

REPUBLICAN FREEDOM: THREE PROBLEMS

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The concept of civic republican freedom has been described as a third alternative to the negative concept of liberty espoused by scholars from John Locke to Ian Carter and the positive liberty of self-mastery associated with the neo-Hegelians.² However, throughout the numerous scholarly discussions of modern republicanism, three troublesome issues arise for which no answer has sufficiently been provided. First, if the concepts of interference and domination are defined in such a way that the focus is shifted from the modern negative view of liberty as non-interference to the republican view of liberty as non-domination, a situation arises where the state now has the power to interfere in the lives of its citizens without reducing freedom *ex hypothesi*, as long as it is careful to ensure that the interference is “non-arbitrary.” Secondly, to maintain this definition of freedom, certain protections are needed to keep the government, armed with the power to impose interference that by definition will not reduce liberty, from running amok and dominating the citizens. Finally, even in a state where the government does not dominate, and where any interference, to the extent it is imposed, is non-arbitrary, the citizens are not really “free” from domination – they are just “free for now” – if the citizens do not risk unfreedom from their own government, those citizens live constantly under the possibility of domination by another more powerful state or coalition of states.

The purpose of this article is to discuss each of these three troublesome issues and thoroughly examine the logical conclusions of modern republican freedom theory. Although I do not allege herein that these criticisms are the only ones

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² Pettit, Philip. *Republicanism: A Theory of Freedom and Government*. Oxford: Oxford University Press (1997), pages 19, 21. For purposes of this Article, I will associate the modern negative view of liberty with those roughly described by Hillel Steiner, Ian Carter and Matthew Kramer. Although there are important differences in the negative liberty espoused by each of these writers, those differences will not be relevant for my purposes here.

possible against the civic republican theory, they must be properly considered to properly understand and evaluate republican liberty theory.³

I. The Dangerous Distinction Between Interference and Domination.

A. Interference and Domination – A Difference of Focus.

The fundamental difference between modern negative liberty and republican liberty centers on how one's liberty is restricted. According to negative liberty theorists, interference or coercion is required for the restriction or lessening of one's liberty. As Isaiah Berlin states, "I am normally said to be free to the degree to which no man or body of men interferes with my activity."⁴ Republicans recognize the concept of interference, but argue the negative theorists' reliance on it is misplaced. According to Philip Pettit, it is the ability of one person to *dominate* over another person that holds the key to controlling freedom:

Domination, as I understand it here, is exemplified by the relationship of a master to slave or master to servant. Such a relationship means, at the limit, that the dominating party can interfere on an arbitrary basis with the choices of the dominated: can interfere in particular in the basis of an interest or an opinion that need not be shared by the person affected.⁵

Republicanism holds that such domination can occur in the absence of actual interference, and conversely, that interference can occur in the absence of domination.

Therefore, the main difference between the modern negative and republican theories of liberty can be, somewhat simplistically, narrowed down to a classification of the role that interference plays in the lives of the citizens. Again, for writers like Jeremy Bentham and John Stuart Mill, any law was an evil that resulted in a reduction of liberty, even if the end-result of the law was to increase a person's overall liberty. Thus, freedom exists to the extent that there is "non-interference." Republicans recognize that some law is needed for civil society to exist – although negative theorists certainly acknowledge this

³ For additional viewpoints on the civic republican theories of Quentin Skinner and Philip Pettit, see Kramer, Matthew. *The Quality of Freedom*. Oxford: Oxford University Press (2008). Paperback edition. pp. 91-149.

⁴ Berlin, Isaiah. "Two Concepts of Liberty" reprinted in *Liberty*. Henry Hardy, ed. Oxford: Oxford University Press (2008), page 169.

⁵ Pettit (1997), page 22.

point as well. Republicans have not so much realized that some law is necessary to live in society or forced a concession from the liberals on this point, but rather they have latched on to this notion as the catapult for what will be the enormous conceptual boulder they are about to release. Most negative liberty theorists agree that some interference is necessary, and take it for what it is – a necessary evil that could (or should, if it is formed properly) lead to greater overall freedom on balance. Republicans recast interference as something else, something positive, and use that new concept of law to propagate the idea that states should only interfere in the lives of its citizens for their own good. The remainder of this section will be devoted to flushing out the major consequences of this argument.

As I stated earlier, interference occurs when a person or group A takes some action with respect to person or group B that results in the performance (or forbearance of performance) of some action by B against B's will. Interference includes physical coercion (as in restraining or obstructing the person), coercion of the will (as in punishment or the threat of punishment), and manipulation (as in misrepresenting certain facts).⁶ While this would be enough for many liberals to decry their loss of freedom, republicans argue this interference occurs without a loss of liberty when the interference is not "arbitrary" – "when it is controlled by the interests and opinions of those affected, being required to serve those interests in a way that conforms with those opinions."⁷ Thus, arbitrary interference is an act perpetrated without reference to the interests and opinions of those affected.⁸ The choices made by A are not forced to track what the interests of B require according B's own judgments.⁹ Interference is "non-arbitrary" to the extent that it is forced to track the interests and ideas of B, or at least forced to track the relevant ones.¹⁰ This non-arbitrary interference does not compromise freedom, but merely conditions it – "If it is nonarbitrary, it won't compromise or undermine my freedom in the manner of a dominating agency, but it will offend against it in a secondary manner."¹¹

While negative liberty theorists view interference as a *per se* violation of liberty, republicans view interference only as such a violation if it is "arbitrary," i.e., does not take into consideration the interests and opinions over whom the

⁶ Pettit (1997), page 53.

