench an arrangement to let world society operate without anyone exercising political power.

Thus, it makes only speculative sense to ask whether it is justifiable that states should possess the power that they have under the system of states. We have no practical as distinct from theoretical interest in arguing that the system of states ought or ought not to be in place—that *the* state ought or ought not to exist, as it is often put—since there is no corresponding ‘can’; there is no agent to which we can address

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<sup>2</sup> Thus, to anticipate later discussion, the choice of a state to remain in existence is not voluntary—there is no acceptable alternative to its doing so—and so it does not impose its own will on its members and does not dominate them by doing so. See <<<REFO:BK>> Serena Olsaretti, *Liberty, Desert and the Market* (Cambridge University Press 2004) <<<REFC>>; <<<REFO:BK>> Philip Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) <<<REFC>>; <<<REFO:BK>> Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (WW Norton & Co 2014) <<<REFC>>.

a suitable prescription.<sup>3</sup> It makes good practical sense, by contrast, to ask whether a particular state is justified in how it exercises the power it has under the system of states. We have a practical interest in knowing the answer, after all, since here there is a ‘can’ that answers to the implied ‘ought’: in saying that it ought to exercise its power in a certain manner, we assume that it can be made to do so.

As the focus on morally justifying how a state exercises its power is distinct from an interest in whether the existence of the state is justified, so it is distinct from a concern with how far the social structure that the state uses its power to establish is morally appealing or just. It is possible for a legitimate state not to establish a fully just order and for an illegitimate state to establish an order that is just in broad

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<sup>3</sup> Of course, we might conceivably want to know whether we should welcome the existence of the system of states on the ground that if it is not the best possible system, it is at least better than the state of nature. It is possible to read Kant’s discussion of the state in *The Doctrine of Right* on these lines. See

[Arthur Ripstein](#), *Force and Freedom: Kant’s Legal and Political Philosophy* (Harvard University Press 2009);

[Kyla Ebels-Duggan](#), ‘Kant’s Political Philosophy’ (2012) 7 *Philosophy Compass* 896.

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outline.<sup>4</sup> And so, the two concerns are relatively distinct. Both may be expressed, of course, as concerns with justice. But ours is a concern for the political or vertical justice of the state exercising monopoly power over its citizens, the other a concern with the social or horizontal justice of the relations that the state sets up among its citizenry.<sup>5</sup>

This chapter is in three progressively longer sections. The first distinguishes the legitimacy of a state from the authority that is sometimes ascribed to the state and

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<sup>4</sup> See <<<REFO:JART>>>A John Simmons, 'Justification and Legitimacy' (1999) 109 *Ethics* 739<<<REFC>>>; <<<REFO:BKCH>>>Philip Pettit, 'Justice, Social and Political' in David Sobel, Peter Vallentyne, and Steven Wall (eds), *Oxford Studies in Political Philosophy*, vol 1 (Oxford University Press 2015)<<<REFC>>>; <<<REFO:BKCH>>>Anna Stilz, 'The Value of Self-Determination' in David Sobel, Peter Vallentyne, and Steven Wall (eds), *Oxford Studies in Political Philosophy*, vol 2 (Oxford University Press 2016)<<<REFC>>>.

<sup>5</sup> As Martin Krygier points out, the word 'arbitrary' is often used to indict a system of law on both counts: on the one side, for being imposed on an unjustified, wilful basis; on the other, for having an unjustified character or content. See

<<<REFO:JART>>>Martin Krygier, 'The Rule of Law: Pasts, Presents, and Two Possible Futures' (2016) 12 *Annual Review of Law and Social Science* 199<<<REFC>>>.

explains the sort of obligation—the sort of political obligation—that legitimacy imposes on citizens. The second sketches the case for what I describe as a will-based approach to the problem of legitimacy, indicating its advantages over benefit-based and merit-based alternatives. And the third looks at the different forms that this approach may assume.

~~The~~This last and longest section argues in favour of a version of the will-based approach that has two characteristics: it takes the state to be a proper agency, not just an apparatus that mediates the agency of individuals; and it takes legitimacy to require not that citizens individually consent to the state or enjoy collective command over the state, but that they share equally in imposing a controlling discipline on what the state does in their name. I have defended this control theory elsewhere on premises drawn from the republican tradition of thought.<sup>6</sup> The aim here is not to recapitulate that defence so much as to show that the theory compares favourably with both the alternatives outside and the alternatives inside the will-based family of theories.

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<sup>6</sup> See Pettit, *On the People's Terms* (n 2); Pettit, *Just Freedom* (n 2);

<<<REFO:BKCH>>> Philip Pettit, 'The General Will, the Common Good, and a Democracy of Standards' in Yiftah Elazar and Geneviève Rousselière (eds), *Republicanism and the Future of Democracy* (Cambridge University Press 2019) <<<REFC>>>.

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## A. Legitimacy, Authority, and Political Obligation

### 1. Legitimacy and authority

The problem of whether a state's exercise of monopoly power is justified or legitimate is distinct from the question as to whether it has the right, on an independent basis, to exercise such power: that is, the right to coerce its citizens into obeying its laws, punish them for disobedience, tax them for resources, and do all of this to the exclusion of any competitor. If its exercise of power can be morally justified, of course, then it may be right that the state should act as it does. And under one or another **morally justified system** of rights, it may be said then to have the right or authority to impose on members in that particular way. But that is not to ascribe an independent right or authority to the state, **only a right relative to that system of rights and that justification.**

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I take the issue of whether the state's exercise of monopoly power is justified or legitimate, not only to be distinct from the question of whether the state has the independent right to exercise such power, but also to be more basic. On this assumption, the state has a certain authority because it is legitimate, and not the other way around. The assumption marks a difference from any approaches that first try to

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See <<<REFO:BK>>> Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press 2002) <<<REFC>>>.

establish the authority of the state and then aim to derive its legitimacy from its authority.<sup>8</sup>

Those who want to put authority first often do so out of a wish to argue that on that same independent basis citizens have a certain duty or obligation to their state: that they have a duty akin to the directed obligation debtors have to their creditor, or children to their parents. But even if the state is an agent in its own right, as I argue later, the idea that citizens have this sort of independent obligation or duty towards it is not immediately intuitive. They may have a duty of obligation to the state, as we ~~must~~ shall now see, only to the extent that the state is legitimate.

## 2. Legitimacy and political obligation

Suppose that the state exercises its monopoly power legitimately or justifiably; put aside for the moment the fact that legitimacy is bound to come in degrees. What follows about how citizens morally ought to behave: about how it is right that they should treat the state and the state's initiatives? What is the political obligation that goes with the legitimacy of a state?

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<sup>8</sup> See <<<REFO:BKCH>>> Fabienne Peter, 'Political Legitimacy' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (summer 2017 edn) <<<REFC>>> <<https://plato.stanford.edu/archives/sum2017/entries/legitimacy/>> accessed 16 March 2018.



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c9.P11 One possibility is particularly salient, and commonly invoked in the literature.<sup>9</sup>

We might say that other things being equal the citizens of a legitimate state ought to obey its laws: that while they may not be obligated towards the state in the directed manner associated with an independent authority, they are obliged in a more general sense to display obedience. The idea is that if the way the state makes and applies law is legitimate, then the compliance of citizens with that law is required *pro tanto*—required other things being equal. On this account, political obligation is nothing more than legal obligation: the obligation to obey the law.

c9.P12 The identification of political with legal obligation is hardly persuasive, however. For the legal obligation of citizens seems to derive from the character of the laws imposed rather than from the legitimacy of the state that imposes them. Even if the state failed to be legitimate, citizens would be plausibly required *pro tanto* to obey established, relatively fair laws. The fairness of the laws would argue in itself for conformity; and this, all the more so, when those laws provide a basis for mutual expectation and coordination among the citizenry. Indeed, if the laws established by a legitimate state were unfair—if they imposed unjust or unequal requirements—then it is not clear that citizens would necessarily be required to obey them; if they were

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<sup>9</sup> See <<<REFO:BK>>> Christopher Heath Wellman and A John Simmons, *Is There a Duty to Obey the Law? For and Against* (Cambridge University Press 2005) <<<REFC>>>.

required to obey, that could only be because the unfairness was not significant and the laws played an important coordinating role.<sup>10</sup>

C9.P13 The pairing of legal obligation with the fairness of the laws rather than with the legitimacy of the state is further supported by the fact that non-citizens who reside in the state are obliged equally with citizens to obey the law. There is a sense **in which** a state does not impose monopoly power on such non-citizens, since they are formally free to leave, assuming they are citizens of another state. And so, we should not expect the legitimacy of the state to be relevant to whether or not they are obliged to obey the law of the country they live in. In their case, then, it is more likely to be the fairness of the established laws, or their role in establishing mutual expectations, that grounds an obligation to obey the law. And if that is the ground of the obligation in their case, it is plausibly the ground in the case of citizens too.<sup>11</sup>

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<sup>10</sup> There may be a range of reasons apart from the fairness of the laws and their role in grounding mutual expectations for why citizens and other residents should obey the law. See Buchanan, *Justice, Legitimacy, and Self-Determination* (n 7).

