On non-domination*

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*An earlier version of this essay was delivered as the inaugural Brian Barry lecture at the London School of Economics on May 7, 2010. The essay does not deal with Barry’s work, and I expect that he would have disagreed with quite a bit of it. But I hope and expect that he would not have thought this disqualified it for the assigned purpose. There was nothing Brian liked more than a spirited argument.
1. Why Non-domination?

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

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

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

My aim in this paper is to differentiate this view from two kinds of alternatives: those whose proponents reject the idea that non-domination is the bedrock of justice, and those who agree with me but understand non-domination differently than I do. The first group divides into partisans of equality, on the one hand, and of freedom on the other. The egalitarians generally think of themselves, like me, as writing about justice, mostly in the wake of the “equality of what?” debate spawned by Amartya Sen’s contention that debates about justice are always at bottom debates about some kind of equality.⁴

² Ian Shapiro, Democratic Justice (Yale University Press, 1999), pp. 85-86.
Proponents of freedom are sometimes less clear about their ideal’s relation to justice, or at least less explicitly so—perhaps because some of them are skeptical of the very idea of justice. Regardless of whether they see freedom as a feature of justice or an alternative to it, they treat it as the gold standard in judging the legitimacy of political institutions. For present purposes I will assume that, like Robert Nozick, freedom’s partisans regard their understanding of it as the bedrock of justice.\(^5\) The friends of equality occupy my attention in part 2, followed by those of freedom in part 3. Having explained why non-domination is a preferable ideal to those put forward in either of these camps, I turn, in part 4, to competing conceptions of non-domination put forward by Michel Foucault, Jürgen Habermas, Quentin Skinner, and Philip Pettit. There is considerable overlap among these various views, and between them and mine, but there are also notable disagreements. I spell out what is at stake in the disagreements, indicating why my own conception, rooted in power-based resourcism, is preferable.

2. Justice, equality, and non-domination

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

When I say that egalitarianism is only trivially associated with non-domination as I conceive it, I do not mean to deny that there is an ultimate sense in which proponents of non-domination acknowledge the moral equality of persons—what Sen describes as basal equality.\(^6\) But it is the idea of non-domination, not that of equality, that does the heavy lifting in my argument. Nor do I mean to deny that a commitment to non-domination has distributive implications, some of which—as we shall see—will be congenial to many people who count themselves egalitarians. I do want to say, however, that egalitarian distributive commitments are desirable to the extent that they serve the goal of non-domination—not the reverse. I agree with John Kane that there is nothing in the meaning of justice that implies an egalitarian distributive presumption.\(^7\) It is when egalitarian distributive arrangements serve the goal of non-domination that they are desirable from the standpoint of justice.

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

2.1. The original position and the logic of justice

Rawls’s device of reasoning behind a veil-of-ignorance does not generate a commitment to equality; rather, it presumes prior acceptance of an egalitarian presumption. His claim is that, under


\(^7\) Kane, “Basal equalities,” pp. 403-5.
conditions of moderate scarcity, the principle of insufficient reason that operates behind the veil of ignorance would lead any rational person to choose equality unless an unequal distribution could be shown to operate to everyone’s advantage. But the original position is an expository device, not an argument for equality—or indeed for any other distributive principle. Rawls himself noted that it was inspired by a conception of fairness according to which the best way to divide a cake is to require the cutter to take the last slice. Assuming rational self-interest, she will divide it equally so as to maximize the size of her slice. Granting the assumptions, arguendo, this does nothing to establish the desirability of an equal division. If we knew, for instance, that one of the recipients had not eaten for three days, another had three cakes in his bag, and a third was a diabetic who would be made sick by eating cake, then the intuitive appeal of “the cutter takes last” rule would quickly evaporate. This is not to say that, absent such considerations, an equal division would presumptively be just. Rather, the point is that no distribution is just a priori. The cake-cutter’s rule seems attractive only in light of a prior commitment to equality. What it offers is a way for self-interest to get people there; nothing less, nothing more.

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

2.2. Moral arbitrariness

What is Rawls’s independent argument for an egalitarian presumption? One candidate is his moral arbitrariness thesis, the claim that differences among us—whether products of nature or nurture—are accidental from a moral point of view. Rawls was right to say that distributive arrangements that are shaped by those difference stand in need of justification. His argument about moral arbitrariness is persuasively subversive of any version of the thesis that losses (or gains) should lie where they fall. Indeed, I have argued elsewhere that Rawls was insufficiently thoroughgoing in his defense of this thesis. His attempt to distinguish capacities, which are said to be distributed in morally arbitrary ways, from the choices people make about how to use those capacities, which are not, fails. There is no good reason to hold that differences in the capacity to decide to use one’s capacities more or less effectively are any less arbitrary, from a moral point of view, than are differences in the capacities themselves. This is, to be sure, a disconcerting conclusion; it threatens to obliterate

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8 In the final formulation of his principles Rawls opts for the standpoint of the worst-off as the standpoint of justice, but this is only because of the assumption that if the person most adversely affected by a policy would choose it, then so would everyone else. In this way, the standpoint of the worst-off functions as a proxy for the standpoint of all. Questions can be raised about the plausibility of these moves. See my Evolution of Rights in Liberal Theory (Cambridge University Press, 1986), pp. 226-30.
9 Rawls, Theory of Justice, p. 74
11 In one of the earliest systematic statements of laissez-faire in torts, Oliver Wendell Holmes argued in lecture III of The Common Law [1881] (Harvard University Press, 2009), that the benchmark presumption should be that losses lie where they fall.
widespread convictions about ownership and personal responsibility. But that does not mean that Rawls supplies us with convincing reasons to avoid it.

The impulse to defend an egalitarian presumption in the literature since Rawls has been animated by fending off what G.A. Cohen identified in 1989 as “the anti-egalitarian right.” The worry was that any conception of fair distribution that ignored rewarding effort and ambition would be so implausible that no one would give it the time of day. This is, indeed, a real possibility unless some limits can be put on moral arbitrariness. It was, presumably, considerations of this sort that motivated Rawls’s unsuccessful attempt to distinguish capacities from the uses to which they are put that I have just discussed. Similar considerations led Ronald Dworkin to propose a view of distributive justice that takes account of the Rawlsian insight about moral arbitrariness but is nonetheless “ambition sensitive.” Dworkin’s view requires a view of equality by reference to which people “decide what sorts of lives to pursue against a background of information about the actual costs that their choices impose on other people and hence on the total stock of resources that may fairly be used by them.” This he tried to achieve by assigning “tastes and ambitions” to the person, and “physical and mental powers” to his “circumstances,” arguing that the former, but not the latter, are irrelevant in deciding how resources should be distributed. In this way he hoped to rescue the idea of a responsible agent. 13

