

SYMPOSIUM  
REPUBLICANISM BETWEEN JUSTICE AND DEMOCRACY



REPUBLICANISM,  
DEMOCRATIC PARTICIPATION,  
AND UNELECTED AUTHORITY

BY  
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# Republicanism, Democratic Participation, and Unelected Authority

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**R**epublican theorists, committed to realizing freedom as non-domination, have taken differing positions on the compatibility of their political ideals with democracy. In this paper, I argue that republicans should adopt a participatory democratic approach to politics. I defend this view by working through ambiguities in Philip Pettit's recent writings on democracy, popular control, and unelected authority. He suggests that, alongside participatory institutions, unelected authorities like central banks, sentencing commissions, and regulators have crucial functions in democratic government. I argue that Pettit's defense of such unelected authority requires clarification and revision. Critiquing his approach, I offer an alternate version of republican democracy. I argue that unelected authorities can only be justified on the basis of popular control and must not undermine actual public participation. As a result, Pettit should give unelected authority a less far-reaching role in his theory of democracy, while relying more extensively on popular participation.

## I

### Introduction

The relationship between republicanism and democracy is complex. Republican theorists, who have a firm commitment to freedom, understood as non-domination, have supported democratic governance to different extents and for different reasons. According to some republicans, democratic decisions can have deleterious consequences for citizens' freedom. In response, they restrict democratic participation to protect citizens. Other republicans see democracy as necessary to support non-domination, however. Moreover, their justifications for democracy, coupled with their views of democratic legitimacy, affect what level of political participation they aim to institutionalize. In this article, I examine the democratic theory of one of the greatest contemporary republican theorists, Philip Pettit, to evaluate his attempts to navigate these issues. Doing so reveals problems with Pettit's view, as well as the need for republicans to adopt more strongly participatory conceptions of democracy.

Pettit's views on the relationship between republican freedom and democracy shift over the course of his writings. His earlier work focuses on protecting citizens' interests, supporting what he calls "depoliticization" rather than participatory forms of democracy. Many criticize this approach from a democratic perspective.<sup>1</sup> His later work reinterprets freedom as non-

<sup>1</sup> See, for example, Nicholas Southwood, "Beyond Pettit's Neo-Roman Republicanism: Towards the Deliberative Republic," *Critical Review of International Social and Political Philosophy* 5 (2002): 16-42; Henry Richardson, *Democratic Autonomy* (Oxford: Oxford University Press, 2003); Cristina Lafont, "Is the Ideal of a Deliberative Democracy Coherent?" in *Deliberative Democracy and Its Discontents* (Aldershot: Ashgate, 2006), 3-26; John McCormick, *Machiavellian Democracy* (Cambridge: Cambridge University Press, 2011).

domination as tightly connected to popular control, solidifying his commitment to democracy. This approach, which suggests that democracy furthers non-domination, is closer to those who see republicanism and democracy as allies. I argue that Pettit does not go far enough in reconciling his republicanism with participatory democracy.

To spell out his democratic commitments, Pettit outlines the degree of political participation necessary for democratic legitimacy. He argues that unelected authorities—like central banks, sentencing commissions, and regulators—have a crucial function in democracy alongside participatory forms of governance. Pettit’s arguments for such unelected authority require clarification and revision; otherwise his view will lapse into a paternalism that undermines freedom as non-domination. Critiquing his approach, I offer a revised version of republican democracy that takes participatory democracy as essential for preserving freedom as non-domination. Drawing on Pettit’s own examples, I argue that unelected authorities can only be justified on the basis of popular control and that they must incorporate actual public participation into their decision-making. This revision means that Pettit should afford unelected authority a less far-reaching role in his theory of republican democracy, and instead should rely more extensively on popular participation.

To build this argument, I will begin by laying out the aspects of Pettit’s theory that support his commitment to democratic legitimacy. Realizing a republican conception of freedom demands popular control, he suggests. Pettit does not view popular control as synonymous with participation, however. On his view, participation is instrumentally valuable as a way of realizing popular control, which means non-participatory institutions may sometimes be called for if they offer greater popular control than participatory ones. To tease out the details

of this view, I explain three different types of popular participation: elections, deliberative forums, and civil society-based participation. While Pettit has a secure place for elections in his view, he does not have as strong a commitment to the other two forms of participation. He does, however, offer strong support for unelected, non-participatory authorities in some cases. To raise concerns about this latter stance, I proceed to demonstrate that Pettit's support for unelected authority is based on ambiguous grounds. His arguments sometimes seem to fit with his commitment to popular control, but he appears to advert to other justifications at times. To determine whether Pettit's position on unelected authority is coherent, I look at different ways he might defend his position. I argue that, ultimately, he must ground his support for unelected authority on popular control. That requirement turns out to raise problems for aspects of Pettit's position, however. I look at different interpretations of popular control and conclude that hypothetical interpretations of it—which would strongly support unelected authority—fail to fit with Pettit's overall republican stance. Only an understanding of popular control based on actual participation can succeed, but that will require Pettit to give up some of his claims about the institutionalization of unelected authority in republican government. Instead, the best reading of popular control permits unelected authority, but does not require it. Even when such authority is put in place to support popular participation, the public must always be able to have a say at some point in the political process. Popular consent turns out to be crucial for Pettit's republican conception of democracy, which means he must rethink his institutional proposals to include a greater emphasis on participation.