<sup>11</sup> Admittedly, there is another possible ground of obligation in the case of non-citizen residents. It may be said that those who choose to reside in a state where they are not citizens, with the permission of the authorities, commit implicitly to conforming with the local laws and regulations. In that case, their commitment to conform would help to explain why they are obliged to obey the laws, and perhaps even to obey unfair laws.

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C9.P14 If the state exercises its monopoly power in a way that is justified, then, is there any more distinctive obligation than the obligation to obey the law supported by this legitimacy? Under almost any conceivable political regime, people are going to differ in how far they are satisfied with the laws imposed, having rival interests in what laws there should be and diverging in their opinions about the justice or fairness of competing candidates.<sup>12</sup> The circumstances of politics, as Jeremy Waldron says, are circumstances of disagreement.<sup>13</sup> That raises a question about the obligations that fall on citizens who disagree with some laws and are disposed to contest them. And it is plausible that the legitimacy of the state has implications for the obligation of citizens in this domain.

C9.P15 If the state were illegitimate, so that its exercise of monopoly power were not justified, then we might say that other things being equal—collateral costs being intuitively acceptable, for example—it would be permissible for citizens to look for radical regime change. If the state was legitimate, however, then changing the regime would seem to be ruled out: it would amount to overthrowing a body that by hypothesis was justified in how it acted. And so, a plausible proposal is that the

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<sup>12</sup> See <<<REFO:JART>> Thomas Nagel, 'Moral Conflict and Political Legitimacy' (1987) 16 *Philosophy and Public Affairs* 215<<<REFC>>.

<sup>13</sup> <<<REFO:BK>> Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999)<<<REFC>>.

legitimacy of a state imposes on citizens the conditional obligation, if they contest the law, to contest it within the system: that is, to contest it in a manner that does not require regime change.<sup>14</sup>

We have been putting aside the fact that legitimacy is bound to come in degrees. **Taking that fact into account**, the proposal supported here is that to the extent to which the state is legitimate, there is an obligation on citizens to contest any public laws or decisions they regard as unjust—or indeed illegitimate in their particular genesis—only within the system. I shall assume in what follows that this conditional,

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<sup>14</sup> See Pettit, *On the People's Terms* (n 2) ch 2. Overthrowing the state and achieving radical regime change need not involve armed rebellion. It might take the form, for example, that it took when the American founders proposed the new constitution of 1787 and established it with popular, electoral support; no such change of constitution was possible under the regime as it stood: that is, under the Articles of Confederation that had united the states. But it is possible to take a narrower or wider view of the processes for amending a constitution that are allowed within it. Thus, while a narrower view would suggest that the US constitution can only be amended under Article 5, Akil Amar argues that it would not amount to a rejection of that constitution to amend it under a countrywide majority vote. See <<<REFO:JART>>> Akil Amar, 'Philadelphia Revisited: Amending the Constitution outside Article V' (1988) 55 *University of Chicago Law Review* 1043 <<<REFC>>>.

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contestatory obligation is the correlate **for** citizens of any legitimacy enjoyed by their state. That this is the correlated obligation does not presuppose that people ought to contest the laws or decisions with which they disagree, but merely that such contestation is unobjectionable or permissible. And, as noted, it does not presuppose that people ought to seek the overthrow of any illegitimate regime; collateral costs might argue for trying to work for change within the system rather than outside it.

c9.P17            In presupposing the permissibility of contesting a legitimate state only within the system, the proposal naturally suggests that the more or less legitimate state ought to establish ways in which citizens may contest the laws that it enacts or proposes. While any plausible regime will offer citizens many different ways in which they may challenge its laws, there is always one mode of contestation—civil disobedience—that any system is required by its very design to leave in place. This might consist in publicly breaking the law to which you object, and not protesting about your conviction and punishment; such behaviour would communicate, on the basis of shared assumptions, that you oppose the law in question and hold that it should be changed. Or, in a slight variant, it might consist in publicly breaking some other law, not protesting your conviction or punishment, and communicating explicitly that you are doing this as a means of challenging the law to which you object. Such civil disobedience constitutes a form of contestation within the system, since it does not challenge the power exercised by the state in convicting or punishing you; it does not suggest that the state is illegitimate.

C9.P18 To sum up these observations, then, the legitimacy of a state is fixed by how far its exercise of power over citizens is morally justified. Such legitimacy is distinct from, and more basic than, any independent authority that a state might claim to exercise this power and any independent duty that citizens might be said to have towards the state; and the duty with which it correlates is not an obligation to obey the law, but an obligation on the part of citizens to contest the law, if they contest it, within the system.

## C9.S4 B. Benefit-Based, Merit-Based, and Will-Based Theories

### C9.S5 1. Three candidate legitimators

C9.P19 Any legitimator of a state, any justifier of how a state exercises its power, should explain why the citizens ought to contest its laws only within the system: why they should seek amendments only in a way that does not require starting again from scratch. Thus, it should explain why citizens ought to seek a change in the constitutional order only under the accepted ways of amending the constitution. Assuming an electoral democracy, it should explain why they ought to seek other changes only at the ballot box or in the courts, in the media, in public demonstrations, or in acts of civil disobedience.

C9.P20 Very broadly, there are three kinds of candidates that might be proposed for the role of state legitimator: the role of providing on its own a sufficient ground for determining legitimacy. One is that the state delivers some significant benefits to citizens, whatever that may be taken to be. A second is that the state is guided by

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personnel who are suitably meritorious: they enjoy appropriate expertise in the issues they confront and, being equally responsive to every member of the citizenry, they display appropriate virtue. And a third is that the state does not impose an independent will on its citizens: it does not hold them in its power.

C9.P21 In each case, the legitimator may come in degrees and confer legitimacy only in a corresponding measure. But again, for convenience, I shall generally speak as if legitimacy is an on-off property: a feature that the state has or fails to have, period.

## C9.S6 2. The republican tradition

C9.P22 There is a long republican tradition of thought under which the first two approaches, respectively benefit-based and merit-based, are not plausible candidates for legitimating the state. I shall draw here on this tradition in order to identify a common failure in the approaches and to provide ground for exploring the will-based approach instead.

C9.P23 The republican tradition begins with figures like Polybius, Cicero, and Livy, who defended the Roman Republic. And it is associated with those in later ages—for example, in the Italian Renaissance, the English revolution, the American war of independence—who took that republic to hold out an ideal for how the state should be organized in their own era. The paramount ideal in these writers was that in a republic all citizens should count as equally free persons. And their guiding institutional assumption was that citizens could only achieve that status if they were protected in the same range of personal choices—the basic liberties, as these were often known—

under a mixed constitution: that is, before a law over which they maintain a multi-centred, multi-level, form of more or less equally shared control.<sup>15</sup>

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<sup>15</sup> There is now an extended literature on the history and nature of republican thought and on the break that classical liberal modes of thought initiated; for an overview, see <<<REFO:JART>>> Frank Lovett and Philip Pettit, 'Neo-Republicanism: A Normative and Institutional Research Program' (2009) 12 *Annual Review of Political Science* 18 <<<REFC>>>. Contemporary republicanism has its origins in <<<REFO:BK>>> Zera S Fink, *The Classical Republicans: An Essay in the Recovery of a Pattern of Thought in Seventeenth Century England* (Northwestern University Press 1962) <<<REFC>>>; <<<REFO:BK>>> Caroline Robbins, *The Eighteenth Century Commonwealthman* (Harvard University Press 1959) <<<REFC>>>; and especially <<<REFO:BK>>> JGA Pocock, *The Machiavellian Moment: Florentine Political Theory and the Atlantic Republican Tradition* (Princeton University Press 1975) <<<REFC>>>, which first revived interest in the classical republican writers and charted the historical continuity of their political ideas. Quentin Skinner argued in a number of essays, later collected (and somewhat revised) in <<<REFO:BK>>> Quentin Skinner, *Visions of Politics, vol 2: Renaissance Virtues* (Cambridge University Press 2002) <<<REFC>>>, that these works had failed to recognize that classical republicanism did not endorse an allegedly 'positive' view of freedom as equivalent to a right of participation in government. And building on this



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In the Renaissance period, these writers included Machiavelli of the *Discourses on Livy's History*; in the period of the English revolutions, authors such as James Harrington, John Milton, and Algernon Sidney; and in the eighteenth century, radicals like the authors of *Cato's Letters*, American rebels like John Adams and James Madison, and English supporters of the American cause like Joseph Priestley

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insight, Pettit—and Skinner himself—cast the republican conception of freedom as one according to which it is the absence of domination or dependence on the arbitrary will of another, and not the absence of mere interference, that matters. See

[Pettit, Philip, 'Freedom and Antipower' \(1996\) 106 Ethics](#)

[576](#); [Pettit, Philip, \*Republicanism: A Theory of Freedom and Government\* \(Oxford University Press 1997\)](#);

[Skinner, Quentin, \*Liberty before Liberalism\* \(Cambridge University Press 1998\)](#). This idea of freedom as non-domination has become the

crucial unifying theme for those who work within the neo-republican framework, although of course within that frame there are also some differences of emphasis and detail. See [Pettit, Philip, 'Keeping Republican Freedom Simple: On a Difference with Quentin Skinner' \(2002\) 30 Political Theory 339](#).