⁷ Pettit (1997), page 35.

⁸ Pettit (1997), page 55.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Pettit, Philip (2002). "Keeping Republic Freedom Simple – On a Difference With Quentin Skinner." *Political Theory*. Volume 30, No. 3, pages 339-356.

interference is imposed. What does arbitrary interference lead to? This is the second great evil in the republican theory of freedom – “domination.”

Domination occurs when one person or group has the power to arbitrarily interfere in the lives of another person or group.¹² Specifically, according to the theory, person A can be considered to have dominating power over person B to the extent that (1) A has the capacity to interfere (2) on an arbitrary basis (3) in certain choices that B is in a position to make.¹³ This domination of one over another causes two major problems, namely (1) it creates uncertainty in the victim of the domination, who is subject to the arbitrary interference of another, and thus, can never be sure of where he or she stands or what to expect, and relatedly (2) domination introduces an asymmetry of status, where it becomes common knowledge that the victim is exposed to the possibility of arbitrary interference.¹⁴ The victim is uncertain as to whether, or when, he will suffer some random arbitrary interference, and because of that (and because others in society will presumably be aware of this) the victim cannot effectively command the respect and attention of others.¹⁵ Freedom, therefore, is a freedom of “non-domination.”¹⁶

To sufficiently drive this point home, Pettit uses the examples of criminal law and taxation to clarify what he means by arbitrary (and hence dominating) versus non-arbitrary interference.¹⁷ Taxes are clearly a form of interference and coercion. To the extent that I no longer have a certain sum of money than I otherwise would have, I have suffered interference, and my range of choices of what to do with my money has changed against my will. Adherents to the republican liberty theory hold if we assume that the tax laws were made by the legislators in a system that tracks the relevant interests and opinions, and the tax laws were made with those opinions and interests in mind, then the tax laws are by definition not arbitrary. If they are not arbitrary, they do not dominate over

¹² Pettit (1997), page 52.

¹³ *Id.*

¹⁴ Pettit (2002).

¹⁵ *Id.*

¹⁶ In his later work, Pettit describes this as “freedom of choice” and “freedom from alien control,” which requires (1) the absence of alien control, not just interference, and (2) the systematic protection and empowerment against alien control over selected choices. Pettit, Philip (2008). “Law and Liberty.” Reproduced in *Law and Republicanism*. Samantha Besson and Jose Luis Marti, eds. Oxford: Oxford University Press (forthcoming), retrieved from <http://www.ssrn.com/abstract=1281157>. However, this is really only a nomenclature change, as Pettit exchanges “domination” for “alien control.” Furthermore, the “systematic protection” discussed under (2) are addressed later in this article, so there is no need to further address it here.

¹⁷ Pettit (1997), page 55.

the citizens. Liberals may consider it a reduction in freedom, outweighed by the benefits that tax dollars mean to overall freedom, such as public provision for the military, schools, roads, and so on, but taxes are freedom-reducing nonetheless. Republicans, on the other hand, would not consider taxes to be freedom-reducing (again, assuming the non-arbitrariness condition is met).

There is also a dual personality that citizens exhibit when it comes to the laws, and I believe this dual personality can be separated as (1) me, as an individual, versus (2) me, as an indivisible member of an overall society. Thus, I, as the member of society, understand the benefits of imposing a set of criminal laws on society, such that individuals who are properly convicted of such crimes are made to suffer a particular punishment. Furthermore, I, as a member of society, understand the tremendous usefulness that a proper system of taxes plays in the financing of necessary state functions, such as security, healthcare, education, building infrastructure, and so forth. However, my other personality, the I-as-an-individual, cringes when I get my tax bill. I would rather not pay it, because I would rather use that money for something else. Even if I have an important use for that money, a use that means far more to me than an intangible social goal of generalized healthcare or education, such as buying medicine for my sick child, I am forced to use that money to pay my taxes instead or suffer negative consequences. In my individual capacity, I do not really want to pay taxes – or at least I am less than enthusiastic about doing so. Similarly, if I suddenly find myself charged with some crime, whether it is a minor traffic offense or a serious felony, I do not wish to be punished as harshly as provided by the law.

In both of the situations described above, I have conflicting interests, because I have conflicting personalities, at least on some level. Where the individual interest conflicts with the societal or group interest, according to civic republicanism, the state is required only to track the interests and opinions of the group.¹⁸ In the battle between individual and group, the group interest wins.

