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# THE CONSTITUTION OF NONDOMINATION*

By Guido Pincione

## I. Introduction

I argue in this essay that procedural constitutional guarantees of market freedoms best protect individuals from domination. One corollary of my argument is that political theorists who attach paramount importance to freedom as nondomination should embrace market freedoms no matter what other divergent commitments they may have. In particular, Philip Pettit's claim that various forms of state interference with private markets are needed to forestall domination will prove to be unwarranted.[1] Another corollary of my argument is that market freedoms are best protected by procedural rules for political decision-making, as opposed to constitutional guarantees of private property and other substantive rules.

A moral presumption against interference has been more or less explicitly advocated by the political tradition known as "classical liberalism" or (sometimes to denote the versions least sympathetic to the state) "libertarianism." On this tradition, a legal system ought to protect spheres of mutual noninterference. To be sure, classical liberals allowed for conditions under which I am morally authorized, or even required, to interfere with someone's actions—say, to prevent her from violating my, or someone else's, rights. But classical liberals typically saw such cases of legitimate interference as the price to be paid for a legal system that minimized the total amount of interference.[2] In contrast, the political tradition known as "republicanism" is not hostile to interference as such but rather to *arbitrary* interference. Republican theorists embrace an ideal of *freedom as nondomination*, according to which persons ought not to be subject to the arbitrary will of others.[3] Notice, however, that libertarians, modern liberals, and egalitarians are also arguably committed to a principle of

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[1] See Philip Pettit, "Freedom in the Market," *Politics, Philosophy, and Economics* 5, no. 2 (2006): 131–49, esp. 144–46.

[2] For a contemporary defense of this view, see Loren Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987).

[3] For a historical and analytical discussion of the differences between the classical liberal and republican conceptions of freedom, see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997), 17–126.

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nondomination, whether or not they explicitly endorse it. Libertarians uphold a strong moral right of self-ownership, a right that those who dominate others violate, or at least threaten to violate. Liberals cherish personal autonomy, a value that domination destroys. And since domination is surely offensive to any attractive understanding of equality, egalitarians should condemn it.

Given this convergence of four major strands of political thought, the thesis that I announced at the outset—that constitutional guarantees of market freedoms best protect individuals from domination—may sound implausible to many readers. How can the free market be less prone to domination than *any* statist alternative, including those typically favored by egalitarians and modern (as opposed to classical) liberals? Indeed, some might want to argue that the extreme form of domination in which slavery consists may emerge from an exercise of market freedoms: it is not obvious why the contractual freedom that is so central to a free market should not extend to selling oneself voluntarily into permanent servitude. Perhaps libertarians have theoretical resources to resist this conclusion consistently with their commitment to self-ownership and the contractual freedom they derive from it,[4] but in that case the modern liberal and egalitarian complaint might persist that free markets in *external* resources give rise to forms of domination that can only be averted by a regulatory state (or one that is, in some appropriate sense, socialist). Since I am interested in evaluating this latter complaint, I shall assume that slavery contracts are invalid both in a free market and in any plausible statist alternative, and I shall confine my discussion to the spheres of freedom and domination created by more or less statist legal regimes for external resources.

By a "free market" I mean a legal regime that confers full ownership rights to persons over their own bodies and labor and over those external things that they have acquired through consensual methods. Such rights include the power to voluntarily transfer their rights over external things. I will also say that legal regimes that restrict such rights are (more or less) *statist*. Of course, this characterization of the free market is in need of clarification at various points. Thus, in some contexts we must say more about just what counts as labor and what counts as a voluntary method of transferring rights. Still, I believe that the characterization of the free market that I offered is clear enough for present purposes. In particular, it helps us to distinguish the free market from its most familiar alternatives, such as the welfare state and all versions of socialism (apart from, as we will see, those forms of collective ownership that result from permissible moves in the free market and that some may want to designate

[4] John Stuart Mill famously argued in *On Liberty* (1859), chap. V, that slavery contracts are void because the person who sells himself as a slave "defeats . . . the very purpose which is the justification of allowing him to dispose of himself," namely, "consideration for his liberty."

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as "socialist"). I should stress that, on the present understanding, a free-market society is composed of persons entitled with property *rights*, as opposed to *revocable* authorizations to control and transfer things: this essay purports to offer a nondomination-based argument for the free market, as distinct from free-market *economic policies* that the government is constitutionally authorized to change for more or less statist alternatives.

Two additional notes on terminology are in order. First, we should distinguish freedom as nondomination both from other conceptions of freedom and from personal autonomy. Roughly put, under the so-called *negative* conception of freedom, my freedom to do *x* is the absence of other people's interference with my doing *x*. My *positive* freedom to do *x* is my ability to do *x*. My *personal autonomy* is usually characterized as my ability to design and carry out plans that are responsive to my reflective self. Thus, my personal autonomy vanishes when I am taken over by drives that I would reflectively like to get rid of (as when my addiction to certain drugs prevents me from pursuing endeavors that I value more than retaining my addiction), or when my desires or beliefs do not flow from my original self (as when they were instilled in me through nonconsensual brain surgery).[5] If Robinson Crusoe had been both accidentally crippled and, after inadvertently eating a poisonous mushroom, temporarily confused, he would have been both less positively free and less autonomous than most of us, even though he would have enjoyed full negative freedom—and necessarily so, before Friday arrived on the scene.

Second, while freedom (whether negative or positive) and personal autonomy are facts that we can describe without reference to rules, nondomination presupposes rules, typically legal immunities against interference. This normative dimension of nondomination distinguishes republicans from typical classical liberals, despite their shared hostility to interference with people's actions. Negative freedom in a society—"social freedom," in Pettit's terminology—is, as he correctly observes, just one component of nondomination, the other one being "protection against arbitrary interference."[6] Indeed, on Pettit's favored interpretation of the republican conception of freedom, nondomination demands "protection against arbitrary interference, not just probabilifying the absence of such

[5] I am simplifying a lot here. For detailed analyses, see Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 118–72; Lawrence Crocker, *Positive Liberty* (The Hague: Martinus Nijhoff, 1980); Gerald MacCallum, "Negative and Positive Freedom," *Philosophical Review* 76, no. 2 (1967): 312–34; and Horacio Spector, *Autonomy and Rights: The Moral Foundations of Liberalism* (Oxford: Clarendon Press, 1992), 9–63. For an interesting attempt to show that the republican and negative conceptions of freedom are vulnerable to objections that do not confront "freedom as the nonobstruction of planning" (i.e., something close to personal autonomy), see Steven Wall, "Freedom as a Political Ideal," *Social Philosophy and Policy* 20, no. 2 (2003): 307–34.

[6] Pettit, "Freedom in the Market," 132–38. See also Christian List, "Republican Freedom and the Rule of Law," *Politics, Philosophy, and Economics* 5, no. 2 (2006): 201–20, at 202 (noninterference is neither sufficient nor necessary for republican freedom). Nevertheless, republican freedom does entail the absence of *arbitrary* interference.

interference."[7] Such protection consists in *legal* means to resist interference. More precisely, it consists in legal immunities against interference (for instance, a legal immunity against arbitrary arrest). As the case of benevolent despots illustrates, the absence of such protections may well coexist with a low probability of being interfered with by the despot. In such cases, persons are nevertheless *subject* to the despot's arbitrary will. Legal issues, and in particular effective constitutional barriers against the concentration of power, are crucial to determining the extent to which domination obtains.[8]

The remainder of this essay is organized as follows. Section II shows how the dispersion of economic power is a barrier against domination, and why free entry into markets furthers such dispersion. As against the idea that the state is in a better position to disperse economic power, I argue that the constitutional provisions needed to implement that idea are contestable, and to that extent require interpretive powers that themselves involve domination. Section III reinforces the argument of Section II by showing that only a procedural constitution that generates full private property rights can shield citizens from domination. Section IV shows that a plurality of suppliers of goods and services is a structural feature of the free market, in a sense of "structural" that matters for measurements of domination based on fairly uncontroversial claims about persons and resources. Finally, Section V offers a brief conclusion.

## II. Nondomination, Dispersion of Economic Power, and Free Entry

The institution of slavery illustrates how legal systems can uphold extreme forms of domination. Now legal systems may also engender domination in less direct ways. If, for example, someone (whether a ruler or a citizen) has a legal monopoly on the supply of some good essential to most life-plans (say, drinkable water), then domination is likely to obtain, for that monopolist is legally entitled to make access to her supply of water conditional on a variety of consumers' behaviors. This example suggests that the extent to which domination occurs varies inversely with the number of suppliers of goods essential to people's life-plans. In this section, I will defend a less obvious claim, namely, that a free market generates more suppliers of goods that matter for a theory of freedom as nondomination than alternative arrangements, *including* regulatory powers officially aimed at eradicating monopolies or counteracting their power.

[7] Pettit, "Freedom in the Market," 132–38.

[8] Legal realists equate legal rules with certain facts, e.g., judicial decisions. Were they right, I would say that, while negative freedom and personal autonomy consist in *nonlegal* facts, nondomination consists in those facts which, according to legal realism, are identical to legal rules against arbitrary interference.