## II

### From Non-Domination to Republican Democracy

Republican theorists have built novel theories of democracy grounded on the value of freedom as non-domination. Pettit's approach begins with his republican conception of freedom, prioritizes legitimacy, and then argues for a version of democracy.<sup>2</sup>

To explain how democratic law can avoid being dominating, Pettit introduces the idea of controlled interference, as exemplified in the following case. Suppose that Martin follows Barbara's instructions and refuses to hand over the key to her liquor cabinet. Martin's act, in spite of interfering with Barbara in the moment, is consistent with freedom as non-domination.<sup>3</sup> If an agent who is interfered with controls the other person's power to interfere, such interference does not come from an "alien will" and does not count as arbitrary subjection or domination. Interference is sometimes wished for, which means it does not count as dominating. And if legal interference is wished for, then it is legitimate, much like in the liquor cabinet case.

Here is where Pettit brings democracy into his theory. He contends that legitimacy requires a form of government that can

<sup>2</sup> Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012). See especially, chapter 1. Pettit also discusses these ideas in *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997). Throughout this discussion, I focus mainly on Pettit's position in *On the People's Terms*, although I will also draw from his earlier works. This recent book takes up, revises, and synthesizes a great deal of Pettit's earlier work on democracy and legitimacy, making it the best text to focus upon for addressing the questions about democratic participation I look at here.

<sup>3</sup> Philip Pettit, *On the People's Terms*, 58. I have added names to this example for clarity's sake.



only be realized via democratic institutions that enable a certain form of popular control over decision-making. Only then does the coercive power of the state avoid violating freedom as non-domination.<sup>4</sup>

At least two conditions must be in place to realize popularly controlled interference. Pettit suggests that along with paradigmatic examples of intentional controlled interference like the liquor cabinet case, non-intentional forms are also possible. As an example, Pettit adopts a case from Amartya Sen where a person lies in a coma, but family and friends carry out the patient's wishes regarding his treatment. His wishes direct treatment (treatment would be different if his wishes were otherwise), but he does nothing intentional to exert control, instead relying on others, given his state.

Pettit distinguishes such control from consent, the latter being less significant in his theory.<sup>5</sup> He thinks one can exert control in situations where one does not *currently* consent to some interference, as with the aforementioned cases. While current consent may sometimes be unnecessary for non-domination, later in the paper I propose that the possibility of consent at some stage of legal interference is crucial.

Pettit sets several conditions on popular control, all of which must be satisfied to render the state legitimate.<sup>6</sup> First, each citizen must have an equal share of control over the political regime. While they needn't participate equally, they must have *access* to the political system on an equal basis. Additionally, the direction imposed on state decisions must be acceptable to each citizen.<sup>7</sup>

<sup>4</sup> Philip Pettit, *On the People's Terms*, 153.

<sup>5</sup> Philip Pettit, *On the People's Terms*, 157.

<sup>6</sup> Philip Pettit, *On the People's Terms*, 166-67.

<sup>7</sup> He restricts the class of people to whom it must be acceptable to those willing to live on equal terms with others. See Philip Pettit, *On the People's Terms*,

While Pettit does not say much about this idea, acceptability does not seem to require that citizens find a decision to be correct, but that it falls within a range of acceptable decisions. Control must also not be conditional on the whims of the regime the people are supposed to be able to influence.<sup>8</sup> Finally, popular control must be efficacious, meaning citizens should not have to relate to the government as an alien will imposed upon them. Pettit's "tough-luck test" is meant to make sure popular control is truly efficacious. The idea of this test is that individuals should be able to see state actions they disagree with as tough luck, not the product of special influence.

Pettit proposes to institutionalize a republican model of democracy to meet these stringent requirements on political legitimacy. He advocates an assembly of elected representatives responsive "at some level to what they see as the wishes of [...] constituents."<sup>9</sup> While he contends there is no conceptual

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170. Pettit explains that acceptability does not mean that something *ought to be accepted*. Acceptability, for Pettit, means people are disposed to accept something or find it acceptable.

<sup>8</sup> Philip Pettit, *On the People's Terms*, 170-71.

<sup>9</sup> Philip Pettit, *On the People's Terms*, 198. To institutionalize democratic lawmaking, he rejects forms of direct democracy like plenary assemblies and popular referenda, due to concerns about inconsistencies he believes they are liable to generate. Given the more limited numbers of decision-makers within such assemblies, as well as their deliberative nature, Pettit contends they can avoid contradictions in the laws they adopt. Pettit discusses the discursive dilemma, which is his argument for why such inconsistencies are a threat in *On the People's Terms*, 191-92. For more in depth discussion of the dilemma (which I do not have space to delve into here), see Christian List and Philip Pettit, "Aggregating Sets of Judgments: An Impossibility Result" *Economics and Philosophy* 18 (2010): 89-110. Pettit also rejects what he calls an indicative assembly, which proportionately represents various interest groups in a society. Such institutions can have a limited role in a democratic society (he mentions the British Columbia Citizens' Assembly), but he is skeptical of them as a state's main legislative body.

connection between electoral institutions and the popular control that republican legitimacy requires, he thinks that in practice, they are needed.<sup>10</sup> To enable popular control, such representative democracy must enact an individualized system of influence, including equal voting rights, which is efficacious and not conditional on wills that are alien to the people's will.

In cases of entrenched majorities, Pettit argues that minority group members should be able to contest decisions where entrenched majorities undermine their equal individual influence. To enable such contestation, Pettit proposes non-majoritarian political institutions to counterbalance representative assemblies and protect equal influence. Besides taking certain options off the table (as in a bill of rights), Pettit mentions courts, ombudsmen, alternative modes of decision-making (like deliberative polls), impartial commissions, and giving minority opinions extra say on certain issues.<sup>11</sup>

### III

#### **Participation in Pettit's Democracy**

While popular control is necessary for legitimacy, Pettit distinguishes it from active public political participation. At best, such participation is instrumentally necessary to realize freedom as non-domination in some circumstances, on Pettit's view. In this section, I lay out Pettit's claims about when participatory decision-making is and is not required by legitimacy. His stance on participation will raise questions about whether his commitment to the value of popular control actually supports his claims about participation or not.