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

The idea that we form our ambitions in some way that is independent of our resources and capacities assumes, implausibly, that we can conceive of goals independently of our understanding of our capacities and life circumstances. 14 This should be evident to anyone who tries to perform a thought experiment in which she is required to choose her future ambitions while kept in ignorance of powers, capacities, and circumstances. The world is riddled with what I have described elsewhere as “empathy gaps” which limit the aspirations people find conceivable, let alone plausible, as a result of their lived experiences. You can readily imagine yourself stepping over a puddle, perhaps even swimming a wide river; but will it occur to you to consider possibilities that are on the other side of an ocean? 15 What drives Dworkin’s intuition here is the notion that people should be held responsible only for the choices they make in life, not for things over which they have no control. But choices are not plausibly cordoned off from people’s circumstances and capacities in the way that his argument requires. Perhaps a variant of his thesis might be defensible, but to date Dworkin has not, as Cohen claimed that he has, “performed for egalitarianism the considerable service of incorporating within it

14 Dworkin’s discussion of tastes is vulnerable to analogous criticisms, as I note in “Justice and workmanship in a democracy,” pp. 73-76.
the most powerful idea in the arsenal of the anti-egalitarian right: the idea of choice and responsibility.”

Cohen himself had a go at this problem, but not with any more success than Dworkin or Rawls. Cohen tried to diminish the problem by insisting that we should not confuse the valid claim that our capacities for effort are “influenced” by factors beyond our control with the false claim that people like Nozick mistakenly attribute to egalitarians like Rawls, that those capacities are “determined” by factors beyond our control. Pointing to this distinction enabled Cohen to say that although not all effort deserves reward, it is not the case that no effort deserves reward, that effort “is partly praiseworthy, partly not,” although he concedes that in practice “we cannot separate the parts.”

To the extent that this is a practical problem it is a devastatingly large one, given that the topic at hand is whether and to what extent the state should engage in redistribution or other remedial action to compensate for differences in outcomes resulting from these practically inseparable parts. But it is in any case misleading to say that it is only a practical problem. Once we concede that the very decision to choose to expend effort is influenced by morally arbitrary factors, it becomes evident that the difficulty becomes one of principle rather than practicality. Certainly Cohen offers no account of how that component of effort meriting reward might, in principle, be singled out.

Rawls, Dworkin, and Cohen all write as if the moral arbitrariness argument generates an egalitarian presumption that would be so radical that no one would take it seriously unless some brakes could somehow be put on it, to rescue the idea the people should be held responsible for the choices they make—deserving the resulting benefits and internalizing the costs. All their attempts to build the brakes in question fail, as I have just noted, because the moral arbitrariness noose throttles their notions of choice and responsibility if it kills anything at all. But they all fail to see that rescuing the ideas of choice and responsibility in order to save a suitably chastened egalitarian presumption is unnecessary if that presumption is thought to be rest on embracing Rawls’s moral arbitrariness argument. This is true for the simple reason that Rawls’s moral arbitrariness argument, while valid, generates no particular distributive presumption. As Susan Hurley puts it, there is “no more a priori reason to regard difference of position as a matter of luck than to regard sameness of position as a matter of luck: people may not be responsible for either.” Rawls’s moral arbitrariness argument establishes nothing more than that that every distributive arrangement stands in need of justification.

2.3. The Kantian interpretation

Rawls’s most plausible candidate for an independent justification of his egalitarian presumption is the so-called Kantian interpretation of his principles as procedural expressions of the categorical imperative. But a commitment to Kantian autonomy does not entail embracing any particular distributive regime any more than the commitment to moral arbitrariness does. The injunction never to

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18 Quoted from Hurley’s contribution to a joint symposium with Richard Arneson “Luck and Equality,” Proceedings of the Aristotelian Society, Supp. Vol. 75 (2001), p. 56. As she elaborates: “[C]onsiderations of responsibility do not direct us to take equality as the default position: they neither specify nor justify doing so. The immediate consequence of this point is that luck-neutralizing per se does not require us to neutralize only one kind of relation that is a matter of luck and not another ... People are not responsible for equal amounts of manna, or any other particular amounts; they are not responsible for it at all.” Ibid., pp. 56-57. Generally, see her Justice, Luck, and Knowledge (Harvard University Press, 2003), pp. 146-80.
use people exclusively as means to your own ends could no doubt be shown to rule out slavery, but no protagonist in the distributive justice literature of whom I am aware is advocating the establishment of slavery. The example of slavery is, in any case, instructive here inasmuch as the Kantian objection is not to the distributive dimensions of a slave economy but rather to the abnegation of a person’s humanity by making them the property of another. The Kantian objection to slavery would stand even in the face of arguments showing that slaves enjoyed distributive benefits that might otherwise be denied them. “We give our slaves more than you pay your workers” would not pass muster as a defense of slavery, even if it was true.20 (Similar points could be made about Apartheid, “separate but equal” and related dehumanizing statuses. They are often accompanied by distributional inequity, but it is the dehumanization, not the inequity, that makes them objectionable).

There are two different objections to distinguish in considering Rawls’s Kantian interpretation of his principles. The less fundamental one is to observe that if our goal was to do our best to preserve the autonomy of all (and assuming that we could operationalize that aspiration in an intelligible fashion), what would be needed is a matter for political economists and policy wonks. How much, if any, in the way of redistribution toward equality would be effective in achieving that goal depends on complex considerations about the effectiveness and costs of different redistributive instruments, on the incentive-effects of redistribution on growth, and on the relations between the size of the economic pie and the benefits that trickle down to the least well-endowed. Rawls genuflects in this direction when he declares his theory to be agnostic between capitalism and socialism.21

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

But why should we want to commit to an egalitarian distributive presumption? Michael Walzer pointed out over a quarter of a century ago that it is not inequality as such that people find objectionable so much as the uses people make of unequally distributed assets. In particular, it is when people use the benefits they have to dominate others that we take exception to their having those benefits. It is the use of wealth to corrupt a politician, or to “buy” a place in college for an otherwise undeserving child, that generates resentment.22 Walzer’s solution, to build barriers between the spheres in which different goods appropriately hold sway, confronts difficulties, as I note below. But they do not

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20 Why the case against slavery should be detached from claims about its economic benefits has been eloquently put by Robert William Fogel in Without Consent or Contract: The Rise and Fall of American Slavery (Norton, 1994), pp. 388-417.
21 Rawls, Theory of Justice, p. 242. Kant was well aware of this, insisting that “welfare does not have any ruling principle” because it depends “on the will’s material aspect, which is empirical and thus incapable of becoming a universal rule.” Immanuel Kant, The Contest of Faculties, reprinted in Hans Reiss, ed. & H. B. Nisbet, trans., Kant’s Political Writings, (Cambridge University Press, 1970), pp. 183-4.
detract from the force of his underlying intuition that it is domination rather than inequality that is objectionable.