B. Problem #1 – Legislating “For Your Own Good” and Calling it Freedom.

The republican form of freedom opens the door for the state to legislate on behalf of the people, against the people’s individual goals, wishes and desires, as long as the state can claim some higher “group” or societal good that it has taken into account. “Freedom” in this sense is not lessened by any number of

¹⁸ *Id.*

paternalistic laws that may be quite oppressive or interfering in the lives of the people, as long as the state's conception of what is in the best interest of the group is taken into account. In this manner, the republican state can force you to be free.¹⁹

How can this be so? Consider two reasonable assumptions: (1) first, that any law passed by democratic means will not have support of 100% of the people to which it will apply, for even laws with a super-majority support still has some dissenters, and (2) laws are made to govern all of the people, not just the majority of people that voted in its favor. Clearly, if 100% support were required, no law would ever pass, or only very few. Furthermore, if a law is passed based on some method of majority rule, then clearly it must apply to some people who did not vote for it. So a citizen may still be subject to coercion of a law passed over his or her objection.

However, if we are to avoid arbitrariness in the law, and thus a law that is dominating over the people, the opinions and desires of the people must be considered. Which opinions and desires, and of which people? We have established that laws can be passed without 100% support, yet still apply to 100% of the people, the state must consider the good of the people when creating laws that all or some of the people do not desire. As in the case of taxes or the criminal law, if in my role as a citizen of the republic, a certain law is in my interest (e.g., that people pay taxes to provide for the common defense, that criminals should be punished) it is not arbitrary, and therefore does not have a dominating effect over me. This remains true in the case where, perhaps in my role as an individual selfish person, I do not want to pay taxes, or I wish to steal with impunity. My individual interests are in conflict with my interests as a citizen of the republic, and in that situation, the state need only consider my "relevant" interests, i.e., my group interests. This renders the law that is against my individual selfish will "non-arbitrary" and non-freedom-reducing.

The major problem with this is the potential for the majoritarian government to impose harsh, drastic, and severely oppressive interference on the minority opposition over their objections. The "tyranny of the majority" is inescapable in a civic republican system. Assume a society in which the majority of citizens ascribe to ideology A, and the minority ascribes to ideology B. For the sake of this assumption, we will say that 51% of the population is in A and 49% are in B. In this society, all proposed laws are drafted and put to a vote, a popular referendum, once a year. This year, there are several laws up for vote that severely restrict the activities of those people in group B. They are not allowed

¹⁹ Rousseau, Jean-Jacques. *The Social Contract*.

to work in any employment they choose, but only must work in the most demeaning and lowest-paying jobs. Group B is not allowed to preach its message. As a matter of fact, those in group A feel that most of the beliefs and activities that define group B as a collection of people are immoral and bad for society overall.

Leaving any constitutional issues aside for now, what is the state to do? A majority, 51%, votes for the laws that severely interfere in the lives of the people who belong in group B. But, taking into account the individual opinions and desires of everyone in society as a collective group, the majority view wins, and therefore the state would be justified in enacting the harsh legislation. While it may conflict with the individual opinions and wants of those people in group B, their individual needs are overridden by what has been determined as the best overall course of action for the state. The laws, even as they apply to group B, are non-arbitrary, and therefore do not result in a loss of freedom.

Clearly the laws would be very oppressive and interfering in the lives of members of group B. The laws seem to be in the best interests (at least in their minds) of group A, so they are non-dominating and do not reduce freedom. However, those laws are clearly not in the best interest of group B as a whole, and taking the whole of their wants and opinions into account, the laws would be arbitrary and dominating.²⁰ Thus, these laws should not apply to group B. This solution is unworkable, because the laws would pass to restrict the activities of group B, for the sake of all the perceived benefits of such laws according to the wants and desires of group A, but then the laws would not actually apply to group B because, taking group B's wants and opinions into account, the laws are dominating. This situation quickly turns chaotic as we realize that society is made up of a real multitude of groups and sub groups, some with common interests, and some with divergent interests, and any one person can be a member of groups that both want and do not want a law to pass.

The only logical, and workable, solution is to release the "tyranny of the majority" on society and then try to institute numerous checks and controls to

²⁰ This is, of course, assuming that when we speak of taking the group wants and opinions into account, we mean that we determine whether the proposed law would be in the group's best interest. Modern republican freedom does not go this far in the analysis. Pettit speaks only of taking into account the relevant wants and opinions of each person. This raises the question, although I will not pursue it farther, of whether the state need only be aware of the wants and opinions of the people and incorporate them into the deliberation, without actually being committed to doing what it is in the best interest of the people as a whole.

make sure the majority cannot become too dominating of a force. Pettit certainly recognizes this result, as he proposes the controls that I will discuss in the next section. His main point seems to be to introduce the concept of domination, which can occur in the presence or absence of interference. Domination can result from the state imposing arbitrary laws, or even from just having the power to impose arbitrary laws. By re-focusing the attention on domination, instead of interference, Pettit takes this into account. However, a perhaps unintended result is that he must account for interference that does not result in domination. Thus, he proposes the arbitrary vs. non-arbitrary distinction.

This distinction is unnecessary and dangerous, as it now sets up the possibility of interference without counting it against freedom. Another alternative Pettit could have chosen was to just introduce the concept that interference and the possibility of interference both reduce freedom. By defining non-arbitrary interference as non-freedom-reducing interference, the state can now interfere without reducing freedom by definition. This leads to the possibility of the state imposing harsh interference, but not reducing the freedom of the individuals, as long as the state can justifiably argue that such interference is in the best interests of the people, or at least the majority.