<sup>10</sup> Philip Pettit, *On the People's Terms*, 207-8.

<sup>11</sup> Philip Pettit, *On the People's Terms*, 216-17.

There are various forms active participation can take. Citizens can participate in elections, deliberative forums, and broader public sphere debates and social movements in civil society.<sup>12</sup> Given Pettit's consequentialist republican commitments, any given type of participation will be evaluated according to how well it promotes popular control. When participatory institutions fail to promote popular control, which Pettit suggests sometimes occurs, he will defend non-participatory decision-making.

Voting in elections is, in Pettit's republican system, the most securely justified form of participation. Voting-based electoral systems, Pettit thinks, are contingently necessary for realizing freedom as non-domination.<sup>13</sup> As a result, he supports elected legislatures as central to popular control and democratic legitimacy.

When it comes to deliberative forums and civil society-based participation, Pettit's consequentialist perspective does not permit any universally applicable conclusions about whether such forms of participation are required. It depends on the conditions in which such participation is to be instituted. Because Pettit appeals

<sup>12</sup> Voting is, of course, a familiar form of participation. For a description of local deliberative institutions, see Archon Fung and Erik Olin Wright's "Thinking About Empowered Participatory Governance" in *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (New York: Verso, 2003). One helpful definition of such participatory forums goes as follows: "A governing arrangement where one or more public agencies directly engage non-state stakeholders in a collective decision-making process that is formal, consensus-oriented, and deliberative and that aims to make or implement public policy or manage public programs or assets." See Chris Gansell and Alison Gash, "Collaborative Governance in Theory and Practice," *Journal of Public Administration Research and Theory* 18 (2008), 544. For a classic explanation of public sphere and social movement participation in democracy, see Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996).

<sup>13</sup> Philip Pettit, *On the People's Terms*, 207-8.

to both deliberative forums and civil society-based participation, however, they are clearly permitted by his theory and will be required if necessary for maximizing popular control.

While deliberative forums—institutions where unelected citizens meet to deliberate over political issues—have a place in Pettit’s democracy, he does not think they can be the sole form of representation in a political regime.<sup>14</sup> Pettit suggests such deliberative forums should focus on particular issues, not adopt the broad agenda parliaments do. These forums’ role in republican democracy may largely be advisory, as with the British Columbia Citizens’ Assembly. That is, on particular issues, deliberation may be farmed out to forums whose conclusions are then subject to some form of public approval via representative bodies or referenda.<sup>15</sup> As we shall see, Pettit also considers using deliberative forums to resist popular participation.

Civil society-based participation—broad engagement in public sphere debates and social movements—has a much broader role to play in democracy, as Pettit describes it. Pettit suggests that the type of representative assembly he supports will be concerned about reelection, making them responsive to such civil society advocacy. He doubts representatives will vote precisely as citizens would, but suggests that legislators will, at least, be affected by the demands of the public sphere.<sup>16</sup>

<sup>14</sup> Philip Pettit, *On the People’s Terms*, 201. He considers a variety of types of such forums, not just the localized variety some theorists advocate. See, e.g., Joshua Cohen, *Philosophy, Politics, Democracy: Selected Essays* (Cambridge, MA: Harvard University Press, 2010), especially “Directly Deliberative Polyarchy” (co-authored with Charles Sabel) and “Reflections on Deliberative Democracy.”

<sup>15</sup> Philip Pettit, *On the People’s Terms*, 205.

<sup>16</sup> In Chapter 5 of *On the People’s Terms*, Pettit also articulates a “dual-aspect model” of democracy where political influence is organized so everyday

While Pettit allows both deliberative forums and civil society as means of participatory control, his consequentialism also permits much less participatory forms of decision-making. For some political issues, Pettit will not rely on deliberative forums or civil society if a different process better supports popular control. More conventional judicial processes and rights protections can play this role, but he also mentions special commissions and procedures that give greater weight to minority viewpoints.<sup>17</sup> Moreover, he thinks public participation—especially through civil society—can be acted upon legislatively in a variety of permissible ways. Judicial bodies, legislatures, and even lotteries are some methods he suggests for making public influence determinate.<sup>18</sup>

## IV

### **Unelected Authorities in Pettit’s Democracy**

Pettit’s defense of unelected, non-participatory authority in certain political contexts poses problems for his view. If we start from the most attractive interpretation of the republican values of non-domination and public control, Pettit cannot justify instituting unelected authority in all the instances he recommends. One central problem is Pettit’s failure to adequately confront the problem of determining who decides when decision-making power should be non-participatory. While surely participation can undermine popular control, Pettit does not sufficiently explain how to determine if threats exist and how to confront them in a

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political contestation leads to the formation of background norms that influence policy-making. This short-term give-and-take is meant to develop into a long-term process where certain generally acceptable considerations gain public sway, strongly influencing policymaking.

<sup>17</sup> Philip Pettit, *On the People’s Terms*, 216.

<sup>18</sup> Philip Pettit, *On the People’s Terms*, 175.

manner consistent with democratic legitimacy. A concern for non-domination creates pressure to allow wider-ranging participation. Thus, the most consistent and attractive institutionalization of republican democracy has a stronger presumption in favor of participation than Pettit's stated position suggests.

