

What counts as arbitrary power?

Frank Lovett*

Department of Political Science, Washington University, St. Louis, MO, USA

What counts as arbitrary power? Civic republicans argue that an account of political liberty or freedom as consisting in the absence of domination best captures the spirit of the classical republican tradition, and also provides the basis for an attractive contemporary political doctrine. Domination, in turn, is usually understood as a sort of dependence on arbitrary social power. While there are many aspects of this conception of freedom as non-domination that might be regarded as controversial, this paper focuses on the specific issue of arbitrariness. It advocates a particular conception of arbitrariness that diverges from the mainstream view among civic republicans, and from the view of Philip Pettit in particular. Specifically, it argues that arbitrariness should be understood procedurally, and not substantively.

Keywords: power; arbitrariness; domination; civic republicanism; political freedom

What counts as arbitrary power? This question, interesting in its own right, is of special concern to contemporary civic republicans. Civic republicans argue that an account of political liberty or freedom as consisting in the absence of domination best captures the spirit of the classical republican tradition from Machiavelli to Madison, and also provides the basis for an attractive contemporary political doctrine.¹ Domination, in turn, is usually understood as a sort of dependence on arbitrary social power. Thus one central criterion – together, perhaps, with some others, depending on the particulars of the account in question – for characterizing a person or group as subject to domination is that some other person or group has the capacity to exercise arbitrary power over them (Wartenberg 1990, Pettit 1997, Lovett 2010).

While there are many aspects of this conception of freedom as non-domination that might be regarded as controversial, in this paper I would like to focus on the specific issue of *arbitrariness*. Let us suppose, in other words, that we are agreed on what it means for one person or group to wield power over another (and on any further criteria relevant for characterizing domination); our question here simply concerns when that power can properly be considered arbitrary. More to the point, if we imagine that social power is arbitrary by default, we will want to know what the necessary and sufficient conditions are for rendering it *non*-arbitrary. This issue is of central importance to civic republicans because, if it were impossible to render social power non-arbitrary, the feasibility of achieving political liberty in the

*Email: flovett@artsci.wustl.edu

republican sense might be cast into doubt.² It is thus not surprising that the critical literature has often targeted the issue of arbitrariness, and charged civic republicans with ambiguity on this crucial point.³

I will not address this critical literature directly here. Rather, my aim will be to advocate a strictly procedural conception of arbitrariness that diverges from the mainstream view among civic republicans, and from the view of Philip Pettit in particular. The dispute under consideration here is thus an internal and somewhat technical one; it should not be seen to overshadow the considerable areas of agreement among all civic republicans. Indirectly, of course, the process of working through this question may go a long way toward clarifying the relevant meaning of arbitrariness, and thus to some extent answer the various critics of civic republicanism.

I

Suppose we agree that political liberty is best understood as the absence of domination, and that domination consists in some sort of dependency on arbitrary social power. Let us further suppose we agree on what it means for one person or group to wield power over another. Our question is then, specifically, the conditions under which that power would count as arbitrary – or, equivalently, the necessary and sufficient criteria for rendering some instance of power non-arbitrary.

Since the English word ‘arbitrary’ can have different meanings in different contexts, it is important to be clear about the meaning relevant for our purposes here. Sometimes, for example, ‘arbitrary’ is used to mean random or unpredictable – as in, ‘the weather seems arbitrary to persons not trained in meteorology’. It is easy to see, however, that this is not the meaning relevant for a conception of domination. Slavery can be taken as a clear example of domination if anything can, and slaves are indeed characteristically subject to the arbitrary power of their masters. Now it is often true that slaves cannot accurately predict when their master will beat them and when they will be left alone, and so this power of the master *can* be arbitrary in the sense of it appearing random from the slave’s point of view. But this quality of randomness is not an essential feature of their domination. Why not? With long experience, a slave might become better able to predict when his master is likely to abuse him, and thus his master’s decisions will appear less and less random over time. This may be better for the slave, of course, but surely it does not follow that he is subject to less and less arbitrary power by that fact alone: rather, we should say, he is better and better able to *cope with* the arbitrary power he is (and remains) subject to. This is not the meaning of arbitrary relevant for our purposes.

‘Discretionary’ is much closer to the relevant meaning, but it is not quite right either. Discretionary power might be delegated to a public agency with a view to advancing certain goals or aims – as for example, Congress delegates discretionary authority to the Federal Reserve –, and this should not (or at least not under the right conditions) count as an instance of arbitrary power. For example, suppose that a principal delegates discretionary authority to an agent on the condition that the agent remains answerable to common-knowledge understandings of the goals and aims it is meant to serve, and the means for achieving those goals and aims it is permitted to employ. Further suppose that the principal can ultimately enforce these understandings against any attempt by the agent to deviate from them. In such cases, we would probably not regard the discretionary authority as an instance of arbitrary power or domination.⁴

What then is the meaning of arbitrary relevant for our purposes? Traditionally, power is often said to be arbitrary when it can be exercised according to the ‘will or pleasure’ of the person or group holding that power.⁵ Thus, even a long-familiar slave master wields power according to his (perhaps predictable) will and pleasure, while the Federal Reserve, by contrast, cannot wield its power according to its own will and pleasure (predictable or not), without answering to the delegating authority. Intuitively, the former is an instance of domination, while the latter is not.⁶

Although this is clearly the meaning of the term ‘arbitrary’ relevant for a discussion of domination, the issue is far from settled. This is because the somewhat elliptical expression ‘according to will or pleasure’ is open to two possible interpretations. On the one hand, we might say that the exercise of social power is left to the will or pleasure of a person or group just in case it is not somehow procedurally constrained. On the other hand, we might say that the exercise of social power is left to the will or pleasure of a person or group when it can be employed by them without regard to the relevant interests of the parties affected by that exercise. Let me explain each of these two interpretations somewhat more fully.