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As we have already seen, domination involves *subjection* to another's will. *X* dominates *Y* if *X* controls *Y*'s behavior and *Y* lacks any legal means to escape such control. The sort of control relevant here should be distinguished from *X*'s inducing *Y* to perform a *particular* act (whether through coercion, persuasion, information, or any other means). If republican freedom is to differ from negative freedom, domination has to affect more pervasively those subject to it than particular instances of coercion and other ways of influencing another's behavior. I am not dominated by *anyone* if *everyone,* one at a time and independently, coerces me into doing something they (arbitrarily) want me to do. In contrast, you dominate me if, over a relatively extended period, you decide, typically through coercive means, how I am to behave, and I lack any legal means of resisting your commands. We might introduce a comparative notion of domination, one that would allow us to say that a person is dominated to a degree determined by a weighted sum of (i) the scope of activities over which she is subject to external control, (ii) the centrality to her life-plans of the goals for which actions within such a scope are constitutive or instrumental, and (iii) the duration of such external control. Context will make it clear, I hope, whether the notion of domination in play in my argument admits of degrees or refers instead to an all-or-nothing condition.

Clearly, domination cannot possibly arise in Crusoe-like scenarios. Societies, too, can aspire to a complete absence of domination, provided they adopt certain rules. Nondomination is achieved under the rule of law, whereas domination is another name for the rule of persons. Those who embrace the ideal of freedom as nondomination (or the ideals that, as we saw in the previous section, should lead libertarians, modern liberals, and egalitarians to abhor domination) should therefore feel pressure toward supporting *legal* remedies against domination. In the remainder of this essay, I offer a rather general and abstract version of the argument they should employ.

A first step in that argument is to contend that competition averts domination. You cannot dominate me if, at no significant personal cost, I can refuse to behave as you ask me to. Competition reduces such costs. Imagine that the only seller of a good essential to my life-plans starts facing competition. This will increase my bargaining power with that seller, forcing her to reduce the price of that good. My bargaining power will increase with the number of competitors. The very existence of a single supplier of a certain good—a monopoly, in one of the senses of the term[9]—gives potential suppliers of goods perceived as homogeneous by consumers an incentive to undercut the price set by the monopolist. It

[9] For a discussion of the variety of meanings of "monopoly," both in economics and in public political discourse, see Murray N. Rothbard, *Man, Economy, and State,* rev. ed. (Auburn, AL: Ludwig von Mises Institute, 1993), 587–95.

follows that free entry into markets reduces suppliers' ability to control consumers' lives. Conversely, barriers to entry increase such control. The idea that firms *compete* for larger shares of *dominated* people is internally inconsistent. Domination shrinks with the dispersion of economic power.[10]

It might be countered that a suitable trade-off between the state and the market as potential sources of domination would favor a legal system that empowers the state to *subsidize* the destitute and other potential victims of domination without increasing state domination. On this view, the institutions of a liberal democracy, with their bill of rights and separation of powers, go a long way toward bringing such subsidies within the boundaries of the rule of law. One problem with this proposal is that public policies based on essentially contestable concepts—such as fairness, equality, justice, and perhaps even domination itself—are doomed to be arbitrary and hence unable to guide constitutional design inspired by the ideal of the rule of law. (A moral or political *concept* is said to be "essentially" contestable when disputes among people holding rival *conceptions* of that concept cannot be rationally settled.[11] Consider, for example, the dispute over whether equality of resources is a better conception of the concept of equality than equality of welfare is.)

But even if, as Ronald Dworkin famously argues, there is a "right answer" to every question of legal interpretation, "hard cases" included,[12] citizens, legislators, and judges *will* in all likelihood hold widely divergent views on which specific subsidies best forestall domination. In other words, even if essential contestability is illusory or overstated, *actual* contestability might well be an ineradicable feature of our political prac-

[10] An increase in the number of suppliers of an essential good, as well as the new options thus created for consumers, are facts, as opposed to rules or norms, but some such facts have legal consequences. Thus, an increase in the number of suppliers of a certain type of good entails that consumers acquire the *legal power* to buy elsewhere that type of good. So the thesis that competition averts domination does not involve a shift toward a (purely) factual (including probabilistic) notion of domination, which I, following Pettit, rejected in the previous section.

[11] See Christine Swanton, "On the 'Essential Contestedness' of Political Concepts," *Ethics* 95, no. 4 (1995): 811–27. I explore the tension between essential contestability and the rule of law in Guido Pincione, "Market Rights and the Rule of Law: A Case for Procedural Constitutionalism," *Harvard Journal of Law and Public Policy* 26, no. 2 (2003): 397–454. In addition to essential contestability, there is what I call "causal" contestability, i.e., persistent disagreement among reasonable persons regarding the most effective ways of bringing about outcomes mandated by the constitution, such as decent housing for all under a constitutional right to decent housing (ibid., 413–15). The present essay counts as evidence, I think, for the claim that freedom as nondomination, in addition to being an essentially contestable conception of freedom (which in turn is, as I pointed out in Section I, an essentially contestable concept), is causally contestable—unless we believe that Pettit and the other writers who claim that some forms of statism fare better than the free market on a scale of domination are uncontroversially correct or mistaken. We will see in Section IV.B why it is important for constitutional design that freedom as nondomination be itself (i.e., as distinct from freedom *simpliciter*) an essentially contestable notion.

[12] Dworkin defends the right-answer thesis in, for example, Ronald Dworkin, *Law's Empire* (London: Fontana Press, 1986). For another defense of interpretive determinacy, see Gerald F. Gaus, *Contemporary Theories of Liberalism* (London: SAGE, 2003), 106–8.

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tices. Wide interpretive powers will then be required to arbitrate among clashing interpretations of the demands of freedom as nondomination. In a world of scarce resources, the state will have to choose whom to *deny* goods that they perceive as central to their most cherished life-plans. Thus, policymakers may have to discontinue subsidies to students of art in order to increase the provision of food stamps for the destitute, or vice versa, even if both groups need the subsidies to accomplish their most cherished goals in life.[13] To the extent that the state is effectively able to deny people those subsidies *at will* (as entailed by the discretionary powers it needs in order to arbitrate among widely divergent interpretations of the demands of freedom as nondomination), citizens will remain at the mercy of the state. It is no reply to say that, by hypothesis, no one will supply in the free market the goods made available to the beneficiaries of such subsidies. This consideration may be relevant for a *welfarist* case for subsidization, but not in the present context, where we are comparing (1) the amount of domination inflicted by a government entitled to take redistributive measures over a vast range of resources and groups with (2) the amount obtaining in a regime where *nobody* is entitled to do so.

Regulatory powers have an even darker side when looked at from the perspective of a theory of freedom as nondomination. Contestable political concepts spawn rhetorical pathologies that render public political justification both epistemically unreliable and inimical to any attractive conception of distributive justice. Fernando R. Tesón and I argue elsewhere that there is a mutually reinforcing interaction between citizens' rational ignorance (due to the individual voter's prohibitive costs of casting a well-informed yet nondecisive vote) and political posturing (due to politicians' and rent-seekers' incentives to reinforce the patterns of political error fostered by rational ignorance). This interaction leads public opinion in a liberal democracy (let alone in illiberal regimes) to a rhetorical equilibrium in which certain patterns of factual and moral mistakes will prevail.[14] Reasonable, sincere, and well-informed citizens will not consent to public policies that stem from such discursive pathologies (much less to the *consequences* of such policies), on any morally relevant notion of consent.[15] This lack of consent should surely count in an assessment of the extent to which the coercion involved in implementing such

[13] I do not think that confining the authority of legislators and judges to arbitration among *reasonable* interpretations of constitutional rules would impose a significant restriction on the scope of my argument. For the notion of reasonableness is itself de facto contestable. Hence, it is utopian to hope that public policies will enjoy consensual support, and for that reason will not evince domination, if policymakers publicly defend them with arguments that they sincerely believe no one will reject on reasonable grounds. See Gaus, *Contemporary Theories of Liberalism,* 136–40.

[14] See Guido Pincione and Fernando R. Tesón, *Rational Choice and Democratic Deliberation: A Theory of Discourse Failure* (New York: Cambridge University Press, 2006).

[15] Tesón and I discuss democratic consent in *Rational Choice and Democratic Deliberation,* 204–11.

policies is symptomatic of governmental domination, especially if such coercion is arbitrary. Let me explain.