For a recent, alternative history of thinking about freedom, see

[Schmidt, David and Brennan, Jason, \*A Brief History of Liberty\* \(Wiley Blackwell 2010\)](#).

and Richard Price. They uniformly celebrate the idea that being a free citizen means enjoying independence from others in the exercise of the basic liberties that any law should recognize. And they equally support the multi-modular system of government associated with the mixed constitution. Variouslly interpreted in the tradition, this is an arrangement that distributes power among different authorities, puts those authorities in a position to check and balance one another, and exposes them to the electoral and contestatory power of the people as a whole.

### 3. Against the benefit-based approach

The benefit-based approach to legitimating the state is rejected in this long tradition on the basis of a spectre that became particularly salient in the eighteenth century: that of the benevolent despot. The idea was that if the benefit provided by a state could legitimate it as a regime, then the dictatorship of a well-disposed monarch—say, a dictatorship that delivered a just and efficient system of law—would be legitimate. And that was taken in this tradition to be utterly implausible, even absurd.

Freedom in the sense in which it requires independence from others in the exercise of the basic liberties implies that no slave can be free, not even one whose master is wholly benevolent; if the slave may choose to act as he or she wishes, this is only possible so long as that is the wish of the master. Any master or *dominus*, no matter how indulgent, has the power to interfere at will with his or her slaves in the

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exercise of their basic liberties. And this *dominatio*, as the Romans called it,<sup>16</sup> is enough to put the will of the master in control. Freedom requires the absence of such domination, then, not just the absence of the interference it might make possible. It requires that so far as possible no one has the power of interfering at will in a person's exercise of their basic liberties: that is, in the exercise of suitably established, suitably extensive choices that each can exercise without detriment or disadvantage to others.<sup>17</sup> Thus, in the words of Algernon Sidney, writing in the seventeenth century, 'he is a slave who serves the best and gentlest man in the world, as well as he who serves the worst'.<sup>18</sup>

This republican understanding of freedom implies that to live under a dictator, no matter how benevolent, is to be effectively a slave of that authority. Even if you can exercise a suitable range of basic liberties under such a regime, your access to those liberties—your access to a law that defines and defends them—is dependent on the willingness of the ruler to establish them. And, of course, your unhindered exercise of the liberties that are actually established is dependent equally on the

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<sup>16</sup> See <<<REFO:BK>>> Frank Lovett, *A General Theory of Domination and Justice* (Oxford University Press 2010) <<<REFC>>> app.

<sup>17</sup> See Pettit, *On the People's Terms* (n 2).

<sup>18</sup> <<<REFO:BK>>> Algernon Sidney, *Discourses Concerning Government* (Liberty Classics 1990) 44) <<<REFC>>>.

ruler's willingness to allow you in particular to benefit from them in the same manner as others. This means that in relation to the ruler you are in the position of a slave: a lucky slave, to be sure, but still a slave.

The supporters of the American cause in the eighteenth century took up this theme when they challenged the legitimacy of British Colonial Rule, as it had come to be conceptualized and practised in the previous decade. The Westminster Parliament may have proved itself to be gentle and benevolent when, in response to American complaints, it withdrew the Stamp Act in 1766. But at the same time, it claimed in the Declaratory Act, as it was called, that it enjoyed the status of a master; it asserted as 'of right' that it had 'full power and authority to make laws and statutes' to bind the Americans. This is one of the things that particularly enraged the colonists, conscious as they would have been that as a people they were then no better than slaves in relation to the British. Richard Price expressed their grievance particularly well. Commenting that individuals under the power of masters 'cannot be denominated free, however equitably and kindly they may be treated', he argued that the same lesson applied to societies like Great Britain and its colonies: 'This is strictly true of communities', he said, 'as well as of individuals'.<sup>19</sup>

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<sup>19</sup> <<<REFO:BK>> Richard Price, *Political Writings* (Cambridge University Press 1991) 77–78 <<<REFC>>.

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c9.P29 Assuming a suitable conception of the basic liberties, it is surely plausible that freedom in the republican sense, freedom as non-domination in the exercise of these liberties, is an ideal we ought all to cherish.<sup>20</sup> And it is equally plausible that the benevolent dictatorship, whether it be that of an individual, an elite, or a colonial power, is a form of subjection or slavery that compromises people's freedom. This being so, it is hard to see how the mere fact that a state produces various benefits can justify the way in which it exercises power and thereby establish its legitimacy.

c9.P30 No matter what the benefits it produces, then, a state may resemble a benevolent dictatorship in the way in which it exercises power and may count as a dominating presence in its people's lives. And when a state has this profile, it is hard to see why the subjects should be morally obliged to operate within the system, even when there are no collateral reasons to refrain from seeking regime change. Perhaps Kant is the only otherwise liberal philosopher who ever held that, regardless of domination by the state, its people were always obliged to operate within the system. He argued that the subjects of any government, even a government that behaves 'tyrannically', should only enjoy the freedom of the pen: the freedom to try to

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<sup>20</sup> Whether or not non-domination is used to define freedom, of course, it may still be regarded as an ideal worth promoting in social life. The argument in the chapter is strictly independent, then, of the republican linkage between non-domination and freedom.

persuade the ruler to act differently, but not to call ‘by word or deed’ for a change of regime.<sup>21</sup>

The complaint about the benevolent dictator supports a critique of many different sorts of arrangements, each identifying a different benefit that a state might achieve for its citizenry. The fact that a particular state promotes the aims of citizens more effectively than those citizens could themselves promote them;<sup>22</sup> the fact that the state is epistemically reliable in the judgements of fact and value that it makes;<sup>23</sup> the fact that by selecting rulers by lottery it allows power to rotate on an impartial basis;<sup>24</sup> or the fact that it delivers a form of governance that could be justified to reasonable

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<sup>21</sup> <<<REFO:BK>>> Immanuel Kant, *Practical Philosophy* (Mary J Gregor tr and ed, Cambridge University Press 1996) 298–392 <<<REFC>>>. For an argument in support of a more congenial reading of Kant, see Ripstein, *Force and Freedom* (n 3).

<sup>22</sup> See <<<REFO:BK>>> Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) <<<REFC>>>.

<sup>23</sup> See <<<REFO:BK>>> David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2007) <<<REFC>>>.

<sup>24</sup> See <<<REFO:JART>>> Alexander A Guerrero, ‘Against Elections: The Lottocratic Alternative’ (2014) 42 *Philosophy and Public Affairs* 135 <<<REFC>>>.

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citizens:<sup>25</sup> these will all fail, at least on their own, to justify the state's exercise of power.<sup>26</sup> For, regardless of the advantages for citizens, the state's exercise of power may still be objectionable on the most basic of grounds, namely, that it puts those citizens severally as well as collectively under the rule of an independent will; it makes them into slaves, albeit slaves of a relatively benign master.<sup>27</sup>

While these and other benefits might not be sufficient for legitimating a state, however, it might be asked if they are necessary for legitimacy. Without considering the question properly, it is worth noting that on the approach defended later in the chapter, they are not necessary in one sense, but they are in another. They are not

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<sup>25</sup> See <<<REFO:BK>>> John Rawls, *Political Liberalism* (Columbia University Press 1993) <<<REFC>>>.

<sup>26</sup> The different proposals gestured at in this paragraph are loosely characterized as legitimating the state by reference to a benefit it provides, and the different authors cited are only loosely associated with those proposals. The list is meant to be indicative only of the different directions that a benefit-based approach might take.

<sup>27</sup> A critique that converges with this complaint is that in benignly imposing on its citizens the state usurps their judgements about what is in their interest and, assuming a paternalistic role, does not recognize or respect them as autonomous subjects. See <<<REFO:JART>>> Seana Shiffrin, 'Paternalism, Unconscionability Doctrine, and Accommodation' (2000) 29 *Philosophy and Public Affairs* 205 <<<REFC>>>.

necessary in the sense that they are not part of what determines or grounds legitimacy: the fact, according to the line taken, that the state is under the equally shared control of the people. But, still, some of them may be necessary in the sense that it is barely conceivable that the state might be controlled in that way without delivering such benefits. They may not themselves help to ground legitimacy, but ~~they are~~ still be entailed by the realization of its proper ground.