In arguing against an egalitarian presumption, I should not be construed as throwing my lot in with those who maintain that arguments about justice should abjure distributive considerations. Marx famously held that to understand the dynamics of exploitation we must forsake the realm of distribution for that of production. More recently, such theorists as Nancy Fraser and Iris Marion Young have suggested that the distributive paradigm should give way to a focus on recognition and domination. I am less than entirely clear about what the term “paradigm” means in these arguments. I think that proponents of these views are wrongheaded if they maintain that we can reason fruitfully about justice in the absence of distributive considerations, or even that we can reason fruitfully about the dimensions of justice to which they theorists in question point in the absence of distributive considerations. Marxian exploitation is in significant part about the distribution of work, recognition is about the distribution of status, and domination is about the distribution of power. Moreover, as I spell out in the course of discussing Philip Pettit’s view in part 4, there are many settings in which achieving non-domination requires attention to—and sometimes redistribution of—material and other resources. Rather than conceive of non-domination as an alternative to distributive justice, we do better to think of non-domination as the essence of justice and acknowledge that it is often intimately linked to distributive considerations. To think otherwise leads down the path symbolic victories that at best obscure what justice requires, and often work at cross-purposes with it.

3. A particular kind of unfreedom

If inequalities are objectionable only to the extent that they facilitate domination, the question arises what domination is. How do we know it when we see it, and why should we care about its presence? This requires attending to the relations between non-domination and freedom. If we think of freedom as the summum bonum, as some theorists propose that we do, then non-domination would stand in the same relation to freedom as I have just suggested equality stands to non-domination. Non-domination would be an instrumental good, when it is a good, geared to realizing freedom. I want to say something different. Non-domination is more closely related to freedom than it is to equality; indeed it is a kind of freedom. As a result, the literature on freedom is indeed relevant to understanding the sources of domination and its amelioration as we will see. But non-domination merits independent demarcation, so as to avoid our being caught up in controversies that need not be resolved to make a compelling case for non-domination as the bedrock of justice.

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

Domination is, first, a type of unfreedom that involves a significant human element. A natural chasm or a medical condition can limit our freedom, but we would not identify either as a source of domination. We can experience domination when our freedom is curtailed because we are in the power of others—be they slaveholders, torturers, spouses, or employers. This is not to insist that domination always results from conscious human agency. Domination can be experienced as byproducts of political, social, and economic structures. Such structures are not reducible to human

agency, but they could not exist without it. This human element differentiates domination from other kinds of unfreedom, and it means that appeals to eliminate sources of domination are always in some sense—however attenuated—directed at changing things that human beings do.

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

This is not to say that all sources of domination in the world can be curtailed. Limiting the power of investment bankers might involve enhancing that of government regulators, and it is an empirical question whether the regulators are more or less prone than the bankers to engage in domination. Foucault might be right that throwing off one domineering yoke typically creates new possibilities for domination, but it is an open question whether this is always so. Even if it is, some kinds of domination will be more severe than others and some kinds will be borne by people who are more vulnerable to its deleterious effects than are others. Any full-blown account of non-domination would have to investigate these differences. My power-based resourcism is intended as a step in that direction.

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

This inevitably raises the question: who identifies illicitness, and how? I have adopted a two-pronged approach to this, involving qualified deference to contextual knowledge or “insiders’ wisdom.” The idea is to agree, but only up to a point, with Alasdair MacIntyre and Michael Walzer that the values guiding human social practices should be defined by the participants via procedures that have evolved over time as appropriate for those choices. Insiders command the relevant street-level knowledge to distinguish licit from illicit uses of authority, but our deference to them should be qualified because external judgments appropriately kick in when basic interests are at stake. So it makes sense to respect

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parental judgments about the medical treatment of their children, but not when the child of Christian Scientists will die as a result of being denied a blood transfusion. It makes sense to defer to managerial practices that have evolved within firms and universities, but not when they become smokescreens for perpetrating rape. And it makes sense to require schools to accommodate parents in matters of sexual mores, but not when it comes to denying children vital knowledge about sexually transmitted diseases. If basic interests are compromised or threatened the state rightly takes an interest, though what it should do depends on the seriousness of the threat to basic interests, and the availability of remedial instruments that do not create more serious violations of basic interests than those that they prevent.26

Fourth, a distinctive kind of particularism is invoked when people speak of domination and non-domination that need not be present when people refer to freedom or the lack of it more generally. This particularism is linked to domination’s rootedness in human collective arrangements. If one is dominated always because of the actions or practices of others, then any charge about domination naturally leads to pointed questions about those actions or practices. Whose? What? How do they produce control, and why is it illicit? As we will see, this means that arguments about domination involve relational claims that are invariably rooted in specifics. Perhaps people are unfree in some existential sense if determinism is true, if we are “being towards death” as Heidegger said,27 or for some other reason unrelated to human social relations. Domination, however, is rooted in the particular.

A different tack, taken by Philip Pettit, is to treat non-domination as the political mechanism to realize the philosophical ideal of freedom. I will have more to say about Pettit’s institutional arguments later. Here I will just say that to treat non-domination as the instrument for achieving freedom, as Pettit does, undersells non-domination’s importance as a normative ideal in its own right rather than as an instrument to achieve some other benefit. Moreover, I worry about a defense of non-domination that makes it hinge on our first buying a particular contestable view of freedom. Pettit contends that non-domination is the best available instrument to realize his theory of freedom as “discursive control.” Some elements of this account of freedom are appealing to me; others I find problematic.28 I think it is a mistake to hold the case for non-domination hostage to prior resolution of these issues.29

Max Weber held that existence of domination requires “the actual presence of one person successfully issuing orders to others.”30 My conception is broader in that I think domination can (and often does) occur without explicit orders emanating from identifiable agents. As I elaborate below, domination can result from inadvertent and unconscious actions, as a byproduct of the distribution of resources, and it can be embedded in structural relationships. My conception is narrower than Weber’s, however, in that I regard domination as arising only from the illicit exercise of power. Compliance is often compelled in armies, firms, sports teams, families, schools, and countless other institutions, but this is not domination unless it is deployed for an illegitimate purpose. In sum, domination differs from

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26 In this there is a parallel with Rawls’s metric of justice inasmuch as he endorses interpersonal judgments about primary goods, but not about the uses people make of those goods in their life plans. See, Democratic Justice, chapters two and three.
29 In fairness to Pettit, he does not deny that there might be defenses of non-domination other than the one he supplies. His argument, after all, is in the first instance a theory of freedom, not one of non-domination, so one could read him as saying that embracing his account of freedom as discursive control is sufficient to justify non-domination as he understands it, but not necessary.
other types of unfreedom in that it focuses attention on particular and alterable human sources of illicit unfreedom, and it avoids the difficulties inherent in generalized commitments to freedom or equality. As a result, I think the ideal of non-domination supplies a better basis for political analysis and argument. It can appeal to people who think freedom and equality the highest goods (I take this to be a plus). We might regard it as part of the overlapping consensus or the incompletely theorized agreement among liberals, who value freedom, and egalitarians, who value equality.\footnote{See John Rawls, “Justice as fairness: Political not metaphysical,” \textit{Philosophy and Public Affairs}, Vol. 14, No. 3 (Summer, 1985), pp. 223-251, and Cass R. Sunstein, “On legal theory and legal practice,” in Ian Shapiro and Judith Wagner DeCew, \textit{NOMOS XXXVII: Theory and Practice} (New York University Press, 1995), pp. 267-87.}