We have seen that domination involves arbitrariness (Section I). Now we should distinguish between a narrow and a wide understanding of arbitrariness. On the narrow understanding, an interference is arbitrary just in case the rules that authorize it are not consented to by the person who undergoes it, or would not be consented to by that person under suitably idealized epistemic and motivational circumstances. This is the sense of "arbitrariness" I assumed when I said, in the previous paragraph, that the discursive pathologies involved in the public justification of public policies deprive such policies of consensual bases.[16] More specifically, the statist (even if democratic)[17] strategy to reduce domination by subsidizing the entry of new suppliers, or the poor, thereby increasing consumers' bargaining power, itself involves domination, because the subsidization criteria rest on contestable views regarding who is to contribute how much to finance the subsidies, who their beneficiaries will be, and what sorts of behavior the subsidies will reward or their denial will penalize. Moreover, such subsidies cannot be continuously implemented without rationing based on criteria that many reasonable people will, in turn, reject (e.g., rationing based on queues, waiting lists, types of consumers' needs, degree of industry concentration, etc.).[18]

On the wide interpretation of arbitrariness, interference is arbitrary if it is morally groundless, and especially if it is morally impermissible; in the typical case, the interferer acts on sheer selfish motives. Policies stemming from the above discursive pathologies are, again, arbitrary in the wide sense, because they fail any plausible moral test. Tesón and I substantiate this claim elsewhere; suffice it to say here that part of the problem is that such discursive pathologies are disproportionately sensitive to special interests that no attractive political morality would uphold.[19] Thus, on

[16] According to Pettit, "I control the interference of the state [and so make it nonarbitrary] so far as that interference is forced to track the interests that I am disposed to avow in common with my fellow citizens" ("Freedom in the Market," 136). If Tesón and I are right, this condition is not met by Pettit's advocacy of various sorts of regulations of markets, as stated, for instance, in the following passage: "Let freedom as non-domination be a central ideal in political life and not only will it be likely to make a case for a variety of forms of regulation, it will also explain how regulation by a coercive state need not be viewed with quite the reluctance that other ideals would generate" (ibid., 147).

[17] Tesón and I argue that the discursive pathologies of nondemocratic or nonliberal polities will be more severe than those we diagnose in liberal democracies. See Pincione and Tesón, *Rational Choice and Democratic Deliberation,* 244–46.

[18] Wouldn't subsidization by lotteries evade the objection that subsidies cannot help being arbitrary? No, because any characterization of the class of suppliers that the state ought to subsidize will be sincerely contested by some reasonable citizens: they would contest, for instance, whether candidates for the subsidies are to be characterized in terms of the structure of their corporate governance, the nature and price of their products, or the location of their plants.

[19] See Pincione and Tesón, *Rational Choice and Democratic Deliberation,* 194–98, 211–13, and 224–27. The critique of theories of "deliberative democracy" that we mount in that book

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either interpretation of arbitrariness, regulatory powers aimed at preventing the emergence of domination in private markets themselves involve domination by the state—or by those who occupy key positions in political decision-making.

## III. Manipulability, Compossibility, and Domination

How can we subject everyone, including the government, to rules? Clearly, we need an adequate answer to this question to devise constitutional rules that shield citizens from arbitrary interference by others—that is, to devise a constitution of nondomination. I argued in the previous section that a constitution that disperses economic power best protects citizens from domination. In this section, I want to show that purely procedural constitutional guarantees of market freedoms hold out a better hope of dispersing economic power than constitutional guarantees of private property and other substantive protections of market freedoms advocated by classical liberal constitutionalism.

Constitutional checks on governmental power will be effective only if they are nonmanipulable. I cannot be constrained by a (putative) rule if I am allowed to interpret that rule at will. Such a "rule" provides me with no guidance or constraint on my behavior, because I am allowed to determine the normative status of my behavior in the light of the "rule," which is tantamount to being subject to no normative requirement at all—to being free to do as I wish. Interpretive manipulation should be of obvious concern to theorists of nondomination. No one can dominate me unless they can manipulate the interpretation of the rules that set limits on how they may affect me. The more interpretive leeway those rules allow, the more power those persons will have over me.

Unfortunately, we cannot aspire to fully univocal constitutions, if only because vagueness is an ineradicable feature of the natural languages in which constitutions are written. The essential (let alone actual) contestability of substantive constitutional rights compounds this problem of constitutional indeterminacy. Even a cursory look at the scholarly literature on substantive constitutional rights, such as the right to free speech and the right to private property, reveals that these rights are highly contestable and vague. It is no surprise, then, that such rights are taken to countenance quite divergent policies and rulings.[20] In contrast, electoral

applies to those versions of republicanism that deny that state interference is arbitrary when it occurs after an open deliberative process that somehow weighs fairly everyone's interests. For a different critique of those versions of republicanism, see Geoffrey Brennan and Loren Lomasky, "Against Reviving Republicanism," *Politics, Philosophy, and Economics* 5, no. 2 (2006): 221–52.

[20] Thus, while Owen Fiss thinks that a constitutional protection of free speech warrants a variety of restrictions on private property, Milton Friedman argues that only a strong protection of private property, and the market freedoms it entails, can afford the amplest opportunities for free speech. See Owen Fiss, *The Irony of Free Speech* (Cambridge, MA:

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systems (e.g., a system of proportional representation in Congress) and voting rules for the enactment of laws and for the appointment of high-ranking officials and justices (e.g., approval by majorities in the two chambers of Congress) are much less contestable.[21] I will call these two latter types of constitutional rules "procedural rules." Disagreements over the normative implications of a substantive constitutional right—that is, over which actions violate that right—tend to persist because they are anchored in deep controversies over what the best conception of such a right is (this is the essential-contestability problem I have alluded to in the previous section), as well as over how to protect the interests or choices that the right so conceived protects.[22] Because procedural rules lack essentially contestable concepts, they are likelier targets of convergent interpretations than substantive rules are. Accordingly, procedural rules can aspire to unambiguous consensual support: those who consent to being governed by them know what they are consenting *to*. Given that, as I argued in Section II, consent excludes arbitrariness (at least under the narrow interpretation of arbitrariness), the fact that procedural rules are better candidates for consensual support is of crucial significance for a theory of freedom as nondomination.

Saying that procedural rules are less manipulable than substantive rules does not mean, of course, that rights or other substantive notions should play no *justificatory* role in constitutional design. Indeed, constitutional drafters keen on protecting certain rights might well conclude that a

Harvard University Press, 1996); and Milton Friedman, *Capitalism and Freedom* (Chicago: Chicago University Press, 1962), chap. 1. The very notion of private property is in turn contested, as shown by such divergences as that between Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985); and Cass Sunstein, *The Partial Constitution* (Cambridge, MA: Harvard University Press, 1993), chaps. 1–6, on the constitutional underpinnings of the regulatory state in the United States. Leif Wenar offers a nice discussion of the changing interpretations of the takings clause by the U.S. Supreme Court in Wenar, "The Concept of Property and the Takings Clause," *Columbia Law Review* 97, no. 6 (1997), 1923–46.

[21] Authoritarian regimes characteristically repeal constitutional bans on presidential reelection—procedural rules, in my terminology. Interestingly, such regimes take care to follow quite cumbersome *procedural* rules for the requisite constitutional amendment, even though they feel no social pressure to refrain from jailing dissidents, confiscating hostile newspapers, and taking other tyrannical measures that violate *substantive* constitutional protections of free speech and other civil liberties. It would seem that tyrannies manage to retain, at least in the eyes of many, an aura of constitutional/democratic legitimacy by abiding by procedural rules only. The 1949 constitutional amendment under Juan Perón in Argentina illustrates this point: ample majorities in the Senate and the House allowed General Perón to repeal the constitutional ban on reelection, thereby enabling his second presidential term and its attendant suppression of civil liberties. Interestingly, the military revolution (with considerable popular support) that deposed Perón in 1955 and banned the Peronist Party on the grounds that it supported "tyranny" (meaning the suppression of substantive civil liberties) was followed by several decades of frequent military takeovers, with Peronists urging the "end of dictatorship" (meaning the return of majority rule). See Félix Luna, *Perón y su Tiempo,* 2nd unified edition (Buenos Aires: Editorial Sudamericana, 1993), esp. 217–42.

[22] See note 11.

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*purely procedural* constitution best serves their goals. If asked for a justification of their constitutional proposal, they would sincerely refer to their commitment to rights, along with their beliefs about how society works. They may add that explicit substantive declarations are counterproductive. Constitutional drafters may foresee, for example, that legislators and judges will be affected by epistemic or motivational flaws that lead them to adopt a conception of a constitutional right that differs from the one favored by the drafters, or to implement that right through counterproductive laws or judicial decisions. The structure of this problem parallels the familiar structure that leads indirect utilitarians to advocate decision procedures that make no reference to the maximization of utility. Agents might better conform to the utilitarian standard of rightness, which judges actions as right just in case they maximize aggregate utility, only if they try to follow the Golden Rule, God's commands, Kantian ethics, or any other decision procedure that maximizes aggregate utility as a side-effect.[23] By the same token, my previous remarks on manipulability, along with theoretical and empirical work on public choice theory,[24] suggest that substantive constitutional rules are vulnerable to the sorts of epistemic and motivational shortcomings that make it advisable for constitutional drafters committed to freedom as nondomination to adopt a procedural approach to constitutional design.