#### 4. Against the virtue-based approach

As resources provided by the republican tradition enable us to challenge any benefit-based candidate for legitimating a state, so they also make it possible to challenge any merit-based candidate for that role. An example of such a candidate is provided recently by Daniel Bell in his defence of what he describes as the China model.<sup>28</sup> This is a model of how state authorities might be selected that idealizes current practices in the People's Republic of China. The idea is that a state's exercise of power would be justified if it was guided by those who proved meritorious or worthy by the standard of such practices: they proved not only to have the expertise required for governing well, but also the virtue to govern impartially.

Assume for the moment that we could rely on a ruler or set of rulers to be suitably expert and, in particular, to be virtuous or impartial. Would that really

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<sup>28</sup> <<<REFO:BK>> Daniel A Bell, *The China Model: Political Meritocracy and the Limits of Democracy* (Princeton University Press 2015) <<<REFC>>.



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support the claim that the state is legitimate? The suggestion is that even if the benevolence of a dictatorial ruler or set of rulers—presumptively, expert or knowledgeable rulers—would not be enough to make the state legitimate, their virtue would.

C9.P35 There is indeed a difference worth registering between the benevolent and the virtuous ruler. For a ruler might be benevolent as a result of certain contingencies: for example, the happy accident of wanting to be remembered kindly in history. But a ruler would not be virtuous if the benevolence they displayed were dependent on that sort of contingency. In order to count as virtuous, we may suppose, they would have to be disposed to be benevolent, not just as things actually stand—not just so long as they want to enjoy historical esteem—but robustly over variations in the personal attraction or ease of displaying such goodwill. In short, they would have to be robustly benevolent.<sup>29</sup> In a phrase of Niko Kolodny's, they would have to be 'resolutely disposed',<sup>30</sup> not just disposed in a more or less adventitious manner, to deal benevolently with subjects.

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<sup>29</sup> See <<<REFO:BK>>> Philip Pettit, *The Robust Demands of the Good: Ethics with Attachment, Virtue, and Respect* (Oxford University Press 2015) <<<REFC>>>.

<sup>30</sup> <<<REFO:JART>>> Niko Kolodny, 'Rule over None II: Social Equality and the Justification of Democracy' (2014) 42 *Philosophy and Public Affairs* 287, 295 <<<REFC>>>.

c9.P36            Would this virtue in rulers do more than mere benevolence to secure the freedom of citizens who live under their power, gaining access to a protected range of basic liberties by grace of their goodwill? The problem with the benevolent dictator is that citizens depend on the ruling will remaining unchanged in order to enjoy their basic liberties, so that in that sense they are subject to that will; let it change and their access to the basic liberties may cease. Is there a similar problem with the virtuous dictator? Or does the dispositional robustness of virtue make for a crucial difference?

c9.P37            I do not think that it does. For even if the rulers were virtuously or robustly disposed to deal well and fairly with the citizens, they would still be liable to lose that disposition or liable not to manifest it on this or that occasion. Consistently with deserving the name of virtue, it could not be hard-wired into their make-up and could not deprive them of choice, making them into involuntary do-gooders. Thus, like the rest of us, they would be exposed to the possibility of corruption, on the one side, and more or less spasmodic episodes of *akrasia*—weakness of will—on the other. And that means that the citizenry would still depend on the will of the rulers for being able to access and exercise the basic liberties established in law. If that will failed to be virtuous, whether permanently or occasionally, they would cease to enjoy that benefit. The virtuous dictator may behave well more reliably than the merely benevolent counterpart, but citizens would still depend on the survival of the dictator's goodwill and still be subject to domination.

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c9.P38 This critique of the virtuous dictator extends to any regime where the exercise of power is supposed to be legitimated by the virtue of those in authority. As mentioned, it would lose force if the authorities were supposed to be incapable of losing their virtue, or acting against it, and in that respect not to be as other human beings. But such a supposition would be fantastical. And in any case, it is a long republican theme that far from the power of office tending to support or even elicit virtue in rulers, it usually has the effect of corrupting them. Providing new opportunities for abuse, and often providing a better prospect for hiding any abuse practised, power tends to destroy virtue rather than maintain it. Lord Acton gave expression to a lesson long rehearsed in the tradition when he said: 'Power tends to corrupt, and absolute power corrupts absolutely.'<sup>31</sup>

c9.P39 This lesson about the effects of power has strong empirical support in the social science of regulation.<sup>32</sup> And equally it is borne out in the long history of politics, where patrimonial interests have always threatened to corrupt politics.<sup>33</sup>

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<sup>31</sup> Letter from Lord Acton to Archbishop Creighton (5 April 1887) accessed 10 October 2018.

<sup>32</sup> See Pettit, *Republicanism* (n 15) ch 7.

<sup>33</sup> See <<<REFO:BK>>> Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (Farrar, Straus and Girous 2011) <<<REFC>>>.

While most republican thinkers celebrated the presence of civic virtue in rulers, none thought that we could rely on its surviving in the presence of unchecked power. Part of the reason for seeking a multi-modular, contestatory form of constitution, indeed, was that it promised to keep the authorities in check, even if their civic virtue wilted. It was with this in mind that republicans endorsed the idea, in an eighteenth-century phrase, that the price of liberty is eternal vigilance: that freedom can prosper only when citizens relentlessly interrogate and invigilate those in authority.

## 5. Towards a will-based approach

You do not have to sign up to the republican way of thinking in order to appreciate the problems cited in these critiques. All you have to do is to endorse the central idea that it is hard to see how the state's exercise of power over its citizens is going to be justified, if things are organized so that the state can interfere at will in determining people's liberties or protecting the exercise of those liberties. The only point in rehearsing the long republican support for this idea is to indicate that it is not a contemporary invention, let alone an idea that I am proposing on the basis of special insight. There is a natural disposition in our species to resent subjection to the will of others.<sup>34</sup> And it is important to be able to show that we join an established way of

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<sup>34</sup> See <<<REFO:JART>> Philip Pettit, 'The Domination Complaint' (2005) 86

Nomos 87 <<<REFC>>; <<<REFO:BKCH>> Philip Pettit, 'Republicanism across

Appears in: 'The Control Theory of Legitimacy', Wojciech Sadurski, Michael Sevel and Kevin Walton (eds), *Legitimacy: The State and Beyond* Oxford: Oxford University Press, 2019)

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thinking about legitimacy when we argue that, regardless of its commitment to benevolence or virtue, no state can be justified in its exercise of power if the constitution of that power means that it dominates its people: it enjoys a position where, **notwithstanding any** benevolence or virtue **in the** rulers, it can interfere at will in their lives.

C9.P41 This critique not only teaches a negative lesson for benefit-based and virtue-based theories of legitimacy. It also supports a positive lesson for how legitimacy may be achieved. It suggests that a state is going to count as legitimate if the will it enacts is not dominating for any of the individuals who live under it. Such a state has to establish a suitable range of basic liberties for each—otherwise its citizens will certainly be dominated by it—and for that same reason it must entrench these against its own capacity to interfere at will in how they are defined or exercised. And while it may pursue other objectives too, it must also pursue these in a non-dominating way.

C9.P42 But how could a state do its job and not dominate its citizens? One abstract possibility might be that it does not operate on the basis of will at all, only as a natural force or only under the impetus of an invisible hand. That possibility can be rapidly dismissed, however, since nothing of that kind could carry out the tasks of the state in

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Cultures' in Jun-Hyeok Kwak and Leigh Jenco (eds), *Republicanism in Northeast Asia* (Routledge 2014) <<<REFC>>>.

enacting and adjusting law, in administering the application of that law, and in adjudicating and penalizing breaches.<sup>35</sup>

Another abstract possibility is that the state might operate under the direction of a robot that does not have a will of any kind, but is designed to do all that citizens might wish.<sup>36</sup> But this also is a possibility we can dismiss. The most ideally designed robot could not possibly keep up to date in adjusting the law to cope with cultural and technological changes, and changes in people's sense of their own interests: for example, their interest in being able to enjoy this or that sort of liberty. And even if it could do these things, there would still be an issue of legitimacy about how such a robotic rule should be established and, once it is in place, how questions may be

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<sup>35</sup> Some thinkers occasionally idealize the rule of common law on the grounds that it operates in the manner of a non-intentional force for good. See <<<REFO:BK>>>FA Hayek, *The Fatal Conceit: The Errors of Socialism* (WW Bartley III ed, University of Chicago Press 1988)<<<REFC>>>.