4. Conceptions of non-domination

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

4.1. Foucault and Habermas

Foucault’s historical work depicts multiple ways in which power shapes human social life,\footnote{Michel Foucault, \textit{The Archeology of Knowledge and the Discourse on Language} (Vintage, 1988); \textit{Madness and Civilization: A History of Insanity in the Age of Reason} (Vintage, 1988); \textit{Discipline and Punish: The Birth of the Prison} (Vintage, 1995); \textit{The History of Sexuality} (Vintage, 1990); Jürgen Habermas, \textit{Legitimation Crisis} (Beacon, 1975); \textit{The Theory of Communicative Action}, Vol. I (Beacon, 1984); and “Three normative models of democracy,” \textit{Constellations}, No. 1, pp. 1-10.} but from my point of view here it falls short in three ways. It is, first, too reductionist. Foucault is right to intimate that power-relations are ubiquitous to human interaction, and in this connection his work is an important corrective to the Habermasian notion of an ideal speech situation, construed as a state of affairs from which domination has been banished, and which Habermas treats as a precondition for genuinely democratic politics. Habermas’s defenders sometimes emphasize that he considers his ideal speech situation to be a regulative ideal, designed to help us reason about the appropriate constraints on, and preconditions for, genuine democratic politics. On my view the counterfactuals needed to make sense of this idea involve setting as preconditions for democratic politics the very issues that give rise to the need for it. The Habermasian gambit involves a kind of rationalist overreaching in which his alleged requirements for uncoerced communication in effect obviate the need for it.\footnote{See \textit{The State of Democratic Theory}, pp. 33-34 for elaboration. See also Albena Azmanova, \textit{The Scandal of Reason}, (Columbia University Press, 2011), chapter 2.}

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

Foucault’s outlook lacks the tools, second, to distinguish licit from illicit exercises of power. The pursuit of goods inevitably involves exercising power—if only because so much of human social life is hierarchically ordered. But hierarchies are not intrinsically objectionable. As I noted earlier, it is the abuse of hierarchies for illicit purposes that is objectionable. To be sure, whether or not a hierarchy is being thus abused will—and should—often be in contention. This is why I argue for mechanisms to facilitate that contention and for a series of interrogatories about hierarchies that are designed to flush out illicit uses and prevent their atrophy into systems of domination. These concern the extent to which particular hierarchies are inevitable, escapable, chosen, insular, and self-liquidating.34

A third, concomitant, failure is that Foucault’s work fails to differentiate among illicit uses of power. In his terms, he does nothing to help us distinguish among more and less malevolent forms of domination. On my account, by contrast, domination that involves peoples’ basic interests is worse than that which does not. A billionaire might be in a position to dominate a spouse who knows that she stands to lose millions in the event of a divorce due to a prenuptial agreement, but this warrants less concern than a spouse who faces destitution in the event of divorce if she is not guaranteed the basic necessities for survival. Both are relationships of domination, but one is worse. Just because ubiquitous power relations make the potential for domination ever-present, it matters to be able to decide which are the most important from the standpoint of justice. My power-based resourcism facilitates the relevant comparative judgments.

4.2. Walzer

Walzer’s view has the merit of focusing on the ways in which people deploy the resources they control to dominate one another. He is right, moreover, that using resources germane to one sphere of human activity to achieve influence in another can be a source of domination because it is often a source of illicity. Yet while he makes a good case for resisting this kind of domination, he has surprisingly little to say about how such resistance can be made effective—about how the boundaries between spheres should be kept robust. Nor does he have anything to say about how disagreements over what the goods germane to different spheres are should be settled.35 For these reasons I maintain that every domain of human interaction should be subject to democratic conditioning constraints. These vary with time and circumstance, but they always include mechanisms to participate in decision-making about the nature of the goods in question and rights of opposition to try to get them changed.

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

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34 See Democratic Justice, chapter 3 for elaboration.
35 For elaboration see Ian Shapiro, Political Criticism (University of California Press, 1990), chapter 3.
the family from egalitarian values that prevailed outside.\textsuperscript{36} My notion of democracy as a conditioning good involves deference to prevailing values, but only to the extent that this does not render people vulnerable to domination by compromising their basic interests. Being vulnerable to someone who can rape or assault you with impunity compromises your basic interests.

4.3. Skinner

Quentin Skinner approaches non-domination through the lens of what he calls the neo-Roman or republican conception of freedom. In his view, the neo-Roman account captures the best understanding of the negative libertarian tradition which he hopes to rescue from Hobbes and his successors. Although the Hobbesians might have “won the battle,” Skinner is not ready to throw in the towel and admit defeat in the longer war. His project is to make a compelling case that the republican tradition offers version of negative liberty that is superior to the Hobbesian one, a version that appeals to the idea of an independent status that is marked by the absence of domination.\textsuperscript{37}

As Skinner notes in \textit{Hobbes and Republican Liberty}, while there is some variation in how Hobbes defined liberty in various writings, in \textit{Leviathan} he seems clearly to be operating with a prototype of the negative liberty view. By talking of liberty by reference to the absence of external impediments, describing the liberty of the subject by reference to “the Silence of the Law”\textsuperscript{38} and what “the Sovereign hath praetermitted: such as is the Liberty to buy, and sell, and otherwise contract with one another; to choose their own abroad, their own diet, their own trade of life, and institute their children as they themselves think fit; & the like,”\textsuperscript{39} Hobbes seems clearly to be thinking of individual freedom as connoting a zone of action in which the individual is left alone by the state to do as she or he pleases. Despite his soon-to-be-anachronistic absolutism, then, Hobbes won the historical battle on this reading, by advancing the negative libertarian view of freedom.

I have noted elsewhere that there is some plausibility to this account,\textsuperscript{40} but, by failing to appreciate what is problematic in the distinction between negative and positive freedom, Skinner draws the wrong moral and political conclusions. The difference between negative and positive freedom is usually seen as residing in the fact that, whereas negative libertarians focus primarily on impediments to action, positive libertarians are centrally concerned with what the agent is able to do. Writers like Rousseau and Hegel are seen as positive libertarians because they conceive freedom as what Charles Taylor has described as an “exercise” concept rather than an “opportunity” concept. For positive libertarians, freedom consists in exercising human capacities to achieve our characteristic potential, and we are unfree to the extent that this possibility is attenuated or blocked by deleterious social arrangements.\textsuperscript{41} Positive libertarians generally link individual freedom to participation in social and political institutions—participation in ways that will lead people to realize their potential.

