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REPUBLICAN FREEDOM: ITS THEORETICAL AND PRACTICAL LIMITS

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TABLE OF CONTENTS

ABSTRACT	v
ÖZET.....	vi
LIST OF ABBREVIATIONS	vii
INTRODUCTION.....	1
PART I: HISTORICAL ACCOUNT OF THE REPUBLICAN CONCEPTION OF FREEDOM.....	6
CHAPTER 1: THE REPUBLICAN CONCEPTION OF FREEDOM IN THE HISTORY OF POLITICAL THOUGHT	7
1.1. Introduction	7
1.2. The Master-Slave Dichotomy.....	9
1.3. The Importance of the Rule of Law.....	15
1.4. The Concept of Arbitrary Power	18
1.5. The Role of Civic Citizenship.....	21
1.6. Recent Contributions to the Revival of Republican Freedom	25
CHAPTER 2: THE NEGATIVE AND POSITIVE DISTINCTION AND SKINNER'S THIRD PROPOSAL	30
2.1. Introduction	30
2.2. Benjamin Constant and Isaiah Berlin: Two Conceptions of Liberty	33
2.3. Quentin Skinner: A Genealogy of Liberty	43
CONCLUSION FOR PART I.....	54
PART II: PHILIP PETTIT'S THEORY OF REPUBLICAN FREEDOM AS NON-DOMINATION	59
CHAPTER 3: FREEDOM AS NON-DOMINATION.....	60
3.1. Introduction	60
3.2. The Concept of Domination	62
3.3. Arbitrary and non-Arbitrary Interference.....	70
CHAPTER 4: CONTESTATORY DEMOCRACY: A SOLUTION OR FAULT LINE OF THE THEORY?	77
4.1. Introduction	77

4.2. Constitutional Constraint and Democratic Control	80
4.3. The Eyeball and Tough-luck Tests	87
CONCLUSION FOR PART II	94
PART III: CASE STUDY: THE SUPREME COURT CASES	
CONCERNING THE FREE EXERCISE CLAUSE	99
CHAPTER 5: RELIGIOUS FREEDOM AND REPUBLICAN FREEDOM	
.....	100
5.1. Introduction	100
5.2. The Case for Judicial Review	114
5.3. The Free Exercise of Religion Clause	128
CHAPTER 6: THE POLITICS OF THE FREE EXERCISE CLAUSE ..	139
6.1. Introduction	139
6.2. The Compelling Interest Criterion	145
6.3. The Shift in the Court's Position: Limiting the <i>Sherbert</i> Test	155
6.4. The Legislative Remedy: The Religious Freedom Restoration Act, RFRA	165
6.5. The Court Fights Back: Overturning the RFRA	174
6.6. The Free Exercise Clause Cases after <i>City of Boerne v. Flores</i>	179
CONCLUSION FOR PART III	200
CONCLUSION	206
REFERENCES	218
ANNEXES	238

ABSTRACT

For a long time, freedom was understood as either a negative or a positive concept. The negative conception of freedom refers to the absence of something, e.g., freedom from interference, barriers, or constraints. The positive conception of freedom understands that concept as an active exercise. However, at some point a third alternative arose, which was seen as freedom from dependence or domination, and became known as the “republican” conception of freedom. Republican freedom is both a negative concept because it is based on the absence of domination, and a positive one, because it relies on civic citizenship as an active consequential ideal. For this reason, in theory, republican freedom offers a more comprehensive approach to freedom than either the negative or positive distinctions.

This dissertation studies the limits of some of the practices of republican freedom. Implementation of republican freedom as non-domination, in particular for claims of minorities, relies heavily on the premise that contestation institutions will offer protection when political means fail to do so. In this regard, judicial institutions serving as contestation institutions, are envisioned to function in a depoliticized way. This dissertation claims that judicial institutions' practices are intertwined with politics, which reveals a fault-line in the theory of republican freedom.

The third part of this dissertation aims to complement the theoretical argument with a case study. Because claims regarding the Free Exercise Clause of the First Amendment of the United States Constitution are concerned with the religious freedom of minorities, the Supreme Court's decisions offer a firm ground from which to test the limits of the theory of republican freedom. The historical account of claims based on the Free Exercise Clause and decided by the Supreme Court, indicates that the Court's decisions have always been intertwined with the contemporary political branches of government. The pendulum-like change of the interpretation of the Free Exercise Clause by the Court exposes this inescapable relationship to the political actors, which brings to light the limits of the theoretical proposition of republican freedom.

Keywords: Republican Freedom, Non-domination, U. S. Supreme Court, Religious Freedom, Free Exercise Clause

ÖZET

Özgürlük uzun bir süre negatif ya da pozitif bir kavram olarak algılanmıştır. Negatif özgürlük müdahale, engel ya da kısıtlamanın olmadığı bir duruma göndermede bulunurken, pozitif özgürlük yapılabilmesi muhtemel bir eylemi ifade eder. Tahakkümsüzlük olarak özgürlük anlayışı, cumhuriyetçi özgürlük olarak, bu iki özgürlük anlayışına ek olarak üçüncü bir alternatif olarak ortaya atılmıştır. Cumhuriyetçi özgürlük hem negatif hem de pozitif özgürlüğün argümanlarını içinde barındırır. Negatif özgürlüktür çünkü tahakkümün olmadığı bir durumu gerekli kılar. Pozitif özgürlük olarak düşünülmesinin sebebi ise işlevselliği hedef alan bir siyasi katılıma dayanmasıdır. Bu sebepten dolayı, cumhuriyetçi özgürlük hem negatif hem de pozitif özgürlük anlayışından daha kapsamlı bir yaklaşım önerdiğini iddia eder.

Teorik olarak tahakkümsüzlük olarak cumhuriyetçi özgürlüğün uygulanabilirliği büyük oranda itiraz kurumlarının siyasal alandan etkilenmeden karar verebilme kapasitelerine bağlıdır. Özellikle azınlık haklarının korunması konusunda siyasal alanın yetersiz kaldığı durumlarda cumhuriyetçi özgürlük teorisi yargı kurumlarının siyaset üstü karar verebileceği varsayımını savunur. Tezin teori kısmındaki tartışma yargı kurumları ile siyasal alanın iç içe geçtiğini savunmaktadır ve bu ilişki cumhuriyetçi tezinin fay hattına işaret etmektedir.

Tezin üçüncü kısmı cumhuriyetçi özgürlüğe getirilen teorik eleştirinin pratikteki uygulamalarını göstermeyi hedeflemektedir. Bu bağlamda Amerika Birleşik Devletleri'nde din özgürlüğü hakkının kullanılmasına anayasal güvence sağlayan Serbert Kullanma Koşulu ile alakalı verilen Anayasa Mahkemesi kararları teorik eleştirinin test edilmesi için uygun zemin oluşturmaktadır. Anayasa Mahkemesi'nin bu konuda verdiği kararların tarihsel bir analizi, mahkemenin verdiği kararların siyasal alandan soyutlanmış olmaktan ziyade, kaçınılmaz olarak siyasal alan ile iç içe bir ilişki içinde olduğunu ortaya çıkarmaktadır. Anayasa Mahkemesi'nin Serbest Kullanma Koşulu'na getirdiği yorumun belli dönemlerde değişmesi ve bu değişimin siyasal alan ile ilişkisi ikinci kısımda ortaya atılan teorik eleştiriye desteklemektedir.

Anahtar Kelimeler: Cumhuriyetçi Özgürlük, Tahakkümsüzlük, Birleşik Devletler Yüksek Mahkemesi, Dini Özgürlük, Din ve İnancı Açığa Vurma Serbestisi Hükmü

LIST OF ABBREVIATIONS

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
RFRA	Religious Freedom Restoration Act
RLUIPA	Religious Land Use and Institutionalized Persons Act



INTRODUCTION

I was an exchange student in Greece in 2007 when student protests included the occupation of universities for several months. One of the most memorable personal experiences I had as a political science student during that period, was experiencing the actual practice of liberty¹ to contest a decision. During the occupation, in addition to all administrative offices and classrooms, both the library and cafeteria were closed. As exchange students, we were dependent on the affordable meals in the campus cafeteria and on having access to the books in the library so that we could work on our term papers. In the following student assembly, attended by the vast majority of students, a few of us contested the decision to shut down those important services. Despite only a few of us needing certain resources on campus, as most of the full-time students returned to their homes during the occupation, in the end, the cafeteria and library were opened again. Since that time, I have never ceased to think about what would have happened if the decision had been otherwise. If those services had not been re-opened, would we have been losers who had been dominated by others, i.e., the majority? This question has been in the back of mind ever since.

Almost a decade later, when I started to read about the republican conception of freedom as “non-domination,” I realized that the theory of republican freedom might propose a persuasive answer to my question above. According to Philip Pettit, who conceptualized and coined the term, every decision concerning minority freedoms would create a loser and a winner. Yet, the loser would not be “dominated”, as long as the decision was not made arbitrarily. The question then becomes, what renders a decision non-arbitrary? In his early works (2002b), Pettit argues that in order to assure a non-arbitrary decision, people’s avowable interests should be heard, and the contestation institutions should be responsive to the contestants’ claims. To achieve this goal, those institutions should make decisions in a “depoliticized way” (2002b, pp. 195-97).

¹ I use the terms ‘freedom’ and ‘liberty’ interchangeably throughout this dissertation.

The above summary of the theory of republican freedom motivated me to study the subject more comprehensively. As I continued my education, I tailored my studies of required and elective tutorial courses more and more toward researching the republican conception of freedom. As a requirement for any study in political theory, as a first requirement, a historical account of the concept of republican freedom seemed inevitable. Sunstein stated "there is no unitary approach that can be described as republican" (1988, p.1547). With that in mind, Part I aims to provide an account of the contributions to republican freedom in the history of political thought from several key thinkers. A genealogical endeavor by Skinner (1978a, 1978b, 2003) shapes the foundation for the historical account of Part I. This account provides a coherent storyline and proposes four commitments for republicanism that have been offered by these republican thinkers: the master-slave dichotomy, the importance of the rule of law to preserve liberty, the concept of arbitrary power, and the role of civic citizenship (Chapter 1). In addition, because republican freedom is conceived as the third alternative to negative and positive conceptions of freedom, Chapter 2 elaborates on the origins of negative and positive freedoms and how they relate to republican freedom.

The theory of republican freedom has two branches: The Italian-Atlantic and the Franco-German. Pettit (2013) differentiates his republican theory from the Franco-German tradition. He follows the Italian-Atlantic tradition of republican thought, which is based upon three ideas: (1) equal freedom of its citizens, (2) constitutional constraint via a mixed constitution, and (3) collective and individual virtue of the citizens to track and contest public policies (2013, p. 170). The Italian-Atlantic tradition has been represented in the works of Livy, Cicero (Roman Republican thought), Machiavelli (Renaissance), Harrington, Sidney, Milton (English Republican thought), and Price (the American Independence). The Franco-German tradition rose upon the contributions of Rousseau and Kant. Pettit claims that both Rousseau and Kant departed from the Italian-Atlantic tradition in advocating the mixed constitution, and more importantly, in taking legislative authority to be the

sovereign (Pettit 2013, p. 184-85; 2019, p. 203). Since this dissertation studies Pettit's theory of republican freedom as non-domination, neither the historical nor the theoretical analyses (Parts I and II) include Kant's or Rousseau's theories.

In addition to Skinner's studies, Philip Pettit's works (2002b, 2003, 2014) also contributed to the historical account of the republican conception of freedom. Each of his books begins with an examination of the historical evidence of republican freedom in the history of political thought; examinations that are mostly shared with Skinner's works. However, Pettit offers more than just a historical analysis of the concept. His works also propose a political system from which the republican conception of freedom could be put into practice. After analyzing the concept of republican freedom as non-domination (Chapter 3), where Pettit conceives the concept of freedom not only in terms of value in life but also as a "gateway good" (2014b, p. 3), the rest of Part II (Chapter 4) focuses on Pettit's theory of a "republican government", in which freedom as non-domination could endure.

The discussions in Chapter 4 present modern republicanism as formalized by Pettit, especially in the ideal form of freedom as non-domination, as well as the problems that arise from its implications. Interestingly, as Maynor and Laborde pointed out, eighteenth-century republicanism faced a similar situation as it tried to reconcile non-domination with current reality. They argued that one of the fundamental reasons for republican freedom being deserted in the history of political thought was its practicality. Non-domination demanded to overthrow the inegalitarian relations in society, which posed extreme implications (Laborde & Maynor, 2008, p. 19). This requirement of overturning the inegalitarian society and its implication for republican freedom give clues about the limits of republican freedom. In this sense, Pettit's theory rests upon the idea of contestable democracy, which at its foundation, depends upon the "depoliticized" response of contestation institutions to the claims of minorities. However, this dependency on the "ideally" non-political institutions for the protection of freedom of minorities represents something that I

consider to be a fault line of Pettit's theory. Part II extensively elaborates on this critique of mine of Pettit's theory.

The fault line of Pettit's theory, as described above, points out a limitation of republican freedom in practice. When minority claims are not heard and resolved within the means of politics (which tend to be controlled by majoritarian political actors), the fate of minority claims is left to judicial institutions. Due to this formulation, the U. S. Supreme Court (the Court) cases regarding the Free Exercise Clause of the First Amendment offers a workable ground for testing the limits of republican freedom. The goal in Part III is to examine the historical account of the Free Exercise Clause jurisdiction in the United States and to discuss the relationship between the Court's decisions (the Court being, in Pettit's theory, a depoliticized institution) and politics (generally, Congress). To this end, first, Chapter 5 discusses the connection between republican freedom and religious freedom. Finally, Chapter 6 analyzes the Court's decisions concerning the Free Exercise Clause throughout American history. The final section of Chapter 6 offers a general argument for religious freedom in the post-*Boerne* period, a time when the conflict between the Court and Congress abated. One of the fundamental reasons that the Free Exercise Clause jurisdiction has been widely debated in American history is that the First Amendment grants an extensive scope for religious freedom. Unlike the European Convention on Human Rights (ECHR), the Free Exercise Clause of the First Amendment does not present any limitations to religious freedom. For this reason, the Court's interpretation of the Clause has changed at various times in accordance with the political environment.

In summary, this study first aims to provide a coherent storyline that has been common in the contributions to the republican theory in the history of political theory (Part I). The second goal is to discuss a limitation of the republican conception of freedom, by elaborating on what I term the fault line of Pettit's theory (Part II). Finally, I show reflections of this theoretical argument within the practices

of the Court's decisions and some resulting political responses regarding the Free Exercise Clause in American history (Part III).



**PART I: HISTORICAL ACCOUNT OF THE REPUBLICAN
CONCEPTION OF FREEDOM**



CHAPTER 1: THE REPUBLICAN CONCEPTION OF FREEDOM IN THE HISTORY OF POLITICAL THOUGHT

1.1. Introduction

Providing an account of the contributions to republican freedom in the history of political thought is a difficult task. The first reason is because the contributions to republican freedom are not monolithic and the spectrum of the contributions spreads not only to various political contexts and ideas but also to the long period of the history of political thought. The second reason stems from the difficulty of describing republicanism as a unitary approach because ideas associated with republican thought differ from each other (Sunstein, 1988, p. 1547). Although it would be necessary to start with the foundation of Roman Law, i.e., the *Digest* and Justinian's *Codex* (Skinner, 2002), my summary starts with Machiavelli's work *the Discourses*² (1979). There are three reasons for choosing Machiavelli as the starting point. The first one is Machiavelli's pivotal role in the works of Quentin Skinner (Skinner, 1990; 2000; 2003), who is, along with Philip Pettit, the foremost scholar who contributed to the revival of republican / neo-Roman freedom in the 20th century. The second reason is that it was Machiavelli who studied the Roman conception of freedom concerning the status of the citizen. In *the Discourses*, Machiavelli analyzes how ancient Rome became free by establishing the Roman republic and there, he emphasizes the importance of the master-slave dichotomy. Finally, the third reason is the limits of my research. While it is tempting to dive into the ancient texts to examine the relationship between the modern republican freedom and the ancient conception of freedom, it was imperative to limit the primary sources and analyze them within a variety of themes.

² The complete title of the book is *Discourses on the First Decade of Titus Livy*.

Despite the reasons above, my summary aims to be comprehensive in terms of the various times and political contexts. While Machiavelli's contribution (1979) sheds light on the Florentine Republic during the 16th century, Harrington's (2019) and Sidney's (2009) works represent the republican vein during the Interregnum Period in England. Furthermore, the study of Richard Price's (2018) contributions attempts to incorporate different political contexts in different periods as well. Finally, in addition to Skinner's works, which will be discussed in detail in the following chapter, the scope of this work compelled me to be selective in joining the dots for the analysis of the contributions in the 20th century: Hans Baron (1955), Pocock (1975; 1995), Viroli (1995;1998; 2001; 2002), Dagger (1997; 2008), and Tarcov (1982; 1997).

I believe the analysis of the contributions of the thinkers mentioned above creates a coherent storyline, which is significant for conceptualizing the republican conception of freedom. This storyline comprises four thematic discussions: the master-slave dichotomy, the importance of the rule of law to preserve liberty, the pivotal aspect of the concept of arbitrary power, and the role of civic citizenship. All these four discussions provide theoretical grounds for the revival of republican freedom in the 20th century. For this reason, instead of analyzing the contributions of thinkers chronologically, this chapter attempts to examine them by categorizing the four thematic arguments.

One can argue that classifying the thinkers under specific arguments would be problematic because of the limitations it causes for the analysis of the corresponding texts. I agree with the criticism of this approach. However, in order to overcome this problem, I will not confine the contributions of one thinker to one thematic discussion. For example, the contribution of Machiavelli will not be discussed only under the master-slave-dichotomy discussion, despite its central role.

1.2. The Master-Slave Dichotomy

The origin of the master-slave dichotomy goes back to the founding of the Roman Republic (509 BCE – 27 BCE) when the Roman state was built upon the very concept of freedom. The political system in Rome before the republican period was a monarchy. Nine kings ruled the state during that earlier period. The overthrow of Tarquinius Superbus, the last king of Rome (753 BCE – 509 BCE), by a group of aristocrats led by Lucius Junius Brutus, marks the beginning of the Roman Republic. The key concept in this decisive part of Roman history was the establishment of freedom in republican terms. In other words, the Roman Republic was founded on the idea of liberation from a single ruler (Skinner, 2003, p. 39), hence from one man's domination. The arbitrary use of power by the Roman kings and their domination over their citizens were the two fundamentals of Roman politics which engendered the birth of the republican conception of freedom.

Another dimension of that concept of freedom, in this sense, is the status of the king. According to this argument, the people should not be the subjects of a single ruler, i.e., they should be the opposite condition to that of servitude, which is defined as being the property of others (Skinner, 2003, p. 39). The status of the people should be defined instead by the concept of citizenship, which gives equal rights to all in order to balance the power between the people (*plebs*) and the ruling class, aristocrats (*patrici*).

The master-slave dichotomy turns the republican conception of freedom into a status. Essentially, it means that being in a state of either a master or a slave defines the status of freedom itself. As opposed to more structural and complex ways of defining freedom (e.g., being free through civic citizenship or simply being free of interference), the master-slave dichotomy is a definition comprising both situations. In essence, if you are a master, you are free; if you are not a master, then you are a slave. It is this strict contrast between freedom and slavery as a status that points out one of the features of republican liberty. Skinner traces this distinction back to

the accounts of Roman historians, such as Livy, Sallust, Seneca, and Tacitus, plus the Roman *Digest*, in which a slave is defined as being subject to the jurisdiction of another person. As it is stated in the *Digest*, it is “to be *in potestate*, within the power of someone else” (Skinner, 2003, p. 41). Moreover, Skinner gives the comprehensive definition as follows:

The concept of liberty is always defined in the *Digest* by contrast with the condition of slavery, while the predicament of the slave is defined as that of ‘someone who, contrary to nature is made into the property of someone else. (Skinner, 2003, p. 39)

The strictness of this distinction during the foundation of the Roman Republic is pivotal in terms of the conceptualization of republican freedom because many thinkers benefited from their knowledge of the history of the Roman Republic when discussing the idea of republican freedom.

The status of freedom is not only applicable to the individual level but also to the state level. Loss of liberty as a state was considered to be the same as loss of liberty for individuals (Skinner, 2003, p. 36). In other words, political bodies may lose their liberty just as individuals do. When individuals lose their liberty, they become slaves. Similarly, states fall into servitude when they lose their liberty. Another way of defining the different levels of considering freedom is indicating that the status of freedom consists of both internal and external levels. While the internal servitude indicates being subject to a tyrant within a political body, the external servitude means being subject to a foreign imperial power.

Skinner argued that republican thinkers consider Machiavelli as one of, if not, the most important thinker who contributed to republican theory (2003, p. 47). His less known work, *the Discourses*, which is a series of commentaries on the first ten books of Livy's History of Rome, addresses the issues that are fundamental in establishing a republican state, such as having a free state, freedom, and slavery. The selection of the first ten books of Livy is a deliberate decision because Livy

discusses the expulsion of kings and the founding of a free Roman state in the first ten books.

Machiavelli's method and goal are quite simple to comprehend. He argues that history might provide us with the solution to the problems of our times. Skinner regards this assumption as a conventional humanist approach that equalizes the affairs of past and present, believing that by applying the same methods as in the past, one would remedy the predicaments of our times (2003, p. 57). For this reason, Machiavelli dug deeply into the relationship between the glory and greatness of Rome and the conception of freedom in Livy's *Discourses* in order to provide a solution to the problems of his own time. Machiavelli's methodology is important to point out because the revival of republican freedom resulted from similar studies. Skinner (Section 2.3) and Pettit (Chapter 3), in this respect, excavated the republican conception of freedom through the works of Machiavelli and other republican thinkers.