<sup>36</sup> For consideration of this possibility, see <<<REFO:BK>>>Jake Zuehl, *Collective Self-Determination* (PhD thesis, Princeton University 2016)<<<REFC>>>:

<<<REFO:BKCH>>>Rainer Forst, 'Die neue republikanische Maschine. Zue Unabdinbarkeit des kantischen Republikanismus' in Violetta L Waibel and Margit Ruffing (eds), *Nature and Freedom: Proceedings of the 12th International Kant Congress* (Walter De Gruyter 2018)<<<REFC>>>.

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raised and decisions made about whether to keep it in place: unless this is possible, then later generations will be subject to the will of those who introduced robotic rule in the first place.

C9.P44 With these abstract possibilities put aside, we turn in the final section to explore the possibility that while there is a will behind what the state does, that will need not be a dominating presence in the lives of citizens. But before we do so, it is important to identify and defend an assumption on the basis of which the inquiry will proceed. This is the assumption that the state is an agent in its own right and, in particular, an agent capable of dominating its citizens.<sup>37</sup>

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<sup>37</sup> This assumption is not accepted on all sides, although it is all too rarely addressed. Allen Buchanan may reject it when he maintains that the state is an ‘institutional structure’, such that it would be conceptually incoherent to imagine that subjects might owe obedience to it. See Buchanan, *Justice, Legitimacy, and Self-Determination* (n 7) 691. And Niko Kolodny may reject it in voicing the thought—misleading though he takes it in certain ways to be—that ‘the state, once the robes and badges are peeled off, is just other people’. See <<<REFO:BKCH>>>Niko Kolodny, ‘Political Rule and its Discontents’ in David Sobel, Peter Vallentyne, and Steven Wall (eds), *Oxford Studies in Political Philosophy, vol 2* (Oxford University Press, 2015) 65<<<REFC>>>. Elsewhere, however, Kolodny argues that it is subordination or social inferiority that is objectionable, not domination as such, and social inferiority

## 6. The state as agent

There are good reasons for assuming that the state has agential status.<sup>38</sup> An agent is any system that forms more or less reliable representations of the environment it can affect and more or less reliably acts for the realization of identifiable goals in the environment as it represents it. Thus, it generally takes advantage of the opportunities that present themselves for action and takes account of the means and obstacles in view. Even a little household robot that scans its surrounds and acts on the basis of its representations or judgements to effect one single purpose—say, to put the furniture in a particular order at the end of each day—counts in that sense as an agent.

Without going into the theory of how group agents can form, it should be clear that groups can incorporate as agents insofar as members go along with a procedure for determining group purposes and judgements, and commit to acting as required of

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would not be threatened by the power of the state as such, only by the power of individuals. See Kolodny, 'Rule over None II' (n 30); [Niko Kolodny, 'Rule over None I: What Justifies Democracy?' \(2014\) 42 \*Philosophy and Public Affairs\* 287](#). From my perspective, that in itself should raise doubts about the importance of non-subordination as distinct from non-domination.

<sup>38</sup> See [Christian List and Philip Pettit, \*Group Agency: The Possibility, Design and Status of Corporate Agents\* \(Oxford University Press 2011\)](#).



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them individually, under accepted protocols. The state clearly displays this sort of agential pattern in both the national and international arenas, with its officials seeking—perhaps conditional on the acquiescence of citizens—to act for identifiable purposes according to suitably formed judgements about the world it occupies. It will do this insofar as it ensures that the law assumes a coherent form across constitutional, statutory, judicial, and executive determinations. And it will do it, more generally, insofar as it pursues various objectives or policies, domestic and global.<sup>39</sup>

C9.P47 Not every agent is capable of dominating others, in particular individuals like us. In order to have the power of interfering at will—or more or less at will—in your choices, an agent will have to know what choice is, will have to be able to identify the options before you in any choice, and will have to have the capacity to choose to interfere with those options, depending on what it wishes. Thus, it will have to have the ability, depending on its wishes, to decide for or against removing an option, for or against replacing it by a penalized alternative, or for or against misrepresenting it to you, whether by deception or manipulation.

C9.P48 Any individual is liable to have this ability in relation to one or another choice on your part. And so, any number of individuals who are incorporated as an agent are

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<sup>39</sup> On the theory of group agency assumed here, see *ibid*; <<<REFO:JART>>> Philip Pettit, 'Group Agents are not Expressive, Pragmatic or Theoretical Fictions' (2014) 11 *Erkenntnis* 79 <<<REFC>>>.

liable to have this ability too. They will inherit the required conceptual capacities from their members, being able to recognize that you face choices in which interference is possible, and they may very well have the ability to interfere as a group, particularly in light of the power conferred by incorporation. Being group agents of this character, then, states are certainly liable to have the ability to interfere in your choices, especially if you are a citizen, as they are liable to have an ability to interfere in the choices of other states and of group agents besides states.

c9.P49 It may be thought that any dominating power of interference that the state has in your life as a citizen is bound ultimately to involve a dominating power on the part of one or another particular agent. And if that thought is sound, then it would follow that in order for a state to be legitimate—in order for it not to enjoy dominating power—all that is needed is that no individuals, in particular no officials of the state, have such power.

c9.P50 Without going into the theory of group agency, it should be clear that this thought is misleading. In order to dominate others, officials would have to have a power of interfering at will in their lives; they would have to have a choice about whether to interfere or not. That means that they would have to be able to interfere voluntarily: they would have to be able to practise or refrain from interference, depending on their wishes: neither option involves significant difficulties or incurs significant costs.<sup>40</sup> But where the state requires officials on pain of its incoherence as

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<sup>40</sup> See Olsaretti, *Liberty, Desert and the Market* (n 2).

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an agent to impose a certain law or policy, they will not generally impose it on a voluntary basis. The alternative of not imposing it would presumably trigger significant costs for them, putting their very position in peril. Thus, they will be in the position exemplified by judges who say that they have no choice but to interpret the law thus **and so** or to impose such and such a sentence: they do so involuntarily and, as it well may be, with great reluctance.

c9.P51            This being so, it is going to be necessary to ensure not just that the exercise of state power does not entail the domination of some by the will of one or another **official**, but also that it does not entail domination by the state itself. **Individual officials might not dominate people even when the state they serve does dominate them**. The laws and regulations **of a dominating state** might evolve, as under an independent will, without any of its agents having the power as individuals to exercise interference according to their own wishes.

c9.S11            **C. Mapping the Will-Based Approach**

c9.P52            There are many approaches that acknowledge the presence of will in the actions of the state, but still maintain that the state need not dominate its citizens. These divide on lines familiar from the history of political theory. One approach says that the state will be un-dominating and legitimate just in case individuals consent to its rule in their lives. Another says that it will be un-dominating and legitimate just in case the people as a body—the people as a group agent—enjoy command over everything the state does, or at least over everything it does in the domain of legislation, which has

traditionally been taken to be more important than other domains. And a third, my favoured approach, holds that it will pass those tests just in case individuals share equally in controlling what the state does: specifically, in controlling it to the point where no one has ground for resentment when it happens to pass unwelcome initiatives.

### 1. The consent version

The consent approach to the legitimacy issue supposes, in a tag from Roman law, that no one is injured or wronged—and so no one suffers dominating interference—when they consent to what is done to them: *injuria non fit volenti*.<sup>41</sup> There are two variants of the approach. One insists on the importance of consensually entering a relevant arrangement; the other emphasizes the importance of consensually staying there, where this is ensured by the permanent possibility of exit.

The pure form of the entry-centred approach would require citizens to endorse unanimously every action of the state or at least every legislative action: this, because of an assumption that legislation is at the source of all other state activity. It would

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<sup>41</sup> The Roman tag presupposes under a natural interpretation that the injury done is done intentionally. Domination is not an intentional injury ~~of that kind~~, since you may dominate me by virtue of your power of interference without wanting to have such power. But interference is ~~taken to be voluntary~~ intentional, of course, and if it does not constitute an injury then presumably it is not imposed in a dominating way.

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give every individual a power of veto over any relevant initiative taken by the state.

This is clearly infeasible under real-world conditions and we may put it aside.

An alternative form of the entry-centred approach would require citizens not to endorse every action of the state unanimously, legislative or otherwise, but to endorse unanimously the majoritarian rule of a sovereign assembly of the citizens, or the rule of an individual or committee that is established as sovereign by a majority vote of the assembly. Hobbes,<sup>42</sup> Locke,<sup>43</sup> and Rousseau<sup>44</sup> all adopt this approach, although they differ on associated requirements.<sup>45</sup> Their main difference consists in

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<sup>42</sup> <<<REFO:BK>> Thomas Hobbes, *Human Nature and De Corpore Politico: The Elements of Law, Natural and Politic* (Oxford University Press 1994) <<<REFC>>:

<<<REFO:BK>> Thomas Hobbes, *On the Citizen* (Richard Tuck and Michael Silverthorne trs and eds, Cambridge University Press 1998) <<<REFC>>.