Pettit's stated position requires unelected authorities to limit participation. He has defended this commitment in the past.<sup>19</sup> In previous discussions of those issues, Pettit appealed mainly to maximizing the protection of people's interests through taking certain decisions out of their hands. In his most recent formulations, however, he has begun to justify unelected authority on the basis of the democratic value of popular control. To support popular control over certain issues, Pettit suggests that participation must sometimes be restricted. The threats to popular control he names are elected politicians, private lobbying groups, and unelected government authorities themselves. To deal with these threats, Pettit proposes some conventional measures, while also considering some less familiar remedies. As we will see, his approach to unelected authority is ultimately in tension with public control.

With respect to politicians, Pettit recommends taking issues related to their re-elections out of their hands, in addition to making sure that independent authorities are in charge of collecting economic and statistical data. He is also concerned that politicians interested in reelection will focus on voters' short term, rather than long-term concerns. As a result, he suggests that

<sup>19</sup> For his evolving discussion on these matters, see Philip Pettit, "Deliberative Democracy, the Discursive Dilemma, and Republican Theory," *Philosophy, Politics, and Society* 7 (2003): 138-62; Philip Pettit, "Depoliticizing Democracy," *Ratio Juris* 17 (2004): 52-65; Philip Pettit, "Three Conceptions of Democratic Control," *Constellations* 15 (2008): 46-55.

certain policy areas be taken out of politicians' hands and handled by bodies that need not worry about reelection. "Politicians, being focused on the electoral short-term, are always likely to favour lower interest rates, easier energy and environmental demands, and tougher, retributively satisfying sentences," he contends.<sup>20</sup> They are tempted to legislate based on their electoral interests in these policy areas, rather than considering public influence or the conditions for its expression.

Pettit suggests that various unelected bodies (citizens' assemblies, central banks, etc.) can take over these (and perhaps other) areas from politicians and administer them more effectively. Some unelected bodies constitute forms of (often limited) public participation, while others are quite the opposite. His proposals for dealing with private interest groups usurping the political process are more conventional: ridding campaigns of pernicious monetary influences and making space for independent public media.

When it comes to the unelected authorities that he promotes, however, he recognizes that they may also present a threat to popular control. To address this concern, he suggests that some independent body should police unelected authorities. Pettit also thinks such authorities must have certain qualifications, be held to professional reputational standards, have a mission with presumptive popular support, and be made transparent and open to contestation. While he does not provide copious detail, he sees these conditions, when suitably imposed, as sufficient to undercut domination from unelected authorities in government.

There is some lack of clarity in Pettit's advocacy of unelected authorities here, at least in the cases he invokes. While his overt justification for relying upon unelected authorities is to make sure

<sup>20</sup> Philip Pettit, *On the People's Terms*, 232.



popular control is preserved, his arguments sometimes seem to rely upon other grounds. This ambiguity about the relationship between popular control and unelected authority is taken up in the next section. According to Pettit, certain sorts of issues—for whatever reason—tempt elected politicians into making problematic decisions.<sup>21</sup>

## V

### **Evaluating Potential Justifications for Unelected Authority**

Since our focus here is legitimacy, we should focus on the value of popular control when deciding on institutions. Whether all of Pettit's claims about unelected authority can be supported in terms of popular control, rather than other values, is unclear. While it makes sense to think electoral issues would tempt politicians, Pettit's special mention of issues like environmental regulation and criminal sentencing are not as easy to support. If the public wants to kick a politician out of office through elections, it is in that politician's interests to manipulate elections to maintain power. If the public judges some environmental or sentencing policy as the correct one to adopt, it is unclear what would tempt a politician to act otherwise on these issues, in particular.<sup>22</sup> While Pettit may be right that politicians sometimes follow people's tendency to focus on short-term interests at the cost of their long-term interests regarding these issues, this

<sup>21</sup> There are, he says, "areas of policy-making in which elected politicians would have to be saintly not to be moved by their own interests, regardless of what popular influence supports—or indeed of what the preconditions for popular influence require." (Philip Pettit, *On the People's Terms*, 232)

<sup>22</sup> There may be countervailing influences like the money and power of certain individuals or groups, but Pettit is clear that these factors cannot permissibly be in play. So to speak more exactly: absent problematic, external influences, politicians concerned with reelection lack reasons to buck public opinion.

possibility does not relate to popular control in any obvious way.

There may be powerful arguments for thinking that long, retributive sentencing laws are socially harmful, but that is not to say that the public does not actually judge them desirable. They may wish to influence government in the direction of lengthening certain sentences, based upon reasons that all find acceptable. In order to set aside certain policy arenas from elected officials, Pettit's criteria of legitimacy require him to appeal to popular control, not the goodness or badness of particular policies. That, however, is precisely what Pettit seems to do. He appears to make his argument for unelected officials taking control of certain non-electoral issues on substantive, non-legitimacy-based grounds, adding some new dimension besides popular control into the equation. In the past, he discussed these issues in a similar fashion, making his argument based on his views about the bad consequences of publicly supported policies regarding sentencing.<sup>23</sup>

Republicans must explain how institutionalized decision-making processes should be established and altered without undermining non-domination and public control. From a republican perspective, there are better and worse ways to organize institutions for political decision-making. Given the ambiguities in Pettit's argument for unelected authorities, I will evaluate several different ways Pettit could justify institutionalizing unelected authority in his theory of republican democracy. The most attractive one constitutes a more participatory version of republicanism than Pettit's stated view.