What Machiavelli discovered in *the Discourses* was that it was the distinct feature of republican freedom that permitted Rome to accomplish its greatness and glory (Skinner, 2003, p. 56). The foundation of Rome after the expulsion of the Tarquins played a crucial role in bringing glory and greatness to Rome because it then became a republican state. The republican freedom Rome attained at the time of her founding was based on the master-slave dichotomy discussed above. Rome's freedom against her kings was the same as the freedom of being a master as opposed to being a slave. Domination of kings, whose power was not controlled, created a state of servitude. Similarly, Athens also enjoyed greatness after deposing the tyrant Pisistratus (Machiavelli, 1979, p. 110). It was the same feature of freedom, according to Machiavelli, that Florentines lacked in his period.

After identifying the reason for Rome's glory and greatness, the next question was how to replicate what Rome accomplished. According to Machiavelli, two requirements are necessary: fortune and virtue. The first element, fortune, is

necessary for the beginning (Machiavelli, 1979, p. 270; Skinner, 2003, pp. 104-5). Establishing a free state by introducing gradual reforms to the laws is almost impossible. Even if a state is free at the beginning, because individuals seek their self-interest or sectarian interest instead of the common good, a fortune is necessary every ten years to restore virtue. Fortune in this context is represented by a leader who coerces the people into acting virtuously (second requirement), i.e., into pursuing the common good. According to Skinner's analysis (2003), the dilemma of being exposed to corruption is still inevitable; for this reason, Machiavelli dedicates five chapters to the role of religion to promote civic life in *the Discourses* (see Machiavelli, 1979, pp. 135-53).

Besides Machiavelli, Richard Price is another thinker who contributed to the theory of republican freedom by stressing the master-slave dichotomy in his arguments. In his famous work published in 1778, *Two Tracts on Civil Liberty, the War with America, and the Debts and Finances of the Kingdom with a General Introduction and Supplement* (2018), Price analyzed four aspects of liberty: physical, moral, religious, and civil. His emphasis on civil liberty is critical for his contribution to republican liberty due to its relations with the political context.

Similar to Machiavelli, Price benefited from the history of Republican Rome in justifying the resolutions he offered to the problems of his times. However, Price focused more on Rome's imperial period due to its relevance. He observed that the provinces of the Roman Empire were the subjects of Rome because they did not have independent legislation; hence they were complete slaves of the imperial power (Price, 2018, p. 30). The reason for studying Rome was also the same as Machiavelli's. Price understood liberty as a precondition for greatness: "Liberty is the soil where the arts and sciences have flourished; and the more freedom a state has, the more have the powers of the human mind been drawn forth into action, and the greater number of brave men has it produced." (2018, p. 17).

Price defines civil liberty as being subject to another's will. In other words, to be guided by one's own will is liberty; if not, then it is by another's will, therefore servitude (2018, p. 11). The strictness of the definition of either freedom or slavery is apparent in Price's definition of liberty, which points out the dichotomy of freedom and slavery as a status.

The definition of freedom at a state-level is analogous to that at the individual level, as discussed above. If a state is subject to the legislative power of another country without any control mechanism or influence on it, then the state is not governed by its own will; consequently, the state is in a condition of slavery. The state-level of liberty is more relevant to Price's political context because his book aimed at justifying independence from the British Crown. For Price, the mere fact of the British supremacy of legislation over America created slavery. His definition of slavery does not depend on the exercise of domination, but solely on the status. Even though British power promotes freedom in America and acts benignly; her actions can change arbitrarily (Price, 2018, p. 44). For this reason, the only way to escape annihilation through enslavement (2018, p. 49) is the declaration of independence from the British Crown. This notion of liberty as a status became essential in the writing of the constitution of the United States.

Price also elaborates on how to establish a free state. First, he says that every man should be a legislator through fair and equal representation. Second, all taxes should be considered as gifts for public service. The tax emphasis is vital to the American context because it engendered the famous slogan of the period: "No taxation without representation."³ Third, he states that laws should be made by common consent, and representatives should carry only such regulations into execution. Finally, Price stresses that laws themselves do not produce or protect liberty. Common consent is

³ Cass Sunstein (1988) argues that the four fundamental commitments of republican thought, deliberation, political equality, universality, and citizenry, played a crucial role in American constitutionalism during its emergence.

a vital part of the laws for effectively guaranteeing the preservation of liberty (2018, pp. 6-7).

Both Machiavelli and Price studied the history of Rome to discover answers to the political problems of their times. What they discovered was that establishing the free state of Rome as a republic helped provide glory and greatness. Their understanding of freedom in the Roman period was based on the master-slave dichotomy, both at the individual (internal) and state levels (external). It is this feature of a master-slave dichotomy that converts freedom into a status, and this feature is prevalent in the conceptualization of republican freedom in the 20th century by Skinner and Pettit.

1.3. The Importance of the Rule of Law

Republican thought perceives the rule of law as the most essential pillar of the political system. It is because the legitimacy of the power stems from the agreement between the ruler and the ruled, the rule of law defines and reinforces the barriers between these two parts of society. Republican thinkers consider the function of laws as preventive of the exercise of arbitrary power, an aspect which will be discussed in detail in the following sub-chapter. The threat of arbitrary power does not only originate from the rulers but from the ruled as well, as in majoritarian domination. For this reason, the laws should be there to protect the individuals from both the ruler and the ruled.

The relationship or a moral space between rulers and ruled is significant because it is the primary source of the origin of laws in republicanism⁴. Machiavelli emphasized the role of a similar relationship between two segments of society in his work *the Discourses*. He argued that the driving force of the Roman republic is the conflict between the people (*plebs*) and the rich (*nobles*). It is this conflict and discord that creates the laws in favor of liberty (1979, pp. 110-11). Machiavelli goes even further by asserting that "the quarrel between the nobles and the plebs is the primary source of Rome's retaining of her freedom" (1979, p. 113). In other words, the conflict is not only beneficial for the different classes of society but for the state as well.

Besides Machiavelli, James Harrington is the most prominent republican thinker who highlighted the importance of the rule of law. Republican thinkers echo his ideas on the importance of the rule of law throughout history. Harrington followed the neo-roman ideas when England proclaimed as a commonwealth, i.e., free state, upon the regicide of 1649 (Skinner, 2003, p. 13). The fundamental difference of his argument from the liberal tradition was that not just individual bodies, but also the

⁴ The idea of moral space, in this context, implies the area established and protected by laws. It does not refer to a space formed by good intentions, or anything subject to arbitrary alterations.

political bodies could possess liberty. In this mode of thinking, as discussed in the previous chapter, political bodies refer to a group of people who could act as political actors.

Most importantly, Harrington discussed a relatively new idea of the vivid contrast between the two types of communities in his book *Oceana*: “the ones organized by the empire of laws and the ones organized by the empire of men” (Harrington, 2019, p. 1). Harrington established his conception of freedom based on the superiority of law, not of men. He states that he adopted his grounding claim that freedom came from the empire of law, not of men, from Livy and Aristotle (2019, p. 1). According to Harrington’s understanding of freedom, the relationship between the organization of a community and the republican conception of freedom is straightforward:

... if the liberty of a man consists in the empire of his reason, the absence whereof would betray him unto the bondage of his passions; then the liberty of a commonwealth consisteth in the empire of her laws, the absence whereof would betray her unto the lusts of tyrants... (Harrington, 2019, p. 92).

Harrington also gives an example of the unfree condition without the rule of law: “even the greatest bashaw in Constantinople is merely a tenant of his head, liable to lose it as soon as he speaks or acts in such a way to cause sultan offence” (2019, p. 8). In this regard, Harrington emphasizes freedom as a status because his example of a slave is the second most important person in the Ottoman Empire. In other words, the life of the bashaw would be dependent on the goodwill of the sultan.

Another classical thinker who contributed to the republican idea by stressing the importance of the rule of law is Montesquieu. In his famous work, *The Spirit of the Laws*, Montesquieu argues the indispensable role of laws in protecting political liberty. He explains that political liberty does not mean doing whatever one desires, but specifically whatever laws allow (2004, Book 11, Ch. 3). The security of political liberty, according to him, is endangered by public or private charges.

Therefore, the effectiveness of laws plays a critical role in protecting liberty (2004, Book 12, Ch. 2). It is with the same emphasis, but in a different context, that John Locke argues a very similar role of laws. He claims that the end of law is to protect and enlarge freedom. In other words, freedom is obtainable only within the protection provided by law (1960, p. 348).

Finally, it is essential to reiterate that the laws do not protect liberty in essence. The laws that are solely made by common consent could protect liberty because they would be pursuing the interest of the people who authored it. As discussed in the previous chapter, Price stressed that common consent is a vital part of the laws for being effective in the preservation of liberty, and not just laws as instruments of constriction (2018, p. 7).

1.4. The Concept of Arbitrary Power

The element in the republican conception of freedom which most strongly contributes to engendering domination is the capacity to interfere on an arbitrary basis in another agent's choices. As long as one has the capacity to interfere on an arbitrary basis, freedom is not something people can enjoy anymore. For instance, the Romans were considered free because the laws they imposed upon themselves were authored by consent in people's assemblies. That interference was authorized, negated the risk of arbitrariness. Due to the pivotal role of the concept of arbitrary power in the literature on this subject, it is necessary first to trace the origin of the concept, and second to discuss its development in the 20th century.

It was again Quentin Skinner who traced the origin of this concept to republican thinkers in England (2003). He discusses how Algernon Sidney, who was a young member of the English parliament from the 1640s until its dissolution in 1653 (Skinner, 2003, p.16), brings out the concept of arbitrary power in his *Discourses Concerning Government* (2009). For the first time, Sidney discusses in this work the concept of arbitrary power, specifically concerning its relations with the protection of freedom. His discussion is considerably explicit. Sidney claims that solely being subjected to arbitrary power, not as a consequence of coercion but a status, makes individuals unfree, hence a slave. As described earlier, it is not the act of domination or dependency that makes people unfree, but solely someone's capacity to interfere. It is then not the act, but the status itself that creates domination.

The advocates of the liberal conception of freedom, namely Benjamin Constant and Isaiah Berlin, also emphasized the concept of arbitrary power in their arguments. Constant, for instance, defined the liberty of moderns with direct reference to the concept of arbitrary power: "Liberty of modern is understood: neither to be arrested, detained, put to death or maltreated in any way by the arbitrary will of one or more individuals" (2011, p. 6). When discussing the notorious implications of the

freedom of ancients, Constant frequently refers to the arbitrariness of power and laws (2011, p. 16). Constant's stress on the arbitrariness of power came to Berlin's notice when discussing the nemesis of the negative conception of freedom, i.e., positive freedom. Berlin emphasized that what motivated Constant was the memory of "Jacobin dictatorship" (1969, p. 126). Although both Constant and Berlin do not contribute to republican thought, their works indirectly influenced the republican thinkers. Quentin Skinner and Philip Pettit, who are the foremost scholars that conceptualized the republican and new-Roman conceptions of freedom, analyzed the works of Constant and Berlin extensively.

Skinner's historical study brings out the origin of the concept of arbitrary power and how it was instrumental in the contexts of the English republican period. However, the development of the concept of arbitrary power in the 20th century is also significant because it shaped the discussions concerning the definition and limits of the republican conception of freedom. In the literature, it is generally discussed that power could be arbitrary in two ways: procedurally and substantively (Carter 2016; Lovett 2012). The first refers to the definition that power is arbitrary when it is not constrained by rules and procedures (Lovett 2010). The rule of law, for this approach, is the tenet of republican freedom (List 2016) because it is the only way to guarantee that freedom procedurally. The second interpretation expands the scope of the definition to include the act or interference as well, by claiming that power is arbitrary "when it fails to track the welfare and worldview of those affected" (Pettit, 2002b, p. 11). According to this argument, judicial constraints are necessary, but not sufficient, to control power *per se*. Pettit asserts that "suitably deliberative processes" are vital for controlling power because unauthorized/alien interference makes people unfree. The crucial point in this discussion is how to determine liberties that are to the benefit of individuals' real interests. Hence, how to guarantee the absence of arbitrary power.

Finally, Carter also introduces the probability argument (2016). Finally, Carter also introduces the probability argument (2016). In a similar fashion, he emphasized the

condition of being subjected to arbitrary power that reduces freedom but adds the probability of interference as a yardstick. In reply, both Pettit and Skinner have insisted that the argument about probability is not the basis of republican freedom (Skinner 2012; Pettit 2014a). It is not the probability of interference is at the stake of republican liberty, but the impossibility of interference.

As seen above, the definition of arbitrary power is central in the republican conception of freedom. Beginning with the concept of non-interference, which will be discussed in the following chapter, Carter and Kramer claim that non-domination is basically a guarantee of non-interference. According to this claim, agents (both individual and collective) are free when the absence of arbitrary/uncontrolled power is guaranteed (Carter 2016; 2008; Kramer 2008). However, Pettit formulates it as agents being free only in the absence of domination and stresses that his conceptualization is fundamentally different from the negative conception of freedom (2003b). Because of the weight of these debates in recent literature on the subject, the substantive approach had a greater influence on the revival of the concept, because procedural tools are not sufficient for guaranteeing freedom as non-domination. As already mentioned, the conversation between these two approaches marks the core of recent debates about the limits of republican liberty. However, before discussing the concept itself and its limits, it is necessary to explain how civic citizenship contributed to the development of republican liberty.

1.5. The Role of Civic Citizenship

Following the argument of the previous section, the substantive approach for the definition of arbitrary power entails active citizenship. In republican thought, being active in politics for the sake of protecting freedom, is known as civic republicanism. Civic republicans, in this sense, refer to thinkers who emphasized the civic role of the citizens for creating and maintaining freedom in a republican sense. The main idea behind civic republican thought is that citizens must be observant of the actions of representative government because uncontrolled or unchecked power tends to accumulate autocratic powers that jeopardize the freedom of citizens. Civic citizenship also carries with it the idea of putting individual interests aside for the sake of the common good. The relationship between the individual interest and the common good is a critical one in terms of defining the civic role of republican citizenship. This relationship is thoroughly discussed in the following chapters.

In general, active citizenship means engaging in public service under a representative form of government. If a government is not representative, there is no constitutional room for being active in politics. In that scenario, the relationship between the citizens and the government is problematic in terms of protecting freedom, because interventions of the government are not controlled by the citizens; hence they create domination. On the other hand, with the ability to be freely active in politics, citizens can hold the government accountable for its interventions. Interventions could solely be a law that regulates society. However, if the citizens are not actively involved in enacting a law through representative government, the law becomes something that is alien, unauthorized, and uncontrolled.

In the literature, there are two different interpretations of being active in protecting freedom: civic republicanism and the civic humanist approach. While the civic humanist tradition, through Baron (1955), Pocock (1975), Arendt (1993), and Honohan (2002), values civic life as intrinsically good in itself, the civic republican

approach values active citizenship from an instrumental perspective, as a necessity for securing people away from arbitrary power⁵. Although Pettit's conceptualization of republican freedom is portrayed as a consequential ideal (see Dagger, 2008; Maynor, 2002), it is still influenced by not only the civic republicans but also by the civic humanist approach through the contributions of Pocock and Baron. We can claim that the works of civic humanists and civic republicans established the theoretical ground on which republican freedom underwent its revival.

In this chapter, I discuss the contributions of two significant thinkers who directly influenced the revival of republican thought. The first thinker who profoundly shaped republican thought in the 20th century was Hans Baron. Hans Baron coined the concept of civic humanism (*bürgerhumanismus*) in 1925. Similar to Constant and Berlin's categorization of liberty as a dichotomy, Baron frames the emergence of civic humanism in its own dichotomy. He claims that the context that provided the ground for the emergence of civic humanism occurred during the crisis between Florence and Milan in the *quattrocento* of the Italian Renaissance (Baron, 1955). Baron used the concept of a civic humanism born in Florence as opposed to the foreign despotism of Milan. In other words, it was a response to the conflict between the intellectual and political leadership of Florence and the aggressive expansionist policies of Milan (Nederman, 2019). At the end of this conflict, Florence reached a victory that sealed the rise of secular economic, social and political ideas on the one hand, and the decline of religious values of the Middle Ages on the other. Baron argues that the defense of civic humanism in the 1400s was a vital test for the existence of both sides. It was the competition between freedom and despotic power, i.e., domination.

The limit of this dissertation does not allow me to elaborate on Baron's thesis in detail. However, it is necessary to point out that the basis of his claim is related to his study of Leonardo Bruni, an Italian historian and statesman of the Florentine

⁵ Sunstein refers to this approach as a classical republican view that valued the role of the *polis* as the sole focus to achieve freedom (1988, p. 1547).

quattrocento. According to Baron's study, Bruni put significant emphasis on the liberty and equality of citizens before the law, as other *quattrocento* thinkers also did. However, according to Baron (1955, p. 367), the division of supreme power, the importance of participation in public affairs to preserve liberty, and the vitality of legal checks on office-holders, which were noted by Bruni, were additional outstanding ideas for his time⁶.

The second thinker, who influenced republican thinkers, is J. G. A. Pocock. Pocock has been a pivotal figure in contextualist analysis of political ideas in history. His influence can be observed best in Quentin Skinner's works. As Skinner himself affirms, his and his generation had been influenced by Pocock immensely about examining the canonical text of the political theory (2003, p. 106). Identifying thematic associations through the investigation of political language and the relationships between political ideas and the notions of time, widened the crevice that was previously opened by the philosophy of history (Tarcov, 1976, p. 381). It is that crevice, I mean the effort of understanding the canonical text within their own contexts, in which republicanism and republican conception of freedom found room to germinate.

In his monumental work, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, Pocock claims that moment(s) in history are defined by their affinities to their own selective contexts. The Machiavellian moment in this sense is a battle to maintain the ideal of active citizenship in a Republic (Pocock, 1975, p.4). Its continual effect in the Atlantic Republican tradition appeared as the reaction against the commercial oligarchic regime in the

⁶ According to James Hankins, later archival studies of Bruni depict a different character than that of Baron's "idealized" figure. Hankins claims that recent studies of Leonardo Bruni require a reinterpretation of Baron's work (1995, p. 310). This reinterpretation does not only change the understanding of Bruni's importance but also undermines Baron's fundamental thesis of civic humanism. Hankins chastises Baron for presenting Bruni as his wooden puppet, as an idealized projection of Baron himself. Hankins argues that the dichotomy between "little Florence", home of the free and the brave, against the "tyranny of Milan" makes Baron's work embarrassing today (1995, pp. 311-22).

late seventeenth century. This response, for Pocock, required new modes of thinking (1995, p. 32). In addition, *The Machiavellian Moment* was also one the most influential works that enlightened the pivotal role of the republican thought in the period of the construction of the American Constitution.

Although the contributions of Baron and Pocock seem to follow a similar line of argument within the same period of time only by referring to different figures, there is a cardinal difference between the two modes of thinking. Maynor and Laborde found this distinction between the two modes of thinking in the argument of commerce. According to Baron, the rise of civic humanism occurred as a result of a commercial, i.e., urban, bourgeoisie, and a modernizing state developed from the rupture with medieval ideas of asceticism. Nevertheless, the Pocockean version of republican thought makes an apparent reference to the private pursuit of gain, which was one of the driving forces of the modernizing state depicted by Baron as an enemy of the republican citizenship ideal (Laborde & Maynor, 2008).

1.6. Recent Contributions to the Revival of Republican Freedom

Before discussing the negative and positive conceptions of freedom and their relationship to the republican conception of freedom, we must finish this chapter with several recent contributions to republican theory. Although the republican conception of freedom is rightly associated with the historical studies of republican thought by Skinner, and with its understanding as a political concept by Pettit, these additional efforts to the revival of the concept in the early 1990s are also significant. We will visit three thinkers in this chapter: Maurizio Viroli, Nathan Tarcov, and Richard Dagger. John Maynor also presents a similar view of this categorization of the contributions to republicanism in his book, *Republicanism in the Modern World* (2003). He claims that the contributions of the other thinkers to republican thought did not bring the conception of liberty itself to light but stressed the various notions of republican thought (Maynor, 2003).

The first stop is Maurizio Viroli's book, *For Love of Country: An Essay on Patriotism and Nationalism* (1995). His book is mostly about the difference between the concepts of patriotism and nationalism. While the former values the republic, and republican freedom in civic life, the latter attaches importance to the cultural unity of the people (Viroli, 1995, p.2). Viroli picks up the discussion about the importance of language in a mode of thinking that is distinct from Pocock's and takes it forward in his own work. He argues that one of the ways to distinguish a patriot from a nationalist is by looking at the language they use. While a patriot uses the language of common liberty for all citizens, a nationalist's language is isolative, and it accentuates homogeneity, uniqueness, and oneness (Viroli, 1995, pp. 2-13). Viroli also argues that the language Machiavelli uses in *the Discourses* and *Istorie Florentine* is one about virtue that directly refers to patriotism. In other words, the republican way of common freedom that makes men virtuous, who can see their interests as parts of the common good, in Machiavelli's writings basically means patriotism (Viroli, 1995, p. 31).

It is not difficult to place Viroli and his book in historical context. The early 1990s brought the rise of nationalism after the end of the Cold War. Following this line of argument, Miller claimed that it was the twentieth century that led to rising nationalism (1996, p. 886), and it did not get better in the early 1990s. Both Miller (1996) and Barnard (1997, p. 141) defined Viroli's book as an antidote to nationalism. In other words, nationalism was perceived as a poison. Barnard also states that it was the fault of socialist intellectuals who did not contribute to republican theory before the 1990s, and Viroli fills this gap belatedly (1997, p. 141). The argument about perceiving patriotism as an antidote to the extremes of nationalism is relevant to the final discussions I offer in the Conclusion chapter of this dissertation. There, I discuss the circulation of the common good in republican thinkers as a response to the critiques of republicanism. Patriotism offers a similar argument by emphasizing the common features of citizens.