II. Constitutional Limitations and Contestability are Insufficient Controls.

The inevitable conclusion of the preceding section is that by making “arbitrary interference” and “domination” the focus of freedom, the majority can interfere severely and oppressively into the lives of the minority, without calling it domination and without considering it a reduction in freedom. Since republican freedom gives the state broad power to interfere in the lives of its citizens without claiming to reduce freedom, the next task is to examine the constraints and controls modern republican theory puts in place to control for the majority domination. Pettit proposes two steps (1) constitutional (written or unwritten) limitations on the power of the state; and (2) a system where all government rules, activities, and laws are subject to the power of the people to contest such action (“contestability”).²¹ As shown in this section, these limits are conceptually insufficient to prevent the state from exercising its “collective will” over the individual will of the people for their own good.

A. Challenging the Majority Through Constitutional Limitations.

²¹ Pettit (1997), page 65.

In order to effectively control state power, according to republican theory, the state must have in place sufficient constitutional restraints that are designed to (1) give the people power against the state (“reciprocal power”) to balance the power that the state has over the people, and, more importantly (2) limit the power that the state can exercise.²² Pettit recognizes the inherent difficulties in a system of creating reciprocal power (whereby the state and the individuals in the state have approximately equal power), and therefore, I will focus primarily on the use of constitutional constraints to limit the state’s power to act.²³

In order for the constitution to properly restrict the modes of state action, it must make those modes (and by “modes” I will assume the constitution itself as well as positive laws) difficult to change. The fact that the law and constitution should remain stable and constant has been recognized for many years,²⁴ and republican theory holds that the instrumentalities of the state should not be deployed on an arbitrary basis – state actors should not have unfettered discretion in how such instrumentalities are used.²⁵ Pettit proposes three conditions to prevent this from occurring: (1) the state should be “an empire of laws, not of men,”²⁶ (2) state power should not be concentrated all in the same body, but rather dispersed among different chambers of the government, and finally (3) there should be in place positive counter-majoritarian protections.²⁷

The “empire of laws” condition states that the government should be controlled by the positive law, and not by the ad hoc, random, or arbitrary decisions of the state actors.²⁸ Essentially, the “empire of laws” condition relates to those characteristics of law that the law must possess to even be rightly considered “law” as such – as in Fuller’s eight ways to fail to make law, or Hart’s concept of the Rule of Recognition.²⁹ To be an “empire of laws,” a system of positive laws must be enacted which have certain characteristics or attributes, and then the government officials and citizens must then assume that all enacted law in fact possesses these characteristics.³⁰ Thus, official state decisions should, where possible, be made according to these properly enacted

²² Pettit (1997), page 67.

²³ Pettit (1997), page 95.

²⁴ See, e.g., Fuller (1969), *The Morality of Law*, rev. ed. New Haven: Yale University Press. Pages 79-81.

²⁵ Pettit (1997), page 173.

²⁶ Pettit, like many others before him, borrows this concept from James Harrington’s *The Commonwealth of Oceana* (1656).

²⁷ Pettit (1997), page 173.

²⁸ Pettit (1997), page 174.

²⁹ *Id.*; Fuller (1969); H.L.A. Hart, *The Concept of Law*. Oxford: Oxford University Press (1961).

³⁰ Pettit (1997), page 174.

and structured laws, and not according to the individual discretion of the state actor.

Secondly, in order to make the instrumentalities of state action more stable and less changeable, there must be a dispersion of powers. Pettit borrows Montesquieu's tripartite classification and argues that government power should be divided among a legislature, administration, and judiciary.³¹ Dispersal of power is necessary because as the power of the state becomes more concentrated in the hands of a few state actors, or groups, there is a greater chance of arbitrary manipulation of the law and a tyranny over the people.³²

Finally, in addition to creating an empire of laws and dispersing the power among different houses of government, modern republican theory calls for explicit counter-majoritarian enactments, such as a Bill of Rights, that will protect all people from oppression, despite what a majority may enact.³³ The belief in counter-majoritarian protections requires a jurisprudence under which "good law" (not just law) is identified by some criterion other than majority support. For republicanism, this criterion is freedom as non-domination. "Good law" is law that promotes overall non-domination: law that reduces the domination to which *dominium* may lead without introducing the domination that can do with *imperium*.³⁴ Thus, the ultimate counter-majoritarian criterion of "good law" is non-domination – law that minimizes individual domination without introducing the type of domination that can control and dominate the entire population. It appears that this may lead to a contradiction – if the majority enacts a law, and that law must then be checked against the ultimate counter-majoritarian condition of promoting overall non-domination, then how do we define "overall non-domination" without referring back to the majority that enacted the law?

B. Challenging the Majority by Giving All People the Power of Contestability.

Separate and apart from the constitutional limitations, Pettit introduces a protection he terms "contestability" because of the possibility that the constitutional limitations still leave too much discretionary power in the hands of judges, administrators, and legislators.³⁵ "Contestability" is when the person to be interfered with can effectively contest such interference, i.e., make it

³¹ Pettit (1997), page 177.