It has been conventional since Berlin wrote to criticize positive libertarians on the grounds that their doctrine wrongly assumes that we can know what people’s potential is, so that we can then design


\textsuperscript{39} Hobbes, \textit{Leviathan}, p. 148.


collective arrangements to facilitate their attaining it. The limiting case of this difficulty is embodied in Rousseau’s slogan that, by being required to obey the general will, people can be “forced to be free.” If people are coerced into certain types of collective participation in order to achieve a particular goal or conception of the good life, then it is hard to see in what meaningful sense they can be said to be free. As a result, Berlin and his followers are often taken to be right in maintaining that the positive conception of freedom is incoherent.

Skinner wants to go part of the way with Berlin, agreeing that the positive conception is problematic. Yet Skinner believes that the Machiavellian, or neo-Roman, conception of freedom that he champions has been misclassified as a positive one on the grounds that it requires active participation of citizens—in the military as well as in the civic life of the republic. But, for Skinner, Machiavelli’s requirement of civic service is an instrumental requirement of freedom for republican citizens. It is necessary so that they can protect themselves from the external domination of aggressive neighbors and the internal domination of power-hungry domestic elites. As a result, Skinner resists the suggestion that a negative conception of freedom cannot include requirements of civic service, holding that it is, indeed, superior to the Hobbesian negative conception. Freedom is the antithesis of slavery on this account; we are free when we are independent beings and virtuous acts of public service are necessary to secure that status. As Skinner puts it, “the paramount distinction in civil association is between those who enjoy the status of *liberi homines* or ‘freemen’ and those who live in servitude.”

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

MacCallum pointed out that any assertion about freedom minimally involves reference to agents, restraining (or enabling) conditions, and action. It always makes sense to ask of any use of the term: *who* is free, *from* what restraint (or *because of* what enabling condition) to perform which action? My suggestion is that we endorse MacCallum’s account but modify it by nothing that when we talk about political freedom a fourth term enters, having to do with legitimacy; it may be thought of by reference to the question *why*, in virtue of what authority, is the agent free? Whereas freedom as MacCallum described it is a triadic relation ranging over agents, restraining (or enabling) conditions, and actions; I supplemented his account by arguing that political freedom or liberty is best thought of as a

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quadratic relation in that it ranges over each of these three and authorizing conditions as well.\textsuperscript{47}

Skinner contends that, claims to the contrary notwithstanding, MacCallum’s account is really a version of the doctrine of negative liberty. “[I]nsofar as MacCallum’s analysis suggests a negative understanding of freedom as the absence of constraints upon an agent’s options (which it does), this [“that the only coherent account that can possibly be given of the concept of liberty is the negative one’] is also the implication of his account and of those that depend on it.”\textsuperscript{48} But this claim misses MacCallum’s point. His argument was that all accounts of liberty have both negative and positive elements, some of which are usually implicit; that negative libertarians focus mainly on constraints while positive libertarians concern themselves with enabling conditions.

To be sure, MacCallum acknowledged that all intelligible concepts of freedom or liberty involve some notion of constraints or their absence, but just because this element could never amount to an account of freedom, talk of freedom from constraint or restraint did not make an account “negative.” The opposition itself should be eschewed, on his account, because constraints and enabling conditions can easily be redescribed as one another. In effect, arguments between negative and positive libertarians are analogous to arguments over whether a prisoner unfree because of the presence of a locked door or the absence of a key. It is thus misleading to think of negative or positive language as indicative of any significant conceptual difference.\textsuperscript{49}

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

Why does it matter? The answer that motivated MacCallum, and motivates me, is that what is consequential in discussions about freedom is not which vocabulary is used but rather what different people are actually able to do, or are prevented from doing, in the world. Skinner would be correct to say that a slave is unfree even if a comparatively benign slave-owner allowed him or her some discretionary resources and range of choice, because of the slave’s compromised status as a person.\textsuperscript{50} But as I noted earlier, virtually every political theory on offer today condemns slavery so that establishing Skinner’s case does not settle much that is at stake among the various contending views. To this Skinner might respond that his neo-Roman ideal rules out other subservient statuses as well, such as serfdom, apartheid, patriarchy, and caste systems. I am happy to concede this as well, but continue to wonder who the serious protagonist is on the other side.

Anatole France famously mocked “la majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain.”\textsuperscript{51} The elimination of

\textsuperscript{47} Shapiro, \textit{The Evolution of Rights}, pp. 14-19.


\textsuperscript{49} MacCallum, “Negative and positive freedom, p. 182n9

\textsuperscript{50} This is not an exact analogue of the Hobbesian account, in which the subject, though dependent for his freedom on the sovereign’s silence, is not owned by him.

\textsuperscript{51} Literally: “the majestic equality of laws, which forbid the rich as the poor to sleep under bridges, to beg in the streets and to steal bread.” \textit{Le Lys Rouge [The Red Lily]} (1894), chapter 7
formal subservience is surely consequential from the standpoint of non-domination. When status hierarchies are present, they invariably become a focus of contention, but eliminating them is seldom sufficient to undermine domination. Someone with the status of a free citizen might confront such enormous obstacles to performing a range of actions routinely enjoyed by others that we would be disinclined to regard him as immune from domination. In recent decades many corporations have fired employees and then rehired them as independent contractors at reduced salaries, and without employment benefits, to do the same jobs that they were doing before. Their status as independent persons has been enhanced, but it would be hard to make a convincing case that they are less vulnerable to domination than they were previously.

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

4.4. Pettit

Considered from the standpoint of actual institutional arrangements, Skinner’s account is conducted at a pretty high altitude. Pettit’s discussion in his book on *Republicanism: A Theory of Freedom and Government* and subsequent writings has the advantage of engaging with institutional arrangements more directly. And there is much in what he has to say that is congenial from the perspective of my institutional arguments. I agree with his contention that democratizing power relations is generally the best path to mitigating domination. More particularly, I agree with his claim that this implies not only a presumption in favor of inclusive participation in decisions by which one is affected, but also a presumption that people should always be free to oppose decisions (“contestation” is his term) with which they disagree—even when these decisions have been arrived at by legitimate democratic means.\(^52\) I also agree that it is the capacity to interfere with someone, rather than actual interference, that is often key to having power over them and that needs institutional managing with an eye to preventing domination.\(^53\)

Despite these points of agreement, Pettit and I have substantial disagreements. These derive from the fact that Pettit’s discussion pays surprisingly little attention to the relative seriousness of different kinds of domination; that his account of social movements and civic associations underestimates the extent to which they can operate to foster domination rather than undermine it; and the reality that his account of the democratic state as the principal instrument for resisting domination is hamstrung to the point of impotence by his republican theory of institutions.