As discussed above, Viroli did not contribute to the revival of the republican conception of freedom directly. Nevertheless, his arguments as responses to the issues of the early 1990s bolstered an emphasis on republican thought, specifically by referring to the concepts of the common good and common freedom. The discussions he started revitalized interest in republican thought and its distinct concepts.

The second thinker is Richard Dagger. His contribution is at the center of the discussion of modern republicanism because of his major book, *Civic Virtues: Rights, Citizenship, and Republican Liberalism*, written in 1997. Dagger pointed out that while there is a fundamental difference between republicanism and liberalism as they have been presented in the history of ideas, this does not mean that they cannot co-exist (Van den Brink, 1999, p. 67). He examines this very notion of coexistence of two opposite comprehensive doctrines about liberty, which

reminds us of the plurality argument in Berlin that I discuss in the second chapter, even though his emphasis was on the negative conception of liberty⁷.

Dagger uses the analogy of bread and butter for the compatibility of liberalism and republicanism. He asserts that although bread and butter are distinguishable, they are hardly incompatible. For him, the same approach could be used for liberalism (emphasis on self-government/autonomy) and republicanism (civic virtue) (1997, p. 12). In order to create autonomy, you need more than an individual effort. However, autonomy, or a means by which individuals can freely pursue their personal interests, is only possible in civic life. Following this line of thinking, autonomy and civic virtue are complementary to each other; hence, republican liberalism, as Dagger claims, aims to provide both autonomy and civic virtue (1997, p. 17, 194).

The fundamental problem of liberalism for civic life is that individuals find it a burden to maintain civic life once it has been established. Dagger does not give a comprehensive answer to this question. It seems that other than making two comprehensive doctrines compatible with each other, his understanding of republicanism embodies liberal values within republicanism. It is not like an eclectic relationship, but a relationship of melding one into another just like butter and bread (butter melts into bread and loses its distinction as a separate part). In addition to his effort to combine liberalism and republicanism, Dagger emphasizes the importance of the republican sense of fair play. Just like Pettit's eyeball test that I discuss in detail in the second part, the ability to look others directly in the eye, Dagger elaborates on the significance of the sense of fair play in his later works (Flathman & Dagger, 1999, p. 660).

Pettit's objection to Dagger's analysis is based upon Dagger using concepts inappropriately. He argues that Dagger gives the upper hand to republican thought

⁷ In a similar fashion, Bellamy (2010) points out that republicanism can be conceived and labeled as democratic liberalism (p. 156).

and uses the two comprehensive concepts of liberalism and republicanism very loosely (Pettit, 2000, p. 882). This approach is the reason he calls it republican liberalism, not liberal republicanism. Dagger's limited conceptualization of liberalism disappears into his use of republican thought. Another objection to Dagger comes from Van den Brink. He argues that "If I am a happy and autonomous metropolis dweller, then who are republican liberals to suggest that I would be far more autonomous, happy and responsible in a smaller city?" (1999, p. 68). Van den Brink also claims that the second part of the book, which aims at explaining the practicality of republican liberalism, actually shows the impossibility of liberalism in the modern world. For this reason, Van den Brink claims that in his last chapter, Dagger reverts to a moderate approach to his theory (1999, p. 68).

Finally, the last thinker of this chapter is Nathan Tarcov. Even though his contributions did not contribute to the re-emergence of the republican conception of freedom directly, his later critiques and contributions in the literature put him in a position of significance within the discussions of republicanism, especially in his study of Machiavelli and Rousseau. Two of his books which contributed to the literature, are the translation of *Discourses on Livy by Niccolo Machiavelli* with Harvey Mansfield (1998) and *The Legacy of Rousseau* edited by Nathan Tarcov and Clifford Orwin (1997).

As the titles point out, both books reinforced discussions about republican ideas, and primarily *The Legacy of Rousseau*, which focuses on the legacy, even legacies (Biro, 1997, p. 789), of Rousseau rather than on his own thought in its original context. From this point of view, it is not surprising that this work contributed to the discussion on republicanism because republicans have benefited from Rousseau's legacy in the early nineteenth century. Balancing out the liberal conception of liberty and of civic liberty in favor of the latter, Rousseau provided an ideological tool for republican thinkers. Tarcov brought the different interpretations of Rousseau back into the light, making his contributions once again valuable within the approach of modern republicanism. Consequently, civic

republicanism has expanded through Tarcov's interpretations of Machiavelli and Rousseau. But Tarcov is not alone in this. Other scholars have made similar contributions through their translations of Machiavelli (Skinner, 2000; Gisela, Skinner & Viroli, 1990; Viroli, 1998), the seventeenth-century English republicans (Skinner 2003), and Rousseau (Viroli, 2002).



CHAPTER 2: THE NEGATIVE AND POSITIVE DISTINCTION AND SKINNER'S THIRD PROPOSAL

2.1. Introduction

In political theory, republicanism (or, republican theory) used to be commonly understood with reference to thinkers in the history of ideas who cherished the importance of civic virtue, along with political participation and the rule of law. The most prominent of these writers in the history of western political thought are believed to be Cicero in Ancient Rome; Machiavelli and other Florentine historians in Renaissance Italy; Milton, Harrington and Sidney in Britain; and Jefferson and Madison, along with other founding fathers in the United States. The tradition of revitalizing Roman values (civic virtues) in the 1400s Italian republics and the continuation of this effort is generally called neo-roman republicanism (Skinner, 2003).

The hegemonic character of what was seen as the opposite mode of thinking, liberalism, had discarded the tradition of republicanism from its practice. However, when freedom in the liberal sense, i.e. freedom as non-interference, started to be questioned after the catastrophic events of our age (World War I, World War II, and their political outcomes), republican theory and its values began to enter the scene again. Starting with Hans Baron and J. G. A. Pocock at the beginning of the second half of the twentieth century, and Maurizio Viroli, Richard Dagger and Nathan Tarcov in the 1990s, contributions of different aspects to republican theory began to emerge. Furthermore, this time, beside the familiar virtues of republicanism mentioned above, a new concept emerged as the central pillar of republican thought: freedom.

Unlike many theoretical dichotomous conceptualizations in political theory, Quentin Skinner and Philip Pettit did not place their own conceptions of republican

freedom in opposition to the liberal understanding of freedom; rather, they offered such conceptions as a third alternative to Benjamin Constant and Isaiah Berlin's understanding of freedom. While Berlin defined freedom as positive or negative, Skinner and Pettit claimed that republican freedom is both negative and positive, but in a different sense as previously understood (to be discussed in Part II).

Skinner first argued that being free in the neo-Roman republican tradition is not being subject to arbitrary power, i.e., a master. Then it was Pettit who studied and formalized these ideas and claimed that republican freedom is freedom as non-domination. At this point, it is useful to review where we are, where we have been and where we are going within the roadmap to this dissertation. We can also review the strategy of this dissertation's presentation. This will allow the reader to anticipate the direction of final conclusions, and in doing so, better understand the cohesion of arguments.

The aim of this dissertation is to do more than simply describe the contributions to republicanism. While for the first chapter, I categorize the contributions to republican theory in chronological order, in doing so I also attempt to discuss each idea within its conceptual framework. These discussions lay the foundation for the next chapter, which is more like an essay on the conceptualization of modern republicanism in its current form, emanating from and being shaped by these earlier ideas.

Even though this dissertation is about republicanism, it is imperative to first understand the liberal conception of freedom. For this reason, the second chapter attempts to explain the dichotomy of freedom, as negative and positive, as argued by Constant and Berlin. Next, section 2.3 defines and discusses modern republicanism as formalized by Skinner and Pettit, especially the ideal form of freedom as non-domination and the problem of its implications. Interestingly, as Maynor and Laborde point out, eighteenth-century republicanism faced a similar problem, as it tried to reconcile non-domination with current reality. Non-

domination demanded to overthrow the inegalitarian relations in society, which posed extreme implications (Laborde & Maynor, 2008, p. 19). This requirement of overturning the inegalitarian society and its implication of republican freedom will be referred to and discussed throughout this dissertation. As this requirement was met by more and more societies of the nineteenth century, new doors for discussion of republican freedom were opened. In particular, new tests of its viability based on actual implementations became possible.

Throughout this chapter, as we proceed through the chronology, the reader should ask the following questions posed by Carter (2016), and consider their answer for that time. Is being active in politics, hence exercising freedom as a positive concept, help agents obtain freedom? If it is possible, can a political entity promote such freedom? On the one hand, classical liberal thinkers, such as Hobbes, Mill, Constant, answered the above questions negatively because their understanding of freedom is a negative concept. On the other hand, thinkers such as T. H. Green, Hegel, and Marx, asserted that the achievement of freedom could only be reached by positive freedom. Perhaps there are times and examples where each model fails. Likewise, perhaps there are times and examples where each model succeeds.

2.2. Benjamin Constant and Isaiah Berlin: Two Conceptions of Liberty

The republican conception of freedom as non-domination did not emerge by itself as a novel concept. Both primary contributors of republican freedom, i.e., Skinner and Pettit, conceptualize the concept by direct reference to two concepts of liberty offered by Berlin: negative and positive. As discussed in the following chapter, republican freedom was proposed as a third alternative to the dichotomy Berlin established. Moreover, republican freedom is also a negative conception of freedom in essence because it requires the absence of domination (Chapter 3). For this reason, the elaboration of Berlin's two concepts of liberty is inevitable to understand republican freedom.

In a nutshell, the negative conception of liberty refers to the absence of something, e.g., interference, hindrances, barriers, or constraints. On the other hand, the positive conception of liberty refers to the presence of something⁸. In this sense, the presence of something refers to an outside force that can exert influence over control, self-mastery, self-determination, or self-realization (Carter, 2016). In particular, Berlin defines two conceptions of liberty by providing the questions for which answers lead to the definition of each concept. In his words, the negative conception of liberty is an answer to the question of "What is the area within which the subject — a person or group of persons — is or should be left to do or be what he is able to do or be, without interference by other persons?". In contrast, the positive conception is trying to answer the question of "What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?" (1969, pp. 121-2).

⁸ Holmes and Sunstein, on the other hand, define the distinction between negative and positive freedom as liberties/subsidies and immunities/entitlements, which are intertwined, and it is futile to conceive them as separate freedoms (2000, pp. 39-40). They simply claim that "it is implausible to be for rights and against government" (2000, p. 47) because positive freedom forms the ground that negative freedom could be enjoyed. Their definition is similar to Pettit's concept of freedom as non-domination, which is examined in Part II.

Before explaining the negative freedom argued by Berlin, it is necessary to consider the work of Benjamin Constant, who was the first thinker to introduce the conceptual dichotomy of liberty, as has been widely accepted and discussed. The foremost thinker of the negative conception of liberty, Isaiah Berlin, praises the work of Constant by claiming that there has been nobody in the history of ideas who realized the struggle between the two types of liberty better than him (Berlin, 1969, p. 163). Berlin stressed the fact that it was Constant who contributed profoundly to the emergence of the negative conception of liberty. In other words, it is not an exaggeration to claim that Constant's conceptualization of liberty heavily influenced Berlin, so that the negative conception of liberty rose on the foundation of the liberty of moderns as defined by Constant.

Constant's conceptual dichotomy refers to the categorization of liberty into two periods: the liberty of the ancients and the liberty of the moderns. Constant claimed that the differences between the two conceptions had been overlooked by thinkers, or at least insufficiently detailed, and he attempted to fill this gap in the history of political thought. The basic differences between ancients and moderns are revealed first of all by their fundamental definitions of freedom. According to moderns, as Constant argues, liberty means that individuals are subject only to laws, and not interfered with by the arbitrary will of one or more persons. Individuals are allowed to express an opinion, associate with others and profess the religion of their choice. But most important, they have an influence on the government (2011, p. 6). As opposed to the definitions of moderns which emphasize the individual, ancients perceive liberty as something collectively exercised. It includes deliberating state affairs or holding judgments in a public square. For this reason, Constant states that exercising the liberty of the ancients as a collective right is a "complete subjection of the individual to the authority of the community", which includes occupation/labor, and more importantly, choice and practice of religion (2011, p. 6).

Another perspective that differentiates the liberty of moderns from that of the ancients is the establishment and maintenance of the private domain of individuals. For Constant, the private domain of the ancients was under strict surveillance by the state power. Ancient states, for example, Rome, established strong institutions and comprehensive laws that regulated all aspects of individual life outside of the public sphere. Due to the subjection of individuals to laws and regulations, individuals were like slaves in their private life, even though they were not “real” slaves, not in the accepted context of master-slave relationships of that period. Constant portrays this predicament perfectly by stating that: "Men were merely machines, whose gears and cog-wheels were regulated by the law" (2011, p. 7). In fact, the possible consequences of objecting to the laws and regulations of private life were exile, banishment, and sentencing to death.

Furthermore, Constant makes a connection between the emergence of commerce and modern liberty. He argues that trade or commerce has a very distinct dynamic, which is fundamentally different than, for example, the dynamic of war. With commerce, individuals are continuously involved. On the other hand, with war, there are often large gaps of inactivity in people's lives. The dynamic character of commerce engenders a constant activity without the intervention of external authorities (Constant, 2011, p. 9). Another aspect of commerce, in this respect, concerns the effect of arbitrary power. Due to the constant activity in commerce and movement of property, the effect of arbitrary power becomes more bearable because confiscation of property becomes more difficult (2011, p. 15).

Nevertheless, the most crucial aspect in the difference between the liberty of the ancients and that of the moderns has to do with political liberty. Ancients forfeited individual independence, in order to gain more political rights. On the other hand, the moderns sacrificed more of their political liberty, in order to gain more individual independence. This distinction is critical in the definition of liberty by ancients and moderns. The former, in this sense, define liberty as "the sharing of social power among the citizens of the same fatherland.", while the moderns "aim

at the enjoyment of security in private pleasures; hence, what they call liberty is the guarantees of these pleasures." (2011, p. 10).

While Constant's emphasis on the political liberty in the ancients is entirely observable, it does not mean that he neglects its importance in the preservation of individual liberty. He asserts that while individual liberty is the true modern liberty (2011, p. 14), political liberty remains vital for protecting individual liberty. It is risky to request that people forfeit their individual liberty in order to gain political liberty, because in the end it may lead to the loss of both (2011, pp. 14-15). In the end, even though he does not elaborate on the differences between political liberty and civil liberty, Constant maintains the importance of political liberty, while repudiating civil liberty. His repudiation of civil liberty within the context of the ancients is due to the subjection of the individual to the collective (2011, p. 15). In addition, Constant does not distinguish between the domination of popular government and the domination of a monarch, or even by a set of oppressive laws. In other words, transferring the source of domination from one hand to another does not enhance liberty. We shall observe the same approach in Berlin's argument; logically, the source of power behind liberty of the moderns or negative liberty is not relevant to the concept of liberty itself.

To summarize, Benjamin Constant argues the differences between the conceptions of liberty of ancients and moderns. He renounces the ancient liberty due to the non-existence in Antiquity of individual liberty within a private domain, and he promotes the liberty of moderns due to the direct relationship he sees between individual liberty and independence. Isaiah Berlin builds his conceptualization, the negative conception of liberty, upon the foundation created by Constant in his liberty of moderns. In other words, despite the differences, Berlin's negative freedom is related to Constant's liberty of the moderns, and Berlin's positive freedom is related to Constant's liberty of the ancients⁹.

⁹ Berlin even directly refers to Constant's individual freedom as negative (1969, p. 163).

Isaiah Berlin's famous essay, *Two Concepts of Liberty* (1969), is one of the monumental works in the history of freedom. His work not only contributed to the liberal conception of freedom but also influenced the works that would lead later to the revival of republican freedom. Berlin defined liberty as having two distinct and conflicting concepts: the negative conception of liberty¹⁰ and the positive conception of liberty. He acknowledged the fact that a study of freedom as a negative concept is a modern one, because except for Constant, there has been nearly no debate of individual liberty as a negative concept in the ancient world.

At first, negative and positive conceptions of liberty may seem to be simply different interpretations of the same proposition. However, their historical journey as political concepts led them to very different and rival camps. In other words, their political implications engendered the conflict with each other (Berlin, 1969, p. 132). The emphasis of the conflictual nature of the relationship is significant, because it is the nature of the relationship between these two interpretations that incentivized Berlin to begin his discussion of negative freedom as antithetical to positive.

The political and social context at the time that he wrote this essay, i.e., after the end of the Second World War, helps us to place his approach in a historical context. Destruction of individual values during the war had a great influence on Berlin's approach. He points out that the political events of his time compelled political theorists to approach the issue more seriously, not just an academic endeavor, and the "socialized form of positive liberty are at the heart of many nationalist, communist, authoritarian, and totalitarian creeds of our day" (1969, p. 144).

¹⁰ According to Giorgini, it was Samuel Pufendorf who coined the term of negative liberty which was also used by Jeremy Bentham afterwards (Giorgini, 2013, p. 207). In addition, Simhony argues that T. H. Green is the originator of the distinction between negative and positive liberty, as opposed to this label being recognized to Constant (see Berlin 1969). Moreover, Simhony advocates his argument by referring to Stephen Holmes's work, *Benjamin Constant and the Making of Modern Liberalism* (1984), which demonstrates that Constant's understanding of modern liberty is more like a space or capacity for the exercise of positive freedom.

Another argument that supports his defense of the negative conception of freedom is its causal relationship with progress. Berlin believes that negative liberty is the only way which can lead humanity to progress. He supports his argument by citing John Stuart Mill, who claimed a similar argument for the progress of humanity, but with respect to truth. Mill argued that truth could only emerge in the free market of ideas, which leads to originality and progress in civilization (Berlin, 1969, p. 127). On the other hand, he argues that the “monstrous” desire for positive freedom prevents the emergence of new ideas. For example, it was a positive conception of freedom that attacked individual freedom, in its Jacobin form, during the French Revolution.

Following the basic definitions of these two concepts, it is useful to explain the similarities and differences between Berlin's categorization and Constant's approach. Berlin, in a fashion similar to Constant, uses the method of dichotomies to define the two concepts of liberty. As discussed above, both authors categorize the concept into two rival camps. Berlin's negative liberty is related to Constant's liberty of moderns, while positive liberty has direct references to liberty of ancients. The main area of difference between Berlin and Constant is in their understanding of the role of positive liberty, i.e., political freedom. Constant regards political liberty as an instrument to protect the liberty of the moderns, which he considers a good thing. On the other hand, Berlin is reluctant to facilitate political liberty due to its further implications, discussed later in this chapter. Although he attempts to utilize the concept of political liberty by referring to it as a means for protecting the ultimate value, individual (negative) liberty, he still acknowledges the risks that democracies could bring. In other words, democracies are only as good as the rights they grant and the power they wield.

When it comes to the negative conception of freedom, in particular, Berlin discusses four issues that negative freedom must be concerned with: 1) the nature of the interference, 2) the area of freedom, 3) its relations with the laws, and 4) the source of freedom.

The first characteristic is that the interference needs to be deliberate. According to Berlin, when there is an intervention, it should be a deliberate interference. For example, physical disabilities such as being blind do not qualify as interference. The second characteristic, the area of freedom, has pivotal importance. In this respect, negative liberty could only be possible in an area in which an individual is not frustrated (Berlin, 1969, p. 161). The scope of the area could be discussed and compromised, yet the necessity of its presence is inescapable. It is in that area that an individual could pursue his/her desires without prevention. For example, the ability to choose a career, and not have one dictated by the needs of the state.

The third characteristic, relationship with the laws, is closely related to the second one. For Berlin, without any law or restrictions, unlimited freedom would engender social chaos. He conditions that while laws should limit freedom, but they must also preserve a minimum area of personal freedom. In this respect, the boundary between an area of private life and public authority defines his approach. The area of private life may be small but shall never be violated. The minimum requirement is: "pursuing [our] own good in our own way" with a reduced role of the state as a night-watchman or traffic policeman (1969, p. 127). Otherwise, according to Berlin, it would be despotism (1969, p. 126).

Finally, the last characteristic is the source of freedom. This is one of the fundamental differences between Berlin's conceptualization of negative liberty and Pettit's republican liberty. Liberty, in a negative sense, is primarily related to the area of individual control. The source of the power that allows for individual control does not concern Berlin's negative conception of liberty. For this reason, he points out how even a democratic government could strip the liberty of individuals, just as a "liberal-minded despot could allow his subjects a large measure of personal freedom" (1969, p. 129). The question of who provides individual control is logically not concerned with the question of interference. As discussed later, Pettit has an opposing argument regarding the source of power. According to him, a

power that is capable of arbitrarily interfering, poses a threat to freedom despite the use or not of such a power.

Berlin's positive conception of freedom is concerned with "the individual to be his own master", "to be the instrument of my own, not of other men's", "wish to be subject, not object", and finally "wish to be somebody, not nobody, a doer, decider, not being decided for, self-directed and not acted upon by external nature" (1969, p. 131). The notion of positive freedom initially does not have a negative connotation. However, Berlin mainly discusses the further implications of the concept in a political context.

Principally, the source of further implications refers to identifying the self as having two components, higher and lower, which internally compete with one another for the "soul" of an individual. Berlin argues that defining people with higher and lower selves jeopardizes the value that individuals obtain via being in control of their own choices. It is because the higher-self or dominant-self is understood as "real" or "ideal" in the long run, while the lower-self, whatever it consists of, is open to oppression for its own sake. In other words, as put by Carter, it is the "dominance of an authentic self over a merely empirical self" (1999, p. 6).

The further implications of defining the self as lower and higher are even broader than the abstract argument. For Berlin, all that is negative comes from the idea of allowing others to decide what is good or valuable: "this monstrous impersonation, which consists in equating what X would choose if he were something he is not, or at least not yet, with what X actually seeks and chooses, is at the heart of all political theories of self-realization" (1969, pp. 133-34). While the negative conception of freedom aims to restrict such power, the positive conception aims to hold and practice it for the sake of liberty. This difference in the relationship with power is an overriding one that leads to weighty and conflicting implications in politics.