³² *Id.*

³³ Pettit (1997), page 180.

³⁴ Pettit (1997), page 182.

³⁵ Pettit (1997), page 183.

account to his or her relevant interests and ideas.³⁶ Effective contestability should create a situation of non-arbitrary interference, and thus removes domination.³⁷

For contestability to be effective, three conditions must be satisfied. First, decision-making must be done in such a way that there is a potential basis for contesting decisions. The government system of making decisions (of creating laws, rules, etc.) must be structured in such a way as to allow the people to contest the decision (or law or rule). Pettit proposes a deliberative democracy system, where the people are free to debate the relevant issues (instead of instituting a *quid pro quo* deal-making system). Democratic governments promote contestability, and the ability to contest government decisions is a hallmark of democracy.³⁸

Secondly, there must be a channel or voice by which contesting decisions can be accomplished. Pettit calls this “inclusiveness” in that everyone who may have a grievance is included in the mechanism to voice that grievance. Inclusiveness is easily established in the legislature in a democracy because legislators are elected by the people (leaving aside the issue that legislators are only elected by a majority of their constituents). However, inclusiveness is harder to establish in the administration and the judiciary. Pettit proposes a proportional representation system – as in a jury-like cross section of society – whereby the administration and judiciary are comprised of the demographic make up of society. “Let the administration or the judiciary become statistically unrepresentative of major stakeholders and there is no longer a guarantee that members of unrepresented groups can make their voices heard in appropriate circles.”³⁹

Thirdly, there must be a suitable forum in existence for hearing contestations, a forum where the validity of the claim is assessed and a suitable response is determined.⁴⁰ This “suitable forum” is the “responsive republic” where the people are guaranteed that the grievances they make will receive a proper hearing. However, there may be at least two reasons why a person’s grievance would not be properly heard (1) the person is guided by self-interest, and thus the judgment is made that the common interest requires frustration of that

³⁶ Pettit (1997), page 184.

³⁷ *Id.*

³⁸ Pettit (1997), page 185.

³⁹ Pettit (1997), pages 192-193.

⁴⁰ Pettit (1997), page 186.

person's interests, or (2) the contestation may represent the minority's judgment of what is in the common interest.⁴¹

Clearly, there is an inherent contradiction in stating that everyone's grievances must be heard, and then stating that it would be an acceptable reason not to address a person's grievance because it may be part of the minority position. How should a non-dominating government respond to the minority? "At the limit, the ideal of non-domination may require in relevant cases that the group are allowed to secede from the state, establishing a separate territory or at least a separate jurisdiction; that possibility has to be firmly on the horizon."⁴² Short of outright succession, the state should have some method of conscientious procedural objection.⁴³ However, in his later work, Pettit backs off this position substantially: "I shall assume that it cannot feasibly exempt unwilling members from its laws, dealing in a different way with those in the territory who identify sufficiently to endorse membership, and those who don't. And I shall assume that, consistently with caring about freedom as non-domination, it cannot give special privileges to those who seek such a status; this would mean that the privileged were well placed to dominate the underprivileged."⁴⁴

If the law is to be both coercive and non-dominating, it must be created under the collective control of the people. No one can be left out from the process – all members must share in the collective control.⁴⁵ In other words, the people should identify a good or public interest, "avowed in common by all," and then create procedures where that interest would dictate the policies to be put in place.⁴⁶ Pettit proposes this "convergence method" to establishing and implementing the common interest: (1) there are public-goods policies in any domain such that everyone would prefer that one of them be collectively and coercively implemented to nothing's being done by the government; (2) only a proper subset of public-goods policies will satisfy the constraint of mutually acceptable reasons in any domain and, special interests aside, everyone would prefer that one of those policies should be implemented there rather than one of the policies that fail it; and (3) only a certain number of procedures for choosing between remaining policies will satisfy the constraint of mutually acceptable reasons and, special interests aside, everyone would prefer that one such procedure be established – on a similarly acceptable basis – and that a

⁴¹ Pettit (1997), page 198.

⁴² Pettit (1997), page 199.

⁴³ *Id.*

⁴⁴ Pettit (2008).

⁴⁵ *Id.* Inexplicably, Pettit states that this mechanism also respects the view that opening power to the people does not mean a tyranny of the majority.