On the first view, let us say that social power is arbitrary to the extent that its exercise is *not reliably constrained by effective rules, procedures, or goals that are common knowledge to all persons or groups concerned*. Roughly speaking, in other words, the more procedurally constrained the exercise of social power is, the less arbitrary it is, and vice versa. Two aspects of this statement will benefit from further elaboration. The first is that constraints on social power, whatever they happen to be, must be *effective* – meaning that they must actually constrain how that power is exercised. Technically, we might say that *A* is effectively constrained to wield her power in manner *x* if it is common knowledge that the probability *p* that *A* will wield her power in manner *x* is relatively high. Merely aspirational standards (as for example, that some power be exercised ‘fairly’) will thus not count as effective unless we have good reasons to believe that they will be respected with a high degree of probability. Formal laws – the requirement that police obtain a lawful warrant before searching a private residence, say – can be effective in this sense, but there is no necessary correspondence between formal laws and effective constraints so defined. This is because, on the one hand, formal laws do not count as effective unless they are actually observed, while on the other hand, informal social conventions might sometimes be effective constraints even without their being explicitly codified as formal laws.

The second important aspect of the statement above is that effective constraints must also be *reliable*. Suppose that a slave master chooses not to exercise the full measure of power granted to him under the law of slavery – perhaps out of a sense of paternalistic obligation, or merely because he happens to be a nice person. Given his contingent preferences and dispositions, it may be highly probable that he will wield his powers with restraint, and thus his powers will be constrained effectively. Nevertheless, we should not regard those constraints as *reliable* so long as they are wholly dependent on his contingent preferences and dispositions remaining as they presently are. Technically, we might say that constraints are reliably effective only if it is common knowledge that the probability *p* that they will be respected remains high across a suitably wide range of nearby possible worlds.⁷ This is not the case with our kindly slave master: he might attend a meeting in which the humanity of slaves is denied by persuasive speakers; or his slave’s familiarity might rub him the

wrong way one morning; and so forth. Such events could easily alter his preferences and dispositions in such a way that the effectiveness of his prior self-restraint is undermined. Practically speaking, securing reliability so defined will usually entail giving the constraint some sort of external backing, as for example a commonly-recognized mechanism for appeal to an independent third-party authority. Constraints on the police can thus be given external backing by appeal to the courts, constraints on lower courts by appeal to higher courts, constraints on the Supreme Court by the other branches of government plus legal and public opinion, and so on. The chain of external constraints need not form a pyramid, of course: *A* might constrain *B*, who constrains *C*, who constrains *A* in turn. Indeed, there are many possibilities here, but a thorough discussion would take us far afield; for our present purposes it is sufficient that the idea here be roughly understood.

It is no doubt apparent that this first interpretation has the effect of associating non-arbitrariness with the familiar ideal of the rule of law – provided, of course, that we are willing to loosen and extend the latter considerably. But arbitrariness is often understood differently than this. It is commonly said, for example, that it is arbitrary to base hiring decisions on irrelevant criteria such as race or gender; or, more generally, that it is arbitrary for one person to be made worse off than another through no fault of his/her own. These uses of the term ‘arbitrary’ represent examples of the second sort of interpretation, which emphasizes the thought that decisions made according to the will or pleasure of the power-holder often do not reflect the relevant interests of the affected parties. Presumably, everyone has a justifiable interest in being assessed and rewarded according to morally relevant criteria such as merit and effort, and not morally irrelevant criteria such as race, gender, or brute luck. Thus when a position is awarded to the boss’ friend, rather than to the most qualified applicant, we might say that the boss has exercised his power to fill positions arbitrarily.

Let us term these the *procedural* and the *substantive* interpretations of arbitrariness respectively. On the substantive interpretation it is not enough that a power-holder be effectively and reliably constrained in their exercise of power, unless they are specifically constrained in a way that compels them ‘to track the interests and ideas’ or ‘the welfare and world-view’ of the persons subject to that power (Pettit 1997, pp. 55–56).

Note that, as characterized here, substantive non-arbitrariness necessarily incorporates procedural non-arbitrariness, insofar as being constrained to track the interests and ideas of the affected parties is to be effectively and reliability constrained in some manner. Conceptually, at any rate, we could imagine substantive non-arbitrariness without procedural non-arbitrariness. This is the case of the benevolent slave-master who, though not constrained by social institution and custom to do so, happens to respect the relevant ideas and interests of his slaves to some extent; or of the kindly husband who, though not constrained under traditional Anglo-American family law to do so, happens to advance the welfare of his wife and children. While this is no doubt better for the slaves, wives, and children overall, all civic republicans would nevertheless want to say that these are relationships of domination: a slave is not free, in the republican sense, merely because his master happens to be benevolent, nor a wife merely because her husband happens to be kind. For civic republicans, the issue rather boils down to whether there are *two* necessary and jointly sufficient conditions for rendering power non-arbitrary (the substantive view) or *one* only (the procedural view). Which view is better?

It is crucial to observe here that our question is not whether the substantive interpretation constitutes a meaningful use of the term ‘arbitrary’. Clearly, it does. Nor is it whether substantive non-arbitrariness is something desirable from a normative point of view. Of course we would want power to be non-arbitrary in both the substantive and the procedural sense, so far as this is possible. A system of racial or ethnic discrimination, for instance, might be non-arbitrary in the procedural sense if its various provisions are carefully instantiated in public laws and institutions rigorously adhered to by all parties. But it cannot, presumably, be non-arbitrary in the substantive sense: those laws and institutions do not compel power-holders to track the interests and ideas (however defined) of the persons discriminated against.