The first set of disagreements is rooted in Pettit’s decision to define domination exclusively by reference to the capacity for arbitrary interference in the choices of another, without attending to the

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\(^{52}\) It is not entirely clear to me what this ultimate basis for this presumption is in Pettit’s account. On my view it derives from the fact that there is no perfect democratic decision rule, which carries the implication that even the best democratic procedures will leave some people feeling not only aggrieved, but legitimately aggrieved.

\(^{53}\) Pettit sometimes writes as if having the power to interfere with another is by itself domination, whereas I would say that it creates the possibility for domination. Perhaps this is why he supports the extensive constraints that I criticize in part 4.4. below.
nature or importance of those choices. At the outset of his discussion he doffs a genuflecting cap to the proposition that “domination in some areas is likely to be considered more damaging than it is in others; better be dominated in less central activities, for example, rather than in more central ones.”

But he never defines centrality, and considerations having to do with it play no role in his institutional recommendations, as we shall see. He talks briefly about how “extensive” domination is, by which he means the number of issues over which people are free to choose, and at greater length about the “intensity” of domination. It is less than entirely clear just what this means, but it has to do with the degree to which those with power can act with impunity. Absolute tyrants exercise domination with greater intensity than opportunistic spouse batterers who figure they can count on lax enforcement of the laws against spouse-beating. But neither the number of choices nor the intensity of domination goes to the importance of the choice in question, about which Pettit has virtually nothing to say.

The implications of this omission become clear in his discussion of egalitarianism. He distinguishes “material” from “structural” egalitarianism. By “structural” Pettit means the “powers” which “include all those factors that are liable to affect political, legal, financial, and social clout.” He thinks both relative and absolute equality with respect to these things is important because whether or not someone is a potential victim of domination depends not only his or her own powers, but also on the powers of others. “In the land of the blind,” as he says, “the one-eyed man is king.”

Because a person’s “absolute score in relation to the intensity of non-domination is a function of their relative score in regard to powers,” attending to the “power-ratio in the society as a whole” is essential to Pettit’s non-domination project. With respect to these power ratios, Pettit argues, accordingly, that increasing inequality is presumptively a bad idea because there is what he calls “diminishing marginal productivity” to increasing your relative power, whereas moves toward equality are desirable.

Leaving the plausibility of these claims to one side, Pettit distinguishes them for what he has to say about “material” inequities, where there is no egalitarian presumption. The reason is that attempts to impose egalitarian redistribution may themselves involve domination on the part of the state, and this is not offset by the same kind of diminishing marginal productivity that holds with respect to powers. “The money that will enable me to do something, poor as I am, will enable you to do exactly the same things.” Pettit concedes that the utility derived from money might be of diminishing marginal utility, “but the capacity to buy things, and its capacity therefore to extend undominated choice, does

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54 Pettit, Republicanism, p. 58.
55 Pettit, Republicanism, p. 57.
56 Pettit, Republicanism, p. 113.
57 Pettit, Republicanism, p. 115.
58 I doubt that they are true, at least not without very substantial qualifications of what Pettit says here. It is far from obvious, for example, that countries lacking nuclear weapons would become more secure if every other country got them. If Iran develops nuclear weapons, it might be more likely to be attacked by Israel than if it does not, and the likelihood of attack would not decrease at a diminishing marginal rate with the number of weapons it creates. It is more likely to be a step function. Analogous considerations often apply to the dealings among individuals within countries, where arms races can be counterproductive in defusing potential conflicts. Nozick might have been too quick to assume that power is a natural monopoly, as I have argued elsewhere that he was (See The Real World of Democratic Theory, pp. 159-62), but he was surely right that it exhibits some properties of a natural monopoly. I suspect that the relationship between relative power and security is sometimes U-shaped, and that it becomes indecipherably complex once we move from the kind of two-player situations Pettit analyzes here (pp. 114-17) to interactions among multiple players who are engaged in numerous overlapping bilateral as well as multilateral power relations.
59 Pettit, Republicanism, p. 118.
not.” As a result, while his non-domination project is committed to “structural egalitarianism,” it is “not essentially committed to any sort of material egalitarianism.”

This myopic focus on the number of choices ignores how important the choices are from the point of view of avoiding domination, and it is also innocent of the ways in which material resources are often integral to resisting domination. Funding health insurance through the tax system reduces the exit costs for those who must otherwise obtain it from employers and spouses, limiting their capacities for domination of those who depend on them for it. This is why I argued in Democratic Justice that when the social wage is low, stringent democratic controls of domestic and work life are warranted from the standpoint of non-domination, though I also argued that the unappealing intrusiveness of stringent controls suggests that a high social wage regime with fewer intrusive controls is preferable. The less my ability to vindicate my basic interests depends on my relations with you the less power you have over me, and hence the less capacity to dominate me. Pettit does at one point describe non-domination as a primary good. This makes it odd that he ignores its evident dependence on the material resources. Locke said that “a man can no more justly make use of another’s necessity, to force him to become his vassal,” than can he “with a dagger at his throat offer him death or slavery.” If we agree with Pettit, as I think that we should, that the capacity to exert power (rather than its actually being asserted) is often key to domination, then we should resist his attempt to banish the material resources needed to vindicate people’s basic interests from the theory of non-domination.

A second set of worries about Pettit’s institutional arguments concerns the degree to which he believes that empowering social movements and other forms of civic association to resist majoritarian politics is advantageous from the standpoint of non-domination. In Pettit’s vision of democracy it is essential that people be “able to contest decisions at will and, if the contest establishes a mismatch with their relevant interests or opinions, [be] able to force an amendment.” His vision is one in which civic associations and social movements serve as oppositional buffers against majority tyranny, fielding complaints and organizing them into effective contestatory politics in support of progressive change. The image that “suggests itself,” he tells us, “is that of popular movement, widespread controversy and debate, and progressive, legislative adjustment.” As examples he cites the women’s movement, the green movement, the gay rights movement, and the movements in support of ethnic minorities and indigenous peoples. “Any democracy that is going to serve republican purposes has to be able to give a hearing to evolving allegiances and commitments,” Pettit insists. It must be open to “deep and wide-ranging transformations.”