The advantages of the procedural strategy against domination are best perceived by considering the shortcomings of the substantive alternative. A substantive approach to constitutional design sets either *goals* for public officials—such as general prosperity, (some version of) equality, or universal health care—or *constraints*, such as the U.S. bill of rights, on the pursuit of legitimate goals. I argued in this section that substantive constitutional rights are contestable, and to that extent are vulnerable to manipulation. But even if constitutional rights were noncontestable, the substantive strategy would engender the following sort of indeterminacy. Given its highest position in the legal hierarchy, a constitution tends to be both abstract and general. In these respects, constitutions are at the opposite extreme of particular legal orders or instructions, such as a criminal court's instruction to the correctional authorities to keep in jail a certain person for a certain time, or a traffic officer's instruction to a driver to turn left. Now we can easily conceive of an indefinite number of mutually consistent particular commands: we just need to imagine legal authorities commanding distinct persons to perform particular actions at different

[23] An example of the extensive literature in favor of this indirect form of utilitarianism is the early John Rawls. See his "Two Concepts of Rules," *The Philosophical Review* 64, no. 1 (1955): 3–32.

[24] See James D. Gwartney and Richard E. Wagner, "Public Choice and the Conduct of Representative Government," in James D. Gwartney and Richard E. Wagner, eds., *Public Choice and Constitutional Economics* (Greenwich, CT: JAI Press, 1988), 29–56; and Pincione and Tesón, *Rational Choice and Democratic Deliberation*, 8–64.

places or times. However, it is also easy to conceive of an indefinite number of mutually *inconsistent* particular commands derivable from (let us assume, noncontestable interpretations of) distinct substantive constitutional rules. This is so because it is of the nature of a substantive constitutional rule that it provides that citizens may, or may not, perform certain *types* of action. As Hillel Steiner argues, a plurality of rights to perform types of actions is not *compossible;* that is, those rights entail mutually inconsistent *particular* norms.[25]

Consider the following example. On a natural, unqualified interpretation of the First Amendment of the U.S. Constitution, which provides that "Congress shall make no law . . . abridging the freedom of speech," fraud committed through speech acts is a protected act; yet fraud arguably violates the protection of private property inferable from various constitutional provisions. Conspicuous among these are the Fifth Amendment, which provides that "no person . . . shall be . . . deprived [by the federal government] of . . . property . . . without due process of law" and that "private property [may not] be taken [by the federal government] for public use, without just compensation" (the "takings clause"); the Fourteenth Amendment, which applies the due process clause to the states; and Article I, Section 10, which prohibits states from passing any "law impairing the obligation of contracts" (the "contract clause").[26] Some particular exercises of an unqualified right to free speech, such as those involving fraud, violate an unqualified right to private property, and some particular exercises of an unqualified right to private property, such as boycotts on the sale of paper to a newspaper, violate an unqualified right to free speech. The upshot is legal indeterminacy: *as far as the constitution is concerned* (at least prior to judicial balancing of conflicting rights),[27] certain actions are both permitted and forbidden.

Constitutional drafters responsive to the value of freedom as nondomination will avoid the legal indeterminacies created by noncompossible rights, because such indeterminacies furnish advocates of expanded political power with the rhetorical advantages of appealing to constitutional rights. Since, as we just saw, substantive constitutional rights are noncompos-

[25] See Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994). For a discussion of degrees of contestability of legal rules, see Gaus, *Contemporary Theories of Liberalism,* 75–77.

[26] The concept of private property I am using here, and arguably the one assumed by the framers of the U.S. Constitution, takes the right to private property to encompass the rights to possess, use, exclude others from the use of, and voluntarily transfer a certain thing (e.g., by selling, donating, or bequeathing it). By definition, fraud renders transfers of property involuntary. See Wenar, "The Concept of Property and the Takings Clause."

[27] Whether judicial balancing of conflicting rights makes an otherwise noncompossible system of rights compossible depends in part on how we conceive of a legal system. If we take judicial decisions and/or the doctrines they adopt, along with certain rules of precedent and legal hierarchy, as components of the legal system, then it may be possible to reconstruct a legal system whose general rules establish mutually conflicting rights as a compossible legal system. The argument that follows in the text does not turn on any specific view on such conceptual issues.

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sible, the state is called upon to adjudicate their conflicts. Thus, the flip side of legal indeterminacy is the interpretive leeway conferred to legislators and courts to adjudicate such conflicts one way or the other. The essential contestability of such rights compounds, as we also saw, such indeterminacies. The upshot is that contestable or noncompossible constitutional rights deprive courts of constitutional grounds to limit the scope of legislative activity, since such activity can be arguably portrayed as responsive to *some* constitutional right. The rhetorical pressure toward increased legislative powers is all the more intense when legislators can appeal to constitutional *rights,* as opposed to general welfare or other aggregative goals, in defense of their preferred ways of filling out constitutional indeterminacies. The classical liberal desideratum that rights trump utility and other aggregative goals of public policy is thus bypassed by turning rights against themselves: any constitutional right can be overridden by another constitutional right, with the legislature deciding which right prevails over which as political expediency dictates. A proliferation of substantive constitutional rights tends to increase political power, and correspondingly exposes citizens to the arbitrariness that the classical liberal rhetoric of rights was supposed to shield them from.

Notice, however, that noncompossible or contestable constitutional rights do not *entail* governmental domination. Noncompossible or contestable constitutional rights will not engender domination if parties to conflicts of rights agree to have their disputes settled by an arbiter. The availability of such arbiters transforms a system of noncompossible or contestable rights into a system of compossible and noncontestable ones. Even if reasonable people held divergent interpretations of a constitutional provision, they would still be governed by that provision (as opposed to being ruled by persons) if they agreed on a procedure for settling their interpretive dispute. The availability of arbiters widely regarded as legitimate is an operational test for the existence of effective legal barriers to domination, especially if such arbiters occupy the highest position in the legal hierarchy. Another way to put this is to say that noncompossible or contestable rules engender domination only if their interpretation does not emerge from consensual arbiters.

We should not hasten to conclude, however, that a constitution that rules out domination should just contain a single provision to the effect that "conflicts of rights shall be settled by consensual courts," or something of that sort. Indeed, the foregoing arguments from contestability and compossibility point to a procedural route to the very creation of consensual courts. Accordingly, a constitution animated by the ideal of freedom as nondomination would contain those procedural rules from which the jurisdiction, composition, and modus operandi of consensual courts would emerge. Such a strategy for constitutional design is dictated by the fact that the very notion of consent lends itself to all kinds of interpretive conflicts. Just consider this question: Are citizens of the United

States consenting to the rulings of the Supreme Court? Among the issues that are arguably relevant to answering the question are the availability of emigration at reasonable cost and the existence of constitutional requirements of congressional supermajorities to confirm nominees for the Supreme Court. Of course, reflection on such issues involves, in turn, highly contestable questions about (1) the relevance of residence as an implicit manifestation of consent, (2) how reasonable emigration costs are (and what "reasonable" means in this context), (3) how close to unanimity a social decision rule must be in order for it to qualify as an expression of consent, (4) how representative members of Congress are, etc. Constitutional designers committed to freedom as nondomination will foreclose these interpretive issues by choosing the right procedural rules. The upshot is that consensual arbitration as a remedy for contestability and noncompossibility holds out hope of success only if it emerges from appropriately procedural, and hence noncontestable and compossible, rules.

I am now in a position to deploy a powerful argument from freedom as nondomination for a procedural constitution that upholds free markets. Its first premise has already been substantiated. It asserts that the proliferation of noncompossible constitutional rights increases political domination, especially if such rights are contestable in the sense indicated in Section II. A second premise asserts that an exhaustive and nonoverlapping allocation of private property rights is both compossible and noncontestable. Here property rights are to be understood as exchangeable rights to control particular things, including rights to participate in mutually agreed collective decision procedures to control particular things (as in condominiums and joint stock companies). For any thing, there is an uncontroversial legitimate owner of it (albeit there might be some *factual* controversy about who that owner is).[28] From these two premises it follows that constitutional procedural rules that generate effective legislative and judicial protection of particular private property rights forestall political domination. What protects citizens from domination is not so much a *generic* constitutional right to private property but rather a procedure for political decision-making that yields particular titles to property as a side-effect of the passions and interests of political actors, who need not have the creation of such titles as their goal.[29] How exactly a

[28] I assume that rational agreement on factual claims is easier to obtain than rational agreement on normative matters, yet I am not assuming moral skepticism. My argument purports to show that a regime of private property rights is less prone to domination than statist alternatives. For a detailed classical analysis of the notion of private property, or "full ownership," involved here, see Tony Honoré, "Ownership," in G. A. Guest, ed., *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 1961), 107–47.