⁴⁶ *Id.*

policy that is selected by that procedure should be implemented rather than any alternative.⁴⁷ If there then exist a number of different policies that are consistent with mutually acceptable reasons, but one procedure suits one faction and one suits another, then Pettit states there should be some tiebreaker, like a lottery.⁴⁸

The public interest has to be defined on the basis of democratic discussion and contestation amongst the people and so that it requires institutions that make room for the debate processes.⁴⁹ Given the public interest and public role in making the laws, are the laws then non-dominating? “Let the public interest rule, and we let an interest rule in which each member of an equally inclusive, contestatory democracy is invested; it is an interest implicit, after all, in the way that discussion and contestation is conducted amongst its members. Let the public interest rule, then, and we let the public rule.”⁵⁰

C. Problem #2 – Constitutional Limits and Contestability Do Not Effectively Control the Tyranny of the Majority.

1. Constitutional Problems.

Constitutional limits, like laws, represent interference over the people to perform certain activities. Therefore, in order to not infringe on freedom, the constitutional limitations themselves, like laws, must not be arbitrary and dominating. Since arbitrariness is determined by considering the needs and wants of the people over whom the interference will be in effect, the arbitrariness of constitutional limitations must be examined in comparison to the needs and wants of the people as a whole. This leads to a situation where the state is creating constitutional limitations to control state power in the very same manner that will lead to arbitrariness and domination of the law. To ensure that the constitutional limitations themselves, as well as the laws they are created to limit, are non-dominating, state actors must consider the needs and wants of the people. And since they cannot consider the needs and wants of each individual person, as shown in Problem #1 above, they must consider the needs and wants of the people as a group. And since, as a group, the people will have diverse needs and wants, the concerns of the majority will take precedence. In creating constitutional limitations to protect against the tyranny of the majority, the state can only go back to that same tyrannical majority to ensure that the constitution itself is not the source of domination.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

I do not take issue with Pettit's arguments that the state should be an "empire of laws and not of men" and the state power should be dispersed among different houses of government. Generally speaking, in the abstract at least, Pettit's last category of constitutional limitation should also be acceptable. In order to protect against majority domination of the minority, the constitution itself must include express counter-majoritarian restrictions. A ready example of this is the Bill of Rights to the United States Constitution, which provides protections of the freedom of speech, freedom of assembly, and against the establishment of religion. No law can be created which violates one of these, or any, constitutional provisions, or it will risk being struck by the chief arbiter of constitutional interpretation – the United States Supreme Court.

However, the argument for counter-majoritarian conditions in the constitution brings us back to the majority itself. The constitution must provide some criterion (or, presumably, criteria) against which a "good law" can be measured as valid without resorting to the fact that it has majority support. This criterion must promote overall non-domination. Unfortunately, "non-domination" is defined with reference to whether the law is arbitrary, which itself is then defined as whether the law takes into account the people's opinions, wants and desires. And with one more step – the step that it is the majority's opinions, wants and desires that are taken into account in a diverse society – we find ourselves back at the tyranny of the majority. Counter-majoritarian conditions must validate the law based on something other than majority rule, and that "something" must be the overall non-domination that the law entails, which then itself must refer back to majority rule to determine whether it is either "overall" or "dominating/arbitrary."

In any common view of liberty, it is readily conceivable that the constitution must contain some absolute protections against certain acts of the majority – so-called counter-majoritarian conditions. However, this idea is probably better explained, in such a view, by vague reference to a Bill of Rights than it is by trying to relate it to republicanism's overall argument of non-domination. It is not a given fact that majority domination can be controlled, even in a democratic republic like the United States. To have a chance of controlling the majority's ability to pass laws that dominate over the minority, the constitution must contain absolutes that are unchangeable, or nearly so. How do we come by such absolute inviolable principles? Do we turn to religion? To ideology? To the mandates of Mill's utilitarianism or Kant's deontological ethics?

The only way to counter the majority is to eliminate it, abstractly, in determining what counter-majoritarian principles must be in the constitution. For example, if 60% of the population of a new state were of ideology A, and

20% were of ideology B, and 10% were of ideology C, and the remaining 10% were of ideologies D through Z, then perhaps one member of each ideology is chosen to represent it at a constitutional convention where the counter-majoritarian principles are drafted. Or, more realistically, one member from each of the ideologies comprising a super-majority of the population, say 80 or 90%, would be present. Each would get one vote on certain fundamental rights, freedoms, or protections to be enacted. With only one vote per group, there is no “tyranny of the majority” that can design a constitution to give legitimacy to dominating acts of the majority, but rather, the majority would have no more say in what is part of the constitution than even a small minority.

2. Contestability Problems.

The bigger problem for republicanism is not the constitutional limitations, but the concept of contestability. By allowing the people to have the ability to contest government action, the state will not abuse its power (or at least such abuses will be minimized). However, once this concept is deconstructed into its component parts, it quickly unravels.

First, the theory holds, the state’s decision-making procedures must be structured in such a way as to allow a citizen to contest the decision – the deliberative democracy. This should allow decisions of the state to be debated in an open forum, and then ultimately subjected to the majority vote of the democracy (whether directly by the population, or by elected representatives). While I agree that free and open debate is an important part of protecting the population against impingements of their freedom, the fact that this prong of “contestability” refers back to majority vote undermines the very protection it is intended to give. Perhaps the citizen can contest a particular decision if they happen to fall into the majority, but for those in the minority, their contest is ineffective.