At first glance, positive freedom does not seem to have social and political implications because one could practice positive liberty in pursuit of chasing a rational life on one's own terms. Berlin first acknowledges this underlying assumption, but then asserts that the positive conception of freedom inevitably affects others in society. No matter how individualistic one acts when putting the concept in practice (as envisioned, for instance, by thinkers such as Rousseau, Kant, and Fichte), conceiving liberty as the pursuit of a rational life leads nevertheless to social consequences (1969, p. 145). Berlin, as Skinner claimed, complained about the idea of understanding "a body politics as the processor of a will" because this approach is a "confused and potentially dangerous piece of metaphysics" (2003, p. 28).

Berlin also makes the case of authorized intervention. As opposed to Pettit's approach, which validates authorized intervention as non-domination under specific criteria, Berlin opposes the idea that the nature of the power of intervention could be beneficial for liberty (1969, p. 164). The difference between both approaches will be discussed in the following chapter, but suffice it for now to say that Pettit acknowledges a legitimate law, authored by the people through suitable democratic means, as not intrusive in individual freedoms, in opposition to classical liberal thought, which considers any kind of law as interference. The issues regarding suitable democratic means and legitimacy of law are the main points of discussion in the following chapter.

At the end of his famous essay, Berlin bemoans the fact that political thinkers categorize different approaches as dichotomies and argue that the pluralistic view is only possible within the extent of negative liberty. The pluralistic view of Berlin recognizes that individual goals are many, and that they are not necessarily commensurable, yet only the negative conception of liberty allows people to live with their own goals within their own independent areas (Berlin, 1969, p. 31).

Berlin's conceptualization of liberty as negative and positive has had a massive impact on the understanding of liberty in liberalism and republicanism. Philip Pettit and Quentin Skinner's initial discussions of the republican conception of liberty reflect on Berlin's dichotomy, and they both proposed a third alternative which is distinct from the two, neo-Roman liberty (Skinner's concept) or freedom as non-domination (Pettit's concept).



2.3. Quentin Skinner: A Genealogy of Liberty

It would not be an overstatement to claim that J. G. A. Pocock passed the torch of the contextualist tradition of the Cambridge School¹¹, mainly focusing on the intellectual history of Renaissance, on to Quentin Skinner, who has contributed immensely to the neo-Roman conception of liberty and has become one of the Cambridge School pioneers in the history of political thought. Philip Pettit, whose contribution will be discussed in the following chapter, was influenced so profoundly by Skinner's works that it is sometimes difficult to distinguish their distinct contributions to the literature of republicanism. However, it was Pettit who in 1999 coined the concept of republican freedom as non-domination (Pettit, 2002b), while Skinner referred to the same concept as neo-Roman liberty.

The difference between the concepts of neo-Roman and republican freedom as non-domination might seem anecdotal. Nevertheless, the political systems they refer to make it an important aspect of the discussion, and therefore it needs clarification. Skinner chooses the concept of "neo-Roman freedom" because the historical evidence he excavated demonstrates that many of the writers he covers (except Osborne and Hall) proposed a political system that has fragments of both monarchy and representative system (2003, p. 55). In addition to references from the English-speaking world, he also includes Machiavelli's thoughts on the matter as they appear in his *Discourses*. Machiavelli, in principle, defends the idea that a self-governing community could also exist under a republic or a princely/monarchical political system. For this reason, Skinner declares that it would be improper to label his theory of liberty as a republican one (2003, p. 55).

¹¹ A contextualist approach to intellectual history does not only rely on the classic text, or so-called canon, but also on the historical and social context of the time. According to that approach, it is believed that abstraction of a text from its contexts narrows its understanding, if not actually becomes misleading. Skinner states that R. G. Collingwood's *Autobiography* initially influenced him in this approach, and then Sir Lewis Naimen, Pocock, and Laslett (Skinner, 2003, pp. 103-5).

Matthew Kramer points out another aspect of the difference between Skinner and Pettit's approaches. He argues that the relationship between morality and freedom reveals a fundamental difference between the two conceptions of freedom. According to his argument, Skinner is against any act of interference, regardless of whether or not it is morally acceptable: "If some person P is unprevented from doing X, then P is free to do X whether or not the act of doing X would morally legitimate" (2007, p. 84). On the other hand, Pettit has a different approach which assesses the "value" of the conduct. It is only arbitrariness that gives a conduct a dominating character. If a conduct is authorized which has suitable moral values, it does not make individuals unfree. The "value" of freedom and its relationship to morality is one of the main discussions or critiques of Pettit emphasized by scholars, for instance Forst (2013) and Honohan (2002). I will comprehensively examine those approaches in the next part of this research.

Besides a plethora of publications on republican thought, Skinner's two major works that most contributed to republican political thought are *Liberty before Liberalism* (Skinner, 2003) and *The Foundations of Modern Political Thought, Vol. 1 & 2* (Skinner, 1978a; 1978b). Skinner's argument about the concept of republican liberty is mainly discussed in *Liberty before Liberalism*. He confined his studies to the English language tradition of classical liberal political philosophy because, he argues, it is still active and effective in our lives. Succinctly, historical writings of Skinner demonstrated that neo-Roman thought held a very different idea of liberty from that of the neo-Athenian tradition (Laborde & Maynor, 2008, p. 3). While neo-Athenian thought is mainly concerned with civic citizenship via participation in public affairs, the core argument of republican thought is based upon the idea of independence from a master or an arbitrary power. The correspondence between different conceptions of freedom, i.e., negative, positive, and neo-Roman freedom, plays a pivotal role in Skinner's works. A genealogy, in this respect, is a study of freedom with reference to its origins and development over time.

Skinner uses the term genealogy, as borrowed from Nietzsche, for whom the meaning and definitions of concepts change in history (Skinner, 2011)¹². He grants a more comprehensive role to an intellectual historian, whom he understands as a kind of archeologist: "...bringing buried intellectual treasure back to the surface, dusting it down and enabling us to reconsider what we think of it" (2003, p. 112). For this reason, as an "archaeologist," Skinner aims at excavating the origin of political liberty in the English language tradition of classical liberal political philosophy and extends the meaning of the concept by discussing different understandings of freedom. In other words, he not only discusses 1) the negative conception of liberty as non-interference but also 2) that of liberty as self-realization and, more importantly, 3) freedom as non-dependence.

In the first category, Skinner elaborates on the negative conception of freedom as non-interference. This approach has two levels: freedom from external interference and freedom from internal interference. According to Skinner, it was Thomas Hobbes who conceptualized the negative conception of liberty as non-interference from the external agent/agencies. In his approach, only substantial interference by force qualifies as interference: "LIBERTY, or FREEDOME, signifieth (properly) the absence of Opposition; (by Opposition, I mean externall Impediments of motion...)" (1982, p. 261). Skinner's example of Hobbes's understanding of freedom is enlightening. If somebody points a gun at you and asks you to choose between handing over your wallet and being shot, you do have a choice (also see Pettit, 2002b, p. 17). It is this rudimentary understanding of freedom that makes Hobbes's approach abstract¹³. It is necessary however, to emphasize the political

¹² Quentin Skinner presented his lecture, *A Genealogy of Liberty*, at UC Berkeley as 2008-2009 Una's Lecturer (Skinner, 2011), which laid the foundation of his endeavour of creating a genealogical proposition for the origins of liberty.

¹³ For modern interpretations of Hobbesian freedom, Skinner points out Ian Carter and Matthew Kramer's works. Carter, in *A Measure of Freedom* uses the term "overall freedom" because he attempts to include both the idea of freedom as non-interference and the idea of freedom as ability (1999, p. 6). He intentionally leaves out the concept of self-mastery and confines himself to the meaning of the liberal conception of freedom. In addition, Kramer in *The Quality of Freedom* clarifies in the introduction of this book that his work expounds a theory of negative liberty as non-interference (2003, p. 2).

context during which Hobbes wrote his anti-republican works. Hobbes wrote his major works, *Leviathan* and *De Cive*, when he was in exile in France during the aftermath of the English civil war (Pettit, 2013, p. 179).

Skinner continues to elaborate on a genealogy of liberty by presenting the contributions of John Locke and Jeremy Bentham, who are the next sequential generations. Locke and Bentham formed their theory of freedom based on the right for property. As Bentham highlights, the right to property and law are inseparable. One cannot exist without the existence of other. Furthermore, the two concepts which Locke and Bentham introduced, ineligibility¹⁴ and coercion respectively, expanded the understanding of external interference into that of the negative conception of freedom. Locke did not deny Hobbes's argument. However, he argued that whenever your will is coerced, you are also unfree (2003, p. 18). In addition to bodily interference by an exercising power, Locke added the argument that it is also the rendering of alternatives as ineligible which makes you unfree (1960). Bentham, furthermore, claimed that threatening an agent with punishments in a case of not compliance makes you unfree as well: "As yet all acts, therefore, are free: all persons as against the law are at liberty. Restraints, constraint, compulsion, coercion, duty, obligation, are things unknown." (Bentham, 2007, p. 8)¹⁵. The only conditions are that the threats should be credible, serious, and immediate (Skinner, 2011). Furthermore, Long pointed out that Bentham's interpretation of the negative conception of freedom as the absence of restraint developed in parallel with his objection to the positive conception of freedom (Long, 1977).

As discussed above, Skinner's genealogy has three different yet internally coherent, so he claims, categories. If we were discussing only the liberal conception of freedom, the chapter would end here. However, in addition to interference from

¹⁴ Sen (1992) proposes a similar argument by emphasizing the vital importance of the necessary capabilities for gaining freedom.

¹⁵ In contrast to Skinner's analysis, Pettit appraises Bentham's contribution as being more central to the topic. He claims that Bentham's conception of freedom provided a "sharper definition and a greater importance" (Pettit, 2019, p. 198).

external agencies, Skinner demonstrates that John Stuart Mill argues how interference could also emerge internally (Mill, 2015). There are various ways that interference could emerge from within the agent him/herself. While passion (anger or hatred) is one of the elements that could generate internal interference, Mill chooses to emphasize the idea of authenticity. He discusses how internalizing social norms and customs could make an individual unfree (Skinner, 2011). In addition to Mill, Skinner also mentions another interference that could emerge internally, which is Marx's concept of false consciousness.

To summarize, interference does not have to comprise two agents. In other words, the nature of interference is not always dependent upon two different agencies, because it could emerge within a single individual. This addition to the negative conception of freedom expands the scope of the concept. As discussed above, the negative conception of freedom started with only Hobbes's bodily interference by force, expanded with Locke's and Bentham's additions of ineligibility and coercion, and finally ended with the discussions by Mill.

The second category is freedom as self-realization. As discussed in the previous chapter, Constant and Berlin defined this approach as positive liberty and criticized the further implications of it in a political domain¹⁶. According to this approach, freedom is not just being free of interference. An agent would enjoy the benefits of non-interference only if it is practiced. In other words, the value of negative freedom should be that it enables something which in practice, is actually done. In this respect, the question of freedom is a positive one. It was Hegel, according to Skinner, who discussed freedom as a dialectical concept. For Hegel, freedom not only refers to "being free-from" but also "being free-to". Hegel also associated the concept of freedom with self-realization. It is the freedom that enables us to "act in such a way to realize the essence of your nature" (Hegel, 1977). Before moving to

¹⁶ Skinner states that his generation inherited two conceptions of liberty which are "rival" and "incommensurable" (Skinner, 2002, p. 262).

the third conception of freedom as non-dependence, it is first necessary to elucidate the positive conception of freedom of Hegel, Marx, Bentham, Taylor, and Arendt.

According to Hegel's argument in *The Philosophy of Right*, freedom is concerned with realizing the true essence of one's nature. Accordingly, freedom is a positive concept because its exercise brings about its realization. Negative freedom, on the other hand, is considered to be an abstract idea that Hegel claims "can only be the fury of destruction" (Hegel, 1977, ch5). Hegel conceives freedom to be more than the ability to exercise our desires. In order to completely comprehend his definition of freedom, one needs to understand that it consists of free will, of right, and ethical life. His emphasis on ethical life is decisive because Hegel associates individual will with arbitrariness, while arguing at the same time that the will is only rational when acting in accordance with ethics in general (1977, p. 230). Despite the complexities of Hegel's discussion of freedom, it is clear that he claims that the value of freedom depends on the realization of the essence of a person's nature.

The second thinker who defended the positive conception of freedom is Marx. He discussed the idea of freedom in his 1844 essay titled *On the Jewish Question*. In that work, Marx questioned the idea of man and the rights of man as opposed to the rights of a citizen. Although 'man' is not different from a member of civil society, Marx deliberately speaks of 'man' and of 'the rights of man' in order to abstract man from society. To put it differently, Marx is interested in detaching 'man as an independent individual' from 'man as one of several components' within the larger societal framework. Marx argues this approach by arguing that the rights are directly associated with being a member of civil society (1978, p. 26). Hence, a man could exercise freedom only in a confined space, which is directly related to the right of private property. It is the arbitrariness of an exercise within the domain of individual freedom that isolates the individual from society and enhances the right of selfishness. As a final note to Marx's critique, without elaborating on the issue, Skinner argues that the concept of false consciousness could be seen as an internal interference to the kind of freedom just outlined.

Besides Hegel and Marx, Skinner also brings T. H. Green's contribution to light within the second category of freedom as self-realization. Green follows Hegel in considering freedom as self-realization, because reason is an element of freedom (Green, 2007, p. 28). In addition to the argument of self-realization, Green also brings in the argument of ability. If an individual is not able to exercise freedom, it is preposterous then to talk about freedom. For this reason, the state must engage in affirmative action to provide that ability within society, which is the primary criterion for the exercise of rights (2007, p. 32).

This debate brings us to understand the meaning of freedom as a kind of exercise, as opposed to an opportunity (Taylor, 1994). It is clear that the positive conception of freedom stems from Aristotle's *zoon-politikon* (understood as service to the community) or a more spiritual essence as in religious context (service to god), which later on influenced Kantian and Hegelian ideas of freedom. It was Hannah Arendt who simplified the meaning of freedom as a political activity in the 20th century: "freedom is politics" (Arendt, 1993). Arendt discusses a similar argument about the role of liberalism. She claims that the foundation of liberal thought rose upon the idea that liberty should not separate from political arena (1993). She questions whether the liberal credo that "the less politics the more freedom" is right or wrong and claims that freedom is directly related to political action (1993, p. 149, 151).

Finally, the third category is freedom as non-dependence. Skinner and Pettit use different concepts, although they refer to the same idea. While Skinner describes freedom as non-dependence, as a neo-Roman understanding of civil liberty (2003, p. ix), Pettit coins the term freedom as non-domination. As demonstrated in the beginning chapter of this section, the republican conception of freedom found its origins in the foundations of Roman Law. The *Codex* starts with the distinction between a free person and a slave. Skinner states that the concept of freedom as non-dependence is based upon the dichotomy between master and slave, which

originated in the foundations of Roman Law. In this respect, the question of what freedom is strictly related to the question of what makes a person master or slave. If we ask the question in this way, the answer does not only refer to interference (both external and internal) but also to the status of an agent. If you depend on another agent's will, you are not free, regardless of the exercise of interference or not. It is a mere fact that the status of dependence makes you unfree or slave.

To put it differently, if there could be interference on an arbitrary will, you are not free. The emphasis on arbitrariness is essential because, as Pettit argues extensively, an authorized interference does not make you unfree. Skinner merely demonstrates the historical journey of the concept without its implications in politics. Finally, self-awareness as being dependent also manifests the essence of the concept. Solely an awareness of dependency without interference would shape one's behavior in such a way as to please the agent who has arbitrary power over one's agency. The act of self-censorship becomes a beneficial tool to help maintain freedom, even if under the threat of becoming unfree at any moment.

Skinner presents some answers to the question of who lives as slaves, which illuminates the concept even more. For Harrington (2019), subjects of monarchs are slaves, due to their dependence on the arbitrary power of the monarch, and citizens who live under a government that does not subject itself to checks and balances, live also as slaves because they cannot contest with their will the unchecked power of executives. For Price (2018) a slave is any who suffers colonization, due to the dependence of the colony on the imperial power. The American Revolution against British dependency is an appropriate example of this. The Declaration of Independence specifies the term 'independence' as 'independence from the British Crown.' This is the reason why *The Federalist Papers* (Hamilton, Madison & Jay, 2014) are the manifestation of republicanism in the dawn of the American Revolution. Finally, for Wollstonecraft (Wollstonecraft & Botting, 2014) and Mill (2015), it is women who live under the dependency of men. Due to the economic

dependency of women and their secondary citizenship status, women cannot practice free will, and hence they are unfree.

Besides introducing examples from the English-speaking worlds, Skinner also demonstrated that the republican conception of liberty pervaded Machiavelli's writings. According to Quentin Skinner's reading of Machiavelli, it was a liberty that brought glory and greatness to Rome. Machiavelli makes this point in his *Discourses on Livy* (1979), an interpretation about Livy's history of Rome and how Rome freed herself from the servitude of kings and became a republic. For Skinner, while Machiavelli does not lose sight of the importance of principalities, he does make it clear that his preference was for the republican government (Skinner, 2003, p. 58). It was also Machiavelli who emphasized that the price of maintaining liberty is eternal vigilance. Pettit later elaborates on this notion of being sensitive to the rise of arbitrary power in each sector of life and puts it at the center of his argument. In summary, Skinner opens a new door (the republican conception of liberty) that has not been touched since the dominance of liberalism started after the end of the Interregnum Period in England and after, not during, the American Revolution and subsequent declaration of independence against the British Crown. Thanks to Skinner, liberty as a third alternative to positive-negative dichotomy will become the central argument in republican thought.

However, there was a strong objection to the methodology used by Skinner in his two-volume work, *The Foundations of Modern Political Thought*, Vol. 1 & 2 (1978a; 1978b). This objection came from Tarcov (1982). Tarcov first summarizes Skinner's methodology, as elaborated by Skinner in his famous article titled *Meaning and Understanding in the History of Ideas* (1969). Tarcov then provides a harsh criticism of this methodology, as used by Skinner in his two-volume work. He believes the methodology to be superficial, confused, and poorly documented (Tarcov, 1982, p. 707). Tarcov claims that Machiavelli's ideas, as represented by Skinner in his book, are not coherent within the bigger picture of Machiavelli's thinking. Tarcov claims that even though Machiavelli occupies a considerable

portion of the book, (which is also an objection to the method), Skinner was selective in the ways he used his method, allowing it to provide textual support for his argument. Tarcov disputes: "Skinner interprets Machiavelli's statements as either contribution to or critiques of traditions which Skinner does not otherwise show were Machiavelli's major concerns" (1982, p. 708). In Tarcov's view, then, if we interpret Skinner's method as a whole, it falls short whenever it encounters contradictions within a historical text.

Other criticisms of Skinner's works come from Matthew Kramer and Allen Patten. In his earlier works (1986; 1990), Skinner made two propositions. The first one is that freedom can only be secured by civic citizenship, i.e., by participating in politics. But Skinner's condition of civic citizenship is different from what is upheld by those following the Aristotelian tradition (for instance, Arendt). Skinner conceives political participation as an instrument, as opposed to considering it as a self-valued virtue. If we keep this in mind, we can see that Patten and Kramer argue very similarly, in that for both, an instrumental understanding of political participation is not fundamentally different from the claims of liberal theorists. Patten argues that liberal theorists, in fact, promote the ideas of republicanism that aim at the maintenance of liberty (1996, p. 36). For this reason, Skinner's claims do not provide an option distinct from that of the liberal understanding of political participation (1996, p. 44).

In his second proposition, Skinner, according to Kramer, advocates the idea that "people sometimes must be forced to be free" (Kramer, 2003, p. 105). But this proposition is problematic, as it is already within the liberal understanding of freedom. Kramer states that in his later book, *Liberty before Liberalism*, Skinner changed his proposition on the theory of liberty. Instead of defending, as in his earlier works, the positive conception of freedom (forced to be free), here Skinner asserts that the basic difference between the liberal and republican conceptions of freedom had to do with the relative comprehensiveness of each (2003, pp. 125-6). In other words, the republican conception of freedom offers a more extensive theory

of freedom than does the negative conception of freedom. In addition, both Kramer and Patten criticize Skinner's confinement of the liberal view to Hobbes's and Berlin's understanding of negative freedom. This is a fair argument, because the result is that Skinner omits the thorough examinations of modern literature on debates that are concerned with the liberal conception of freedom and its implications on the political and social spheres (for instance Hayek 1978; J. P. Day 1970; Oppenheim 1981; Miller 1983; Steiner 1994; Kramer 2003; Carter 1999).

As a final note, Skinner argued that the reason for locking up the Roman theory of liberty into the dungeons of the history of political thought, is an ideological endeavor (also see Pettit 2019, p. 197). It is because of the definition of liberty in a negative sense, that the connection between public and private liberty was refuted by several Royalists after the beginning of the English War, such as Sir Robert Filmer and Griffith Williams. Nonetheless, the most influential and fervorous objection came from Thomas Hobbes (2003, p. 6). Hobbes's concise and curt definition of liberty enlightened many liberal theorists of freedom in the centuries that followed: "A FREE-MAN, is he, that in those things, which by his strength and wit he is able to do, is not hindered to doe what he has a will to" (1982, p. 262). His definition is not concerned with the idea of public liberty, or the role of political action in order to preserve liberty, which is the central theme of the neo-Roman thinkers, as discussed above. Hobbes even insists that conceiving such a relationship between public and private liberty is the poorest way of conceiving freedom. It is this refusal or incapacity (Skinner, 2003, p. 78) to understand the connection between the two that inspired liberal thinkers. As Skinner points out, objecting to a theory of freedom is different from labeling it as incoherent. It is Hobbes's systematic attack on neo-Roman ideas of freedom, as a complete refusal of the theory, that made it an ideological means of future liberal theory.