<sup>43</sup> <<<REFO:BK>> John Locke, *Two Treatises of Government* (Cambridge University Press 1960) <<<REFC>>.

<sup>44</sup> <<<REFO:BK>> Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings* (Victor Gourevitch ed, Cambridge University Press 1997) <<<REFC>>.

<sup>45</sup> Strictly, Hobbes takes the approach ascribed only in *Human Nature and De Corpore Politico* (n 41) and *On the Citizen* (n 41). In the later

<<<REFO:BK>> *Leviathan* (Richard Tuck ed, Cambridge University Press

the fact that Hobbes allows the assembly to transfer its sovereignty to an elite committee or an individual monarch; Locke thinks that such a transfer—not his word—can always be retracted when a majority rise up against such a sovereign; and Rousseau denies that a transfer would ever be acceptable.

C9.P56           The requirement of such indirect unanimity is as infeasible as the requirement of direct unanimity. And it is subject to the added difficulty that entering a contract voluntarily does not guard against being dominated within the relationship set up by that contract. This lesson was traditionally illustrated by the possibility of the slave contract, which had had a marginal presence in classical Rome. Someone would enter the contract more or less voluntarily in order to achieve a certain benefit—say, the benefit for a foreigner of being taken to live in Rome. But in subjecting themselves to the domination of the other they would trade away their freedom. The slave contract made vivid the possibility of suffering domination in a relationship, despite having consented to entering that relationship.

C9.P57           These unanimity-based proposals, direct and indirect, all put emphasis on the ways in which individuals enter into relations with the state, whether in submitting to a particular law, or submitting to an arrangement for law-making. An alternative sort of proposal would invest, not in any such entry condition, but rather in a condition of

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1991) <<<REFC>>>, he also seems to envisage the possibility of individuals unanimously consenting to be ruled by an individual or a committee without recourse to majority voting in an assembly of the whole.

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exit. The idea would be that if citizens are free to leave a state in the event of its proving objectionable—in particular, to leave it for a state that was not similarly objectionable—it follows that when they stay, they stay consensually. They effectively consent, if not to every law and policy, at least to the general arrangement for making law and policy.

c9.P58 This proposal parallels the familiar claim that in a market where workers could exit any particular employment relationship—this, of course, might be only a utopian possibility—they would not be subject to domination by any employer; if they stayed with an employer, that would be by their own continuing consent.<sup>46</sup>

c9.P59 The proposal might work in principle, but it is utterly infeasible in practice. Whatever difficulties there may be with the idea of a market where workers could freely move between jobs, they are overwhelmed by the difficulties facing any proposal that would rely on citizens being able to move between countries. As in the market case, there would likely be great costs associated with moving, so that the employer or state would have the upper hand. But every country has to control its

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<sup>46</sup> See <<<REFO:JART>>> Philip Pettit, 'Freedom in the Market' (2006) 5 *Politics, Philosophy and Economics* 131 <<<REFC>>>; <<<REFO:JART>>> Robert S Taylor, 'Market Freedom as Antipower' (2013) 107 *American Political Science Review* 593 <<<REFC>>>; <<<REFO:BK>>> Robert S Taylor, *Exit Left: Markets and Mobility in Republican Thought* (Oxford University Press 2017) <<<REFC>>>.

borders, since it could not otherwise maintain the monopoly power of a state. And so, things would actually be worse here than in the market case. In a world where there are no stateless territories, people cannot possibly be guaranteed the capacity, should they wish, to move elsewhere.

But even if every state gave its citizens freedom of exit, and every state allowed anyone to enter, that might still not help individuals. For every state might dominate its members, as every firm in a market might dominate its workers.<sup>47</sup> In such a world, things would be organized so that domination was inevitable among people; their only choice would be a choice between living under this or that dominating regime. The arrangement might not be dominating as such, not being imposed by anyone's will, but it would facilitate, indeed necessitate, domination; it would be structurally, not agentially, dominating.<sup>48</sup>

## 2. The command version

The approaches that invoke consent all require that how the state operates should conform to the wills of its individual citizens, thereby ensuring against domination. But there is another approach according to which it is going to be enough if the

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<sup>47</sup> See <<<REFO:BK>>> Alex Gourevitch, *From Slavery to the Cooperative Commonwealth: Labor and Republican Liberty in the Nineteenth Century* (Cambridge University Press 2014) <<<REFC>>>.

<sup>48</sup> See Pettit, *On the People's Terms* (n 2); Pettit, *Just Freedom* (n 2).



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citizens establish a shared will about how the state should exercise its power and impose that will on the state.

Rousseau is at the origin of this approach too, for he thinks that it is necessary not only that the majority vote of the assembly should rule on the basis of unanimous consent, but that it should rule in such a way that it expresses what he describes as the general will of the people.<sup>49</sup> Thus he moves the focus from individual will to collective will, arguing that what is also needed in order for people to control the will of the state, and to escape an illegitimate form of political domination, is that they form a general will and let this determine what the state does, at least in the sphere of legislation. The command approach to legitimacy, as envisaged here, would suggest that such command over the state is not just necessary for its legitimacy, but sufficient too; it does not have to be based in unanimous consent.

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<sup>49</sup> See <<<REFO:BK>>> Jean-Jacques Rousseau, *The Discourses and Other Early Political Writings* (Victor Gourevitch ed, Cambridge University Press 1997) <<<REFC>>>. For an argument that the two parts of this package pull against one another, raising the spectre of a dilemma, see <<<REFO:BKCH>>> Philip Pettit, 'Rousseau's Dilemma' in Avi Lifschitz (ed), *Engaging with Rousseau: Reception and Interpretation from the Eighteenth Century to the Present* (Cambridge University Press 2016) <<<REFC>>>.

C9.P63 The main problem with this approach is well recognized in the literature. On any conceivable way of determining the shared will of the people—the general will, in Rousseau’s terminology—it is almost certain that some individuals will not share in that will. And that means that while the state may be governed by the collective will of the people—while it may not dominate them collectively—it is likely to dominate at least some of them individually. Certainly, it will dominate those who do not share in the purportedly collective will.<sup>50</sup>

C9.P64 Rousseau thought that the general will could be determined by majority voting provided that three conditions were met: (1) voting is confined to matters of general law where personal or factional interests are less likely to influence citizens; (2) the citizens are well advised and informed on all relevant issues; and (3) when they vote, they think as members of the people, not as self-interested or faction-bound individuals. When these conditions are fulfilled, he holds that the general will expressed in majority voting is likely to be the will of each individual, existing side by side with his or her particular will, and that members of the defeated minority can think of themselves as having been mistaken about the general aspect of their will. If in such a case ‘the opinion contrary to my own prevails’, he writes in *The Social*

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<sup>50</sup> The problem discussed here does not affect those who want to argue, like Anna Stilz, that there is a workable sense of self-determination that should be taken as a relevant value, at least in matters of international justice. See Stilz, ‘The Value of Self-Determination’ (n 4).

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*Contract*, 'it proves nothing more than that I made a mistake and that what I took to be the general will was not'.<sup>51</sup>

There are a number of problems with this proposal. One is that majority voting among individually consistent voters does not guarantee consistency of judgement when the issues in question are logically connected with one another, as many laws will be.<sup>52</sup> But even if that were not a problem, it is hard to see why the members of a

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<sup>51</sup> Rousseau, *The Social Contract* (n 44) IV.2.8. This reading of Rousseau, under which it is important that the general will is my will, is not uncontroversial, of course. But I am interested primarily in the view that each of us can share in the will behind the law, whether or not Rousseau was explicitly committed to it.

<sup>52</sup> See <<<REFO:JART>>> Philip Pettit, 'Deliberative Democracy and the Discursive Dilemma' (2001) 11 *Philosophical Issues* 268<<<REFC>>>. This is the discursive dilemma, as I have called it. Suppose you, Mary, and I vote on whether p, whether q, and whether p&q. Mary and you may vote for p, Mary and I for q, and only Mary for p&q, yielding the inconsistent majority judgements that p, that q, and that not-p&q. For a generalization to an impossibility theorem in the aggregation of judgements, see <<<REFO:JART>>> Christian List and Philip Pettit, 'Aggregating Sets of Judgments: An Impossibility Result' (2002) 18 *Economics and Philosophy* 89<<<REFC>>>; and for later work in this area, see <<<REFO:JART>>> Christian List and Ben Polak, 'Symposium on Judgment Aggregation' (2010) 145 *Journal of Economic Theory*

minority on any issue should have to regard the will of the majority as truly their will: this, at any rate, without endorsing a dubious doctrine of what constitutes someone's 'real' or 'true' will.<sup>53</sup> And even if this in turn were not problematic—even if minority voters could be persuaded of the effect alleged in a case where Rousseau's conditions are satisfied—they would surely have good reason in many situations to think that the conditions are not satisfied: that the majority vote is driven by factional interests and is not in any sense their will.<sup>54</sup>

### 3. The control version

We have looked at two broad versions of the will-based approach to legitimacy. Under the consent account, citizens have to give their individual consent to how the state rules, whether by voluntarily entering it or by voluntarily staying put: that is, staying put in the presence of a viable exit option. Under the command account, citizens have to share in a single will as to what laws should be in place and install

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<sup>44</sup> [REFC]. For background to the discursive dilemma, see

[REFO:JART] Lewis A Kornhauser and Lawrence A Sager, 'The One and the Many: Adjudication in Collegial Courts' (1991) 81 *California Law Review*

[REFC] on the doctrinal paradox in law.