[29] For illustrations of the idea that even abstract rights to property and contract have indeterminate particular applications, see Arthur Ripstein, "Authority and Coercion," *Philosophy and Public Affairs* 32, no. 1 (2004): 2–35, at 26–32. For an overview of procedural constitutional rules that generate private property rights on particular things, with due allowances for the production of public goods (see Section IV), see James D. Gwartney and

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constitution that effectively guarantees such rights should be worded is a question I cannot address here except to offer a couple of examples. A strongly federalist system, with states autonomously deciding on tax and spending policies over a wide range of issues, induces states to compete with each other for investment and inhabitants (and thus for taxpayers) by offering an optimal bundle of taxes and genuine public goods (as opposed to redistributive policies). Similarly, a supermajority voting rule in the federal legislature would increase the cost of rent-seeking (that is, of "buying" legislative votes through campaign contributions and other means) and ensuing special-interest legislation, thereby fostering legislation aimed at the production of public goods, including that overarching public good in which (the maintenance of) a free-market economic system consists. In general, although the literature on constitutional economics is officially guided by welfarist or contractarian ideals, a good number of the procedural rules that literature advances are defensible instead as responsive to the ideal of freedom as nondomination.[30]

## IV. Plurality of Suppliers as a Structural Feature of a Free Market

In Sections II and III, I argued that the political power needed to subsidize suppliers of goods and services, or the poor, itself involves domination. This thesis is compatible with the claim that the concentration of economic power enabled by a fully free market, and its attendant decrease in consumers' bargaining power, is a more serious threat to freedom as nondomination. In this section, I argue that this latter claim is unwarranted: empowering the state to fight private domination just makes things worse. This completes my case for relying on market mechanisms, instead of the state, as a weapon against domination.

The argument I am going to offer for the claim that the free market best protects persons from domination should be distinguished from other well-known, yet ultimately weaker, arguments. I begin by indicating the shortcomings of those other arguments (subsection A), and then proceed to my own argument (subsection B).

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Richard Wagner, "Public Choice and Constitutional Order," in Gwartney and Wagner, eds., *Public Choice and Constitutional Economics,* 44–49.

[30] For a seminal contractarian defense of procedural constitutional rules that protect market freedoms and help overcome market failures (see Section IV.B), see James Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1962). Notice that economic approaches to constitutional design need not be procedural. Examples of largely substantive (and welfarist) discussions of the constitutional protection of market freedoms are Dennis Mueller, *Constitutional Democracy* (New York: Oxford University Press, 1996), 209–36; and Robert Cooter, *The Strategic Constitution* (Princeton, NJ: Princeton University Press, 2000), 241–308.

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*A. Misguided strategies*

Some libertarians might wish to claim that there is a conceptual connection between the free market and the absence of domination. They might say that the free market bans arbitrary (aggressive, violent, unjust, etc.) interference, and thus makes domination impossible. Such arguments invoke conceptual, as opposed to empirical, links between the free market and the absence of domination. A usual strategy of this sort has it that the free market presupposes, by definition, private property rights over one's body and labor, as well as private property rights over external resources acquired through consensual means (e.g., labor on unowned land, contracts, and bequests, provided third parties are not thereby made worse off). If we then define "arbitrary interference" as any violation of such property rights, we can deductively infer that the free market bans arbitrary interference. On this view, then, the moral justification of the free market lies in its unique compatibility with a prohibition against arbitrary interference.[31] Conversely, any regulation of the market to the detriment of property rights so defined—any form of statism, in my terminology—will sanction arbitrary interference and the potential for domination that comes with it.

This argument suffers from circularity, because "arbitrary interference" and like notions are defined in terms of the very property rights the argument purports to justify.[32] The sort of interference inflicted by a thief on his victim may be physically indistinguishable from the sort of interference inflicted by a police officer to force the thief to return a stolen item to its legitimate owner, yet the grounds on which the argument distinguishes "arbitrary" interference from "legitimate" or "defensive" interference are not purely physical. The police officer's interference is assumed to be legitimate in that it is interference authorized by a legal system that protects property rights. More specifically, such an authorization is granted to enforce a legal prohibition of theft, where "theft" is defined, in turn, as an *unlawful* taking of somebody else's property. Moreover, who owns what—what property rights there are over what—is determined by the law of property. But, of course, it is the very law of property, and the particular property rights it generates, that the argument was supposed to justify. The kind of free marketeer I am considering must say that a legal system that upholds free markets bans *arbitrary* (aggressive, violent, unjust, etc.) interference with sets of options *defined by property rights.* She cannot rest content

[31] Murray N. Rothbard offers an argument of this sort in "Society without a State," in Tibor R. Machan, ed., *The Libertarian Reader* (Totowa, NJ: Rowman and Littlefield, 1982), 53–63, at 54.

[32] For versions of this critique, see G. A. Cohen, "Capitalism, Freedom, and the Proletariat," in Alan Ryan, ed., *The Idea of Freedom: Essays in Honor of Isaiah Berlin* (Oxford: Oxford University Press, 1979), 9–26, esp. 12; and Spector, *Autonomy and Rights,* 14–22, esp. 20.

with a purely physicalist notion of noninterference: she does not want to condemn, for instance, the police officer's interference with the thief's use of the stolen goods. Indeed, all forms of statism may be conceptualized as bans on arbitrary interference with the property rights *they* recognize (e.g., interference with the ways in which a single mother with children wants to use her welfare entitlements).[33]

Free marketeers aware of the difficulties of the conceptual route to establishing a nondomination case for the free market might want to invoke an empirical correlation between free markets and the absence of domination. Yet it is hard to come up with uncontroversial arguments of this sort. Take, for example, the claim that free markets spread economic power by increasing the number of suppliers of goods and their close substitutes. As we saw in Section II, the extent to which people exert monopoly power over the sale or purchase of things, including labor, obviously bears on the question of how much domination obtains. A competitive market for labor, for example, might be deemed to reduce or eliminate workers' dependency on any particular employer.[34]

Such arguments are open to dispute, though. On the empirical front, the literature on antitrust legislation abounds in controversies about the extent to which the free market will give rise to monopolies.[35] To be sure, a monopoly (short of a monopoly over much of a whole economy) may not dominate its workers: many of them may find a job elsewhere. But many others may depend on their jobs in ways that render them vulnerable to domination by their employer. Thus, technological change may result in layoffs of those workers whose specific skills will not be demanded elsewhere; they will accordingly be vulnerable to domination by their

[33] Gaus embraces a presumption against nonmoralized interference, and takes it to be the kernel of the limited-government ideal advocated by classical liberals. Following Stanley Benn, he contends that "there is a basic asymmetry between you acting and another interfering with your actions" (Gaus, *Contemporary Theories of Liberalism,* 223). As it stands, this claim is not vulnerable to the circularity objection, because it refers to purely physical interference. However, some of Gaus's illustrations of the presumption against interference rely on a moralized conception of interference. Thus, he argues that "a specific national health care scheme could only pass the test of liberal legitimacy if there is a conclusive justification—a justification that no citizen has sound reasons for rejecting—that there be some sort of national health care. . . . If there is no conclusive justification for a principle or a type of policy, then the 'wait and see' stance seems dictated by the Liberal Principle: if thus far no conclusive justification has been given, then thus far no government action is justified" (ibid., 221). But is government not "taking action" when it protects people's private property rights to the resources that would otherwise be redistributed (typically, through taxation) to the national health care scheme? It would seem that at some point Gaus's argument shifts from a physicalist to a moralized notion of interference; to that extent, his argument for the sort of limited government praised by classical liberals is circular.

[34] See Pettit, "Freedom in the Market," 142; and John Gray, "Against Cohen on Proletarian Unfreedom," in John Gray, *Post-Liberalism: Studies in Political Thought* (London: Routledge, 1996), 123–55, at 149–54; reprinted from *Social Philosophy and Policy* 6, no. 1 (1988): 77–112.

[35] For an overview of the economics of antitrust law, see Richard A. Posner, *Economic Analysis of Law,* 5th ed. (New York: Aspen, 1998), 309–46. For the view that antitrust law is counterproductive, see Thomas Sowell, *Knowledge and Decisions* (New York: Basic Books, 1996), 202–13. See also notes 52 and 53 below.

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current employer (or prospective ones). How likely such plights are is itself an issue open to dispute. Also open to dispute is the extent to which unregulated markets will give rise to monopolistic supply of highly wanted or urgently needed goods, and the forms of domination that go with it. Moreover, the project of establishing an empirical correlation between free markets and the absence of domination faces hardly tractable measurement problems, of both a practical and a theoretical nature. We would have to determine the impact of various kinds of monopolies, including the monopoly of regulatory powers to fight monopolies, on the total amount of domination—a task that involves counterfactual comparisons among an indefinite variety of more or less statist alternatives.