CONCLUSION FOR PART I

Even though I felt tempted to begin my research with the diligent study of the Roman law, the limits of the length of this dissertation compelled me to start with Machiavelli. However, confining the spectrum of the history of political thought does not necessarily mean that I ignore the significant role of Roman law in the conceptualization of republican freedom. It simply means that I refer to secondary resources, which are fundamental works in the literature of republicanism.

The historical journey of the contributions to the history of political thought that I have covered, mainly from Machiavelli (1979), Sidney (2009), Harrington (2019), and Price (2018), offer a coherent storyline and propose four commitments for republicanism that have been shared by the republican thinkers. While it was primarily Quentin Skinner's and Philip Pettit's various studies that unearthed the republican conception of freedom and proposed a coherent narrative of the subject, I have also included studies that indirectly contributed to the same narrative. These are mainly the studies of Hans Baron (1955), Pocock (1975, 1995), Viroli (1995, 1998, 2001, 2002), Dagger (1997, 2008), and Tarcov (1982, 1997).

In the first chapter, the coherent storyline I propose contains four fundamental commitments of republican thought: the master-slave dichotomy, the importance of the rule of law to preserve liberty, the concept of arbitrary power, and the role of civic citizenship. The republican conception of freedom was established on a foundation comprised of these thematic discussions. While some thinkers contributed to more than one theme, others were strictly focused on a single discussion. Nevertheless, the thinkers who considered themselves to be republicans contributed to the discussions above. Even though they are not directly related to the concept of freedom, the foundation they establish is vital for the emergence of a distinct new concept of freedom, i.e., the republican conception of freedom as non-dependence/non-domination.

What does the narrative I compress into these four thematic discussions reveal about the republican conception of freedom? To consider this, let us review each of the discussions and then once again bring them together as a coherent whole.

The first theme is the master-slave dichotomy. Republican thinkers define freedom in terms of these two opposite conditions. In this sense, freedom is conceived as a status; someone who is a master is free, while those who are slaves are not free. Based on this definition, republican thinkers felt it necessary to advise the prevailing Roman conceptions of the free state and free citizenry. This is because the master-slave dichotomy played such a key role in determining those concepts in ancient Rome.

The second discussion in the context of republican freedom is the rule of law. Republican thinkers were in favor of a mixed constitution, which would offer both checks and balance to political power. They believed that a complex institutional system of law would make it harder for a political power to obtain more prerogative than necessary. This is because laws can establish an insulating layer between power and its practice. In contrast to the rule of law, are the rule of one, many, or all. Republicans considered the latter as inimical to freedom. For this reason, they called the system they proposed the “empire of laws”, in contrast to the idea of the “empire of men”.

The third common concept shared by republican thinkers is the idea of arbitrary power. Some republican thinkers understood the concept as a procedural one, such as the absence of legal and procedural constraints on interference (Lovett 2010). Some understood the concept as a substantial one, such as the idea of non-arbitrary interference (Pettit, 2002b), because they find the legal constraints insufficient. The substantial approach yielded further implications of the idea. For instance, Pettit claimed that power is arbitrary only “when it fails to track the welfare and worldview of those affected” (Pettit, 2002b, p. 11). In this context, interference is not arbitrary if it does not meet the conditions above. In short, the reason why the

concept of arbitrary power occupied such a significant space in republican theory, is that republican thinkers referred to the concept when discussing the conditions of dependence or domination. The definition of the conditions of dependence or dominance is based upon the arbitrariness of interference. The key concept in the definition of dependence or dominance is arbitrariness, because when it is not present, interference does not qualify as a factor affecting freedom.

Finally, the fourth theme is the importance of active citizenship in securing freedom. The emphasis on this goal is crucial, because it is this which distinguishes republican citizenship from civic citizenship. Republican thinkers valued active citizenship immensely due to its central role in securing freedom. Unlike defendants of civic humanists, such as Baron (1955), Pocock (1975), Arendt (1993), and Honohan (2002), republican thinkers regarded civic citizenship as a consequential ideal. In other words, participating in political activity was understood by republican thinkers to be instrumental in securing freedom. Civic humanists, on the other hand, valued political participation as an end in itself, without any other “required” purpose. The difference between the two approaches is critical, because this distinction established the new idea of non-dominating interference (non-arbitrary interference) within the concept of republican freedom.

At the end of this part, I also summarized recent contributions to republican thought. As in the case of previous material, the studies of Maurizio Viroli (1995; 1998; 2001; 2002), Nathan Tarcov (1976; 1982), and Richard Dagger (1997; 2008) contributed to republican thought, but not to the republican conception of freedom *per se*. However, such contributions paved the way for the re-emergence of the concept in the late 1990s.

Developing a coherent storyline of the contributions to the republican conception of freedom is significant because it paves the way for a more comprehensive understanding of republican freedom, specifically when discussing the limits of it in practice. When the contributions are examined under this narrative of a broader

republican ideal, the further implications of republican freedom as a political ideal become more elusive. Critiques of republican freedom, which are embedded throughout this investigation, as well as objections to positive freedom, generally opposed the further implications of the republican system of government—specifically, how the role of active citizenship and the societal view of republican thought were central to securing freedom. Many critics, such as Benjamin Constant and Isaiah Berlin, constructed their defense of the liberal conception of freedom through a critique of positive freedom based on the definition of their ideal of political participation. However, as discussed above, the republican conception of political participation refers to a consequential ideal, rather than valuing participation as an end in itself.

The second chapter outlines two fundamentally different approaches to freedom: Isaiah Berlin's negative conception of freedom—based on his distinction from positive freedom—and Quentin Skinner's neo-Roman conception of freedom, which excavated the origins of a third, alternative conception of freedom, to Berlin's dichotomy. The main reason for examining both discrete approaches within the same chapter is Skinner's numerous references to Berlin's approach, while simultaneously framing his own historical analysis.

The study of Constant and Berlin's approaches to the theory of freedom is inevitable for the conceptualization of republican freedom. Albeit they contributed to the liberal conception of liberty (i.e., negative freedom as the absence of interference, as opposed to positive freedom as self-mastery), Skinner and Pettit benefited from their approaches when forming their third alternative conception of freedom. Another valuable aspect Berlin and Constant provided was the understanding of freedom as a negative concept. Skinner and Pettit took the negative conception of freedom as the absence of interference and turned it into a new concept by replacing interference with dependence and dominance. What they fundamentally did was define the concept of interference differently, and in a fundamental way, from

liberal thinkers. While the liberal theory interprets interference as an external force, republican theory adds the condition of arbitrariness to the act of interference.

The nexus between the two distinct approaches openly reveals itself in Skinner's genealogical endeavor of excavating the origins of freedom. It is due to this nexus that Skinner's interpretation of liberty as non-dependence, became an alternative to both negative and positive distinctions (2003). It is precisely this direct, but somewhat limited relationship, on which I did not thoroughly elaborate as I examined the context for a liberal conception of freedom. My excuse is that I incorporated within my research discussions on the liberal conception of freedom, as comprehensively as Skinner and Pettit did in theirs. Since my research focuses on the republican conception of freedom, it ends up being more comprehensive in this area. The relationship between the republican conception of freedom and the liberal conception freedom, especially modern liberalism as opposed to the classical theory, is a subject for another study.

**PART II: PHILIP PETTIT'S THEORY OF REPUBLICAN FREEDOM AS
NON-DOMINATION**



CHAPTER 3: FREEDOM AS NON-DOMINATION

3.1. Introduction

Philip Pettit is the foremost scholar who conceptualized the republican conception of freedom as non-domination. As discussed in the previous chapter, Quentin Skinner also studied the same concept with similar arguments. However, Skinner's work is solely based on historical research. Pettit, on the other hand, does not stop where Skinner did when the latter reached a republican conception of freedom as non-dependence. Pettit also offered a comprehensive framework for the applicability of the concept to actual politics¹⁷.

In this part of my dissertation, I will discuss Pettit's contributions both in the theoretical and practical spheres. I start by breaking down his definition of republican freedom as non-domination into two categories and discuss them separately in the following sub-chapters.

When we break his definition into two parts, we notice that Pettit defines domination first by examining its opposite, and second by elaborating on the condition of arbitrariness. In the same way, I will first discuss how Pettit conceptualized domination, as well as the implications and pitfalls of his definitions at a theoretical level. In this chapter, moreover, I'll discuss how Pettit defined the republican conception of freedom as non-domination.

Freedom as non-domination is a negative concept because it offers the absence of something. While the liberal conception of freedom valued the absence of interference, Pettit claims that his approach as the absence of domination offers a

¹⁷ De Wispelaere and Casassas use Pettit's concept of freedom as non-domination in respect to disability rights (2014). There are discussions about republican liberty from different perspectives, such as in the context of family life and gender relations (Pettit 200b; Phillips 2000; Costa 2013), and in criminal law and civil law (Braithwaite and Pettit 1990).

broader meaning. Domination, for Pettit, is simply an interference on an arbitrary basis. So, Pettit's definition of freedom broadens with respect to the liberal conception by eliminating some forms of interference. To put it differently, if an interference is not injected on an arbitrary basis, then it is not exerting domination. Such a definition allows for freedom within a framework of non-arbitrary laws. In addition to the definition of non-domination, this chapter will also present essential discussions on the preconditions for interference, arbitrariness, and non-arbitrary interference.



3.2. The Concept of Domination

In addition to Berlin's negative and positive distinction of freedom, Philip Pettit's seminal work on the republican conception of freedom, *Republicanism: A Theory of Government*, marks a milestone in the development of a new way of conceptualizing freedom. The historical development of Pettit's theory is very similar to Skinner's contribution¹⁸. However, when compared in their entirety, there are two main differences between Pettit and Skinner's work.

The first is that Pettit defines his conception of freedom as republican and non-domination, while Skinner defines his as neo-Roman and non-dependence. As discussed in the previous chapter, the difference derives from the nuanced divergence in understanding the concept of freedom, with respect to its political materialization.

The second difference is that Skinner does not attempt to offer a theory of government in support of the new conception of freedom he offers. Skinner focuses solely on the historical development of his concept, within the context of its relation to the liberal understanding of freedom. So, while Pettit follows a historical route similar to Skinner in his conceptualization of freedom as non-domination, Pettit further offers a theory of government within which he can discuss the practical implications of his concept. Since both Skinner's and Pettit's works expand upon the already well-known ---history of republican tradition, I call their contributions a revival of the republican / neo-Roman conception of freedom. But even though what they offer is not novel to the theory of republican freedom, their attempts to excavate and bring the older understandings of freedom to light are a significant addition to the field.

¹⁸ Pettit addresses this confusion by pointing out that even though he and Skinner benefit different concepts, the discussions of republican freedom or neo-Roman freedom refer to the same ideal (2002a, p. 342).

Another difference between Skinner and Pettit occurs with regard to the work of William Paley. As mentioned above, Skinner and Pettit follow almost the same route in the history of political theory. However, it was Pettit who "discovered" Paley's contribution to the liberal conception of freedom, with its firm rejection of civic liberty. Pettit claims that Paley's book, *The Principles of Moral and Political Philosophy* (2002), published in 1785, may have been the first of his generation to discover the turn from civic freedom (republican freedom as security against arbitrary interference) to the liberal conception of liberty (2002b, p. 45).

There are two reasons Pettit emphasizes Paley's work. First, Paley explicitly acknowledged the republican conception of freedom as non-domination. By recognizing freedom as non-domination, Paley claims that republicans confused the instrumental value of civil liberty with ends, arguing that freedom as non-interference offers a more scientific theory while making it impossible to practice civil freedom in actual politics (Pettit, 2002b, pp. 46-7). Second, Paley's contribution to the liberal conception of liberty became influential in the development of liberalism. Pettit asserts that his view of freedom became a mandatory reading of the Cambridge syllabus up until 1925 (Pettit 2019, p. 198).

Pettit argues his conception of freedom from within the context of republican theory. Before elaborating on his theory of freedom as non-domination, it helps to remember once again the ideas of the republican view upon which his theory rests.

Pettit bases his conception of republican freedom upon three pillars. 1) The first, the main foundation of the republican government, is freedom as non-domination, which is the pivotal issue of this chapter. This concept addresses the capacity of one party to interfere with another on an arbitrary basis. The dominating party does not have to actually practice the power to interfere. Simply having the capacity or capability of domination is sufficient to reduce the freedom of the other party¹⁹.

¹⁹ Richardson claims that Pettit's definition of dominations as having a capacity to interfere is exceedingly broad. He gives the example of kidnappers for discussing his argument (2003). While

This is because although the ruler does not practice actual interference, the status of domination limits the choices of the other party by making him or her subject to self-censorship. 2) The second pillar is a mixed constitution. For Pettit, having a mixed constitution should provide an opportunity for all sectors of society to have their voices heard, so that the distribution of power could be effective in checking the system by its own citizens. 3) The third pillar is a form of citizenship that gives people the authority to challenge the government. Pettit stressed the significance of the role of citizens in society because it is the people who should ultimately protect their own liberty. As stated before, the cost of freedom given to the people by the people, is eternal vigilance.

Pettit thoroughly argues the negative and positive distinctions offered by Berlin. He even thinks that Berlin's understanding of freedom, either positive or negative, "served us ill in political thought" (2002b, p. 18). His critique of Berlin on an ontological level is valuable because Berlin conceives mastery and interference as essentially the same thing, both of which reduce freedom. But Pettit argues differently. For Pettit, mastery and interference do not engender the same things that affect liberty in a negative way (2002b, p. 21). However, his critique of the liberal conception of freedom as non-interference does not categorically negate the theory, because Pettit himself benefits from the negative conception of freedom²⁰. Although he claims that his conception of freedom is a "radically different way of understanding freedom and the institutional requirements of freedom" from Berlin's approach (2022b, p. 19), I personally do not think the difference between the two conceptions is radical. If it were, Pettit's conceptualization of freedom as non-domination would not be based upon the foundations of negative conception, i.e., the absence of something. While the requirement of "absence" in Berlin's approach

kidnappers have a capacity to exercise their power, the possibility of such interference does not make people unfree.

²⁰ Alan Coffee states that conceiving the republican conception of freedom as a negative ideal is "misleading and misguided" mostly because it is exposed to the misuse by oppressive authoritarian governments (2015). Coffee's critique of the internal logic behind republican theory reflects on Isaiah Berlin's objections on the positive conception of freedom.

is limited to “external” interference, it is still considered as interference in Pettit's approach. For Pettit, the salient qualifier is whether or not the interference is applied on an arbitrary basis. It is the application of interference on an arbitrary basis which Pettit calls domination.

Freedom as non-domination, as Pettit also indicates, is a negative conception of freedom. Pettit terms this way of reasoning an "intermediate possibility" that could allow freedom to emerge “in the absence of something” (2002b, p. 22). In his theory, the “absence” is not absence of interference, as in the liberal conception of freedom, but absence of mastery or domination. In other words, freedom could only occur in an area free from domination, hence of non-domination. But domination in this sense is an arbitrary interference, so not all types of interference qualify. Before elaborating on this definition of domination and on what constitutes domination or not, it is crucial to examine what qualifies as interference in Pettit's theory.

As explained above, Pettit's definition of freedom as non-domination is a conception of freedom that specifically provides security against any interference that is applied on an arbitrary basis. In other words, domination occurs to the degree that an agent has the capacity to interfere on an arbitrary basis with respect to certain choices that individuals or groups may exercise (2002b, p. 52). Pettit breaks down the definition of each term and rigorously examines the nature and extent of each. His concept of interference addresses the act of an agent on an individual or a group within each specific qualifying criterion. Similar to Skinner's analysis of expanding the scope of interference after Hobbes to the areas of constraint, Pettit also claims that interference exists in different forms.

First and foremost, interference should be an intentional exercise. In addition to the mere act of interfering, the interference must also prevail by limiting the options accessible to another agent, through the threat of punishment, or even by omission (2002b, p. 53). In addition to criteria being applied to an agent that interferes,

qualifications also need to be made on both the dominated party and the conditions which are being dominated. The capacity of a dominating agent to interfere, should be present and available as a viable option to be exercised on the dominated party. Note that even if an option is not exercised, the requirement remains that it must be viable. Conversely, domination which is not perceived as mandatory by a party, does not qualify as an applicable option, and hence, does not qualify as an act of interference. Finally, Pettit also asserts that contextual differences are also crucial for the qualification of interference. An act which could be classified as interference within one cultural setting, may not be classified as interference in another (2002b, p. 57). This contextual emphasis is essential, because despite the concepts of domination and non-domination being global within Pettit's theory, the qualification of interference depends on the local cultural contexts. It is from this contextual basis that Pettit advocates the concept of freedom as non-domination as a “gateway good”, as opposed to the idea of “ecumenical good”. Pettit addresses the concept of gateway good in his later work, *Just Freedom* (2014)²¹. The main assertion in *Just Freedom* is that freedom as non-domination could be used as a moral compass, i.e., a universal value, for the complex world of our time. Furthermore, Pettit points out that freedom as non-domination is more than a zero-sum game. It represents more than a single value within the ideal form of freedom; enabling freedom as non-domination would bring about the realization of other goods (Nyholm, 2014, p. 441).

Pettit discusses three themes that historically provided the background for freedom as non-domination. The three themes are: 1) freedom as non-domination is not a positive concept, 2) the theoretical argument of republican freedom rests upon the master-slave dichotomy, and 3) there is an organic relationship between republican freedom and the rule of law.

²¹ The main argument in *On People's Terms* was the applicability of freedom as non-domination in theory of justice and discussing the role of the contestatory model of democracy in the application of republican freedom. His later book *Just Freedom* does not cover new grounds, because it reiterates the discussions from two previous books mentioned above, except for a new section on international justice added at the end.

The negative conception of freedom as the absence of domination or dependence, as Pettit argues, appeared already in the prevalent republican tradition. The positive understanding of freedom, as Berlin discussed, refers to self-mastery as an end in itself. Yet, Pettit claims that his theory takes civic citizenship as a consequential, i.e., instrumental, ideal (Pettit 2002b, p. 30). The consequential character of his theory, which is discussed in the next chapter, provides to Pettit's theory an instrumental value for securing freedom. For this reason, the main goal of political participation is understood to be the avoidance of atrocities linked with arbitrary interference (Pettit, 2002b, p. 27). Pettit introduces the works of Hanna Pitkin (1988) and Machiavelli (1979) in order to illustrate the purpose of active citizenship in the Roman period as "not for public power but private security," and "not to rule but rather not to be ruled" (Cited in Pettit, 2002b, pp. 27-8). In addition, the same idea transferred to the writings of Harrington, Sidney and, Milton in England, and Price in America.

In the second theme, the master-slave dichotomy, Pettit reflects upon the status of freedom (see arguments in Chapter 2). Here he makes two main points. The first is the understanding that liberty could only be accurately conceived, when based upon an understanding of the opposite conditions of a free person and a slave. For example, if one is a slave, one is always subject to arbitrary interference, even without the actual practice of interference. A non-interfering master, even a benign one, still reduces a slave's liberty simply by the definition of a slave's status, and the potential of the master to interfere. The potential, in this sense, means the arbitrariness of an act.

The second point of the master-slave theme, which is also the third theme of Pettit's theory, i.e., the rule of law, is even more elucidating. The act of interference does not necessarily render a person unfree. In a scenario of a non-mastering interferer, the freedom is not reduced or abridged. In the republican tradition (Machiavelli, Harrington, Sidney, and Paine), as Pettit demonstrates with abundant textual

evidence, the law and government do not always generate mastering interference. In a well-ordered republic that tracks the interest of the people, government interference does not make people unfree (2002b, pp. 32-3).

"Good laws", as Pettit describes them (2002b, p. 36), occur under conditions of non-arbitrary implementation, i.e., when they are "controlled by the interest and opinions of those affected" (2002b, p. 35). In a later essay, Pettit (2013) clarifies his stance on this issue even more. He argues that there is not a legal system that does not sanctions unlawful exercise. For this reason, law comes with interference. While laws as a coercive interference do not in essence diminish freedom (as they do for Hobbes in particular, and in liberal thought in general), they do so in reality, if they are not positively aligned with the interest of those affected. Pettit's arguments for non-dominating interference will be further discussed in the next chapter, especially with regard to the preconditions that can make an interference a non-dominating one.

While Pettit offers a theoretical blueprint for establishing a republican government, the difficulty occurs when we consider altering the laws. Since majoritarian groups control the democratic influence within the limited power of constitutional security for minorities, those who currently hold power should voluntarily forgo the control, i.e., moderate the dominating power they have over others. Pettit still defends his argument by pointing out that we should not omit the possibility of established dominant party may be willingly to forgo some of its power. In addition to Pettit's optimistic framework, the only viable theoretical exercise for the practicality of republican freedom, in this case, rests upon the contemplation of an original position (see Rawls 1971). Even then, guaranteeing the idea of "tracking the interest of the people" seems questionable without the robust ground of common good.

Alan Coffee introduces a strong critique of Pettit's conceptualization of domination. He argues that when domination emerges in society, it originates not only from the laws that are not controlled by the citizens, but also from the norms. He refers to

the two different spheres of domination as the community's laws and the community's norms, where norms, just like laws, have the capacity to bring about domination. Coffee even assigns the community's norms a determinative role in scrutinizing the laws, provided the laws were initially designed to track the common good. But in contrast to laws, norms are not subject to any form of editorial review, due to the lack of a supreme authority that could offer "better" norms (2015, pp. 56-7). According to Coffee, Pettit takes only laws into consideration when discussing domination, something which Coffee views as a deficient approach.

As a final note on dominating and non-dominating conditions, Pettit offers two categories by which to distinguish different versions of domination. For Pettit, freedom is breached by unauthorized intervention on an arbitrary basis. The two categories of intervention are first discussed by Pettit in his book *Republicanism* (2002b). Here he refers to the categories as vertical and horizontal. However, in his later work, *Just Freedom*, Pettit uses different terms for these two types of intervention, depth and breadth, which from a social perspective are a little less mathematical. According to this view, you must not only have the room and resources, but also the capacity to freely exercise your own preferences without interference. For breadth of freedom, in this view you should be able to choose an option freely, over a suitable number of choices.