Second, the element of “inclusiveness” requires that the mechanism by which grievances are heard include everyone in society. For each person to be properly heard, they must be properly represented in the mechanism of government. This is easily accomplished in the democratic legislature, where each representative is voted in by the population (leaving aside the problem with majority rule voting). However, it is not clear how a proportional demographic representation in the administration or judiciary can lead to some higher (or better) level of contestability. While I agree that in the abstract, the ability to contest (or voice an opposition to) state action should be possessed by everyone in the population, I do not agree that this is best accomplished in a manner where the population must rely on (1) majority rule and (2) vague

demographic criteria for representation. How would this work in the administration or judiciary? What are the relevant factors to take into account? Race, religion, education, social status, wealth, age, sex, sexual orientation? Is there a hierarchy of factors, or should all of these be ranked equally? How often should the population undergo a census in order to ensure proportional representation in these bodies of government? Should some factors, like education, be excluded entirely, as in the case of the judiciary (assuming that the judiciary should not be representative of both the most and least intelligent in society)?

Furthermore, the concept of proportional representation is not logically related to the ability to contest government action. This basis for contestability assumes that by having an administration and judiciary that are the same demographic make-up of society, that the society's interests will be better represented. There is some logical traction in the idea that, again in the abstract, a government that looks like the people will better represent the people. However, am I more adequately represented in government because I am a Catholic, and therefore the Catholic members of the judiciary and administration share my views on certain issues? If I'm African-American, can I assume that any African-American in the administration or judiciary will represent my interests? This view neglects the complex and multi-faceted nature of one's political and social beliefs and instead focuses on factors that are tangentially related, if at all, to one's views.

The final prong of contestability is that a forum must exist where the people can be assured that their grievance will receive a proper hearing, or the "responsive republic." This element of contestability is qualified with two large exceptions to the rule of "responsiveness" that eviscerate its effectiveness. The first major exception is that if a person is guided by individual self interest, the judgment can be made that the common interest requires frustration of that party's wishes. If it is determined that the person voicing the grievance is acting not in the common interest, but rather self-interest, then the person's grievance need not be heard, or rather heard and disregarded. The majority would be determining the "common interest" and thus, anything that does not match the common interest can be classified as individual self-interest and disregarded. The second major exception to the final prong of contestability is merely the first exception, but stated more boldly: the grievance simply represents the minority interest, and therefore can be excluded.

Contestability is a sham protection. Giving people the right to contest government action, even through a well-run judicial process, does not guarantee that the contesting citizen will be successful. Furthermore, what if

the state decides that certain forms of contestability, such as a free press, or demonstrations, are not for the betterment of the people and not in their best interests? The state can do away with these for the citizenry's own good, and still not reduce freedom. The limits and effect of contestability, short of the threat of civil war, are completely within the control of the state and the majority of citizens that support the state. As a single person fighting against the passage of a law that I consider particularly oppressive, is my freedom any better protected whether I am fighting the fight alone, or with ten friends, or with 49% of the entire state? In all of those scenarios, I lose, and I am subject to interference against my will.

It is not completely fair to fault Pettit for failing to establish protections against majority domination that are not themselves based on the will of the majority. In a democratic system, where the people vote on the constitutional amendments or (directly or indirectly) for the laws, majority rule is the only way to achieve an acceptable outcome. However, this failing must be widely acknowledged and understood, and not hidden in the context of counter-majoritarian conditions. Certainly, it must not be disguised as protection for the people.

III. Relativistic Freedom and the Problem of International Power.

A. Freedom on a Global Scale.

Essentially, the concept of freedom from the republican camp is not confined to geographic borders, and it can be examined on an international scale. If the state is not adequately secured and protected, there is a constant threat of domination from external agents – other more powerful countries.⁵¹ In the threat of external domination, the best answer is not going to be immediate violence, but rather a “readying” of the state for potential conflict through the building up of armies and arms.⁵² Pettit analogizes this readying for conflict to the concept of “reciprocal power” he described with reference to the limits on the state's power and also argues that the situation may be better resolved through being a “good international citizen” and supporting a body like the United Nations.⁵³ In other words, a state should support other states with constitutional constraints on power and promote this as an international goal with other states and through the United Nations.⁵⁴

⁵¹ Pettit (1997), page 150.

⁵² Pettit (1997), page 151.

⁵³ Pettit (1997), page 152.

⁵⁴ *Id.*

In his zeal to promote multinational cooperation and “good international citizenship,” Pettit argues for a weakening of state sovereignty and a turning over of certain historically domestic issues to international decision-making and adjudication, such as homosexuality and gay rights, development in a certain wilderness area, and women’s rights. “[International bodies] may promise to do better in the promotion of freedom as non-domination among the citizens of that state than the state itself. The best republican policy may well be to expatriate domestic sovereignty in such cases and to give a certain guaranteed weight, if not absolute discretion, to relevant international agencies.”⁵⁵

B. Problem #3 – Freedom is Always Relative.

Assuming that Pettit’s republican freedom can be set up in a state such that only non-arbitrary interference is imposed on the people, Pettit himself admits that freedom and domination are relative. Freedom, under the republican theory, is when people are not subjected to the arbitrary interference from another person or collective of people, or even the potential for such arbitrary interference. Assume for the sake of argument that through properly considering the people’s needs and wants, and instituting such power-abuse controls as constitutional limitations, and contestability, there is no possibility of arbitrary interference and the people in a given state can consider themselves “free.”