The free marketeer might look for shortcuts. She might say that there are well-established positive correlations between the extent of market freedoms and the amount of general prosperity, hoping that the general prosperity effected by free markets enhances the bargaining power of workers and consumers and consequently reduces domination by employers and sellers.[36] But even if we granted (as I think we should) that free markets bring about general prosperity, some theorists might wish to resist the claim that general prosperity reduces domination. Thus, some writers argue that capitalist labor relationships revolve around "coercive wage offers"—a fact that would be inherent to capitalist "relations of production" regardless of prosperity.[37] To be sure, I have distinguished domination from particular instances of coercion (see the second paragraph of Section II), but many wage relationships are long and demanding enough to shape a worker's life-plans: if such relationships were coercive, they would in all likelihood evince domination of workers by employers.[38]

Thus, to offer an effective reply to the coercive-wage-offer argument, the free marketeer committed to freedom as nondomination cannot rest content with showing that free-market societies are generally more prosperous than alternative regimes; she must show in addition that, whatever their social costs, safety-nets like those provided by the welfare state will fail to grant workers a higher bargaining power with employers than that possessed by the worst-off in the free market. Admittedly, it is hard to maintain such safety-nets permanently, because those eager to qualify

[36] Publications such as the *Index of Economic Freedom* (http://www.heritage.org/Index/), by the Heritage Foundation and the *Wall Street Journal,* offer the kind of evidence that might be invoked by the argument I am considering.

[37] See David Zimmerman, "Coercive Wage Offers," *Philosophy and Public Affairs* 10, no. 2 (1981): 121–45; and Allen Buchanan, *Ethics, Efficiency, and the Market* (Oxford: Clarendon Press, 1985), 87–95.

[38] Notice that free marketeers cannot say that wage offers constitute exercises of the right to private property, which entails the alienability of labor, and that *for this reason* wage offers are not coercive: that move would presuppose the very property rights that are in need of justification. Such an argument would therefore be guilty of the kind of circularity I diagnosed earlier in this section.

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for welfare benefits will adjust their behaviors to the very existence of the safety-nets (we should expect increased numbers of single mothers with children if they qualify for welfare benefits).[39] But it is hard to show that a commitment to freedom as nondomination rules out *any* trade-off between current and future domination, so that any reduction in current poverty through statist measures would involve an overall decrease in domination, no matter how uncertain and less serious the long-term adverse effects on poverty rates (and attendant domination) might be. Unless we could make interpersonal (and intergenerational) comparisons of domination, we could not know whether harming the current beneficiaries of welfare programs (by dismantling such programs) is more apt to engender less overall domination (including that obtaining in the more or less distant future) than currently harming the foreign poor or increasing domestic poverty for future generations—the two groups that are arguably impoverished by welfare programs.[40]

Here is still another type of empirical argument that a free marketeer committed to freedom as nondomination might offer. Some writers argue that free markets rein in politics because they disperse economic power. Such dispersion should surely count in measurements of freedom as nondomination for reasons that should be distinguished from those that supported my claim in Section II that free markets disperse economic decision-making. There the idea was that the free market increases the bargaining power of workers and consumers in their negotiations with employers and firms. The present claim assumes instead that *politics* is an especially powerful source of domination in that it legally monopolizes one key component of domination, namely, physical coercion. Accordingly, other things being equal, reining in politics should be a paramount goal of those who embrace the ideal of freedom as nondomination. On this view, then, the dispersion of economic power fostered by the free market is a good thing not just because it enhances the independence of workers and consumers from employers and firms, but also, and primarily, because it enhances everyone's independence from the most threatening source of domination—the state.

For all the strengths that I find in this argument, reasonable people may demur. To be sure, societies largely based on free markets have fared vastly better than centrally planned economies as providers of freedom as nondomination, as shown by the infamous record of communist regimes

[39] Indeed, such behavioral adjustments pose a serious threat to proposals such as an unconditional basic income, which might be thought to circumvent the worries about arbitrariness that affect traditional welfare schemes. For a related point, see the text accompanying note 18.

[40] See David Schmidtz, "Taking Responsibility," in David Schmidtz and Robert E. Goodin, *Social Welfare and Individual Responsibility: For and Against* (Cambridge: Cambridge University Press, 1998), 1–96; and Tyler Cowen, "Does the Welfare State Help the Poor?" *Social Philosophy and Policy* 19, no. 1 (2002): 36–54. As Cowen argues, granting equal rights to immigrants would render welfare states financially unsustainable.

in matters of civil liberties, deprivation, and arbitrariness, a record that is certainly indicative of relationships of domination. Yet there is strong evidence that private firms operating in formally free markets have been able to sway politics in favor of the rich, typically by sponsoring regulations that restrict the entry of competitors.[41] Perhaps we should conclude that unhampered markets engender their own destruction through anticompetitive regulations sponsored by rent-seekers and politicians who stand to gain from the disproportionate influence of small, well-organized, and well-informed groups vis-à-vis dispersed and ill-informed taxpayers and consumers.[42] On this view, unhampered markets are unlikely to disperse power to the benefit of freedom as nondomination. Others would conclude instead that further layers of regulation, such as antitrust legislation, could foster competition. Such meta-regulations have been attacked, in turn, as unduly sensitive to the political influence that they were expected to neutralize.[43] Be that as it may, it seems fair to conclude that the issues involved here are, once again, far more controversial than the type of argument that I offer next.

### *B. The structural argument*

As a first approximation to that argument, let me say that I have in mind the sort of argument advanced by Thomas Hobbes in his account of the emergence of the state from a "state of nature," by David Hume in his explanation of the origins of property rights, and by H. L. A. Hart in his account of the various types of legal rules found in a modern, developed legal system.[44] Such arguments rely on empirical generalizations connecting, on the one hand, broadly characterized facts about legal systems, persons, and resources, and, on the other hand, broadly characterized social outcomes. More specifically, such arguments infer fairly abstract and general patterns of social outcomes from (i) fairly uncontroversial claims about people's perceived needs and basic types of desires, as well as their relative physical and mental abilities and vulnerabilities, (ii) assumptions about technological conditions, (iii) fairly uncontroversial claims about the scarcity of resources relative to people's needs and desires, and (iv) assumptions about legal rules, broadly characterized (e.g., whether such rules protect private property or some form of communal ownership, whether

[41] See Roderick Long, "Toward a Libertarian Theory of Class," *Social Philosophy and Policy* 15, no. 2 (1998): 303–49.

[42] For a seminal rational-choice analysis of such asymmetries, see Mancur Olson, *The Logic of Collective Action* (Cambridge, MA: Harvard University Press, 1965).

[43] See note 35, especially the reference to Sowell. See also William C. Mitchell and Randy T. Simmons, *Beyond Politics: Markets, Welfare, and the Failure of Bureaucracy* (Boulder, CO: Westview Press, 1994), esp. chaps. 4–11.

[44] See Thomas Hobbes, *Leviathan* (1651), Part II; David Hume, *Enquiry Concerning the Principles of Morals* (1751), chap. IV and appendix 2; and H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), chap. 5.

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damages are awarded on the basis of fault or strict liability, and how judges are selected and removed). Let us call arguments of this sort *structural*. Structural arguments yield empirical predictions and explanations of broad patterns of social outcomes. Such predictions and explanations follow deductively from the propositions about agents, technology, scarcity, and the legal system. Notice that the premises of a structural argument—especially (ii) and (iv)—do not have to be true in order for it to perform *justificatory* functions. For example, Hobbes famously argued that rational, self-interested inhabitants of a "state of nature," that is, an imaginary and hardly ever existent situation in which there is no state or legal system, will devote most of their efforts to plundering others and resisting other people's attempts at plundering them, thus living lives that are "solitary, poor, nasty, brutish, and short."[45] They will accordingly realize that it is in their interest to appoint a political sovereign that monopolizes overwhelming physical force and thus is in a position to deter plundering and other barriers to mutually beneficial interaction, thereby making productive activities beneficial to all. Hobbes implies that such a potential explanation[46] of the emergence of the state is a justification of the state.

Structural explanations point to rational (though not necessarily reflective) choices—stories about agents pursuing their perceived goals through choices that are personally cost-effective, given their beliefs. The totality of such choices shape broadly characterized aggregate outcomes (e.g., more or less general prosperity, more or less poverty, more or less equality). Structural explanations feature an *a priori* component in that, given the relevant assumptions about persons, resources, and legal systems, no empirical research is needed to figure out what those aggregate outcomes will be: the outcomes can be deduced from the assumptions. Many of those deductions may be unexpected and interesting, even to those who find the assumptions obvious. Thus, in Hobbes's argument, it is not immediately obvious that inhabitants of a state of nature for whom it is rational to engage in a "war of all against all" will ever find it rational to make a covenant with an eye to surrendering all of their weapons to a sovereign. Hobbes's argument depends on propositions about strategic behavior that we can nowadays formulate more precisely with the tools of game theory. Some of the game-theoretical insights involved in his argument are fairly counterintuitive (e.g., the claim that, sometimes, rational agents will *not* adopt strategies leading to their most preferred collective outcome), yet this fact does not detract from the deductive validity of (appropriate reconstructions of) his argument.[47]

[45] Hobbes, *Leviathan,* chap. XIII.

[46] For an explication of the notion of potential explanation involved here, see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 6–9.