These are not our present concerns, however. Our question is strictly a technical one: How should we define the term ‘arbitrary’ as a term of art in contemporary civic republican political theory and philosophy? In other words, given that we are going to define political liberty as non-domination or the absence of arbitrary power, and that we are going to regard political liberty as a primary political value, which construction of the term ‘arbitrary’ best answers to our purposes? The usual view among civic republicans (Pettit included) is that the substantive interpretation is better. In what follows, however, I will advance the contrary line – that the procedural interpretation is better.

The main consideration in favor of the substantive interpretation is probably that procedural non-arbitrariness, in a sense, seems too easy to achieve. It sets the bar too low. This objection is highlighted precisely in the example of a rigorously legal system of racial or ethnic discrimination just mentioned. Of course, real-world systems of discrimination – as for example, Jim Crow in the American South, Apartheid, or the legal liabilities once imposed on European Jews – are not usually characterized by a strict adherence to explicit rules and procedures, but we might imagine cases in which they were. Surely, one might think, systems of institutionalized discrimination, no matter how carefully framed in scrupulously-observed public rules and regulations, must count as instances of domination, and thus as deprivations of freedom. Ergo, our strong initial intuition is that the relevant sense of arbitrariness must be the substantive one.⁸

This is indeed a significant consideration. But intuitions are not, by themselves, decisive. In developing a conception of political liberty as non-domination, other considerations must also be taken into account, and if the latter are found sufficiently weighty on the other side, we should be prepared, on reflection, to revise or drop our conflicting intuitions. This is precisely what I attempt to show in the argument that follows. Later, I will also try to explain what accounts for our initial contrary intuition, so as to ease our revising or dispensing with it.

II

In order to assess the substantive interpretation of arbitrariness, we need to say what the ‘ideas and interests’ (welfare and worldview, justifiable interests, etc.) of the parties subject to social power amount to in the relevant sense; in the absence of such an account, naturally, the substantive view would be underspecified. In this connection, three possibilities immediately spring to mind.⁹ On the first, we would understand the ideas and interests of a person or group to mean their objectively-defined, normatively-justifiable interests; on the second, their subjectively-expressed preferences or desires; and on the third, their ideas about their interests as

expressed through some appropriate deliberative process. These might be called the objective interest, welfarist, and deliberative accounts of substantive arbitrariness respectively.¹⁰

Now an obvious difficulty with the first is that it would seem to depend on a comprehensive doctrine of the human good, which is bound to be controversial in pluralistic modern societies. For civic republicanism to be an attractive contemporary political doctrine, it must be possible for persons holding diverse conceptions of the good to agree at a minimum on what counts as an instance of domination and what does not. This they will not be able to do on the objective interest account of arbitrariness, since what counts as arbitrary on that view hinges on the controversial question of what interests are normatively justifiable.¹¹ Moreover, an objective interest account of arbitrariness would generate what has been described as a ‘moralized’ conception of freedom from domination: on such a view, power is arbitrary (thus an instance of domination) whenever it is not normatively justifiable, and non-arbitrary (thus an instance of freedom) whenever it is. But then freedom as such has no independent weight as a political ideal – it merely adds the superfluous rhetorical tags of ‘freedom’ and ‘domination’ to what we have already identified as good or bad on our underlying moral theory (Christman 1998, Larmore 2004, Carter 2008). This of course cannot be the civic republican view.

In principle, at any rate, the welfarist account does not encounter these difficulties, since it is a matter of descriptive fact what subjective preferences or desires people happen to have: even in the absence of agreement among our conceptions of the good, we can presumably agree whether people are getting what they prefer or not. But the welfarist account faces other, rather familiar problems. To begin with, there is the problem of interpersonal comparisons of welfare, which would be needed in order to determine whether the domination of one person is greater or less than that of another. What is worse, there is the difficulty of adaptive preferences: persons subject to social power could apparently be freed from domination, on the welfarist view, simply through becoming convinced – rightly or wrongly – that their relevant desires were being respected by those holding power over them. And finally, the welfarist account would seem to say that when people hold differing preferences with respect to some issue that inevitably affects them all, any possible outcome of that disagreement would constitute domination over the party not securing the particular outcome it desired (Ferejohn 2001, Pettit 2004). For reasons such as these (which I have sketched only briefly), most civic republicans have thus opted for some version of the deliberative account, only disagreeing on how that account should be worked out in the details.¹²

Having thus narrowed our sights on the deliberative account of substantive arbitrariness, the discussion will proceed in two stages. First, in the remainder of this section and in the next, I will elaborate on the deliberative account, and register some particular objections to it as an account of arbitrariness suitable for a contemporary civic republican political doctrine. After that, in section four, I broaden my focus again, and discuss some reasons for believing that *any* substantive account of arbitrariness – not merely those currently under discussion in the literature – should be rejected in favor of a procedural account.

On the deliberative account of substantive arbitrariness, we are supposed to understand the ideas and interests of a person or group subject to social power to mean their *ideas about their interests* as expressed through an *appropriate deliberative process*. That is to say, social power will be considered non-arbitrary, on this

view, to the extent that it is constrained to track the ideas affected persons express about their interests after suitable deliberation.¹³ Now we might take this to mean that there must be some sort of formal mechanism or process for democratic contestation on the part of those subject to social power. ‘The key to determining what is arbitrary,’ writes John Maynor,

centers on whether or not the interfering agent consulted and tracked the opinions or interests of the agent subjected to the interference. For an act to be non-arbitrary, the onus is on the interfering agent to seek actively the opinions or interests of others before acting ... Thus, existing hierarchies of power can be undermined by forcing them to account for and track the interests of those they dominate *through the processes and institutions of democratic contestation*. (Maynor 2006, p. 137, emphasis added).