In summary, vertical domination occurs when there is a lack of control over a systematic interfering agent, such as a state or government. The degree to which freedom can exist under such control can be described as its depth, where "deeper" means "freer" and is obviously better. Horizontal domination takes place when one individual's personal power to interfere, on an arbitrary basis, dominates the choices of another individual. The degree to which freedom can exist under this influence on choice can be described as its breadth, where "broader" also means "freer" and, again, is also obviously better. According to Pettit, you are truly free only if you enjoy both significant depth and breadth of freedom.

3.3. Arbitrary and non-Arbitrary Interference

After clarifying the definition and qualifications of interference, Pettit examines the condition of arbitrariness. Pettit's definition of arbitrary interference is as follows: "an act is perpetrated on an arbitrary basis, we can say, if it is subject just to the *arbitrium*, the decision or judgment, of the agent; the agent was in a position to choose it or not choose it, at their pleasure" (2002b, p. 55). The emphasis of the definition lies in the final part of the definition: at their pleasure. An act could only be arbitrary if external factors do not compel it. The only compelling factor should be the choice of the agent²² who decides on his or her own pleasure. Arbitrary action, in this sense, does not entail controlling mechanisms other than the decision of the exercising agent. Pettit twists this idea of a lack of control and defines the non-arbitrary interference²³, which will be discussed in detail later²⁴. For an analogy of non-arbitrary interference, both Pettit (2005, p. 197) and Bellamy (2010, p. 159) address Ulysses's story. When Ulysses' sailors bound him to the mast, they interfered with his ability to act as he wished but did not dominate him because Ulysses himself authorized the interference.

The idea of non-dominating interference is given significant weight within Pettit's theory of freedom²⁵. The definition of non-dominating interference seems easy to understand, but the conditions and requirements of such interference makes the matter complicated. Due to the difficulty of framing a coherent and sturdy theory, Pettit chooses to discuss what reduces the arbitrariness, not what eliminates it, and proposes two ideas. The first idea is to make the sectional or individual interference

²² In addition to external factors, internal factors could also interfere on freedom. See discussion in sub-chapter 2.3. Quentin Skinner: A Genealogy of Liberty.

²³ In this respect, Bellamy prefers to use legitimate and illegitimate interference (2010, p.159) due to his emphasis on political legitimacy for interference.

²⁴ Simpson terms the interference on a non-arbitrary basis as the externally controlled will to interfere (2017, p.30).

²⁵ Alan Coffee points out that the concept of non-arbitrary interference, which the republican theory is concerned with, is a socially constructed idea. For this reason, the definition of non-arbitrary interference would not be the same in different social and political contexts, hence the theory does not offer a universal ideal (2015, p.47).

more difficult to implement and practice, via governmental sanctions or procedures. The second idea, if the first one is not sufficient, is putting penalties in place, i.e., threatening the agents into making them liable for their acts. But Pettit's preconditions for reducing the arbitrariness of action are often not sufficient. When his arguments reach a deadlock, he usually employs yet another, more comprehensive concept. At the critical junctures of his theory, Pettit refers to the ideas of common good and common interest, as opposed to individual or sectional interests. Pettit also elaborates on the idea of contestatory democracy, which will be discussed in the following chapter, but suffice it for now, even contestatory democracy depends on the vague idea of the common good when the theoretical framework reaches a deadlock. Defining a concept by its opposite condition sometimes makes it less complicated and easier to understand, e.g., defining the condition of slavery through an understanding of what it means to be master, and vice versa. Pettit applies this exercise to his endeavor of defining domination, by arguing the capacity of interference and limiting the choices that are viable to a dominated people. He asks the following illuminating questions: what is non-domination, what qualifies for non-domination, and how is it protected?

Pettit offers two procedural suggestions for the achievement of non-domination: 1) strategy of reciprocal power and 2) constitutional design (2002b, pp. 67-9). The first one addresses dispersing power equally, such that the dominating and dominated parties have a balanced power relationship. One way to facilitate this idea is by giving an active role to agents. The second one refers to establishing a higher authority, e.g., a constitutional institution, to decrease domination. At this point, the question arises: how would an institutional authority provide such a service? Pettit refers to the same idea of the common good in this question by defending the idea that so long as institutions follow the interest of the people, not factions, interference will not dominate citizens (2002b, p. 68).

Pettit additionally advocates that the absence of domination could only be an attainable condition in relation to others. It is not a condition that one can enjoy in

a private space, secluded from others. In this respect, the concept of non-domination is a social concept, in contrast to the liberal conception of freedom as non-interference, which is achievable in isolation, i.e., in the absence of others. Due to the social component of the above discussion, interference without domination is only possible between parties who share the same context, but more specifically, people who share the same political context.

Pettit, again, in this very challenging endeavor of discussing non-dominating interference, refers to the idea of the common good and interest. He reiterates the proposition that the republican government's mechanisms should compel public authority in such a way that it pursues the common interest (2002b, p. 65, 199). For instance, taxation by the state, which meets the criteria above, is a non-dominating interference.

Because of the inclusive nature for all members of the society, Pettit's emphasis on the social value of freedom as non-domination is also a pluralistic idea. Because of this, the ideal of freedom as non-domination becomes an inherently dynamic idea, and the pluralistic language becomes a part of the republican state. We observed before a similar emphasis on language in the work of Pocock (1975) and Viroli (1998). The importance of language in political theory occupies a significant place in republican theory because of its value within the contextualist tradition.

If discussed in other theoretical contexts, non-dominating interference is not a novel idea. The ontological discussion of liberal theory appraises any type of interference as an obstacle for individual freedom. In this regard, laws are also a type of interference because they limit the choices of an individual. It was Hobbes who articulated this thought that found a place in classical liberalism. Yet, aside from the classical liberal theory, which occupies a central position in both Skinner and

Pettit's critiques of the liberal conception of freedom, laws gained importance in protecting individual freedom in twentieth century liberal thought²⁶.

The main objection to Pettit's theoretical framework, as well as Skinner's, arises from the argument above (see Dagger, 1997). With respect to the contribution to liberal thought in the twentieth century, it is challenging to distinguish Pettit's formulation of republicanism from liberalism. Charles Larmore and Henry Richardson even argue that Pettit's concept of interference without an arbitrary power seems similar to a liberal understanding of the common good (Laborde & Maynor, 2008, p. 9). According to his argument, the line that distinguishes republicanism from liberalism, especially constitutional liberalism, is unclear. Gourevitch claims the same blurriness between the two theories. The fervent attempt to critique liberty in the liberal sense as non-interference does not satisfy the expectation of proposing a clear and decisive account of a distinct republican theory (2010, p. 39).

In addition to the conceptual value of non-domination, Pettit also advocates that non-domination is a political ideal. In this respect, it is also a consequential ideal, i.e., it provides an instrumental good (Pettit, 2002b, p. 81; for discussion, also see Dagger 2008; Maynor 2002). Pettit states that "the institutions which promote people's freedom as non-domination go to constitute that freedom, not to cause it; the doctrine does not countenance any temporal or causal gulf between civic institutions and the freedom of citizens" (2002b, p. 81)²⁷.

Dagger's objection to Pettit's consequentialist proposal is significant. Pettit perceives the non-domination aspect of his theory of republican freedom as an ideal which is supported by constitutional and social institutions, rather than one which

²⁶ Pettit states that Hayek's view on law is not strictly negative with regard the protection of law (2002b, p.50).

²⁷ For a thorough discussion of consequentialist and non-consequentialist approaches in political philosophy, see *A Theory of Freedom: From the Psychology to the Politics of Agency* (Pettit, 2001).

limits the actions of the state. For this reason, Dagger points out the problematic notion of republicanism, which he calls retributivist republicanism (Dagger, 2008, p. 241). Dagger believes the intrinsic value of freedom disappears when republicans seek to shape self-interested individuals and nurture their individual desires in a way which aligns them with what they perceive as the common values of society. When this idea is achieved, while republican citizens may not be subject to arbitrary interference, they will instead be subject to direct interference. Therefore, shaping the behavior of distinct individuals toward a common end seems problematic, especially within the context of a consequentialist critique.

Although it is discussed in the first chapter, regarding the discussion of the consequential ideal, it is important to mention the differences between the civic humanist and the republican humanist approaches to establishing freedom. In the civic humanist tradition (see Arendt²⁸, 1993; Pocock, 1975; Baron, 1955; Honohan, 2002), political participation and civic life are valued as intrinsically good, i.e., they stand on their own merits. The positive conception of freedom is, in this sense, embedded with the humanist tradition. With the republican humanist approach²⁹, on the other hand, political participation is appraised as a “means” used to secure people from arbitrary interference, and hence from domination. In the literature, scholars also refer to these two different approaches to freedom as neo-Athenian or neo-Roman. The main reason that Pettit and Skinner distance their theories about a republican humanist approach from the idea of positive liberty, i.e., from the humanist approach, is the need to avoid any metaphysical assumptions of positive liberty, something which was vigorously criticized by liberal thinkers³⁰.

²⁸ In her article, “What is Freedom?” Arendt argues that freedom, sometimes during times of crisis, becomes the sole goal of political action, which gives the meaning to it (1993, p. 146).

²⁹ Civic republicanism approach has recently expanded through interpretations of Machiavelli (Skinner 2000; Gisela B., Skinner Q. & Viroli M. 1990; Viroli 1998), the seventeenth-century English republicans (Skinner 2003), and Rousseau (Viroli, 2002).

³⁰ David Held uses slightly different terms to demonstrate the different approaches. He states that neo-Athenian republicanism and neo-Roman republicanism, could also be called ‘developmental republicanism’ and ‘protective republicanism’ respectively (2006, p. 35).

Rainer Forst criticizes Pettit's consequentialist approach by employing the argument of Kantian republican thought. According to Kantian republican freedom as non-domination, as Forst claims, citizens engage in politics with the belief that their efforts are “ends in themselves” (2013, p. 154). In other words, political participation has intrinsic value regardless of its political role in reaching other goals. In addition to the critique of the consequentialist character of republican freedom, Schuppert, Maynor, and Laborde offer various further analyses. Schuppert claims that republican theorists have not elaborated on the relationship between republican liberty and equality. He claims that the ideal of freedom as non-domination is not sufficient to secure social equality (2015). The next discussion, closely related to the first, concerns egalitarianism. Maynor and Laborde also point out that republican thinkers attempt to limit the effects of wealth in political life by institutionally preventing the excessive accumulation of wealth (2008, p. 21). However, their contribution to the political economy of republicanism is extremely limited. Unequal conditions do not concern Pettit's republican theory because he clearly states that egalitarianism is not the levelling-down of the well-off for the sake of achieving equality (Pettit, 2013). Instead, egalitarianism is about providing resources to citizens in equal terms. Guaranteeing citizens equal resources and protections does not necessarily provide freedom as non-domination. In fact, equality of access to resources resonates with the equality of access to opportunity, as in the case of liberalism.

Finally, Pettit defends his conception of freedom as a consequential idea by discussing Rawls's reflective equilibrium argument (see Rawls 1971). Reflective equilibrium, in a nutshell, occurs when a stable, coherent position is reached by deliberating the weights of our moral judgments with their comparable issues. It is difficult to find coherence between our own moral ideas and the more extensive spectrum of moral arguments. While Pettit claims that the conception of republicanism based on civic humanism would fail to satisfy reflective equilibrium, the consequentialist approach of republican freedom as non-domination would meet

the test (Pettit, 2002b, p. 102). Despite the limited reference in his theory to modern liberal thought, Pettit consults with Rawls's idea to bolster his argument.



CHAPTER 4: CONTESTATORY DEMOCRACY: A SOLUTION OR FAULT LINE OF THE THEORY?

4.1. Introduction

How Pettit conceptualizes republican freedom as non-domination is crucial because it generates and directs the propositions of this theory for the republican government. In this chapter, I discuss how a different model of democracy, as Pettit claims, has a critical role in the applicability of republican freedom. Pettit calls his model a contestatory model of democracy. As opposed to the consensual model, Pettit claims that a contestatory model offers a different and sturdier citizenry, which is a necessary condition to secure freedom against government or majority will.

The contestatory model of democracy is the hallmark of Pettit's theory of freedom for a republican government. As opposed to a model of democracy based on consent, Pettit defends the contestable model for the republican government. In a contestatory model of democracy, individuals have the right to contest decisions in an institutionalized setting, not just through their vote. Although the role of voting and its influence on decision-making is important, Pettit argues that post-decision contestatory involvement is also crucial for republican freedom as non-domination. Just how Pettit defines, discusses, and defends the concept of contestability, unveils, I contend, this crucial feature of his theory. He believes his arguments present contestability as an umbrella for the protection of liberty (2002b, p. 200). I believe and thoroughly discuss in this chapter, that his contestability requirement exposes a fault line within his theory. My reason for choosing the term fault line is deliberate. When viewed in both the short term and long term, fault lines do not necessarily predict earthquakes. Yet they almost guarantee a much higher risk. What politics will bring and change in the long term is not foreseeable. That said, being open to a risk which could destroy the whole system, makes a theory vulnerable. When a condition/status of freedom is vulnerable to outside factors, e.g.,

through a version of arbitrary interference, it is also open to domination as well. The following statement by Pettit exposes this risk within his theory: "Any system of law will leave certain decisions in the hands of different individuals and groups." (2002b, p. 183). If the decisions he refers to are being made by individuals or groups with a sectional interest, it becomes incumbent to consider whether or not the sectional interest will benefit or harm the common good, something which Pettit also attempts to avoid in his theory.

Pettit initially defines the republican conception of freedom as non-domination, as security against interference on an arbitrary basis. Furthermore, he provides theoretical provisions on how the republican freedom as a goal or ideal would work in a political system. He advocates that the claim of freedom as non-domination is quite favorable, even though he does not consider it as the only goal (2002b, p. 81). He discusses the extension of this idea to various spheres, such as environmentalism, feminism, socialism, and multiculturalism³¹ (2002b, pp. 135-43).

Instead of examining the hypothetical functions of republican freedom in various spheres, I focus on the role of democracy in a specific way that Pettit identifies. It is a contestatory model of democracy that Pettit proposes for the adoption of republican freedom. In general, Pettit argues that the idea of contestation leads to broader implications for individuals, which are strictly related to the views of the republican government.

Equally, according to this traditional body of thought, the opportunity for challenge argues for opening up channels of consultation and appeal between the public and the legislature; for establishing a system of courts

³¹ Pettit also claims that freedom as non-domination is compatible with the common problems of our age. Liberty as non-domination will not deteriorate the social conditions of women in society. Still, it will help to improve their situation, because of the core idea of feminism, which is to put an end to men's domination of women. Besides feminism, one may add environmentalism as not dominating the environment, socialism as classes not dominating other classes, and multiculturalism as various components of society not dominating one another but seeing each of them instead as part of a plural society.

and other tribunals in which challenges to laws can be heard and decided; for appointing independent officials and bodies in ombudsman or auditor roles, enabling them to raise challenges in the name of individuals; for recognizing constraints of rule of law and due process that authorities ought to be held to account for breaching; and for allowing the sorts of public meetings and demonstrations that may be necessary to muster more radical challenges to the status quo. (2014b, p. 216)

The main discussion of Pettit's work engages an argument regarding different republican forms, e.g., constitutionalism and democracy. Nonetheless, Pettit sometimes takes a less audacious position on the capacity of republican freedom. He asks the following question: "How can the state be organized so that state interference involves little or no arbitrariness?" (2014b, p. 171). Kramer offered strong opposition to Pettit's initial proposition; a proposition that addressed the idea of guaranteeing non-arbitrariness. Kramer offers his harsh criticism as follows: "Were anyone to think that risk can indeed be altogether removed, he or she would be indulging in irresponsibly wishful dreaming, such dreaming may be suitable for the conclusion of a fairy tale, but it should not enter into political philosophy" (2003, p. 139). Despite the fact that Pettit sometimes discussed the means of guaranteeing arbitrariness through republican freedom (2002b, p. 183), his emphasis shifted towards more practical implications and became less audacious. This change occurs when Pettit offers propositions for the republican government. It seems that the minimization of arbitrary interference has become the main concern for Pettit's theory, as opposed to delivering more comprehensive and bold propositions, such as guaranteeing the status. This change of his language toward more cautious implications of his theory is quite observable, despite being implicitly stated in his later work, *On the People's Terms: A Republican Theory and Model of Democracy*. Even though this topic occupies a limited space within his book, I believe Pettit's two main discussions are significant regarding the change of the claims of his theory: eyeball test and tough-luck test. These will be discussed in greater detail later in this chapter.

4.2. Constitutional Constraint and Democratic Control

Pettit discusses two ideas that would facilitate the application of republican freedom: constitutional constraints and democratically controlling the decision-making power³². The most important aspect of his theory, which I believe to be the fault line of his argument, is the responsiveness of the contestatory institutions. But before elaborating on this issue, it is important to first discuss constitutional constraint.

Constitutional constraints, initially handled in the literature on republican government by Sidney and Harrington, have been one of the main features of republican freedom since the foundation of the Roman Republic in 509 BCE. According to Pettit, there are three fundamental goals behind imposing a constitutional constraint on political power. The first is that the law, in specific terms, should apply to all, not just a few or many. The specific terms, in this sense, refer to laws made known in advance, and "intelligible, consistent and not subject to constant change; and so on" (2002b, p. 174). The idea behind the famous republican tenet, "empire of laws and not of men," is to keep closed as tight as possible the door that opens to arbitrariness. The less that laws are open to interpretation, the more protection that can be provided against arbitrary interference. Otherwise, interpretation of the law would give immense power to the executive branch, enabling its arbitrary practice.

The second goal of constitutional constraints is the distribution of power among various parties. Consolidation of power, which is what republican government tries to avoid, is the foundation of tyranny. The origin of this idea can be traced back to the founding of the Roman Republic, where power was given to both of the two conflicting classes, i.e., the people (*plebs*) and the ruling class, aristocrats (*patrici*),

³² Pettit argues that legal constitutional constraints will be playing a major role, in addition to civic citizenship, to control political power. Bellamy, on the other hand, asserts that the leading role should be given to legislative branch because it grants more appropriate means to reflect public opinion (2010, p. 160).

in order that a more representative government might be formed. In addition to the basic idea of separation of power between legislative, executive, and judicial branches of government, Pettit offers three more ideas that could also promote this goal: bicameral parliament, decentralization of power via a federal system, and being restrictive with respect to international treaties (2002b, p. 179). All of these ideas aim to further disperse power within a government, because consolidation of power is understood to be such a central threat to freedom. It is interesting to note that these same additional ideas designed to prevent arbitrariness are in practice in the USA. Despite the fact that it sometimes leads to a deadlocked system, a thorough set of checks and balances was introduced by the American Framers in order to keep one political party or branch from gaining "too much" power over the other.

Pettit discusses in addition a crucial issue regarding the power to interpret the law. When the courts interpret the law, i.e., when they practice the power of judicial review, they are effectively using the *law-making* power of government. Pettit not only recognizes this issue, but also asserts that the "leakage" of law-making power to other divisions of power is acceptable for the republican government. However, as he states, this leakage is not tolerable for governments based upon the populist conception of freedom. When there is no leakage, Pettit calls this a "watertight compartmentalization" (2002b, p. 180). The feature of leakage of law-making power to other divisions of power for the republican government is especially significant to this thesis, because when we examine the Supreme Court of the United States in the next part of our discussion, we will have the chance to explicitly observe the power and extent of this "leakage".

The third goal of the constitutional constraints is to make a system which is less exposed to abuse by the majority will. But Pettit's proposition for making laws more resistant to the majority is not completely satisfying. Pettit argues features such as ratification by a bicameral parliament and/or supermajority vote (2/3 of the total) for the amendment of laws, as means to support this goal. "More basic and

important laws" according to Pettit, must not be open to easy amendment (2002b, p. 183). However, he does not delineate what the "more basic and important laws" are. This leaves the terms "more basic and important" open to interpretation, along with a temporal component that depends upon who is in power. Furthermore, even Pettit admits another pitfall of his proposition; while all laws are subject to change, the rules for changing laws are ultimately made by political power³³.

So an obvious limitation to constitutional constraints, is that if taken alone, they would not be sufficient to protect freedom. This is a point on which Pettit also concurs. But as an additional means, constitutional constraints could play a significant role in protecting liberties. They could enhance and extend the liberties for both liberal and republican freedoms. As alluded to above, perhaps the greatest obstacle to constitutional constraints providing full-scale protection of freedom is that they are subject to change dictated by political power. Recognizing this, Pettit offers a contestability argument in his theory. It is this proposition which I will examine in greater detail next.

In the second discussion above, controlling the decision-making process through *democratic* controls, I begin to unveil what I call the "fault line" of Pettit's theory. There I mention how I believe the fault line lies in his third precondition of democratic contestability, the responsiveness of contestatory institutions to the real-time needs of law. In order to help elucidate an understanding of the fault line, I will begin my discussion with Pettit's own defense of the contestable model; this as opposed to the consensual model, which is covered by the first two preconditions of his theory, the deliberative and inclusive processes³⁴.

³³ For instance, during the confirmation of Justice Neil Gorsuch in 2017, the members of the Republican Party changed the Senate rules in a direction that it requires only a simple majority for confirmation of the Supreme Court Justice nominees, not 60 out of 100. This simple change of rules might seem surprising, however the implication of it is immense because it diminishes the necessity to work with opposition party members in nominating the Supreme Court Justices.

³⁴ In order to clarify the difference between consenting and contesting, Pettit offers an example of producing a newspaper article. While authoring a newspaper article is concerned with the initial stage of writing, editing has similar capacities that contestation promises. In other words, consenting a decision is about the authoring process, and contesting it afterward is similar to editing.