[47] Hobbes defends the rationality of obeying the law in his imaginary discussion with "the Fool," in *Leviathan,* chap. XV. Some of Hobbes's insights here anticipate modern analyses of iterated prisoner's dilemmas, as theorized by Robert Axelrod, *The Evolution of Coop-*

A particularly interesting type of structural argument postulates an *invisible-hand* process, that is, a sequence of interactions whose aggregate outcome is an unintended effect of different people's actions aimed at local objectives.[48] *Visible-hand* processes, in contrast, bring about aggregate outcomes aimed at in concert by the relevant agents. Conspiracy theories conspicuously postulate visible-hand processes. Invisible-hand theories are usually more interesting than their visible-hand counterparts because invisible-hand theories ground unexpected predictions. Moreover, they have greater predictive power because their premises can be independently tested, as opposed to being ad hoc. The concerted actions postulated by many visible-hand explanations of overarching societal features, such as a country's relative economic backwardness, are inferred from the occurrence of the facts one is trying to explain. The fact that such inferences are ad hoc explains, in turn, the lack of predictive power of such visible-hand explanations.

We normally know the types of goals pursued by ordinary people in their everyday activities—goals such as making money, being amused, or fulfilling the duties of friendship—yet we may have a hard time trying to figure out even the broadest patterns of aggregate outcomes inferable from such knowledge. Good invisible-hand explanations bridge this gap. Thus, the branch of economics known as public choice theory enables us to explain, and predict, otherwise puzzling societal patterns, such as the systematic patterns of exploitation of taxpayers and consumers by small and well-organized groups, even under well-functioning liberal democratic institutions. Such explanations and predictions rest on independently testable hypotheses about the types of local goals pursued by voters, bureaucrats, and rent-seekers.[49]

Crucially for present purposes, invisible-hand processes rule out domination because domination involves *intentional* interference.[50] Invisible-hand theories are a subset of rational-choice theories (visible-hand theories, too, may well assume that agents are rational, as typical conspiracy theories do). As such, invisible-hand theories postulate that agents pursue certain goals, but these are *local* goals (e.g., buying a pound of apples, eating sweet fruits, plundering a plot of land, or resisting plunder), and

*eration* (New York: Basic Books, 1984). See also Russell Hardin, *Liberalism, Constitutionalism, and Democracy* (New York: Oxford University Press, 1999), 82–119; and Gregory Kavka, *Hobbesian Moral and Political Theory* (Princeton, NJ: Princeton University Press, 1986), chaps. 3–6.

[48] The metaphor of the invisible hand was famously introduced by Adam Smith in *The Wealth of Nations* (1776), Book IV, ii.

[49] See Olson, *The Logic of Collective Action;* and Robert Tollison, "Rent Seeking," in Dennis C. Mueller, ed., *Perspectives on Public Choice: A Handbook* (Cambridge: Cambridge University Press, 1997), 506–25.

[50] That dominating power is exerted through intentional interference was implicit in my analysis in Section II. See also Pettit, "Freedom in the Market," 135; and Guido Pincione, "Welfare, Autonomy, and Contractual Freedom," in Mark White, ed., *The Theoretical Foundations of Law and Economics* (New York: Cambridge University Press, 2009), 214–33.

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the agents who pursue them do so without intending to do their share in bringing about the aggregate outcomes that those theories are expected to explain (e.g., the equilibrium price of apples, changes in the price of substitute goods, low average investment in farming, or high average investment in self-protection). Whether a process whereby members of a group of people *G* worsen their situations is constituted by the concerted actions of members of group *H* seeking to benefit themselves at the expense of members of *G*, or is rather an invisible-hand process that worsens the members of *G* and benefits the members of *H*, is surely relevant to determining whether the members of *H* dominate the members of *G*.

I can now deploy two nondomination-based structural arguments for the thesis that freer markets involve less domination. The first argument is premised on the idea that tearing down legal barriers to entry into markets sets in motion forces against domination. What I have in mind here differs from a thesis I defended in Section II, namely, that competition reduces domination. This latter thesis is compatible with the claim that freer entry will not, as a matter of fact, increase competition, a claim that the first structural argument disputes. Imagine that a monopoly on goods essential to consumers' leading minimally meaningful lives has emerged in a free market. As we saw in Section II, the holder of such a monopoly arguably dominates consumers; she can, for example, refuse to sell a life-preserving drug to a patient unless he complies with whatever requests the monopolist happens to make.[51] Economists have shown that a monopoly emerges in a free market just in case certain market structures obtain. More specifically, technology, along with supply and demand for substitute goods, must be such that the monopolist maximizes her profit by charging a price that exceeds her marginal cost. Call these the *market conditions*. Nobody has an incentive to compete with a monopoly under current market conditions. However, the very existence of a monopoly gives entrepreneurs an incentive to change the current market conditions. This is especially true of the market conditions that matter for a theory of freedom as nondomination. The existence of a single supplier of a good that consumers perceive as necessary to carrying out their most cherished life-plans sets in motion forces that check domination: a monopolist's very ability to increase revenue by raising her price above the equilibrium price for a competitive market[52] generates incentives for others to invest in new technologies or otherwise change the market conditions under which it is unprofitable to compete.

[51] The argument I am offering holds, mutatis mutandis, for a monopsony (i.e., a single buyer) as well. Thus, a single employer (i.e., a buyer of labor) can threaten disobedient employees with dismissal.

[52] Such ability rests on the fact that the demand curve for the monopolist's output becomes more inelastic just above the competitive price, a fact that enables the monopolist to obtain, beyond that point, per-unit gains that are higher than required to compensate for a reduction in sales. For a fuller, though still nontechnical, explanation, see David Friedman, *Law's Order: What Economics Has to Do with Law and Why It Matters* (Princeton, NJ: Princeton University Press, 2000), 244–46.

Moreover, the very existence of monopoly prices increases consumption of substitute goods, including goods invented in response to the "excessive" monopoly price.[53] But then, showing that a firm is a monopoly fails to prove domination, even if the firm monopolizes goods necessary to leading a minimally decent life—unless, of course, it is a *legal* monopoly, and as such prevents the emergence of the countervailing forces described above. It seems far-fetched to assume that no amount of investment in new technologies, exploration, and substitutes (including new substitutes) will upset monopolistic positions, or even that inordinately high levels of investment will be necessary. I want to suggest, then, that the free market has built-in incentive structures that correct for monopolistic tendencies, *especially* if a monopoly engenders domination. Moreover, even if a monopoly retained its position for long enough to dominate its consumers, the self-defeating structure of incentives under which it operates would have no parallel in the structure of incentives created by the regulatory powers needed to fight private domination. The fact that some kind of regulation of a monopolistic market (e.g., a price control) would be needed to simulate the outcome that such a market would have attained under competitive conditions does not entail that the regulatory powers that are needed to implement such regulation will not be subject to the sort of perverse incentives theorized by public choice economists. Nor does it entail, in particular, that such powers will not involve the forms of domination that I described in Section II. In short, any sound argument for the claim that statist alternatives to private monopoly best realize freedom as nondomination must meet the burden of proving that the forms of domination spawned by statism are less serious or come with better self-correcting mechanisms.

Notice, also, that freer markets facilitate mutually beneficial interaction—a fact that surely prevents the emergence of domination. Saying that freer markets facilitate mutually beneficial interaction may sound platitudinous, because the free market by definition involves contractual freedom, a freedom that allows persons to interact in ways that they perceive as worth their personal cost. It is well known, however, that barriers to mutually beneficial interaction may arise in a free market. Economists have studied such nonlegal barriers under the heading of *market failures.* A common example of market failure takes place when transaction costs prevent a firm from making contracts with neighbors over levels of pollution they are willing to tolerate, thereby inducing the firm to increase output, and the attendant pollution, beyond the point at which marginal social benefits and marginal social costs are equal. More generally, market failures prevent rational agents from attaining aggregate outcomes that they rank higher in their

[53] See Rothbard, *Man, Economy, and State,* 586–620 and 632–60. The relatively short history of the personal computer contains many examples of what David Friedman calls "serial competition," i.e., dominant (in a sense, monopolistic) products quickly replaced by other dominant products. See Friedman, *Law's Order,* 259.

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respective preference orderings than the outcomes they in fact attain.[54] Such divergences between individual rationality and what we might call "collective rationality" are usually taken to prove the inefficiency of real-world markets (as compared with "perfectly competitive markets").

It would be pointless to challenge the theory of market failure without challenging the assumptions under which it is derived, given the deductive validity of the arguments premised on such assumptions.[55] Indeed, some writers propose to revise the rationality assumptions, such as the transitivity of preferences, contained in such arguments.[56] I want to challenge instead the use of the theory of market failure to model real-world economies, as described by fairly uncontroversial claims about human psychology, relative physical and mental abilities, scarcity, and technology—hence the structural nature of my argument. Conceptual truths about market failure need not undermine the proposition that actual markets will tend to fail less often in ways that matter for a theory of freedom as nondomination than *feasible* statist alternatives. My previous remarks in this subsection on changes in market conditions—as well as those made in Sections II and III on dispersion of economic power, manipulability, and compossibility—suggest that this latter proposition holds true with regard to private monopolies. But the point can be generalized in the following way.