One difficulty with this is Pettit’s manifest assumption that social movements and civic associations will in fact be organized in support of change that Pettit regards as progressive. Opposition movements have indeed organized to advance the goals he enumerates, but they also organize to enact proposition 13 in California, to force repeal of the federal estate tax on multi-millionaires, and to outlaw

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60 Pettit, Republicanism, p. 118-19.
61 See Democratic Justice, chapters 5 and 6.
62 This power-based resourcism puts my argument squarely into the resourcist camp of Rawls, Dworkin, and Sen, and others, but my focus differs from theirs in that I think the resources needed to vindicate basic interests should be guaranteed to people not as to enable them achieve some conception of welfare or the good life, but rather to protect them from vulnerability to domination by others.
63 Pettit, Republicanism, p. 90-91.
65 Pettit, Republicanism, p. 186.
66 Pettit, Republicanism, p. 195.
gay marriage and affirmative action. Perhaps the most effective such movement in the U.S. in 2010 was the Tea Party movement that emerged to resist Barack Obama’s agenda on health care reform, environmental legislation, and financial regulation. As these examples suggest, there is no particular reason to suppose that empowering social movements to resist democratic government will, on balance, lead to progressive change as Pettit supposes. He implicitly acknowledges as much in his discussion of criminal penalties when he notes that “challenges to criminal-justice practice are generally heard in a public, politicized forum, with a variety of bad effects,” by which he means harsh sentences that experts know to be ineffective deterrents. But perhaps people care about retribution more than deterrence. Who is Pettit to decide which issues should be subject to empowered civic contestation and which subject to gag rules? His Republicanism is an appealing manifesto for the Sensible Chaps Party. Whether it supplies a sound political basis for limiting domination is dubious.

Pettit underestimates the difficulties of his position, I think, partly because of his faith in deliberation to push politics in what he takes to be felicitous directions. He supposes that, following an appropriate round of deliberation or appeal, people will accept outcomes that go against them if they are in the general interest. “All that is necessary is that they be assured that the judgment is made according to their ideas about proper procedures and that it is dictated, ultimately, by an interest that they share with others.” Pettit’s contestatory vision of the democratic process is one that “is designed to let the requirements of reason materialize and impose themselves.” This confident deployment of the passive voice can be encouraging only to the extent that we share Pettit’s faith that losers in the contestatory process will accept the legitimacy of their defeat. You do not have to spend much time listening to Rush Limbaugh, Sean Hannity, Glen Beck, and the leaders of the Tea Party Movement to realize that they have no intention of conceding the legitimacy of any aspect of the Obama Administration’s agenda and that they will use every resource that they can muster to derail as much of it as they can. To the extent that they are successful they will see themselves as successful resisters of domination, and on Pettit’s account they will be right. On my account, by contrast, we should prefer that they fail because they do not have basic interests at stake, whereas those who stand to lose (or not to get) health insurance, unemployment insurance, or their pensions do.

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

67 Pettit, Republicanism, pp. 196-7.
69 Pettit, Republicanism, p. 198
71 Pettit, Republicanism, p. 189.
72 Pettit, Republicanism, p. 188.
This is a non-sequitur as a defense of deliberation in the real world. It may be that deliberation will lead people to discern and then move toward areas of agreement, although I have adduced reasons for skepticism of this proposition elsewhere. But in arguing for deliberation’s superiority to bargaining, Pettit never confronts the reality that people cannot be forced to deliberate, and that those who are not inclined to do so can and do press deliberative mechanisms into the service of stonewalling change—in effect to bargain. This is why I have argued that, if we want to press deliberation into the service of reducing the kinds of domination that should concern us, then rights to insist on deliberation should be limited to those who have basic interests at stake. To be sure, they might deploy those rights to bargain instead of to deliberate, but at least in that instance it is those who are vulnerable in ways that we should care about whose interests are being protected.

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

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

This worry leads Pettit to embrace an exceedingly long list of constraints on majoritarian politics. In addition to the deliberative and other contestatory rights already discussed, he is a fan of multiplying checks on collective action through bicameralism, supermajority requirements, separation of

73 The State of Democratic Theory, pp. 21-34
74 Ibid, p. 48-49.
77 Pettit, Republicanism, p. 150.
powers, judicial review, federalism, appeals processes against administrative decisions, ex-ante measures to limit their effects, independence for national banks, exemptions and special treatment for minority cultures, turning politically charged matters over to “professionally informed bodies,” and using gag rules otherwise to limit the writ of electoral politics. Despite his acknowledgment that vetoes can block legitimate change, Pettit’s discussion of these matters seems to entirely innocent of the literature on veto points from Brian Barry to George Tsebelis, which has made it clear that, as veto players become stronger and veto points multiply, so does protection of the status quo and those who have the resources to wait out opponents.

There is a curious paradox to Pettit’s view here. On the one hand he expresses considerable skepticism that non-state actors are powerful enough effectively to reduce domination in modern societies. This he describes as the strategy of “reciprocal power”—in effect relying of private and other decentralized resources as means for combating domination. Pettit notes that the trade union movement “almost certainly advanced the non-domination of workers in the industrial world of the nineteenth century,” yet he insists that there is “very little reason” to be attracted to their strategy of direct action which confronts “too many problems to be taken seriously.” Instead he argues that “the strategy of having recourse to a state looks by far the more attractive option.” On the other hand, we have seen that his list of preferred institutional devices to separate, disperse, check, and veto collective action is so extensive that it is hard to imagine a government guided by his principles doing anything that could have a meaningful impact on private domination. The example of trade unions is a case in point. Organized and widely supported as they were in Britain and the United States in the middle part of the last century, they could not possibly have enjoyed the success that they did without strongly supportive legislation from successive Labour governments in Britain and the passage of the Wagner Act in the U.S. in 1935. Yet it was the whittling away at those protections at the behest of business-oriented interest groups and their supporters through exactly the kinds of “contestatory politics” Pettit champions that led to the evisceration of organized labor in both countries that began in the U.S. in the 1950s and took off in both countries the 1980s.

Pettit seems to be at cross-purposes with himself. On the one hand he agrees that efficacious action by democratic governments is likely essential to any project of rooting out entrenched systems of domination; on the other he seems to be so fearful of democratic politics and government that he wants to hem them in at every turn. Given the many opportunities for special-pleading, forum-shopping, and delay that are disproportionately afforded to those with time and resources on their side by Pettit’s model of dispersed power and institutional checks, it is hard to imagine governments in the world as he envisages it doing much of anything at all—let alone tackling entrenched systems of domination. This tension is puzzling. It is as if for all his attention to the centrality of domination in his theory, Pettit doesn’t actually notice much domination in the world around him. He also seems, generously, to attribute his own sunny disposition to all mankind. His is a world in which progressive contestatory pressure combined with faltering prodding from a semi-incapacitated state can be expected to get people to give up domineering positions as they are persuaded that this in the general interest.

I am inclined to a darker view of the human social condition. It assumes that people in positions of advantage seldom give this up unless the status quo becomes costly to them, and that among the things a government committed to non-domination must do is increase the relevant costs of the status-quo to the powerful when the basic interests of those who are vulnerable to them are at stake. Most

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80 Pettit, Republicanism, p. 95.
people in poor and middle-income countries and poor and middle-income people in rich countries are vulnerable to serious domination in many situations because their basic interests are either compromised or so precariously met that their dealings with others are inevitably laden with the possibility of domination. Tackling that reality seems to me the starting point for any plausible theory of the distributional and institutional arrangements needed by a principled commitment to non-domination. Pettit’s focus on the numbers of choices people have without reference to their import misses this, and his faith in civic-minded deliberation progressive social action is insufficient. His account of public institutions is a recipe for protecting the status quo, which could only be appealing from the point of view we share if one did not perceive it as heavily laden with domination. In this respect our disagreement has less to do with the meaning of domination than it does with our perceptions of how power is distributed in the world and how politics works.