<sup>53</sup> See [REFO:BK] Isaiah Berlin, *Two Concepts of Liberty* (Oxford University Press 1958) [REFC].

<sup>54</sup> See Pettit, 'Rousseau's Dilemma' (n 49).

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this in the operation of the state: ideally, they should establish their assembly as the legislature.

C9.P67 Neither the entry-centred consent approach nor the command approach would seem to deliver what is required: a guarantee that individuals are not dominated under state rule. And even if the exit-centred consent approach would guarantee this, it shares with the other proposals the problem that it is manifestly infeasible. The fact that someone is allowed to leave their state does not imply that they will be allowed to enter any other state, and in a state-bound Earth, that means that they cannot have an effective right of exit. In any case exit would enable them to avoid domination, only if there were a non-dominating regime that they were in a position to enter; it would not be enough to have the freedom to enter dominating alternatives.

C9.P68 But there is a third way of thinking about how a state might be forced to conform to the wills of its members. This requires that the citizens should share equally in controlling the state: that is, in imposing suitable constraints or terms on how the state exercises its power over them. The idea is that such constraints can ensure that the state's power of interfering in the lives of citizens is not dominating. The state may impose laws coercively and exclusively of rival authorities, it may dictate the basic liberties that citizens are to enjoy under those laws, and it may forcibly tax citizens for the resources it needs to pursue its goals. But it would do these things, so the idea goes, under such constraints that it does not dominate its citizens.

#### 4. The guiding idea in the approach

The idea behind the control version of the will-based theory of legitimacy is motivated by examples of everyday relationships in which you allow someone to make certain decisions for you without that person counting as a dominator. Suppose that you no longer want to indulge your occasional impulses to travel at weekends to foreign places—it is costing you more than you would like—and that you give me your passport, instructing me to return it to you only at a week's notice. In such a case, I have and exercise a certain power over you when in response to your impulsive request I refuse to hand over the passport and thereby stop you flying abroad on a particular weekend. Do I dominate you in virtue of having that power? Surely not. My power is constrained according to your will, so that my interference in refusing you the passport does not impose an independent will in your life.

One dis-analogy between this case and the case of the state is that none of us sets up the state as an entity with a power of interfering in our lives. In that respect, your relationship to the state is very different from the relationship with me in the passport case. But even if you do not set up that relationship, the existence of the relationship is the irreversible legacy of history, not the effect of anyone's interference or domination, whether in the past or the present. And given that you need have no problem about the existence of the relationship, you may hope to achieve in your dealings with the state the same sort of un-dominated status that you enjoy in dealing with me. There is a possibility, at least in principle, that how the state

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behaves towards you can be constrained in the same way, and to the same welcome effect, as my behaviour in relation to you.

C9.P71

But a second dis-analogy suggests that this possibility may not be available in practice. This consists in the fact that whereas you are the only subject over whom I have a power of interference, you are only one of many over whom the state has a power of interference. Hence you cannot expect to be able to impose constraints on the state that govern its relationship with you independently of the effect on its relationship with others. You cannot expect, for example, to be able to constrain the state not to harm certain of your interests, if that constraint would be disadvantageous to others.

C9.P72

This dis-analogy need not be fatal, however, to the proposal. For the fact that you are born into a society with others, and the fact that others have the same interest in constraining the state, is not a condition that is imposed on you by a dominating agency; even more than the existence of the state, it is a fact about which you can have no complaint.

C9.P73

That being so, you cannot plausibly complain about being able to constrain the state's exercise of power in relation to you only in a manner that equally constrains its power in relation to others. To look for a special degree of constraint over the state would be to look for a dominating relationship to others of the very kind that you seek to avoid in your own relationship to the state. Thus, I assume here that whatever

legitimacy requires, it requires it equally for all and that we need only be concerned with arrangements for controlling or constraining the state that assume such equality.

C9.P74        Suppose, then, that the state could be constrained in how it is allowed to act towards you, albeit constrained only in a manner that benefits others in the same way it benefits you. Might such constraints have the effect of removing domination from the way in which the state interferes in your life and the life of other citizens? A third dis-analogy with the original passport case appears at this point. For while you voluntarily set up the terms under which I can return your passport—you propose that I can only return it at a week's notice—you and others will not have set up constraints on the state in the same voluntary way. Given the circumstances of disagreement that characterize politics, there is no way, for example, in which you might all have unanimously agreed to the constraints to be imposed.

C9.P75        The response to this final dis-analogy is that, notwithstanding the considerable difficulty involved, it may be possible to identify constraints that, despite not being agreed by everyone, have at least these two characteristics. First, they are generated under a system of influence to which everyone has equal access. And second, they are constraints that everyone is ready to accept or support. Such a system of equally accessible, equally acceptable influence—such a system of equally shared control—would hold out the promise of constraining the state in a way that everyone ought to welcome, or at least everyone who is prepared to accept that they must live on equal



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terms with others. And such a pattern of constraint might be efficacious enough to ensure that no individual citizen was dominated by the state.<sup>55</sup>

## 5. The tough-luck test for efficacy in control

How efficacious would this system have to be in order to count as preventing domination? Any plausible system of control is bound to leave some discretion in the hands of state authorities. And so, the question is whether there is any test for when the discretion allowed is sufficiently restricted not to allow domination: any test, in effect, for when the restrictions are sufficient to make the state's exercise of power legitimate.

Being under the power or will of another is an objective condition that may obtain whether or not you are aware of its obtaining. But when you are aware that it obtains, and particularly when you are aware that the power is exercised to your detriment, that is bound to trigger resentment and indignation. These are primal, more or less universal responses to the hostile actions of another agent or agency, at least

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<sup>55</sup> Because the move to a collective system for disciplining the state is introduced on these grounds, the approach is proof against Anna Stilz's concern that it confuses protecting the citizenry as a group against domination with protecting individual citizens against that danger. See Stilz, 'The Value of Self-Determination' (n 4) 111.

when the actions are taken to be reflections of the presence and influence of will.<sup>56</sup>

And so, they would be entirely appropriate in response to the unwelcome interventions of a dominating subject.

Now every state is bound to establish some regulations or laws that you or others will find unwelcome. It may be an initiative that imposes a higher tax on those in your particular corner, or a zoning decision that reduces the value of houses in your neighbourhood, an immigration decision that works against those of your particular religion, or a travel restriction that you and almost everyone in the society takes to be excessively onerous. And that directs us to a test for when the state's exercise of power is un-dominating. If the state is un-dominating, then you will not have any reason to see its unwelcome decisions as actions meriting resentment or indignation. You will be able to regard the decisions, as you might regard natural accidents, as just tough luck. If the zoning decision goes against you, for example, you will be able to think of this outcome as you might think of the effects of natural chance.

The challenge before us now is to identify an equally accessible system of equally acceptable influence that might constrain the state sufficiently for it to meet

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<sup>56</sup> See <<<REFO:BK>>> PF Strawson, *Freedom and Resentment and Other Essays* (Methuen 1962) <<<REFC>>>; <<<REFO:BKCH>>> Victoria McGeer, 'Civilizing Blame' in D Justin Coates and Neal A Tognazzini (eds), *Blame: Its Nature and Norms* (Oxford University Press 2013) <<<REFC>>>.

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the high standard required by the tough-luck test. Are there institutional designs that can support such a system? If there are, then a state that operates under those designs is going to exercise power in an un-dominating way and will count, in that sense, as legitimate. The state may occasionally allow laws to pass, or officials to be appointed, in a way that breaches the system, and in that sense, those particular laws or the appointments may be illegitimate. But insofar as it normally operates under the systemically generated constraints—insofar as breaches are incidental, isolated, and ideally remediable—the state itself will enjoy legitimacy as a body; it will exercise power in a way that respects the wills of its citizens.

This is not the place to explore the sorts of institutional designs that would support a suitable form of civic control over the state. But it may be useful to explain in sketchy outline how suitable institutions might give us a system of equally accessible, equally acceptable, and suitably efficacious influence over the state.