However, this freedom is relative only to their own state and time. They are not free throughout all time and space, but free with respect to a particular time in history with respect to a particular government, their own, for sure, and perhaps with respect to some other non-threatening governments. I am in State A, a large powerful state with high GDP, a stable democratic government, and strong military. Assuming all of the factors above, the world will look at the citizenry of State A generally as “free” or possessing many “freedoms.” State B is smaller, has a smaller population, smaller military, smaller GDP, but possesses the same safeguards above, and therefore its citizenry is considered “free” from arbitrary rule by the government of State B. Is State B really “free?” Even if unlikely to happen, isn’t there the chance of invasion and arbitrary control over B by State A? Even if State A is a “benevolent master”, doesn’t State B only enjoy its freedoms at the pleasure of State A?

Consider States C, D, and E. All of these states are smaller, with smaller populations, maybe with governments not as stable as A or B, but they do have some military force. And they hate State A for ideological reasons.

⁵⁵ Pettit (1997), page 153.

Individually, State A could dominate any of those states, and could probably even dominate a number of combinations of those states. But it is clear that if States B, C, D, E, and maybe others, joined forces against A, they would dominate State A and impose their arbitrary rule over the citizens of State A. This is a possibility, however remote. Are the citizens of State A really “free”? Are they mostly “free”? Are they “free” to a probability of 95%?

Unless there is one state that can effectively defend itself against an onslaught of attack from the rest of the world, and thus runs no potentiality of being dominated by any combination of other states, there is no freedom as non-domination in the world from the republican perspective.

IV. Conclusions.

In this brief account of the republican ideal of freedom, I have attempted to set out the main tenants of that ideal, at least as described by one of its contemporary scholars, Philip Pettit. According to this account of freedom, we see law as an oppressive, but necessary force that has the potential of reducing freedom of a society. We need law to structure government and restrain people’s actions, but how is that accomplished without imposing a harsh, totalitarian regime?

In the republican theory, freedom is only harmed by “domination” that comes as a result of “arbitrary” laws or interference. Laws are arbitrary to the extent that they do not account for the opinions and desires of those on whom they are imposed. And how is it determined that laws do take this into account, and are thus non-arbitrary? Either the ruling autocrat dictates the law, claiming to have taken these issues into account, or the people themselves (directly or through democratic representation) vote for the laws on a majority basis. Republicans recognize the inherent problem of the “tyranny of the majority” and to combat that, Pettit argues for restrictions on power, coming in the form of (1) constitutional constraints on the government and (2) giving the people the power to contest those decisions.

Despite these arguments, republicans cannot account for two major sources of oppression of freedom (1) the state’s ability to legislate for the people’s own good over their objection, in a Hegelian sense, and (2) the tyranny of the majority. Pettit institutes several mechanisms designed to combat the majority rule, should it oppress the minority, even going so far as to label one such restriction “counter-majoritarian conditions.” None of it will logically protect the citizens against the majority, however.

First, by bifurcating the needs and wants of the state into individual versus community needs and goals, the ruling party can easily create laws that take into account the necessary conditions to be labeled “non-arbitrary” and hence “non-dominating” by merely claiming that such laws are created for the good of the people, as a whole, by legislators that have their best interests at heart. Any dissention from this could easily be labeled as the selfish view of a minority, or worse, the selfish view of individuals as to their individual interest, which is always subordinated to the group or community interest.

Secondly, the constitutional and contestatory “restrictions” on oppressive state action still rely on majority rule in some fashion or another. The constitution is created by majority rule or by rulers chosen by some other means who will act without input of the people (the definition of “arbitrary”). The ability of citizens to effectively contest state decisions would protect them from arbitrary state power, but the principals of contestability are not workable from the republican standpoint. It requires us to create a system that allows citizens the ability to contest decisions, and it requires the government to represent the demographic makeup of the people, or be chosen by the people. Legislators are elected, but the judiciary and administration are not, so they should be chosen to represent a slice of society. Even if this can be readily accomplished (and it cannot) the fact that a citizen shares some characteristic with a person in the state government does not mean that such state actor will protect, or even share, the citizen’s concerns.

Finally, under this republican outlook, there is no ultimate freedom, only degrees of freedom of one party relative to another. It is not clear whether there are any criteria, in a concrete sense, so claim that the people of a certain state are “free” or not. But worse for this theory, even if the people can claim to be free in their state, they may not be free from the exercise (or the threat of exercise) of arbitrary power from a neighboring state. At this point in history, it would be difficult to imagine that the people of the United States are free from domination and oppression from the United States (or any of the several states) government, but not free from the potential of arbitrary rule of neighbors like Mexico or Canada. However, in 1991, the people of Kuwait could have been considered “free” from oppressive rule by their own government, but certainly subject to the arbitrary rule of neighboring Iraq. Clearly other power dynamics have existed and continue to exist around the world – the U.S. and the U.S.S.R. during the Cold War era, India and Pakistan, Israel and Iran, and the list could continue on. The republican theory has missed the mark. At best, it does not provide a more workable theory of freedom for states to implement, and at worst, it provides states an easier mechanism to dominate the people.