<sup>23</sup> See Philip Pettit, "Depoliticizing Democracy," especially. For an earlier discussion of his view of when interference is appropriate, see Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Oxford: Oxford University Press, 2001).

Pettit could plausibly rely on three potential justifications for unelected authority, falling into two broad categories: those that do not appeal to popular control and those that do. First, I suggest that justifications for unelected authority that do not appeal to popular control have no place in Pettit's republican theory of democracy. Next, I look at two other options that do appeal to popular control. One is based on hypothetical agreement and the other is based on actual participation, each of which constitutes a competing interpretation of popular control. I ultimately defend the actual participation-based approach, as well as the institutions it demands, as the most attractive formulation of republican democracy. The best interpretation of popular control will not support unelected authority in as many cases as Pettit thinks. Instead, it creates presumptive warrant for participatory institutions and, in most cases, demands that the public controls whether unelected authority is established.

#### *A. Non-Popular Control-Based Justifications*

One possible justification for unelected authorities is that they can promote certain goods that trump whatever value popular control has. In the past, Pettit defended the view that such non-participatory institutions can correct failures of public judgment.<sup>24</sup> Insofar as Pettit aims to circumvent public judgment for the sake of citizens' long-term interests, he relies on a rationale other than popular control.

This approach to determining when unelected authority should replace participation conflicts with the overall thrust of Pettit's theory in its most recent form. Restricting citizens' electoral or participatory influence solely for the sake of

<sup>24</sup> See Pettit's *A Theory of Freedom*, "Depoliticizing Democracy," and *Republicanism*.

protecting their interests is insufficient. Arguments for unelected authority based on “costs that electors may be presumed to care about” not considerations the public *actually* avows, threatens to lapse into paternalism, which he expressly wants to avoid.<sup>25</sup> Recognizing that interests must be interpreted, Pettit sees paternalism as imposing one’s own interpretation on another’s interests and intervening in that person’s choice on the basis of interpretations of their interests that are alien to them. The intervener discounts the self-interpretation of the person who is interfered with. To avoid paternalism, a person may only interfere based on “interests that [person is] disposed or ready to avow, where that readiness is easily tested and established.”<sup>26</sup> That is, an outside interpretation of the public’s interests cannot be allowed to usurp citizens’ control over when and how they are interfered with. If Pettit claims that some “objective” interpretation of citizens’ long-term interests justifies restraint on participation, he will have to give up a core aspect of his republican commitment to non-domination: anti-paternalism. Pettit’s proposals for unelected authority in contested arenas like fiscal policy, environmental regulation, and criminal sentencing cannot rely on interest-based justifications, then.

### *B. Popular Control-Based Justifications*

Beyond the non-popular control-based approach, there are two rationales for unelected authority that appeal to popular control, but interpret that concept differently.<sup>27</sup> Popular control

<sup>25</sup> Philip Pettit, *On the People’s Terms*, 232.

<sup>26</sup> Philip Pettit, *On the People’s Terms*, 59.

<sup>27</sup> The distinction I apply here—between hypothetical agreement and actual consent—is drawn from Cristina Lafont, “Agreement and Consent in Kant and Habermas: Can Kantian Constructivism Be Fruitful for Democratic Theory?” *The Philosophical Forum* 43 (2012): 277-95.

might be fleshed out from the third person standpoint as the hypothetical agreement of a properly constituted public. This option understands popular control in terms of what an ideally constituted public would decide and determines when unelected authority is warranted accordingly. As an alternative to this approach, popular control might be understood as something that requires the actual participation and consent of the public. That would mean that a third party like a political philosopher could not determine when decisions ought to be taken out of the public's hands. These two interpretations of popular control differ over when unelected authority can be instituted. I argue that the approach based on actual participation is superior.

### *1. Hypothetical Popular Control*

In justifying unelected authority, Pettit could argue that the public *would* agree to be governed by such an institution if they engaged in idealized discussion about what kind of decision procedure ought to be in place. That is, a hypothetical decision-making ideal can be articulated and applied to potential institutions to evaluate whether they promote popular control. This hypothetical agreement approach asks whether a procedure would be adopted under particular ideal conditions. If it could be agreed to in such conditions, then it is an expression of popular control, even if actual citizens did not agree to the proposed institution.

In taking this approach, Pettit could support many, if not all, of his specific claims about when unelected authority is justified. That is, this way of understanding popular control is consistent with his claims about the need for unelected authority to decide issues in monetary policy, energy policy, and criminal sentencing policy. In the last section, we saw that justifying such authority

based on objective interests fails, since this approach leads to a paternalism that Pettit wants to avoid. By taking a hypothetical agreement approach instead, Pettit can justify these proposals on the basis of popular control, albeit an idealized non-actual sort. He can suggest that citizens, in suitable conditions, *would* agree to remove certain issues from the control of elected authorities.

In the case of sentencing policy, Pettit could argue that the public, provided with equal influence under the right conditions, would arrive at an equally acceptable conclusion that an unelected authority should decide sentencing policies. This argument describes a hypothetical, improved version of the public, modeling what it would do if it took into account all relevant considerations, including the likelihood that elected officials would focus on the public's short, rather than their long-term interests.

While an apparent improvement upon justifications for unelected authority, this hypothetical model faces serious issues, as well. Although the hypothetical agreement view is meant to provide an interpretation of popular control, its justification of unelected institutions doesn't seem to involve control at all. Rather than controlling a decision or making the choice to give up their rights of participation, the actual public is bound by an idealized version of themselves. A third-personally articulated model of decision-making ends up replacing actual public sphere control over politics. Although the hypothetical model may help outline the content of ideal democratic public reasoning, it is problematic as a ground for the enactment and enforcement of particular political decisions.