Absent from such democratic mechanisms for contestation, social power counts as arbitrary by default. Notice that, on this sort of view, the ‘deliberative capacity’ to challenge social power through democratic processes ‘is constitutive of, and not merely instrumental to, nondomination’ (Bohman 2008, pp. 207–208). Quentin Skinner is even more explicit about building democratic processes into our conception of freedom from domination. On the civic republican view, he contends,

if a state or commonwealth is to count as free, the laws that govern it ... must be *enacted with the consent of all its citizens*, the members of the body politic as a whole. For to the extent that this does not happen, the body politic will be moved to act by a will other than its own, and will to that degree be deprived of its liberty (Skinner 1998, p. 27, emphasis added).

It follows that ‘free states, like free persons, are thus defined by their capacity for self-government. A free state is a community in which the actions of the body politic are determined by the will of the members as a whole’ (Ibid., p. 26.). This democratic construal of the deliberative account is ubiquitous in the literature, with the interesting exception (as we shall see) of Pettit himself. Before considering Pettit’s particular take on the deliberative account of substantive arbitrariness, however, let us consider some disadvantages of the more typical democratic construal.

The main appeal in the deliberative-democratic account of substantive arbitrariness, no doubt, is that it renders the connection between freedom from domination and democracy as transparent as possible. This very strength is also, however, a serious weakness. For one thing, it runs the risk of folding the republican conception of freedom from domination into a positive or participatory conception of political liberty. This is something contemporary civic republicans are very anxious to avoid, and with good reason: as Berlin and many others have argued, positive conceptions of political liberty are wholly unsuited to the conditions of modern politics (Berlin 1969). But since these debates are already familiar to many, let us focus on another problem.

Without exactly defining domination and democracy as opposites, the deliberative-democratic account nevertheless renders the connection between them more or less analytic. In other words, on the deliberative-democratic account it is effectively *true by definition* that we cannot secure freedom from domination without democracy. In my view, civic republicans should resist defining domination in this way. Partly, this is for pragmatic reasons, since it will not be possible on such an account

to determine whether a person or group is subject to domination unless we can first agree on what would count as a sufficiently democratic mechanism of contestation, which may not be easy to do.¹⁴ But there are also normative reasons for resisting this move. One of the strongest arguments for democracy is that it tends to reduce domination, and this argument is trivialized if we define domination such that it becomes analytically true. Suppose we stipulate that to be happy is to be healthy, wealthy, and wise. It will then be trivial to say that the reason to become wealthy is that it will make you happy: of course it will, given that definition! In order to show there is a compelling empirical connection between democracy and freedom, we must first conceive of them as two analytically distinct things.

III

Pettit, in contrast with most other contemporary civic republicans, does not construe the deliberative account of substantive arbitrariness in exactly this manner. Admittedly, his earlier discussions were not sufficiently elaborated, and hence sometimes misleading. Despite his insistence that a determination of arbitrariness ‘is not essentially value-laden,’ many early readers mistakenly assumed he was advancing some version of the objective interests account. Perhaps this was because, although he described ‘the identification of a certain sort of state action as arbitrary’ as ‘an essentially political matter,’ he also indicated that he meant this in the sense of politics being a ‘heuristic’ device for determining the relevant ‘issue of fact’ (Pettit 1997, pp. 56–57). And what is the relevant issue of fact? Apparently, it is the fact about what ‘interests and ideas’ people share ‘in common with others’ (Ibid., p. 55). Without further elaboration, this might seem to imply a hidden assumption regarding some sort of objective account of the common good, though it was not intended as such.

In later writings, Pettit developed his account in greater detail. His line of thinking begins with our imagining a group of persons somehow associated with one another – a group of citizens, for example. Presuming that the members of this group are committed to an *ongoing* association, we would expect that in their various discussions and activities they would over time develop shared ways of doing things among themselves. Indeed, this must be so, for if each simply went her own way at every turn, their association would last only so long as their diverse paths coincidentally happened to align. Among these shared practices, let us assume, will emerge a set of ideas about the sorts of considerations or reasons that are relevant or admissible in deciding what they should do together as a group. As Pettit puts it:

The fact that members of our paradigm group will have deliberated ... over different proposals means that in their evolving practice various considerations and criteria of deliberation will have been identified as reasons that are countenanced as relevant to group decisions and group decision-making. They will constitute *a fund of reasons* such that short of raising novel objections, everyone will be expected to recognize them as relevant to group behavior ... (Pettit 2004, p. 163, emphasis added)

This fund of shared reasons constitutes, for that group, a framework for their deliberations. We would not expect every group to embrace exactly the same sorts of reasons, naturally, but every group must embrace *some* fund of shared reasons, or else deliberation within that group would simply not be possible – there would be

no way for the group to decide what to do when its members happened to disagree, since there would be no agreed-on standards for evaluating the alternatives.¹⁵

Now let us define the ‘ideas and interests’ of the members of our group as simply whatever determinations would be supported by the balance of arguments drawn from that particular group’s fund of shared reasons. In other words, we may say that

A set of practices and policies will be in the public interest in any society just so far as it transpires that by publicly admissible criteria that particular set answers better than feasible alternatives to publicly admissible considerations: the fact that it best satisfies the fund of reasons that are publicly admissible in deliberation about what should be collectively done. (Pettit 2004, p. 164, cf. Pettit 2001, pp. 156–157)

Recall that on the substantive interpretation of arbitrariness, social power is non-arbitrary only to the extent that it is constrained by rules, procedures, or goals answering to the ideas and interests of the persons affected. Here we construe the ideas and interests of the persons affected as whatever determinations would be supported by the balance of admissible reasons shared by those persons as a group – the reasons in their common fund. Thus, to the extent that social power is subject to constraints answering to a group’s specific fund of shared reasons, we may regard its exercise as non-arbitrary, and not an instance of domination; otherwise, it will be arbitrary, and possibly (conditional on further criteria, if any) an instance of domination.