To summarize the previous arguments, domination occurs when interference is established on an arbitrary basis. Since some interference is inevitable in order to protect freedom itself, measures should be taken to ensure that interference is of a non-arbitrary nature. If the interference is authorized, hence owned by the people who are affected by it, the interference is non-arbitrary. In other words, non-arbitrary interference does not dominate the ones who are being interfered with. Pettit states that traditionally, to own an interference—for instance, a tax regulation or any public decision—, people who are affected by it should consent to it. While consenting to a decision is essential, such a requirement can also provide a trap which makes the process inert or passive. It implies that when a people consent to a decision, the executor then has the power to determine how the law will be implemented. Checking the power of the executor then becomes essential. The check is applied periodically, at each election.

As previously discussed, the ability of the executive to interpret a law, indirectly provides a law-making power. For this reason, the mere act of consenting to a decision does not render extensive protection against its abusive execution. As Pettit puts it, "It is only if I can effectively contest any such interference—it is only if I can force it to account to my relevant interests and ideas—that the interference is not arbitrary and the interferer not dominating" (2002b, p. 185). Therefore, just what it takes to make the act of contesting effective and just what it takes to recognize that which is of pivotal importance, depends upon the ability of a government to apply pre-conditions.

The first pre-condition for democratic contestability is having a deliberative process³⁵. As opposed to the bargain-based decision-making, Pettit claims that a debate-base deliberative process is the foundation of contestation, due to the basic

³⁵ Pettit benefits from the contributions of Habermas on the literature of deliberative democracy (Habermas 1994; 1996).

negotiating possibilities it renders (2002b, pp. 187-8). If a decision is not based on the deliberative process during its origination stage, contestation would be neither viable nor effective, due to the nature of the decision already being problematic.

The second precondition is providing a voice to all in the decision process, i.e., being inclusive. Delegating the right to present one's own view, as is the case in the representative system, already engenders problems in the consensual model. The contestatory model of democracy, on the other hand, does not inherently tolerate any vulnerability regarding presentation of one's own voice. The expansiveness of inclusion is the most fundamental issue, considered to be a crucial concern for the theory of republican freedom. Specifically, the underrepresented groups, such as religious or cultural minorities, or just ordinary people, must have the resources needed to present their voices without any deference to the controlling majority. Pettit, in this respect, proposes the introduction of quotas, which would hopefully serve to make things as inclusive as possible. For instance, quotas to establish more equal representation for women or minorities in a parliament would be a viable tool (Pettit, 2002b, p. 191).

Finally, the third precondition, which draws my critique, is the responsiveness of institutions intended for contestation. Ideally, the process of contestation should be as follows. 1) Initially, people participate in deliberation on a decision that concerns them in a debate-based model. This is the first precondition. 2) The participation is inclusive of all who are affected by the decision and provides the right to present your own voice. This is the second precondition. 3) If none of the deliberative and inclusive processes provide the results expected, contestation could be made to the institutions for final review. This is the third precondition.

With respect to contestation, there are two critical questions here: 1) having followed a course of deliberation that is inclusive, what outcomes are acceptable to the whole, despite offending those who believe that their freedom is undermined and 2) who decides? For the second question, Pettit gives a very clear answer:

The responses that share the practice must be agreed by autonomous, professionally informed bodies that are not exposed to the glare and the pressure of public debate' the responses must be determined in a depoliticized way. In a case like this, contestatory democracy requires that the demos, and the legislative representatives of the demos, generally tie their hands and gag their mouths". (2002b, p. 197)

But with respect to the first question, Pettit provides an answer which is not so specific, as his answer is the same as the one given for when the larger theory reaches a deadlock. He states that the process should be "under an appropriate institutional setting", "decisions should be persuasive" and the process "represents a genuine attempt to determine the common interest," (2002b, p. 198). The concept of the common interest, without any deliberation about what it entails, occupies immense space in this discussion, just as it did in his other problematic arguments examined in previous chapters.

As a corner case, Pettit contemplates the most extreme example of domination under the republican system he proposes. This is a useful mental exercise because it demonstrates the limits of his theory. Pettit gives an instance of domination, or not being responsive to contestations, of religious or cultural minorities. What if the objections of a group are not mitigated by the contestatory system, e.g., all preconditions are provided, yet they are forced to act otherwise? Ironically, Pettit calls such groups 'radical dissenters' (2002b, p. 200). The solution he offers, is the right of secession from the political unit or at least, the granting of a separate territory or jurisdiction, such as the Amish community in the USA, within the political unit. When the fault line of his theory is unveiled, even by himself in the example above, Pettit does not offer a solution that is within the republican system. The solution he seeks (succession/separate jurisdiction) is outside of the republican system he designs.

The structure of contestatory institutions embodies yet another problem³⁶. Pettit envisions contestatory institutions that are resistant to popular political influence, with unelected authorities that are not vulnerable to public opinion or political influence forming their core³⁷. The obvious problem posed is the possible domination and/or influence on those authorities by public opinion or political parties. Pettit discusses this problem in his book *On the People's Terms*³⁸. He weighs the pros and cons of having or not having unelected bodies, and he concludes by taking a position in favor of having them: "The existence of these authorities may cause less of a problem for a system of popular influence than the dangers they are designed to combat." (2014b, p. 236).

³⁶ Pettit avoids a detailed examination of institutional design. His defense is that the scope of his book (*On the People's Terms*) does not allow him such an endeavor. Yet, he also makes it clear that such avoidance does not suggest that he is satisfied with the current institutional designs in most democracies (2014b, p. 217).

³⁷ Pettit gives examples of such authorities and institutions, such as judges or ombudsmen, statisticians or auditors or regulators; bodies like electoral commission, a central bank, a budgeting office or a food and drug administration, media organizations like BBC... (2014b, p. 234).

³⁸ In his book *On the People's Terms*, Pettit reiterates the conceptual framework of freedom as non-domination and expands the implications of his theory to the discussions of democratic control, influencing and directing a government.

4.3. The Eyeball and Tough-luck Tests

As discussed above, the fault line of Pettit's theory unveils when the majoritarian or popular government undermines the rights of minorities. Undermining the rights of minority groups or even individuals could simply mean not responding appropriately to their contestations. I discussed above what renders a decision and the process of decision-making appropriate above. I believe that scrutinizing a hypothetical example of this situation in terms of the republican conception of freedom could make the argument clearer. Even though the example is a hypothetical construction, it can help establish the grounds for discussion of the case-study which I present in the third part.

To begin, let's imagine a religious minority that has a religious practice that includes using stimulant drugs during prayer. Further, let us also assume there is in that jurisdiction a local, state or federal ban on the use of stimulant drugs. The ban was imposed as the result of legislation that was passed through the political, legislative processes (parliament and/or senate). If the religious group wants to seek to have their right to use stimulants during prayer reinstated, they could attempt to lobby the legislative bodies. However, because they are a minority group, their efforts may not exert sufficient effect on the legislative. In this case, Pettit offers contestation institutions that are not established on a popular political basis, to provide mediation for the religious group. Next, imagine that the contestation institution is an appeal court or such. For the sake of this mental exercise, let us assume that the contestation institution fulfilled all of the preconditions that Pettit offered: it was deliberative, inclusive, and responsive. Yet, the response of the institution was still in favor of maintaining the ban. The reason for the decision was that judges were simply following the majoritarian opinion. Pettit claims that this institution should not have been influenced by public opinion, but it was. He does not offer any argument or mechanism to mitigate this. But even if we assume that their decision was not affected by public opinion or political influence, the net result is a ruling that is against a religious minorities' right to pray in their own way. While

the interference of laws is accepted as a necessity within the context of republican liberty, the interference must not be arbitrary. Otherwise, it would be dominating. How could we be sure that the legal decision against the religious group, which is interference, is not the dominating kind, but something else?

Pettit proposed two new answers to this question in his later work, *On the People's Terms*. Here, he provided two tests that could be useful to determine if the final decision is dominating or not. He believes that seeking to satisfy those tests would be very effective in warding off arbitrary intervention, hence domination. These two tests are 1) the eyeball test and 2) the tough-luck test. I believe these two propositions, which were offered in Pettit's later works, bolster Pettit's initial theory of republican freedom. No actual government will ever be perfect. While the fault line (majoritarian/popular government undermining the rights of minorities) will always exist in his theory, the two propositions offer a way to reduce the risk that the fault will become active³⁹.

The eyeball test basically means that people should not have any reason to feel intimidated for pursuing their freedom and raise their voices if needed for the sake of protecting their freedom (2014b, p. 84). It is the political system that should provide the conditions for passing the eyeball test. Pettit claims that the republican system he proposes has a capacity to provide such ground.

The eyeball test initially was offered by Cass Sunstein without elaborating on the idea in detail. Sunstein's major contribution to the republican tradition was the argument that the commitments of republicanism are not necessarily antagonistic to liberalism, or vice versa. He claimed that the four tenets of republican thought are compatible with republicanism: deliberation, political equality, universality, and

³⁹ Pettit states that he benefited from the arguments offered by Amartya Sen in order to conceptualize both eyeball and tough-luck tests. Sen claims that the lack of necessary capabilities for gaining freedom has something to do with living among others in society without shame.

citizenry (1988). When he examined the importance of deliberation, Sunstein defended the following idea regarding the eyeball test:

Above all, republican theories stress the importance of dialogue and disagreement in the governmental process; they are designed to ensure, not that political actors are disembodied, but that they may look as much as possible through the eyes of all those affected. (Sunstein, 1988, p. 1589)

Before moving on to the tough-luck test, the weakness of the eyeball test should be examined. I believe the eyeball test offers a useful conceptual tool to determine whether there is domination or not. However, it is almost impossible to measure or even experiment with the test in actual life. How could one say that he/she passes the test while being dominated? Domination produces self-censorship due to the nature of freedom as a status, which was discussed in detail in chapter three. If someone does not enjoy the republican conception of freedom as non-domination, how is it possible to raise your head and "look others in the eye without reason for fear or deference"? The lack of measurability and testability of the eyeball test creates, I believe, problems for the applicability of the idea in actual life, although in theory it offers a good measure.

In addition, Marti and Seleme offered a different critique of the eyeball test (2015). They argued that the goal of the test is fundamentally to provide an instrument which can be used to determine whether or not protections against domination are satisfactory. This goal puts the test at the center of the theory because it offers a sign to determine whether or not the central proposition of the theory is being met. Marti and Seleme claim that the test, even at a theoretical level, is "neutral to the morally irrelevant factors of variance in personal character traits." (2015, p. 6). However, the test itself is very much related to social traits like shyness and cowardice. The lack of inclusion of issues belonging to the personal level unveils another weakness of the eyeball test.

The second test Pettit offers is the tough-luck test. This test plays a central role in determining whether a final contestatory decision is dominating or not. As such, it

too can play a key role in predicting the underlying volatility of conditions beneath a fault line. Note that the answer to this test too is both subjective and dynamic, i.e., the answer at any given time may depend upon the particular group and their current circumstances. Tough-luck is basically responding to a decision against your interest with a “sometimes you win, sometimes you lose” attitude, as opposed to believing that you are being systematically persecuted or dominated by the decision. There is no guarantee to obtain a verdict in favor of your freedom from the contestatory institutions. But for things to work, the decision must be accepted in good faith by both sides. The decision could be one like banning your religious practice, as in the hypothetical example handled earlier. According to Pettit's tough-luck test, if it is possible for you to think that the decision is based on tough-luck, your freedom is not abridged. Pettit elaborates on the idea of the touch-luck test, with reference to his discussions about three requirements of effective popular control that can offer protections against domination.

The first requirement is being appropriately “individualized”. This requirement is about giving each individual in an electorate an equal voice in the control of the government. In this way, the system satisfies the idea of the inclusion of each individual in the practice of controlling political power. The second requirement is about being “unconditioned”, in other words, not being dependent on external factors for the support of one's own interests, e.g., the goodwill of others. Such dependence would itself dynamite the ground of the basic theory of freedom as non-domination. The third requirement is about being efficacious. Pettit offers the following arguments in *On the People's Terms*, which connects the efficacious requirement to the tough-luck test:

[The tough-luck test] must be [e]ffective or efficacious enough to impose a popular direction on government that nullifies the intrusion of the alien will. (2014b, p. 175)

[The] [e]ye-ball test is a good index of whether the guards against private domination is adequate, a parallel tough luck test is a good index of whether the guard against public domination is efficacious (2014b, p. 176)

However, Pettit's examples for discussing the tough-luck test are not completely satisfactory within the broader scheme of his theory. For instance, he offers the case where a local town decides to build a school or factory adjacent to your backyard. He then asks how such a decision, which might be against your interest, could ultimately affect your judgment about your freedom. Pettit offers two ways to arrive at an outcome which could in high likelihood, lead to your sense of still feeling free. The first is through the contestatory institutions, assuming they have properly responded to your objection, i.e., they followed the common interest and "tracked the interest and the ideas of those citizens whom it affects". The second way is through the mechanisms of popular control, having met the requirements of being individualized, unconditioned, and efficacious. If either path is followed, the decision should make the individual feel free in the sense of non-domination, because the interference is not based on arbitrary will. Again, imagine our hypothetical example of banning a religious practice due to the use of stimulant drugs during prayer. Also imagine that all of the requirements of popular control are met on paper, and that the outcome of the contestatory institutions is such that the ban is based on the common interest and "tracks the interest and the ideas of those citizens whom it affects". The ultimate question is whether or not the member of that religion will accept the decision as a case of tough-luck, or otherwise. My argument is that the judgment could be either way. In my opinion, the republican constraints on power and the requirements of popular control on that power do not provide firm ground for an entire theory of freedom to be based upon. A fault line will always be there, the depth and breadth of which will always be determined by either the success of contestatory institutions to meet required conditions, and/or by whether popular controls are efficacious. Because there are no obvious tools to measure whether or not contestatory institutions have been able to follow or to meet their required conditions, and/or whether popular controls are truly efficacious, the fact is that, while the idea of a tough-luck test is a nice mental exercise, it does not by itself actually provide any useful tool for the theory.

The tough-luck test and its implications on the freedom of religious practice have pivotal importance for unveiling/defining the fault line of Pettit's theory. For this reason, the case study in the third part provides a strong argument for the thesis included in my dissertation. My hypothetical example of restrictions on religious practices is actually not too far-fetched. The issue of the Free Exercise Clause in the US Constitution and the implication of the Supreme Court's decisions on the practices of religious minorities are illuminating with regard to the theoretical argument I propose. For instance, the Court's landmark decision in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990) addressed the "incidental effect" of the decision in religious minorities. Accordingly, chapter 6 discusses how Pettit's tough-luck argument is similar to the Court's justification of limiting religious freedom in *Smith*.

Finally in his discussion of non-domination, Pettit reiterates the significance of active citizenship in the republican government, prevalent in the republican tradition as a means of securing freedom. The limited and insufficient functions of laws require active participation in politics. Pettit discusses this notion as applied to a contestatory citizenry under an argument for civilizing the republic. Since the republican conception of freedom is a social concept, as opposed to the premise of natural freedom (Pettit 2002b, p. 66), achieving a status of non-domination requires more than being isolated. Pettit claims that his conception of democracy, i.e., the contestatory model of democracy, grants individuals an active role in politics so that they could exercise the capacity of controlling the power, and hence be capable of diminishing domination.

The further implication of practicing contestatory citizenry generates another notion that is fundamental in a republican society: social norms⁴⁰. Socially established norms enhance civic citizenship because they engender a feeling of habit, which is different from responsibility and duty. Pettit points out that this feeling is a

⁴⁰ Alexis de Tocqueville discusses a similar condition in his work *Democracy in America*. He explains the role of mores, in addition to religion, in the practice of democracy in America (2000).

necessary condition for institutions to function properly. In short, it is the idea of contestatory citizenship that provides broad civility in a society, which is crucial to have the law "keep track of people's changing and clarifying interests and ideas" (2002b, p. 247). Pettit claims that only his model of contestatory democracy puts freedom to the test on a regular basis, which generates social norms and active control of the government.



CONCLUSION FOR PART II

Theories of the deliberative model of democracy and the contestatory model of democracy reflect two separate steps in the sequence/process of political participation. Deliberation is concerned with the initial process of decision-making. For instance, when the legislative power proposes a new law, or a change to an existing law, deliberation takes place, and it does so within a domain that is broader than politics. Non-governmental organizations, public opinion surveys, and state institutions for counseling are involved in the process of deliberation before any actual voting takes place in the legislative branch. In the deliberative model, the initial process of decision-making plays a crucial role for democratic participation.

Contestation, on the other hand, takes place in the post-deliberation period. Even though deliberation plays a vital role in constructing and maintaining republican liberty, Pettit considers contestation to be the most critical pillar of his theory of freedom. According to this view, because the contestation capacities of a society underlie its freedom as non-domination (Maynor, 2006; Pettit, 1999), being heard is therefore vitally important to the exercise of republican freedom. Pettit does not negate in any way the importance of deliberation; he recognizes that both deliberation and contestation are important to liberty in two separated, but interconnected, phases of political participation.

There are two possible ways of undermining participation. The first one is that, in a public debate, at the deliberation phase, your voice could be heard but not taken into consideration. The second one is that the deliberation process would not be effective in involving the voices of those affected. To counter these, contestation requires an editorial reaction to decisions reached through processes that originally were non-deliberative or under-deliberative⁴¹. Contesting an already consented

⁴¹ In this respect, Pettit's claim is very close to Richardson's approach, defined as "qualified populism" (2003). Qualified populism is an idea that the will of the people as in the form of populism is structured with constitutional constraints.

decision in a post-deliberative period serves as a check on the decision. As discussed above, Pettit places more importance on contestation than consent. He goes further and claims that the possibility to contest power is, in fact, the foundation of freedom (2002, p. 189). Since the core of republican liberty is about contestation, the limits and critiques of contestation also concern the practice of that capacity.

In order to contest a decision, an individual or a group of people should not be dominated by an agency of state power or majoritarian will⁴². A slave could be a contented slave if the master does not interfere, but a slave, happy or not, has no contestation capacity. From the same line of argument, Pettit claims that the contestation viewpoint functions only under liberty conceived as non-domination. How liberty as non-domination is maintained, and how contestation capacity could be practiced, are two questions whose answers refer to each other. In other words, you can only contest a legal decision if you have republican liberty (as non-domination), and you are free from domination only if you are able to utilize contestation.

The ontological dilemma above marks one of the limitations of Pettit's approach to democratic contestation. As stated earlier, Pettit refers to three preconditions for democratic contestability to be constituted properly: legal decisions must be deliberative, inclusive, and responsive (2002b, p. 186). While all three preconditions are important, the limits of republican theory and its critiques mostly refer to the third, i.e., responsiveness, and in particular, the responsiveness of contestation of institutions. Pettit's answer to the question of how contestation becomes responsive to the contestant's claims is critical. He defends independent bodies that is capable of making decisions without being affected by politics or public opinion.

⁴² Pettit claims that the republican conception of freedom as non-domination is an agency-freedom because freedom as non-domination is a property of agents as opposed to freedom as non-interference which is an option-freedom (Pettit 2003b; List & Pettit 2006).

I believe a fault line of Pettit's republican liberty is exposed when one considers the faith he places in contestation institutions. At the heart of the discussion, Pettit refers to institutions whose responses are determined in a depoliticized way; democratic debate, public justification, or consent do not seem to be at the center of his argument⁴³. Two critiques of his republican theory also mark this fault line. According to Forst, public justification and public debate are more important than how institutions function. He claims that the practices of contestation should be at the center of the political process in order to avoid the domination of institutions (2013, p. 164). In other words, depoliticization of contestation institutions engenders the pitfall of domination by non-electoral agencies. For Honohan, in a similar argument, the depoliticization of the functionality of institutions opens a way for manipulation. She argues that, in Pettit's argument, the active feature of democracy is confined to the fate of contestation institutions (2002, p. 236).

Bellamy, additionally, discusses the persuasive power of contestatory institutions from a Rousseauian perspective (2010). Pettit claims that Bellamy and he both endorse an institutional system that provides a sense of common interest, but they have different propositions on how it is established. Pettit emphasizes a two-dimensional view on establishing the sense of common interest: first at the input end (electing officials with the deliberative process) and then at the output end (checking officials and decisions afterward through contestation institutions). On the other hand, Bellamy claims that institutional control is best established via promoting an electoral system (2016, p. 672). He goes further and also claims that "depoliticizing constitutional values in the manner of legal constitutionalism creates domination" (2010, p. 146). Moreover, in his critique, Bellamy refers directly to the Supreme Court's rulings at the beginning of the twentieth century. The Court struck down various legislations that aimed to enhance the conditions of workers, including prohibiting child labor and limiting working hours. Bellamy claimed that

⁴³ In his later work, Pettit restates his defense of depoliticization of deliberation to a certain extent as a vital component of the democratic system (2004a).

those practices were "of course, with the even worse evil of slavery" (2016, p. 677), but the Court blocked the remedies proposed by legislation. That is to say, Bellamy argued that the constitutional protection secured by the judicial review of the Court is not sufficient even for the most basic practices of domination.

Objections to Pettit's theory of freedom by Forst, Honohan, and Bellamy are considerably similar to the critique of this dissertation. They refer to public legitimacy and consent as key concepts needed to solve the problems of republican liberty, engendered by affording too high a weight to the role of contestation. In this respect, Pettit's theory of freedom as non-domination lies on a groundwork that has a leakage into non-political spheres, and which I call its fault line. The case studies I discuss in the next part aim at demonstrating this fault line in the practical implications of the theory, not just the theoretical. Pettit proposes non-political solutions to the issues stemming from the political domain. The protection of the liberties of minorities against the domination of a state or majoritarian power is dependent on non-political, non-electoral, and depoliticized institutions. However, the historical analysis of the cases regarding the Free Exercise Clause in the United States demonstrates the conflictual relationship between the supposedly depoliticized uppermost judicial institution, i.e., the Supreme Court, and the political power exercised by legislative and executive branches.