Such a hypothetical reading of popular control becomes far too similar to the non-popular control-based view when used to defend unelected authority. This hypothetical approach offers reasons for establishing unelected authority that the public could

accept *if* the public was an ideal version of itself. However, actual public opinion may come to a quite different conclusion from a theorist or public official's judgment of what an idealized public would decide. Moreover, what constitutes ideal conditions for public deliberation is itself something that can be subject to contestation. The fact that there can be such disagreements is not, itself, concerning. The issue is that unelected authority cannot be defended under the banner of public control while downplaying such disagreements. Such arguments are especially problematic when coupled with the assertion of a privileged understanding of ideal deliberative conditions and what conclusions would be decided under them. Just as the non-popular control-based view constrains the public based on an objective conception of their interests, the hypothetical consent view constrains the public based on an idealization of intersubjective processes. In both cases, there is interference without direct public control over that interference. Actual public control requires creating institutions that allow people to effectively voice and work through disagreement, while moving political decision-making in a particular direction. Unelected authority, justified on the basis of philosophical idealizations, threatens to foreclose that possibility.

In addition, it's not just a particular policy decision being legitimated through the claim that a hypothetical public would agree to it, but the very form of governmental decision-making. Moreover, the form of governmental authority at issue is explicitly formulated to render decision-making about some set of issues non-participatory. As a result, an entire sphere of policy-making is taken out of the public and their representatives' hands. This move is justified on the basis of a philosophical model that questions electoral authorities' ability to achieve a substantively correct result of the sort that the hypothetical model demands. A hypothetical, non-existent public ends up permanently binding and controlling the actual one.

While I have made a general argument that hypothetical agreement views do not support freedom as non-domination, Pettit offers other arguments that may undermine my criticisms. To evaluate these potential counterpoints, I begin by pointing to some evidence that Pettit might hold a hypothetical agreement view. Next, I look at two cases he offers, which might be used to support a hypothetical approach. I argue that this defense of the hypothetical approach fails, however. Finally, I look at how Pettit might argue for the hypothetical view based on the concept of public valuation. I suggest that this approach is also unsuccessful. Insofar as his use of the concept of popular control is ambiguous, it should be clarified to avoid hypothetical agreement-based interpretations.

While I have argued that the hypothetical agreement view of popular control is problematic, it remains to be seen whether what Pettit says is actually consistent with such a view or not. Where he stands is not clear-cut. At one point Pettit suggests that unelected authorities ought to have “presumptive popular support.”<sup>28</sup> The use of “presumptive” raises the question of *who* presumes to determine what is publicly supported. It might be presumed by philosophers on the basis of hypothetical models or on the basis of some actual avowal on the part of the public, potentially expressed through electoral institutions or other public forums. When Pettit discusses the coma patient case and the liquor cabinet key case, he seems to lean in the direction of presuming popular support without actual public avowal.

To see how Pettit might defend a hypothetical approach, we can reexamine his discussion of Amartya Sen’s example of a coma patient whose wishes are carried out by his family.<sup>29</sup> Though the

<sup>28</sup> Philip Pettit, *On the People’s Terms*, 236.

<sup>29</sup> Amartya Sen, “Liberty and Social Choice,” *Journal of Philosophy* 80 (1983): 5-28.



patient cannot communicate, Sen says his indirect liberty is protected insofar as his wishes are fulfilled. Pettit sees the case as an instance of control, despite the lack of current input from the patient. One reading of this case suggests that if it is legitimate for the patient's family to carry out his wishes without his avowal, it is legitimate for unelected authority to be put in place without the public's avowed consent. Instituting such authority may be done on the basis of a hypothetical judgment, just like those that are made on behalf of a patient who is unable to consent.

There are serious worries about relying on this case to support unelected authority. The unconscious patient cannot communicate his wishes. As a result, his lack of consent appears less problematic; having his family make decisions seems like the best alternative available. For this argument to work, we must presume that his family knows his wishes, in spite of his inability to communicate them. The combination of these circumstances explains why the family's action seem like an appropriate solution to a terrible problem.

In politics, however, the public, whose participation in decision-making would be restricted by unelected institutions, is not analogous to the unconscious patient. Crucially, the public is capable of expressing its wishes through political activity, assuming the appropriate social and institutional conditions are in place. If we imagine that the patient could communicate like the democratic public, then his family's actions would be paternalistic, absent his consent. Because of the patient's unconscious state, this case cannot support the legitimacy of unelected authorities that lack the consent of the public.<sup>30</sup> The

<sup>30</sup> As I have suggested above, there are cases where unelected institutions are necessary to protect popular control from elected officials and entrenched majorities. This intuition can be supported by a modulation of the patient case.

cases are simply not analogous; any inferences about politics that might be drawn from the example are questionable.

The same point can be made about the liquor cabinet case. If we look at it carefully, it does not support a hypothetical agreement view. Although Barbara does not currently consent to have her liquor cabinet kept out of reach, she initially consented to this arrangement. Martin was asked to hold onto the key in order to keep it out of her reach. If we imagine this case without Barbara's initial request, then Martin does something illegitimate, as well as paternalistic. Suppose he collects a list of alcoholics, systematically locks their liquor up, and refuses to give them back their keys. Even if Martin has the best of intentions, he imposes an interpretation of another person's interests upon them and restricts their choice on this basis. Without actual consent at the outset, this arrangement is clearly not under the control of the person being interfered with. Participation and consent seem required at some point in the decision-making process, as I will argue in the next section.