Here we might remark on several features of this account. First, notice that it is not an objective interest account in disguise, since on Pettit’s view it must be the case that the members of the relevant group actually embrace a fund of shared reasons for the reasons in that fund to be determinative of the ideas and interests of that group. Supposing that some group has indeed embraced a particular fund of shared reasons, whatever they happen to be, there is in principle ‘a fact of the matter as to what these support’ – i.e. a fact as to which determinations are supported or not by the balance of reasons in that common fund (Pettit 2001, p. 157).

At the same time, notice that Pettit does not collapse the distinction between non-domination and democracy. Naturally, we would expect that social power is more likely in practice to track the fund of shared reasons in groups organized along democratic lines than otherwise, and this will explain the tight empirical connection between democracy and freedom in the republican sense; but Pettit nevertheless remains agnostic at a conceptual level as to the democratic credentials of the group in question. Ongoing non-democratic groups, just as well as democratic ones, might develop common ways of doing things that include a fund of shared reasons. However decisions are *actually* made in such groups, in principle it will still be possible to pick out the decision that *would have* been favored by the balance of the reasons in their fund, and thus would not count as arbitrary. This means that his account of substantive arbitrariness, while at first pass appearing similar to the deliberative-democratic account, is really something else.¹⁶ Though he would certainly resist this language, the best term for it might be *deliberative-communitarian*, insofar as determinations of arbitrariness on Pettit’s account turn out to hinge on the values shared by the members of the relevant group.

Despite its advantages over the deliberative-democratic account, Pettit’s alternative account of substantive arbitrariness faces difficulties of its own. One puzzle concerns how to analyze situations in which persons subject to social power have not managed to develop a fund of shared reasons, or perhaps only a limited fund

insufficiently rich to give determinate answers on important questions.¹⁷ Slaves subject to the power of diverse masters, for example, might find themselves isolated and unable to form common cause with one another; the subjects of autocratic regimes might analogously find their efforts to develop a shared discourse intentionally suppressed; and so on. When no fund of shared reasons exists, by what standard are we supposed to judge arbitrariness? The answer, perhaps, is that we are supposed to regard social power as arbitrary by default – no matter how constrained procedurally – unless or until some fund of shared reasons comes into being and begins to constrain that power under its jurisdiction. But then we have the problem that power is far too easily found arbitrary, and our hopes for freedom from domination correspondingly dimmed in cases where the development of a fund of shared reasons is impractical. What are we to say of international power relations, for instance, where the prospects for a rich common fund of reasons at the global level would appear remote?¹⁸ How are we to assess international institutions robust enough to constrain powerful nations in the meantime?¹⁹

Perhaps this is merely a theoretical difficulty. But it suggests a deeper worry – namely, that the deliberative-communitarian account will be too conservative. Imagine a society in which some people (say employers) wield arbitrary power over others (say workers). This might be a long-standing instance of domination that has never properly been dealt with, or else it might be a new case that has emerged when some new instrument of power (the contract for labor, say) became widely available. Either way, on the civic republican view, this domination should be a cause of urgent concern. Unfortunately, on the deliberative-communitarian account of substantive arbitrariness, our efforts to constrain social power in such cases will not count as domination-reducing so long as the members of dominated group fail to agree on the form those constraints should take. Perversely, the agents of that domination might themselves encourage disagreement, thus prolonging the difficulty.

Of course we might say that introducing some constraint or other will at least not make things *worse* from a republican liberty point of view, provided that the introducing agent – the state, for example – has itself been previously constrained in the appropriate manner. Alas, this may not be the case. Suppose that, in order to constrain the arbitrary power in question, the state must establish a new regulatory agency with the power to intervene on behalf of the dominated group. This introduces a new power over both groups. It is not enough that this new power be itself constrained (e.g. by the state) unless the affected parties share reasons sufficient to determine the form those constraints should assume. Thus, not only is no domination removed, new domination is apparently added to the pile! This will indeed be a problem whenever it is necessary to set up new regulatory agencies or powers to respond to new challenges.

Pettit's deliberative-communitarian account, in my view, represents an advance over the previous attempts to develop a substantive interpretation of arbitrariness. It does not slide easily into a positive or participatory conception of liberty; it does not collapse the distinction between democracy and non-domination; and it does not wait on a fully-developed doctrine of the human good. Nevertheless, as I have tried to show, it faces serious challenges of its own. Could *any* substantive interpretation of arbitrariness succeed? That is what I will discuss next.

IV

On the procedural interpretation of arbitrariness, we reduce the arbitrariness of social power whenever we introduce effective and reliable constraints on the exercise of that power. On the substantive interpretation, only some constraints genuinely reduce arbitrariness: namely, those meeting some additional substantive requirement. Substantive accounts vary, as we have seen, according to how they specify the substantive requirement at issue, but they all have this much in common: they all distinguish between those constraints that count as genuinely arbitrariness-reducing and those that do not. This is the essential feature that distinguishes the substantive interpretation of arbitrariness, on any of its various accounts, from the procedural interpretation.

The criticisms in the previous sections were specific to the various accounts of the substantive interpretation that have actually been offered in the literature. They do not, as such, demonstrate that some possible account of the substantive interpretation could not succeed – that is, serve better in its technical role within civic republican political theory and philosophy than the procedural interpretation. Civic republicans rely on the concept of arbitrariness to distinguish instances of social power that constitute domination from those that do not, and doing this is important because they hold reducing domination – or in the more usual language, promoting freedom from domination – to be the primary republican political value. In this section, I will try to make out a general case in favor of the procedural interpretation of arbitrariness as against any possible account of the substantive interpretation.