Pettit’s fulsome embrace of institutional sclerosis has been conventional among republican thinkers since the American founders wrote The Federalist. Fear of majority tyranny prompted them to build many of the institutional features Pettit finds so appealing into the American constitutional model partly because there was no other way to get the constitution ratified and partly out of what turned out to be the mistaken conviction that it would prevent civil war. It has become clear, since then, that consociational institutions contribute little, if anything, to democratic stability, and nor do they limit the propensity for majority tyranny. The evidence strongly suggests that economic development is the best predictor of democracy’s survival, and that different kinds of institutional arrangements appear to have a negligible impact—though presidential systems are somewhat less stable than parliamentary ones.81 That is scarcely an advertisement for the beneficent effects of separation of powers. As far as majority tyranny is concerned, there is no evidence that adding bills of rights and constitutional courts to democratic systems makes any difference as far as the protection of minorities is concerned.82

Imperfect as competitive parliamentary systems might be, they turn out to be the stabllest democracies and at least as good as any other from the standpoint of protecting vulnerable minorities. Given the propensity of republican arrangements to protect entrenched systems of domination and powerful minorities, the reasons to reject them in favor of parliamentary systems seem to me to be decisive.

5. Non-domination revisited

Non-domination is the bedrock of justice. Though it is often connected to egalitarian considerations and appeals to a kind of freedom, I made the case that it should be differentiated from both. Egalitarians might still resist this case arguing, in the spirit of the “equality of what?” literature that my argument commits me to a principle of equality of non-domination. But that is not my view, because domination ranges from the trivial to the momentous and I have argued that only the most serious forms of domination merit government’s attention. This might provoke the retort that I really favor equality of domination where basic interests are at stake. But I resist that characterization too, because even within the realm of basic interests some violations are worse than others and I agree with Judith Shklar and Casiano Hacker-Cordón that preventing the most extreme forms of cruelty and deprivation should trump remediation of other kinds of domination involving basic interests.83

This might provoke the further retort that my implicit principle is to equalize elimination of the most egregious sorts of domination, but this seems to me to be trivially egalitarian at best. It strains

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81 See Adam Przeworski et al., Democracy and Development (Cambridge University Press, 2000), pp. 78-186.
ordinary usage, and most people who count themselves egalitarians would not recognize it as such. Moreover, it belies the extent to which comparing extreme cases of domination often involves judgments that verge on the incommensurable—if they are not in fact impossible to make. During the 1970s, defenders of the National Party in South Africa would sometimes respond to criticism by asking: why are you attacking Apartheid when worse things are going on in Uganda? It was not clear to me then, nor is it now, that it was possible to evaluate the assertion embedded in this question and intended to supply its rhetorical force. A dispositive comparison of the two cases would surely involve many complex judgments, some of them counterfactual, that made it difficult to know where to begin. It also seemed to me a waste of time. Unlike the trolley-bus examples that sometimes give moral philosophy a bad name, these cases are unconnected.\textsuperscript{84} The question was little more than a disingenuous diversion because forsaking opposition to Apartheid would have no effect on the domination being perpetrated, to the north, by Idi Amin.

Nor are my prescriptions egalitarian—at least not conventionally so. Rather, I view the power-dimensions of human interaction through a Hirschmanesque lens in which there is a tradeoff between the importance of enhancing democratic voice and reducing the costs of exit for the vulnerable.\textsuperscript{85} In employment relations, for instance, I argue that where exit costs for the vulnerable are high due to the lack of a robust social wage, then government should insist on more voice: stronger protections for unions and other protections for workers within the firm. Likewise in the domestic context I argue that a divorce law regime that protects the vulnerable at dissolution of marriage legitimates greater laissez-faire with respect to what goes on within marriage than would otherwise be the case.\textsuperscript{86} True, I argue that a low exit-cost/low-regulation regime is better than a high exit-cost/high regulation one, which leads to my defense of a comparatively robust social wage. But this flows from two considerations, neither of which is egalitarian: my power based resourcism and my general presumption that, while it is important to vindicate people’s basic interests, it is always best to do this in ways that interfere as little as possible with what goes on within civil institutions and practices.\textsuperscript{87}

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

\textsuperscript{84} Trolley-bus problems involve hypothetical examples of tragic choices, designed to provoke reflection on our moral intuitions. Typically they involve forced Hobson’s choices—as when the only way in which passengers in an out-of-control trolley bus can be saved is by diverting it in such a way that it will kill a pedestrian. The examples are sometimes contrived to the point that it is hard to see their relevance to the moral dilemmas that people actually confront. See Philippa Foot, The Problem of Abortion and the Doctrine of the Double Effect in Virtues and Vices (Oxford: Basil Blackwell, 1978); Judith Jarvis Thomson, “Killing, letting die, and the trolley problem,” The Monist, Vol. 59 (1976), pp. 204-17 and “The Trolley Problem,” Yale Law Journal, Vol. 94 1395-1415 (1985) (1976); Peter Unger, Living High and Letting Die (Oxford University Press, 1996); and Francis Kamm, Harming Some to Save Others, Philosophical Studies, No. 57 (1989), pp. 227-60.


\textsuperscript{86} Democratic Justice, chapters five and six.

\textsuperscript{87} Democratic Justice, chapter two.
sources of domination as and when they arise. As a result, it always operates at the margin—eschewing the project of designing a basic structure for society as a whole.

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

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

It is well known that James Madison offered a trenchant defense of these institutions in The Federalist. At the time he was thirty-six years old, and the bulk of his political experience lay ahead of him. Perhaps this is why much of what he wrote about political parties and competition in The Federalist reads like someone who is trying to learn to swim by walking up and down next to a lake while discussing the theory of swimming. What is less well known is that the mature Madison rejected the republican thinking that is famously attributed to him and to which Pettit and other contemporary republicans appeal. His years in the rough and tumble of politics in Congress, as Secretary of state, and as the Fourth President of the United States convinced Madison that democratic competition is the best available guarantor of the values that republicans seek to protect. In 1833, three years before his death, he was unequivocal that “if majority governments ... be the worst of Governments those who think and say so cannot be within the pale of republican faith. They must either join the avowed disciples of aristocracy, oligarchy or monarchy, or look for a Utopia exhibiting a perfect homogeneity of interests, opinions and feelings nowhere yet found in civilized communities.” 88 Subsequent evidence suggests that the mature Madison was right that democratic competition offers the best hope for mitigating domination. As a result, working to protect and expand it is the best path forward for those who regard non-domination as the bedrock of justice.