There is one last move available to defend the hypothetical approach based on Pettit's stated views. In the past, Pettit has also relied on considerations the public agrees are relevant—what he calls “public valuation”—to justify unelected authority in certain policy areas.<sup>31</sup> These arguments suggest that if publicly accepted considerations can justify a policy, it is democratically legitimate. Perhaps hypothetical agreements to unelected

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Just as it is appropriate for unelected authorities to support public participation, the family may sometimes decide on the patient's behalf to enable him to communicate his wishes other times. Unconsented-to authority may support participation and the expression of consent in other cases, both in politics and in the case of the patient. As I argue, though, eventual consent to unelected authority is always desirable.

<sup>31</sup> Philip Pettit, “Depoliticizing Democracy,” 58.

authority are constrained by which considerations are actually seen as valid for use in public discussion, then.

At times, Pettit offers very optimistic claims about how much public agreement there is about the considerations that can ground the mandate of unelected authorities, including those focused on criminal sentencing, electoral districting, and more.<sup>32</sup> There is reason to be skeptical of his confident claims about the consensus around the institutional goals he mentions, however. Take deterrence through punishment, one institutional goal he refers to. Not only are there competing punishment goals that would have to be weighed against deterrence, but there are abolitionist groups that contest the goals of the criminal justice system generally. Pettit glosses over the significant disagreements over sentencing, monetary, and food policy, all of which he refers to as candidates for control through unelected authority.

In addition, the public valuation constraint on hypothetical agreement is too weak. Even *if* there is agreement on policy goals, how to put that agreement into practice is, itself, something that must be subject to at least some degree of public control. Given public disagreement about how to weigh public valuations in various cases, it is difficult to see at what point citizens have control over such a process. The point where one stops appealing to the public's valuations and starts advertent to a politician, judge, or theorist's judgments is hard to identify. Popular control, on such a reading, amounts only to utilizing some generally accepted set of reasons, not paying heed to actual public judgments and participatory control. When the public's actual judgments conflict with those of a theorist, it is hard to see why we would side with the latter for the sake of legitimacy. If Pettit adopts a public valuation-based view, he will be vulnerable to the

<sup>32</sup> See Philip Pettit, "Meritocratic Representation" in *The East Asian Challenge for Democracy* (Cambridge: Cambridge University Press, 2013), 148-49.

objections I levied against hypothetical agreement-based views. Although some elements of Pettit's arguments lean toward versions of a hypothetical agreement view, he should abandon the view insofar as he holds it, given its shortcomings.

## 2. *Actual Participation as Popular Control*

To develop a consistent and attractive version of republican democracy, Pettit ought to eschew reliance on hypothetical agreement as an interpretation of popular control. Instead, an alternative view would require actual participation before unelected authority could be instituted. Even if a theoretical model suggested that an idealized, hypothetical public would accept such institutions, a view based on actual participation would require “*actual* consent of citizens through a democratic procedure.”<sup>33</sup> While not every single political decision requires participation, this view requires input *at some point* in decision-making, especially when unelected authority is to be established. My reading of the unconscious patient and liquor cabinet cases in the last section supports this requirement. Through things like voting in elections and referenda, a non-hypothetical popular control is to be maintained, insofar as the choice to make certain decisions non-participatory is itself determined through participation. This view allows the actual public to bind itself, but does not allow it to be bound on the basis of a hypothetical model alone.

Actual participation-based approaches fit well with Pettit's description of public control in some respects. He indicates that control involves “systematically shaped inputs that control for the form of corresponding outputs.”<sup>34</sup> Input into a system, which

<sup>33</sup> Cristina Lafont, “Agreement and Consent,” 279.

<sup>34</sup> Philip Pettit, *On the People's Terms*, 155.

Pettit calls influence, can take several forms. Some forms of influence are active, entailing intervention in the relevant system, but others involve a disposition to actively intervene. Either way, a requirement of popular control is the *possibility* of intervention through some available route at some point during decision-making. This requirement pressures republicanism to incorporate popular participation through elections, deliberative forums, and civil society deliberation, since these enable citizens to intervene in state interference.

Because Pettit thinks popular control is consistent with the public not actively exercising control over government, but merely being ready to do so, it might create the impression that he must adopt a hypothetical agreement account of popular control. This suggestion is mistaken, however. The notion that the public must be ready to intervene indicates that they really have such a disposition, not that a hypothetical version of them does. That is, although the disposition itself needn't be activated, it must exist and have an outlet for its expression if public control is to be possible. As a result, democratic institutions must incorporate various means of exercising these dispositions in order to exert influence, if the public decides to do so. This republican commitment is equivalent to a general demand for avenues of popular participation.

Actual participation-based interpretations of popular control avoid hypothetical agreement theories' paternalism, but require Pettit to abandon some of his claims about when unelected authority is warranted. On this view, Pettit's argument that certain issues should be taken out of electoral control must be modulated. In particular, he suggests that democracies are

obligated to enact such unelected authorities.<sup>35</sup> This obligation must be made conditional in many of the cases that Pettit mentions, such as interest rates, environmental regulation, and criminal sentencing. The condition of these unelected authorities' legitimacy is that the public consents through some sort of actually realized democratic procedure.<sup>36</sup> Only on the basis of such participatory avowal will the actual participation view say that popular control and, hence, legitimacy have been achieved. The public can decide to restrict its own participation in certain policy areas, but only based on their own choice, rather than the judgment of a philosopher. Treating these issues in a non-participatory manner is not a condition of popular control and democratic legitimacy on this view. Pettit has merely shown that it is permissible for the public to bind itself with regard to certain issues; instituting unelected authority over certain issues does not have the obligatory character Pettit suggests.