Let us begin with a concrete example. Suppose that for various historical, economic, and cultural reasons, one group in some society manages to acquire a preponderance of social power, which it wields over the other groups in that society directly and without constraint, much to its own benefit. Since the subordinate groups are in no position to challenge directly the preeminence of the powerful group, they instead demand only that the various rights and privileges of the latter be written down, codified, and impartially enforced by independent judges. In time, let us suppose, the powerful group accedes to this demand, on the view that since the rules will be designed to benefit them, after all, there will be no significant cost in their doing so. Now on any account of substantive arbitrariness, it would seem that this change does nothing to affect the levels of domination present in the society. This is because the powerful group is in no way compelled by the newly-introduced rules to wield social power specifically so as to track the welfare and worldview (however understood) of the subordinate groups. But should this be the end of it? In my view, it should not. After the introduction of public rules, the situation has indeed changed, and in an important way. Members of the subordinate groups can now at least know exactly where they stand: they can develop plans of life based on reliable expectations; provided they follow the rules, they need not go out of their way to curry favor with members of the powerful group; and so on (cf. Thompson 1975, pp. 258–269). These are important experiential differences, best captured by saying that the introduction of externally effective constraints on the holders of power itself constitutes a reduction of domination, and something to be desired.

This is not to say, of course, that the advantages enjoyed by the powerful group in the second period are now perfectly fair, or that the subordinate groups could not be made better off in many other respects. Far from it. Rather, it is only to say that not everything that is unfair must also constitute domination. We must keep in mind

the work we want the concept of arbitrariness to perform: its role is specifically to help identify instances of domination, and hence the absence of political freedom. Within civic republican theory, as we have said, political freedom is meant to be a primary political value. On this view, political freedom need not be the *only* valuable thing, nor even lexically prior to other valuable things. What is required is only that it have a certain sort of political priority – i.e. that in most public contexts, especially when it comes to the design of political and social institutions and practices, it should usually be attended to first before we turn to other things.²⁰ In order for freedom from domination to serve as a primary political value in this way, it must be the case that many reasonable persons holding diverse comprehensive doctrines can readily agree both on what counts as an instance of domination, and on the value of reducing its prevalence.

Now it would seem that any account of substantive arbitrariness must hinder, rather than facilitate, these aims. This is all but transparent on the normative common good account, which moralizes the concept of freedom from domination. As noted above, this has the effect of displacing political freedom with a specific normative account of the human good, which no doubt will be the subject of disagreement in pluralistic societies. But in truth, the difficulty is general. Any substantive account of arbitrariness introduces additional criteria for distinguishing which constraints on social power genuinely reduce arbitrariness, and which do not. Even if these criteria are not themselves explicitly normative, they will introduce new subjects of disagreement, and thus render political liberty a value more difficult for diverse persons to agree on. Moreover, substantive criteria will inevitably displace political freedom as a primary political value with something else – namely, whatever it is that makes some constraints rather than others count as genuinely arbitrariness-reducing. For example, suppose the substantive criterion is a welfarist one: thus, constraints will only reduce arbitrariness to the extent that they satisfy the preferences of the relevant persons. In this case, it is really preference satisfaction we are aiming to promote, not political freedom. Our argument would really stand or fall depending on the case we could make out for satisfying preferences as such. Alternatively, suppose the substantive criterion is a communitarian one: thus, constraints will only reduce arbitrariness to the extent that they are supported by the relevant shared values. In this case, it is again really shared values we are aiming to promote, not political freedom. And so on.

Perhaps it would be necessary to introduce substantive criteria if there were no ‘there’ there, so to speak – that is, if there were no distinctive value specifically answering to the term ‘political freedom’. In that case, talk about political freedom would necessarily be displaced by talk about something else, and perhaps it would be best to be explicit about that fact. But in my view, this is not the case. There is a distinctive value specifically answering to the term ‘political freedom’, not reducible to talk about the other things we might value. The example posed near the beginning of this section suggests the sort of value I have in mind: roughly, the value of knowing where you stand in relation to others (whether they are more powerful than you or not), and being able to plan out your life accordingly, without having to count on your ability to curry favor or sympathy down the road. Clearly, political freedom, so understood, is not the only thing we value. Among other things, for example, it is important how well our lives go overall, independently of this – how many of our preferences are satisfied, the extent to which institutions and policies reflect our values, and so on. But this does not detract from the value

of our freedom from domination, which should be regarded as its own distinct value.²¹ Introducing additional substantive criteria to our conception of arbitrariness obscures the distinct value of knowing where you stand by muddling this and other values together under the single heading of political freedom. This would be a mistake, and not merely for reasons of conceptual purity. In practice, distinct values may conflict with one another: sometimes we must decide whether to sacrifice some degree of political freedom in order to secure greater well-being, or vice versa. These are hard choices, which we should think about very carefully. Muddling distinct values encourages the illusion that such choices need not even be made.

When arbitrariness is interpreted procedurally, our conception of domination can better serve in its assigned role within civic republican theory. It is relatively easy for persons holding diverse comprehensive doctrines to agree both on what would count as non-domination, and on its importance. Regardless of a person's conception of the good, she can appreciate the value of knowing where she stands, and being able to plan out a life on that basis. Political freedom, so understood, has compelling credentials to be a primary political value. Under most conditions, it is crucially important to secure procedural non-domination at least, often before other goods which may depend on it for their ultimate success. (There is a plausible case to be made that democracy, e.g. depends on a prior establishment of the rule of law.) Now it might seem that procedural non-domination is too easy, if any constraint will serve, but in fact this is an advantage. If our idea is to make liberty a priority, it will not do for that value to be so demanding that we cannot ever turn to focus on other things.

Any substantive account obscures the distinctive value of knowing where you stand in your relations with powerful others. We need not claim that this is the only valuable thing, only that it is an important and valuable thing in its own right. The procedural interpretation of arbitrariness makes this as clear as possible.