For any amount of market failure, there will be correspondingly strong incentives to invest in changing the market conditions that give rise to that failure. For example, there will be correspondingly strong incentives to find new sources of a scarce resource, or to use (and if necessary invent) technologies to reduce transaction costs and exclude free-riders in the production of collective goods worth their social cost. While, as we saw, it is by hypothesis unprofitable to compete with monopolies *under current market conditions,* the very existence of a monopoly provides people with incentives to alter such conditions in order to make competition profitable. To be sure, this is an empirical hypothesis, yet we do not need regressions and other usual techniques of empirical research to validate it.[57] It rests on fairly uncontroversial propositions about persons and their circumstances, propositions that should surely figure in any empirical interpretation of formal economic models aspiring to possess predictive/explanatory power. Of course, empirical testing of that hypothesis may ultimately undermine it, but its *structural* nature—the fact that it rests on

[54] See Alan M. Feldman and Roberto Serrano, *Welfare Economics and Social Choice Theory,* 2d ed. (New York: Springer, 2006), 119–93.

[55] For a simplified formal proof of the inefficiency of externalities—a major source of market failure—see ibid., 143–50.

[56] Fernando Tesón and I defend standard rational-choice assumptions in *Rational Choice and Democratic Deliberation,* 65–86.

[57] The realism and verifiability of the assumptions under which standard economics proves the inefficiency of monopolies have been questioned by the Austrian school of economics, as illustrated by Rothbard, *Man, Economy, and State,* 560–660. See also note 35.

fairly uncontroversial propositions about human psychology, relative physical and mental abilities, scarcity, and technology—places the burden of proof on those who advocate state intervention as a remedy for the forms of domination that free markets may produce. Given my arguments in Sections II and III to the effect that such interventions themselves involve various forms of domination, I am skeptical that statists could meet such a burden of proof under moderately realistic assumptions.

My second structural argument rests on the fact that the processes whereby free markets disperse economic power need not involve especially virtuous agents. On the contrary, the invisible-hand nature of such processes ensures that the free market economizes on those virtues that would otherwise be necessary to prevent domination. Virtue, understood as a disposition to act on duties that sometimes demand self-sacrifice, is a scarce resource, and, for this reason, well-informed, rational, and morally motivated constitutional drafters will economize on it.[58] They will design constitutions that provide the right people with the right incentives to bring about good social outcomes. Whether those drafters seek to improve the lot of the poor, to promote general prosperity, to secure equality, or to achieve any other social outcome sanctioned by their preferred political morality, they will avail themselves of invisible-hand processes to achieve those goals as long as they take seriously the fact that virtue is scarce. They will not design constitutions that *empower* public officials to attain certain goals.

Constitutional design guided by the goal of nondomination is no exception. Constitutional drafters committed to freedom as nondomination and persuaded by my first structural argument will not seek to protect freedom through solemn constitutional declarations, or even through more or less detailed lists of rights that can naturally be thought to shield persons from domination. They will not, for instance, provide that "labor in its several forms shall be protected by law, which shall ensure to workers: dignified and equitable working conditions; limited working hours; paid rest and vacations; fair remuneration; minimum vital and adjustable wage; equal pay for equal work; participation in the profits of enterprises, with control of production and collaboration in the management; protection against arbitrary dismissal; stability of the civil servant; [and] free and democratic labor union organizations."[59] Even though there arguably is *some* plausible interpretation of such rights that makes them effective tools against "coercive wage offers" and other sources of domination discussed in the previous subsection, the constitutional drafters that I have in mind will not draft the constitution along those lines.

[58] For a formal analysis of institutions that economize on virtue, see Geoffrey Brennan and Alan Hamlin, "Economizing on Virtue," *Constitutional Political Economy* 6, no. 1 (1995): 35–56.

[59] These are provisions of the Argentine Constitution, section 14bis. (Section 14bis is a section introduced by amendment between sections 14 and 15.)

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We saw in Section III how such substantive provisions make room for interpretive manipulations that furnish legal cover for the very relationships of domination that they are expected to eliminate.[60] My present point is that, in addition, such provisions do not economize on virtue: at least one alternative route toward freedom as nondomination requires less virtue, namely, the invisible-hand process depicted in my first structural argument. Constitutional drafters committed to freedom as nondomination will seek to generate, through the sort of procedural rules advocated in Section III, an invisible-hand process of governance whose side-effect is another invisible-hand process—a free-market process—whereby freedom as nondomination is, in turn, an aggregate side-effect of agents pursuing their separate goals.[61]

## V. Conclusion

Cuba is currently (2009) a member of the United Nations Human Rights Council. Due to its harsh suppression of political dissent, its lack of free elections, and the absence of effective legal safeguards against arbitrary executions and imprisonments, organizations such as Amnesty International, Freedom House, and Human Rights Watch have long denounced Cuba for serious violations of human rights.[62] Supporters of the regime typically note that Cuba makes health care and education available to all citizens, and for this reason it respects basic human rights to a larger extent than liberal democracies do. Many opponents of the regime object either that those achievements exist only as pieces of the regime's propaganda or that they do not make up for Cuba's violations of civil rights and liberties. Such opponents tend to regard advocates of the Cuban regime as either misinformed or insensitive to the paramount importance of liberal rights; and when, as is too often the case, Cuba's defenders condemn a liberal democracy for its occasional curtailments of civil rights and liberties, many charge them with hypocrisy.

The argument I have developed in the course of this essay suggests another way of looking at things. It suggests that, whatever the accuracy of the factual premises on which supporters of the Cuban regime rely, whatever the weight of the human rights they invoke as a reason to

[60] For a study of the capture of Argentine society by vast amounts of special-interest legislation dressed up in a rhetoric of constitutional rights, see Jorge E. Bustamante, *La Argentina Corporativa* (Buenos Aires: EMECE, 1988).

[61] Notice that a free market, on the understanding of it that I adopted in Section I, excludes appeals to the types of rights illustrated by the passage from the Argentine Constitution quoted above.

[62] See Amnesty International USA, http://www.amnestyusa.org/all-countries/cuba/page.do?id=1011139; Freedom House, http://www.freedomhouse.org/template.cfm?page=22&country=7592&year=2009; and Human Rights Watch, http://www.hrw.org/en/search/apachesolr_search/Cuba.

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suppress civil rights and liberties, and whatever their sincerity, their very advocacy of a manipulable set of rights amounts to supporting tyranny (and the corresponding violations of nonmanipulable human rights against torture, arbitrary arrest, and other forms of domination). Indeed, the more seriously they take the alleged achievements of the Cuban regime as a matter of rights, and not merely as a matter of public policies that are, as such, systematically outweighed by rights-based considerations, the more plausible it is to interpret their ostensible reasons for supporting the Cuban regime as reasons for supporting tyranny. Those of us who abhor domination should regard the lists of "human rights" contained in the United Nations Charter and so many constitutions and international treaties as rhetorical tools for tyranny. We should accordingly not take the membership of Cuba in the United Nations Human Rights Council (merely) as an aberration of the language of human rights. On the contrary, it is precisely people's willingness to treat all of the rights contained in those documents as genuine that *commits* them, for the reasons I have offered throughout this essay, to embracing a huge concentration of arbitrary power.

I end with two caveats. First, the kind of procedural constitution that I have advocated should not be taken as an infallible recipe against domination, or even as a recipe that will often work well. Nondomination may well be unattainable in societies where social conventions induce people to breach formal legal rules, for example, through bribes and informal sanctions for whistle-blowing. In the jargon of game theorists, in such societies noncompliance with formal legal rules and compliance with the rules of organized crime or other groups capable of subjecting others to their arbitrary power is the strategic equilibrium.[63] Under those circumstances, not even a procedural constitution will shield citizens from the forms of domination that such groups may impose. But this is not to say that we cannot do anything to prevent the emergence of domination in societies where noncompliance with procedural constitutional rules does not pay. To the extent that societies of this latter sort exist, my argument for a procedural constitution against domination will be applicable.

Second, I have offered a presumptive case for the advantages of the free market when nondomination is our primary concern, yet I do not mean to downplay the significance of other principles or values for an overall assessment of the free market. Indeed, I indicated at the outset why those who embrace self-ownership, personal autonomy, or equality should be attracted to a principle of nondomination—and, if I am right, to the

[63] See Robert Cooter, "The Rule of State Law versus the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development," in Edgardo Buscaglia, William Ratliff, and Robert Cooter, eds., *The Law and Economics of Development* (Greenwich, CT: JAI Press, 1997), 101–48.

market freedoms it sanctions.[64] Theorists of freedom as nondomination who support statist solutions have the burden of disproving the presumption in favor of the free market that I have endeavored to establish. They will have to show, in particular, why the concentration of political power needed to implement their preferred policies, including those officially aimed at curbing private domination, should not itself loom large in our measurements of domination.

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[64] Perhaps less transparently, welfarist political moralities also seem responsive to the value of freedom as nondomination. Thus, I have argued elsewhere that welfarist and autonomy-based arguments converge on justifying a strong presumption of contractual freedom and are ultimately based on a hypothetical contract that embodies the value of freedom as nondomination. See Pincione, "Welfare, Autonomy, and Contractual Freedom."

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