Somewhat paradoxically, though, the actual participation view can sometimes support the democratic legitimacy of establishing unelected institutions in the absence of actual consent. My previous criticisms focus on cases where Pettit seems to propose restricting electoral authority without public consent, basing his claims on grounds other than actual popular control. Not all of his arguments for unelected authority have this structure, however. He also suggests that electoral authority can be structured not just in ways that run counter to some interpretation of the public's interests, but in ways that undermine participation. This point underpins an argument for unelected

<sup>35</sup> "...I have been suggesting that there *must* be unelected authorities established in political life..." (emphasis added). See Philip Pettit, *On the People's Terms*, 235.

<sup>36</sup> Pettit seems to hint at going in this direction without fully committing to it in "Meritocratic Representation," 153-54.

authority that is consistent with an understanding of popular control as actual participation.

Pettit rightly worries that elected officials may manipulate electoral law and data collection in ways that subvert the public's desire to exert control over its political destiny.<sup>37</sup> He also indicates that the results of majoritarian decision-making procedures can undermine the equal influence of citizens.<sup>38</sup> If politicians manipulate the structure of elections (via gerrymandering, for instance), then the meaning of popular participation through voting will be distorted. Similarly, public deliberation and decision-making on the basis of manipulated data is not an authentic expression of popular control. And if the public makes decisions that abridge the right of individuals to participate in public decision-making, then popular control is not truly realized, either.

In such cases, Pettit suggests that unelected authority is warranted to preserve popular control. This move is plausible even when popular control is understood in terms of actual participation. To keep participatory mechanisms from undermining their own point—enacting popular control—they must be constrained. This claim fits the cases of electoral law, data collection, and majoritarian domination, which directly affect the public's ability to exert control over political decisions. Pettit's arguments for constraint in cases related to monetary policy, sentencing, and so on do not fit with preserving popular control like the previously mentioned ones do, though.<sup>39</sup> There may, then,

<sup>37</sup> Philip Pettit, *On the People's Terms*, 232.

<sup>38</sup> Philip Pettit, *On the People's Terms*, 216-17.

<sup>39</sup> It is, of course, possible that policy decisions in these areas might contingently undermine popular control. If so, then there are several options available to deal with the problem besides putting decisions in a particular realm under unelected authority. Courts could strike down particular, anti-

be times where unelected authority can legitimately be put in place to protect public participation. Imposing such authority will only be warranted if it is the most effective way to protect popular control in a given instance.<sup>40</sup> Doing so is not paternalistic, but preserves freedom as non-domination.

Yet even if the actual participation interpretation of popular control supports certain constraints, there may still be strong reason to incorporate consent at some stage of the overall political process. In cases like electoral law and data collection, constraints on the actions of elected officials could easily be subject to public consent through referenda or other mechanisms. Institutions meant to avoid majoritarian domination are trickier, though. If institutional rights protections are subject to popular will, majority biases may be allowed to dominate certain groups and individuals, ultimately undermining the necessary conditions for democratic popular control. All of these cases are difficult and require more discussion than I can provide here. Nonetheless, even if unelected institutions are put in place to preserve popular control, we should not presume that actual participation and consent play no role in their validation.

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popular control laws (rather than taking over an entire policy area) or legislatures could reverse bad laws. Instituting non-participatory institutions is not the only option. As a result, the actual participation view will support alternatives that preserve participatory decision-making. Thanks to Mark Schranz and Carlos Pereira Di Salvo for discussion of this issue.

<sup>40</sup> For an argument in favor of dealing with such issues via participation and legislatures rather than unelected authorities like judges, see Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999).



## VI

### Conclusion

Although interpreting popular control as actual participation requires Pettit to modulate his claims about when certain unelected forms of authority are called for, it is still superior to hypothetical agreement and non-popular control-based views. These other two views articulate a third-personal interpretation of the public's interests or of an idealized, intersubjective public decision-making process. Actual participation views take a different approach, successfully avoiding paternalism by understanding popular control as realizable only through public participation, expressed under certain conditions. Moreover, these conditions cannot only be hypothetical, but must actually be in place for a political system to be under popular control. On the one hand, this view understands legitimacy to be a demanding ideal. Pettit's various requirements, such as equally accessible influence, must actually be met for political decisions to be made properly. On the other hand, the actually existing public is enabled to express their will and interpret their own interests.

Although the actual participation interpretation of popular control requires revisions to Pettit's discussion of unelected authority, this approach is more in the spirit of republicanism than its competitors. This normative advantage justifies revising Pettit's claims about when unelected authority is needed, as well as rethinking the significance of the liquor cabinet and coma patient cases.

Pettit's view is meant to promote non-domination in political decision-making. The concept of popular control is central to this goal, so avoiding the incorporation of paternalist domination is especially important. The actual participation view can do so. Moreover it does not rule out the institution of unelected

authority, but suggests that it is most appropriate for the sake of preserving popular control through political participation. The view also suggests that securing consent for even these kinds of institutions is an important aspect of supporting popular control.

By connecting non-domination to popular control, Pettit offers a way to link republican conceptions of freedom to democratic politics. His discussion of unelected authority does not go far enough in this direction, however. The republican commitment to popular control creates a strong presumption in favor of popular participation. While unelected authority may sometimes support participation, in most instances the public's actual avowals should guide decisions about unelected authority's role in democracy. Republicans ought to view participatory democratic institutions as a crucial basis for realizing freedom as non-domination.<sup>41</sup>

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