V

The balance of considerations, I have argued, favor a procedural interpretation of arbitrariness. Adopting this view, however, has the consequence that a rigorously legal system of institutionalized discrimination might not, at least under the right conditions, count as an instance of arbitrary power or domination. This grates against our strong prior intuitions. Even if we conclude, after due consideration, that we should to drop this intuition, we may wonder what accounts for it in the first place.

Let us, therefore, consider systems of institutionalized discrimination in somewhat more detail. How do such systems operate? Presumably, they employ an array of public laws and policies that impose special burdens on a group of persons defined racially, ethnically, or in some other defined way. Examples might be: denying persons in this group voting rights, segregating educational facilities, disallowing the members of this group to take up certain professions, blocking certain legal actions to the members of this group, and so forth. To be sure, no reasonable person would deny that laws and policies of this sort are bad for those persons unfortunate enough to be members of the group in question, but we must admit that they need not be arbitrary in the procedural sense. Any given member of the group could know in advance that they are not allowed to ϕ , and the law prohibiting their ϕ -ing could be enforced with absolute impartiality and procedural fairness (in the sense that only members of the specified group are punished for ϕ -ing, they are

punished if and only if they have in fact ϕ -ed, and the punishment imposed is no more or less than what the rules require in that event).

Of course, institutions are not themselves social actors, and thus strictly speaking cannot be said themselves to dominate anyone. Rather, institutions (and social conventions more broadly) constitute the structural environments for social relationships within which some people might wield arbitrary power over others. Now in many instances, discriminatory laws and policies create precisely such environments. One example would be a law that effectively blocked legal actions in defense of the members of some defined class: this would allow other people arbitrarily to harm the members of that class with impunity. Under Jim Crow, for example, this result was more or less effectively obtained by excluding blacks from the jury pool. Arbitrariness in the procedural sense is thus involved here after all, and so we might correctly say that such laws support domination. But in other instances, discriminatory laws or policies need not create situations of this sort. We might imagine, for example, a law that prohibits the members of some group from becoming furniture makers. While such a law would certainly be objectionable on equal opportunity grounds and so forth, it need not create problems of procedural arbitrariness specifically.²²

Real-world systems of institutionalized discrimination tend to combine laws and policies of both sorts into a single, complex mass. Not unreasonably, we view the mass as a single problem because it stems from a single source: the desire – born of self-interest, of hatred, of misunderstanding, etc. – of some persons in one group to systematically disadvantage the members of another group. Some of the laws and policies in this mass may constitute relations of domination, while others may not. It is natural, however, in the absence of a more precise analysis, to come to regard the whole mass as implicated in the domination of one group by another. This accounts, I think, for our strong prior intuition with regard to such cases.

It is important to keep in mind that our question here is strictly a technical one. Given that we are going to define freedom as non-domination, and domination as arbitrary power, which interpretation of arbitrariness is the most useful one for a civic republican political doctrine? Adopting the procedural interpretation entails that we cannot count those specific laws and policies that do not themselves create opportunities for the exercise of (procedurally) arbitrary power as instances of domination in the relevant sense. Political and social institutions and practices are implicated in domination specifically – whatever their other merits or demerits – only when they enable one person or group to wield (procedurally) arbitrary power over another. Once all the relevant considerations are in, revising this single prior intuition seems the better option.

This conclusion is less worrisome than it might appear. Domination is a bad thing, certainly, but by no means is it the only bad thing. It is bad to starve, for example, but it does not follow that to starve is to be subject to domination. It is also bad to treat others unfairly in the distribution of goods and opportunities, but it does not follow that this is, as such, to subject them to domination. Domination is one thing, and unfairness another. Collapsing such values only makes each less clear and precise than it should otherwise be, and the challenge of weighing them against one another when they conflict even more difficult to perform.

Notes

1. The civic republican literature is enormous, but see especially Pettit (1997), Skinner (1998), and Viroli (2002), or Lovett and Pettit (2009) for a recent review.

2. Of course this doubt need not be crippling if it is possible to reduce domination through alternate means – for example, by *equalizing* shares of power.
3. See, e.g. Christman (1998), Larmore (2004), or Friedman (2008).
4. For further discussion of the conditions under which discretionary authority might not count as arbitrary, see Pettit (1997, chaps. 6–7) and Richardson (2002).
5. O.E.D., 2nd ed., *loc. cit.*
6. Arbitrariness, so defined, is not merely an excessive sort of discretion. Discretion is an ambiguous umbrella term that covers both unconstrained power as well as power that happens to be constrained in the manner suggested above by common-knowledge goals, rather than rules or procedures.
7. For this technical characterization of the distinction between effectiveness and reliability I am indebted to List (2006) and Pettit (2008).
8. This worry is rather forcefully put by Hacker-Cordón (2011).
9. Here cf. Richardson (2002, chap. 3).
10. Note that, in each case, when more than one person is subject to the social power of a given agent, we must also give an account of how the relevant ideas and interests are to be aggregated – no easy task itself. I will leave this problem aside, however.
11. This is not to suggest that civic republicans can do without a theory of the good entirely. A relatively thin theory, at least, will be necessary in order to show that freedom from domination is an important human good. Identifying cases of domination, however, is a task distinct from evaluating them, and here the issue is identifying them.
12. Civic republicans adopting this view include: Skinner (1991, 1998), Pettit (1999, 2004), Richardson (2002), Maynor (2003, 2006), Bellamy (2007), and Bohman (2008).
13. It is ambiguous on this view what we should make of a person or group who, after suitable deliberation, opts to grant another person or group *procedurally* unconstrained power over them. Presumably, the republican view has to be that this nevertheless counts as arbitrary power: in order to be non-arbitrary, power must satisfy *both* procedural *and* substantive requirements.
14. And indeed this question precisely has been the subject of some debate: see, e.g. Maynor (2006), Bellamy (2007), and Bohman (2008).
15. Or at any rate, this must be true of any group that, at least some of the time, actually engages in deliberative decision-making concerning group activities.
16. This difference is missed, for example, in Lovett (2005).
17. A related puzzle, of which space does not permit a full consideration, concerns how to analyze the domination of a single person. Are the relevant ‘ideas and interests’ then simply whatever she (the subject of domination) regards as relevant? If so, this account would simply collapse into a story of subjective consent, which Pettit has aimed to avoid (see Pettit 2001, p. 156, 2004, p. 159).
18. See Dahl (1999).
19. This is, no doubt, equally a challenge on the deliberative-democratic account, but for a contrary view see Bohman (2008).
20. Usually in most contexts, but not necessarily always in all contexts: for example, during a humanitarian crisis, when people’s survival itself is at stake, our humanitarian obligations no doubt take priority over other considerations.
21. For further discussion of the connections between freedom from domination and human flourishing, see Lovett (2010, pp. 127–136).
22. Laws of this sort often do, of course. For example, if the members of a group are prohibited from being lawyers, this might result in a legal incapacity similar to the one described above – but then, of course, we bring arbitrariness back into the picture, and the procedural view is unharmed.