## 6. Institutions for controlling the state

In order to introduce the explanation, it is first necessary to distinguish two ways in which a group of representatives—say, a small committee delegated to make some decisions on behalf of a larger population—may go about its decision-making. The two models differ in the motives they allow members to act on, as they seek to push the group in one or another direction. Under each, the members are allowed to do the best they can by the interests and opinions they represent. But under the first, this permission is unqualified, so that they can bargain as hard as they wish for their own

point of view, whereas under the second, it is significantly constrained. Members are required in this model to argue in favour of their respective proposals for how the group should go, on the basis of considerations that purport to be equally relevant, if not equally weighty, from everyone's point of view.<sup>57</sup> The constraint is effective to the extent that if someone fails to adduce such considerations in deliberative support of a proposal they make—if all they can say, for example, is that it would advantage their particular constituents—then they will be exposed to disesteem, even ridicule.<sup>58</sup>

The committee members will have to discharge three tasks in any decision. They will have to settle the menu of options among which to choose; determine the mode of decision-making to be followed in choosing; and make and vote for their preferred option. At each level, the first model would allow them to bargain, seeking to get concessions from others at least cost to themselves. The second model, by contrast, would require them at each level to make a deliberative case—a case based in purportedly shared or shareable considerations—for whatever process or policy

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<sup>57</sup> <<<REFO:BK>> Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Columbia University Press 2012) <<<REFC>>.

<sup>58</sup> This model, associated in particular with Jürgen Habermas, is nicely described in <<<REFO:BKCH>> Jon Elster, 'The Market and the Forum: Three Varieties of Political Theory' in Jon Elster and Aanund Hyland (eds), *Foundations of Social Choice Theory* (Cambridge University Press 1986) <<<REFC>>.

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they prefer. It would restrict each to defending one of those alternatives—and no doubt there will be a number on any issue—that are supported by some such considerations and cannot be knocked out by others.<sup>59</sup>

Suppose, to invoke an other-worldly possibility, that the state were governed by a committee that operated under the second model. Assume that there is no question about the universal relevance of the considerations that the members of the committee valorize. And assume that there is also no question about the fact that in every case of political decision-making the menu of options considered, the mode of voting adopted, and the actual option favoured is indeed defensible by such considerations. Under these assumptions, the decisions of the state, however unwelcome to some, are going to be acceptable to each under the abstract guise of

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<sup>59</sup> The approach clearly connects with the tradition of deliberative democracy: see <<<REFO:BKCH>>> Joshua Cohen, 'Deliberation and Democratic Legitimacy' in Alan Hamlin and Philip Pettit (eds), *The Good Polity: Normative Analysis of the State* (Blackwell 1989) <<<REFC>>>; <<<REFO:BK>>> Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press 1996) <<<REFC>>>. It connects in particular, as will be clear, with the tradition in which this is taken to involve different interconnected sites of deliberation. See <<<REFO:BK>>> Jane Mansbridge and John Parkinson, *Deliberative Systems* (Cambridge University Press 2012) <<<REFC>>>.

being decisions that are supported in terms that all take to be relevant. And everyone who accepts that no one can be especially favoured by the state must find this abstract acceptability enough to silence a complaint about the content of what is decided in any case.

C9.P84 While this possibility is other-worldly in other respects, the idea that the citizens of a state might recognize the common relevance of certain process-related and policy-related considerations is not outlandish. When any officials or citizens of a state argue with one another about rival proposals on matters of process or policy, they are certainly likely to disagree about the proposal to realize. But if they are to argue with one another about the proposals, they must find considerations in support of their favoured candidate that are presumptively relevant for all, although perhaps not weighted equally by all.

C9.P85 Suppose that members of the community argue about policies like medical insurance or legal assistance, for example, the minimum wage or national defence, same-sex marriage or prosecutorial discretion. If any such argument is not to descend into brute conflict, it must proceed on the basis of commonly valorized, although hardly commonly weighted, considerations like those of equality and efficiency, privacy and protection, autonomy and fairness. While the argument generates divergence in the different proposals people defend, then, that very divergence will presuppose that the members converge on certain values and will have the effect of marking the values as accepted community standards. Those standards may be quite

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indeterminate in their individual demands and relative weights, at least as between familiar proposals. But at any moment they will surely outlaw an endless number of policies, rendering them more or less unthinkable. And they will be capable of becoming more determinate over time: think of how the significance of equality has shifted in the United States with the rejection of the separate-but-equal doctrine.

C9.P86 We said that members of the other-worldly community we have been imagining will hardly have a complaint about the criteria on the basis of which decisions are reached by the ruling committee. But they will still have a complaint, of course, about the power of the committee. However sensitive the committee may be to community standards, it still must count as a dominating presence in their lives. While it reaches decisions that are acceptable to all in the sense explained, it is not forced to meet this constraint; it exercises its own will—by earlier argument, its own corporate will—in reaching those decisions. And so, it holds sway over the several and collective citizens for whom it decides.

C9.P87 But now suppose that institutions are introduced whereby others can make it more and more difficult for the committee to do anything other than select in each decision a menu of options, a mode of decision-making and a particular candidate that fit with what, from all perspectives, are universally relevant considerations. And suppose that everyone has equal access to the system that imposes this discipline on the committee. In that case, we would have an equally accessible system of influence over the state that imposed constraints that, by the earlier argument, were acceptable

to all. And in that case, it would surely be plausible that each could think about any suitably formed decision, however unwelcome, that it was just tough luck that it went against them.

c9.P88           How might the committee with which we began be forced to make its decisions under the constraint of universal acceptability? Abstractly, it would seem to be a good idea to constrain those representatives by open, periodic, competitive election; to introduce safeguards against an elite of any kind, especially a moneyed or cultural elite, gaining special influence over elected representatives; to establish other committees for making decisions, say in deciding district boundaries or in publishing economic data, where electoral incentives are likely to be perverse; to set up independent auditing and review procedures for vetting all such bodies; to expose every level in this structure of government to public contestation, whether in courts or commissions, in the media or on the streets; to impose constraints of universal acceptability on every committee decision and on every process of contestation; and to frame such requirements under a constitution that ideally enjoys popular support and is entrenched against being amended too easily or too quickly.

c9.P89           These gestures at the sorts of institutions required indicate, as the republican tradition has it, that something like a mixed constitution is likely to be required. But there is nothing more that can be done here in outlining such a constitution.<sup>60</sup> The aim is merely to direct attention to a means whereby the control requirement on legitimacy

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<sup>60</sup> For a more detailed sketch, see Pettit, *On the People's Terms* (n 2) chs 4–5.



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might possibly be realized: a means that is approximated, however partially and imperfectly, in familiar democratic regimes. The satisfaction of that requirement not only promises to be enough to justify how a state exercises power, then; it also constitutes a condition that can feasibly be fulfilled.

C9.P90 While there are regimes in existence that have many features of the institutional template highlighted in this discussion, it should be noted finally that this is not a reason for complacency. The different constraints envisaged are not individually beyond our institutional reach, and are illustrated in a number of extant constitutions, but they are rarely realized as a coherent package. And when they are realized, they are usually realized only in a half-satisfactory measure. The theory of legitimacy whose feasibility they are designed to vindicate directs us to a regulative ideal, not an ideal that we can expect to be routinely satisfied.

## C9.S18 7. Conclusion

C9.P91 In the first section of this chapter, we saw that the obligation owed by citizens to a legitimate state is that of opposing its laws, if they oppose them, within the system: this, as distinct from looking for regime change and starting again from scratch. That view of political obligation fits nicely with the control theory of legitimacy. For if the state were truly constrained by an equally accessible system of equally acceptable influence, it is hard to see any basis on which citizens could reasonably look for regime change. Or better, to register the fact that legitimacy comes in degrees: to the

extent that a state was constrained in that way, its citizens would be obliged to contest its laws and procedures only within the system.

C9.P92

Suppose that the state did not perform well on this or that front; suppose, for example, that it failed to prevent a serious economic recession. If its claim to legitimacy rested only on the benefits it claimed to produce, or on the virtues it ascribed to its rulers, then we can see why citizens might well think of looking for regime change. If its claim to legitimacy rested on its operating under effective and equal democratic control, however, then things would surely be very different. The state that operated under such a constraint might fail to meet the natural expectation that it should provide various benefits. But a failure to do so would hardly offer any reason for citizens to renounce control over the state and to look for some other mode of political organization. At most, it would prompt a rethink of policy, a rejection of the elected government, a resort to constitutional amendment or, at the limit, a temporary recourse to emergency rule. The lesson, as John Dewey put it, is that ‘the cure for the ailments of democracy is more democracy’.<sup>61</sup> But democracy, as understood, in this principle, is democracy in the image of the mixed constitution: a democracy that is characterized not just by periodic electoral arrangements, but by the

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<sup>61</sup> <<<REFO:BK>> John Dewey, *The Public and its Problems* (Ohio University Press 1991) 146 <<<REFC>>.

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constraints imposed on elected government by constitutional counter-powers and an engaged, contestatory citizenry.