Notes on contributor

Frank Lovett is associate professor of Political Science at the Washington University in St Louis, and from 2008 to 2009, he was visiting Fellow at the Princeton University Center for Human Values. His primary research concerns the role of freedom and domination in developing theories of justice, equality, and the rule of law. He is the author of *A General Theory of Domination and Justice* (Oxford, 2010).

References

- Bellamy, Richard, 2007. *Political constitutionalism: a republican defense of the constitutionality of democracy*. Cambridge: Cambridge University Press.
- Berlin, Isaiah, 1969. Two concepts of liberty. In: *Four essays on liberty*. Oxford: Oxford University Press.
- Bohman, James, 2008. Nondomination and transnational democracy. In: John Maynor and Cécile Laborde, eds. *Republicanism and political theory*. Malden, MA: Blackwell.
- Carter, Ian, 2008. How are power and unfreedom related? In: Maynor John and Laborde Cécile, eds. *Republicanism and political theory*. Malden, MA: Blackwell.
- Christman, John, 1998. Review of Pettit's. *Republicanism: A Theory of Freedom and Government in Ethics*, 109, 202–206.
- Dahl, Robert A., 1999. Can International organizations be democratic? A skeptic's view. In: Ian Shapiro and Casiano Hacker-Cordón, eds. *Democracy's edges*. Cambridge: Cambridge University Press.
- Ferejohn, John, 2001. Pettit's republic. *The Monist*, 84, 77–97.
- Friedman, Marilyn A., 2008. Pettit's civic republicanism and male domination. In: John Maynor and Cécile Laborde, eds. *Republicanism and political theory*. Malden, MA: Blackwell.
- Hacker-Cordón, Casiano, 2011. Review of Lovett's. *A General Theory of Domination and Justice in Perspectives on Politics*, 9, 705–706.
- Larmore, Charles, 2004. Liberal and republican conceptions of freedom. In: Daniel Weinstock and Christine Nadeau, eds. *Republicanism: history, theory, and practice*. London: Frank Cass.
- List, Cristian, 2006. Republican freedom and the rule of law. *Politics, Philosophy, and Economics*, 5, 201–220.
- Lovett, Frank, 2005. Milton's case for a free commonwealth. *American Journal of Political Science*, 49, 466–478.
- Lovett, Frank, 2010. *A general theory of domination and justice*. Oxford: Oxford University Press.
- Lovett, Frank and Pettit, Philip, 2009. Neorepublicanism: a normative and institutional research program. *Annual Review of Political Science*, 12, 11–29.
- Maynor, John W., 2003. *Republicanism in the modern world*. Cambridge: Polity Press.
- Maynor, John W., 2006. Modern republican democratic contestation: a model of deliberative democracy. In: Iseult Honohan and Jeremy Jennings, eds. *Republicanism theory and practice*. London: Routledge.
- Pettit, Philip, 1997. *Republicanism: a theory of freedom and government*. Oxford: Clarendon Press.
- Pettit, Philip, 1999. Republican freedom and contestatory democratization. In: Ian Shapiro and Casiano Hacker-Cordon, eds. *Democracy's value*. Cambridge: Cambridge University Press.
- Pettit, Philip, 2001. *A theory of freedom: from the psychology to the politics of agency*. Oxford: Oxford University Press.
- Pettit, Philip, 2004. The common good. In: Keith Dowding, Robert E. Goodin, and Carole Pateman, eds. *Justice and democracy: essays for Brian Barry*. Cambridge: Cambridge University Press.
- Pettit, Philip, 2008. Freedom and probability: a comment on Goodin and Jackson. *Philosophy and Public Affairs*, 36, 206–220.
- Richardson, Henry S., 2002. *Democratic autonomy: public reasoning about the ends of policy*. Oxford: Oxford University Press.
- Skinner, Quentin, 1991. The paradoxes of political liberty. In: David Miller, ed. *Liberty*. Oxford: Oxford University Press.
- Skinner, Quentin, 1998. *Liberty before liberalism*. Cambridge: Cambridge University Press.
- Thompson, E.P., 1975. *Whigs and hunters: the origins of the Black Act*. New York, NY: Pantheon Books.
- Viroli, Maurizio. 2002. *Republicanism*. Antony Shugaar, Trans. New York, NY: Hill and Wang.
- Wartenberg, Thomas E., 1990. *The forms of power: from domination to transformation*. Philadelphia, PA: Temple University Press.