As a final note to the critique of Pettit's theory of freedom, one could point out the lack of a more comprehensive study of negative freedom in his work. In this respect, the weakness of Pettit's theory is his limited reference to modern liberal theory in his works. In chapter two, I demonstrated a similar problem in Skinner's studies as well. Both Skinner and Pettit, who are the two foremost scholars for the republican or neo-Roman conception of freedom, based their theories on critiques of liberal freedom. Yet when they analyzed the liberal conception of freedom as non-interference, they predominantly referred to classical liberalism, rather than modern to liberal theory. The analysis of liberal freedom within the republican theory is confined to the text of Hobbes, Bentham, Paley, Constant, and Berlin. Even recent

contributions to the negative conception of freedom, such as those of Hayek, J. P. Day, Oppenheim, Miller, and Steiner, do not occupy any space in both Skinner and Pettit's theories other than brief references contained within footnotes.

The lack of discussion of modern liberal theories by the two foremost scholars of republican freedom is a significant deficiency for the republican theory. Scholars who in the twentieth century have advocated the negative conception of freedom as non-interference, consider the role of law differently than theorists of classical liberalism. For instance, Hayek defended the beneficial aspect of law for safeguarding liberty. Although Hayek opposed the positive conceptions of freedom by reiterating and expanding the implications proposed by Berlin, he recognized nonetheless the value of legitimate and coercive laws when they are used to protect negative liberty. Pettit is aware of Hayek's negative conception of freedom and his emphasis on the beneficial use of laws; however, he does not include Hayek's arguments in his account of liberal freedom other than to mention them in a footnote (Pettit, 2002b, p. 50)⁴⁴. The scope of my research does not allow me to thoroughly discuss the modern versions of negative liberty, or how they relate to the arguments of republican liberty. The inclusion of a comprehensive study of negative liberty remains a necessity for a more substantial judgment of republican freedom as non-domination.

⁴⁴ Cass Sunstein points out a similar argument when discussing the false antagonism created between liberalism and republicanism. He states that liberal scholars, such as Rawls and Holmes, "have been alert to the threats posed by both public and private power and have sought to design systems to limit both threats" (1988, p. 1567). Sunstein mainly argues that all four republican commitments he names, deliberation, political equality, universality, and citizenship, are compatible with modern liberalism; hence, republicanism is not an antiliberal theory (1988, p. 1589).

**PART III: CASE STUDY: THE SUPREME COURT CASES
CONCERNING THE FREE EXERCISE CLAUSE**



CHAPTER 5: RELIGIOUS FREEDOM AND REPUBLICAN FREEDOM

5.1. Introduction

As extensively examined in Part II of this thesis, Pettit's theory of republican freedom as non-domination relies heavily upon the functionality of the contestation institutions. Pettit defends the contestatory model of democracy, as opposed to the consensual model, as the better means for promoting republican freedom. But again this will only be the case if the contestatory institutions are able to function properly, i.e., "track the common interests of the people", such that the application of republican freedom is possible. It is because the role of active citizenship is so crucial in securing freedom, that Pettit argues only a contestatory model of democracy will do this. The contestatory model advocates civic citizenship, which provides a more reactive, editorial role, while the consensual model promotes a voter role (authorial) that is only periodically exercised during elections. As a further stipulation, Pettit also states that contestatory institutions should be isolated from the political arena so that the decision can be made without being affected by the public opinion (2002b, p. 197)⁴⁵.

Based on the above, one can argue that *the Supreme Court of the United States* (the Court) and its proceedings, resembles the contestatory institution Pettit presumes. Four reasons allow me to make this assertion. First, the court is designed to be an independent body⁴⁶. Thus, it is hoped that the Court will act independently with respect to the other two branches of government, i.e., the executive and legislative. The fundamental reason for the existence of the Court lies upon the idea of dispersing power among three co-equal branches of government, such that each

⁴⁵ In contrast to Pettit's proposal, Richardson (2003) stresses the government's requirement to consult citizens in particularizing the policies. That is to say, Richardson values consultation, i.e., the process of authoring a decision, as a better constraining practice than contestation.

⁴⁶ There are nine Justices in the Court, who must be appointed by the President and confirmed by the Senate. Justices hold their tenures for life.

would offer a check and balance to the other two, and thus prevent a concentration of power within any single branch.

The second reason for my assertion is that the Court gained its independent quality through the U.S. Constitution, which is the highest judicial power. The court, as a constitutional institution, thus takes its power from the highest authority. Since constitutional institutions play a vital role in Pettit's theory of republican government, the Court should meet this criterion, which it does.

The third reason for my assertion is that the Court is as old as the country itself. Pettit believes the longevity of laws and institutions serves two essential purposes: 1) trial and error over time help to fix defective laws, and 2) the longer they have been in existence and upheld, the higher the respect they receive from the people. Since the Court was established by the Constitution of the United States⁴⁷, it meets the longevity criteria that Pettit points out. However, it should be stressed that the power of judicial review (review by the Court of the constitutionality of a legislative act) was not established until 1803. It was through the *Marbury v. Madison*⁴⁸ (1803) decision that the Court assumed the role of judicial review; something that the Court has exercised ever since.

Finally, the fourth reason is the accessibility to the Court by petition, *a writ of certiorari*. There are two conditions that constitute the jurisdiction (the type of cases that can be heard) of the Court. The first one is original jurisdiction, where the Court is the first to hear a case. However, the Constitution limits the areas of original jurisdiction for the Court to disputes between the states, among ambassadors or high-ranking officials⁴⁹. The other jurisdiction is the appellate jurisdiction, where the Court has the authority to review the decision of lower

⁴⁷ For Article III, Section 1 of the Constitution see Annex 1.

⁴⁸ The details of this case are discussed in the following sub-chapter: 5.2. *The Case for Judicial Review*.

⁴⁹ Article III, Section 2 of the Constitution, see Annex 1.

courts, i.e., either of the U. S. Court of Appeals or a Constitutional case of a state. If a party is not satisfied with the decision of the lower courts, it is possible to submit a petition to the Court for reviewing the case. The goal of the petition is to grant a *writ of certiorari*. If four of nine Justices vote for hearing a claim, then the case is reviewed by the Court. Thus, a *writ of certiorari* gives individual access to the Court by petition. There is no guarantee, however, that the Court will hear the case. In fact, the Court has to decline thousands of petitions of *certiorari* each year due to the high workload. For instance, the number of cases petitioned to the Court in 2017 was 6,315. However, only 69 cases were argued in the same year (2018 Year-End Report on the Federal Judiciary).

In addition to cases of the U.S. Supreme Court, I will also make reference to cases regarding freedom of religion before the European Court of Human Rights (ECtHR). My inclusion here of ECtHR cases is not an attempt to provide a comparative analysis of my Supreme Court research. Instead, my goal is solely to enrich the content and context of Free Exercise Clause cases in the United States, and in this way help a reader to consider the arguments within a more ample horizon. Despite historical, social, and textual differences in the practice of religious freedom between the United States and Europe, it can be of interest to bring in an additional discussion of cases which are both relevant to the ECtHR, and can help in demonstrating various interesting similarities, especially with respect to the relationship between freedom of religion and regulative political power.

The workload of the Supreme Court compels the Justices to be extremely selective in choosing cases for further review. Although almost all of the discussions regarding the Supreme Court target the decisions and opinions articulated by the Justices, sometimes not selecting a case for review is also controversial. For instance, as Liam Ray pointed out (2018), the *Stormans v. Wiesman* (2016) case

was one of those rejections that drew attention directly from the Justices who dissented the rejection⁵⁰.

The Stormans family, who are devout Christians, was operating a pharmacy in a grocery store they owned in Olympia, Washington. In 2005, the State of Washington introduced a regulation that required pharmacies to stock and dispense the so-called “morning-after” and “week-after” birth control pills. The Stormans family believed that providing these emergency contraceptives would violate their religious beliefs and took the issue to court. Their claim was based upon the violation of the Free Exercise Clause. While the trial court held that this regulation of the state violated the Free Exercise Clause, the United States Court of Appeals for the Ninth Circuit reversed the decision.

When the Stormans family petitioned the Supreme Court, *certiorari* was denied by the majority of the justices. Although it seems like just another denial of *certiorari*, Justice Alito’s dissent unveiled the gravity of the issue. He claimed that the issue of determining the scope of the Free Exercise Clause with respect to the rights of pharmacies was such a significant question, that many state pharmacy associations had already filed briefs in order to press the Court to review the issue. In addition, Justice Alito criticized the decision of the Ninth Circuit because the state provided a stipulation that the facilitated referrals would help to access prescribed medications (Ray, 2018, p. 136).

Justice Alito’s argument is significant because a similar case was reviewed and decided differently in the Republic of Ireland. According to the Pharmaceutical Society of Ireland (PSI) Principle 1 and its accompanying commentary, the practice of a pharmacist must aim toward “maintaining and improving the health, wellbeing, care, and safety of the patient” and in the instances when a pharmacist is unable to provide

⁵⁰ Justice Samuel Alito, joined by Chief Justice John G. Roberts, Jr., and Justice Clarence Thomas dissented in the rejection of the case. They said that the Court’s rejection for hearing the case was “an ominous sign.”

prescribed medicine, they should have alternative ways to ensure providing such services (Ray, 2018, p. 139). The course of practice in Ireland showed that facilitated referrals offered a workable solution to the problem when a pharmacist does not want to provide the prescribed medicine because of his/her religious belief. Ray (2018) argues that a similar proposal would have solved the Stormans family problem, but the Ninth Circuit, as Alito also criticized, ignored such evidence even though it was provided by the State.

The ECtHR reviewed a similar case in 2001. A pharmacy in France refused to provide contraceptive medicine to three women. When the domestic court denied the application of the pharmacists, they applied to the ECtHR on the basis of the violation of Article 9 of the European Convention on Human Rights (ECHR). The ECtHR decided that the application was inadmissible (*Pichon and Sajous v. France*, 2001).

After discussing the reasons for studying Supreme Court cases, the next question is, why select cases concerning the Free Exercise Clause?⁵¹ The cases studied in this dissertation concern the freedom of religious practice, especially as applied to minorities. And issues concerning any conception of freedom often become more challenged when they also meet the criterion of being a minority issue.

As for the reason for selecting cases concerning the Free Exercise Clause, as opposed to one of the other First Amendment rights, there is the additional idea of how religious freedom has been woven into the “foundation myth” of the United States—by which is meant, not a concocted, “imaginary” story, but rather a narrative that is based on, and bolstered by, historical events. According to the foundation myth of the United States, America has always been the bastion of religious freedom and tolerance, where tolerance generally means freedom applied

⁵¹ The First Amendment of the Constitution establishes both the Free Exercise Clause and the Establishment Clause: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

to minorities. In this regard, Davis highlights the foundation myth of the United States by emphasizing the notion that the American continent was conceived as a melting pot where the free exercise of religion is considered to be a tenet of the social contract (2010).

Since the idea of religious tolerance is deeply embedded in the historical narrative of the United States, selecting the Free Exercise Clause may help provide a challenging and sturdy case for the test of republican freedom; a test which it may or may not pass. It is a challenging test to republican freedom because the Free Exercise Clause “should not” pose any serious predicaments of questioning or interpretation, due to its central role in the Constitution. It is a sturdy test because if the issue of religious freedom/tolerance does present a slippery slope for republican freedom, based on the grounds of its relations with politics, then this would provide a compelling argument that supports my critique of Pettit’s republican freedom, i.e., my identification of what I consider to be a fault line in his model. In other words, if religious freedom in the United States, which has been considered one of the strongest features of the country due to its constitutional foundation, can be shown to fail the test of republican freedom, then my critique of Pettit’s republican freedom would not just be demonstrated, but it would, in fact, be both demonstrated and supported by a very strong and significant case.

One could argue the inseparable connection between the Establishment Clause and the Free Exercise Clause for religious freedom (see Berg, 2008; Ellis, 2019). Yet, I believe the Free Exercise Clause could be studied on its own, specifically for the context of the United States and its relations with the theoretical argument of my research. Ellis states that we could conceive the Establishment Clause as security against laws favoring religion⁵² and the Free Exercise Clause as protection against

⁵² The emphasis on favoring a religion is reminiscent of the “benign master” argument, which was discussed in Part II. According to the argument, the republican conception of freedom claims that domination does not necessarily occur with the act of interference. The status of a slave represents a form of domination even in the absence of interference. Accordingly, if political power favors a religion, unequal relationships create a form of domination regardless of the nature of interference.

laws that disfavor religion (2019, p. 296)⁵³. Disfavoring religion refers to a targeted interference on religion without generally applicable law. For this reason, specifically, the cases regarding the Free Exercise Clause represent a better case study for my research. As mentioned above, the republican conception of freedom could be tested best by examining minority religions. The Establishment Clause, on the other hand, is about favoring or advancing religion. Presumably, because political branches of the government are controlled by majorities in a representative system, not the minority religion but majority religions would be subject to such treatment. Hence, the Establishment Clause would not provide a workable ground for the test of the theoretical argument of this dissertation.

In contrast to the arguments asserted by Berg (2008) and Ellis (2019), Salmons claims that the landmark cases decided by the Court have given the Free Exercise Clause of religion a more comprehensive meaning than the other freedoms guaranteed by the First Amendment (1995). His argument is significant because despite the fact that religious freedom was listed with other freedoms in the First Amendment, the change of course for justification of allowing or preventing religious practice demonstrates the gravity of the issue. For example, the implications of the *Sherbert* decision in 1963 and the *Yoder* decision in 1972 go beyond the issue of religious freedom itself⁵⁴. For this reason, Salmons states that “With these decisions, the Court seemed to make clear that the Free Exercise Clause did have a protective sphere of its own that extended beyond that of other First Amendment freedoms” (1995, p. 1247).

For this reason, favoring religion is not compatible with the idea of religious freedom. Natelson offers a similar argument about the protection of religious freedom by stating that “The idea of free exercise was freedom OF religion, not freedom FROM religion” (2005, p. 101).

⁵³ Ellis also argues that the idea behind the Establishment Clause is about equality and non-discrimination. He asserts the argument of religion to be flourished if left alone with the defense of a Lockean conception of freedom (2019, p. 296).

⁵⁴ The hybrid feature of these cases and controversial justifications are discussed in the following chapter.

Furthermore, the argument above does not mean that there is no connection between two clauses of religious freedom. The concept of legislative exception, which is one of the fundamental discussions of religious freedom and is discussed in the following sub-chapter, is concerned with both clauses. When states offer legislative exceptions for the sake of providing religious freedom to minorities, the extent of such regulation could cause favoritism, hence be violating the Establishment Clause.

Finally, the other reason for selecting freedom of religion is that it entails both belief and exercise, and the latter has been subject to legal restrictions. It would be even more challenging to study a case that is not involved in an activity because of the difficulties in testing freedom. The issue of granting or restricting the religious practices of minorities in the United States has been a topic of the Court since 1879. It is with the decision of *Reynolds v. United States* (1879) that the Court, for the first time, took the initiative to interpret the Free Exercise Clause by exercising its power of judicial review. The Court reviewed the federal *Morrill Anti-Bigamy Act* in the case of George Reynolds, a member of the Church of Jesus Christ of Latter-day Saints in the Utah Territory, more commonly known as the Mormon Church. There were six questions the Court answered in the *Reynolds* case. The last two questions were concerned with the freedom of religion because they refer to whether someone is innocent if re-married according to religious conviction.

The court answered the above two questions quite explicitly. However, it is necessary to summarize the background of the case in order to understand the references to the opinion mentioned. In the trial of the lower court, George Reynolds, a member of the Church of Jesus Christ of Latter-day Saints, was charged with violating the *Morrill Anti-Bigamy Act*, because he married a woman while also married to his previous wife. His defense was based upon the religious doctrine of the church he belonged to.

The opinion of the Court, which was written by Chief Justice Morrison R. Waite, argued the decision by reference to the history of religious freedom not only in the United States but also in England. The main emphasis was on the ideas of Thomas Jefferson when he stressed the importance of constitutional protection for religious freedom during the establishment of the Constitution. However, he was in France at the time, as minister to France. Jefferson's emphasis was on the distinction between belief and action. What Justice Waite did was simply reiterate Jefferson's argument in the opinion to justify the decision (*Reynolds v. United States*, 1878).

The connection between the issue of religious freedom and civil duty/order is significant. The opinion acknowledged the institution of marriage as "a civil contract, and usually regulated by law" (*Reynolds v. United States*, 1878); hence, it made the justification for regulating it by referring to further implications of such religious freedom. The opinion gave a hypothetical example of such religious freedoms being exercised in extreme cases, such as human sacrifices⁵⁵. Due to the fear of further implications, the opinion emphasized the superiority of civil law over religious doctrines, although only in exercise. The following quote points out this issue concisely:

To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances. (*Reynolds v. United States*, 1878)

In summary, the Court upheld the conviction based on anti-bigamy. Still, it noted that the Free Exercise Clause allows the federal government, i.e., the Congress, to regulate, hence interfere to, only the action, not the belief or opinion⁵⁶. Even though it took almost a century for the Court to review the Free Exercise Clause for the

⁵⁵ The argument of assuming the extreme examples of such religious freedoms are common in the *Smith* case (*Employment Division v. Smith* 494 U.S. 872, 878, 892) in 1990, which will be discussed in Chapter 6.

⁵⁶ In a landmark case, *Sherbert v. Verner*, the Court referred directly to the main argument of the *Reynolds* opinion by reinstating the difference between religious belief and action.

first time, according to Pepper, the Court basically turned to Jefferson's dichotomy for the *Reynolds* decision (2008, p. 53). For this reason, the issue of freedom of religion in the context of the United States since 1878 has been representing only the exercise of religion, not the belief.

At the end of the *Reynolds* opinion, Justice Waite referred to a lower court case *Regina v. Wagstaff* (10 Cox Crim. Cases, 531). In this case, the parents of a sick child decide not to seek medical assistance for their ill child based on their religious beliefs. The omission of care for a child was not considered to be manslaughter since the omission did not include an action. If such negligence included an action, as the opinion states, the decision would have been otherwise (*Reynolds v. United States*, 1878). Again, the emphasis on exercise is crucial. Here we have a situation requiring positive exercise with respect to religious freedom before an opinion would even be considered.

Before examining the definition of religion in case law according to both the Court and ECtHR, another significant factor used to select the cases regarding the Free Exercise Clause for my research is the relationship between the ideological positions of the justices. There is a profound discussion in the literature regarding the ideological positions of the Supreme Court justices and how these positions affect the decisions they make (see Segal & Cover, 1989; Segal et al., 1995; Epstein & Segal, 2006; Martin & Quinn, 2002). While I do not intend to elaborate on the ideological position of each justice in every case I study, it is important to note that for cases regarding the Free Exercise Clause, the way each justice votes is not necessarily in line with what one would expect. From the *Reynolds v. United States* in 1879 to *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* in 2018, I study 19 cases in the following chapter. Among those 19 cases, 9 cases unanimously, 2 cases by 8-1 vote, 4 cases by 7-2 vote, 2 cases by 6-3 vote, and only 2 cases decided by 5-4 vote. When the justices review a case regarding religious freedom, their votes are not compartmentalized by the ideological values they represent. The landmark cases of the Free Exercise Clause have not been decided

by close margins where the ideological stances become sharp: *Reynolds* (unanimously), *Cantwell* (unanimously), *Sherbert* (7-2), *Yoder* (unanimously), *Smith* (6-3), *City of Boerne* (6-3). In addition, in the *City of Boerne* decision, Justice O'Connor dissented alongside justices who are normally considered of opposite ideology. In other words, the ideological and political values of justices are less deterministic with respect to cases regarding the Free Exercise Clause. This fact is significant because it says that for the Court, at least with regard to the Free Exercise Clause, Pettit's requirement that contestation institutions be unbiased and unaffected by the political power is being met.

Finally, it is necessary to consider how the Court and ECtHR define religion, paying particular attention as to how they differ. The Supreme Court initially preferred to define religion in terms of theistic beliefs. In the opinion of *Davis v Baeson*, the Court defined religion as "one's views of his relations to his Creator" (1890). Similarly, in 1931, the definition of religion was stated as "Belief in a relation to God involving duties superior to those arising from any human relation" (*Macintosh v United States*, 1931). However, according to Berg, the Court extended the definition of religion to nontheistic views starting with the decision of *Tarcaco v Watkins*, where the "Court struck down a state law that unconstitutionally favored religious believing in a deity over religions that did not, including Buddhism, Taoism, Ethical Culture, and Secular Humanism" (1961); and with the *United States v Seeger* (1965) decision, "belief in and devotion to goodness and virtue for their own sakes, and religious faith in a purely ethical creed" (2008b, p. 170). The extension of the definition reached its limits with the *Welsh v United States* decision, as illustrated in the following statement: "a claimant who has crossed the word 'religious' from his application, had formed his belief through readings of 'history and sociology'" (1970). Justice Harlan, despite concurring with the opinion, objected to the overstretched definition of religion in the *Welsh* opinion. Despite the controversial stance in *Welsh*, the Court has not revisited the issue of defining the scope of religion since then.

On the other hand, the ECtHR case law offers a different approach⁵⁷ to the definition of religion. According to a report published by the Research Division, Council of Europe/European Court of Human Rights, the ECHR extends the scope of the definition of religion “to ideas, philosophical convictions of all kinds, with the express mention of a person’s religious beliefs, and their own way of apprehending their personal and social life” (Overview of the Court’s Case-law on Freedom of Religion, 2013, p. 6)⁵⁸. Evans criticized the practicality of this definition by referring to two key decisions of the ECtHR. The first case, *Pretty v. UK* (2002), controversially limited the scope of the definition. Dianne Pretty had a terminal illness, and with the assistance of her husband, decided to take her own life. Although Ms. Pretty’s decision is a form of religious manifestation as a belief, the ECtHR held otherwise. (Evans, 2008b, p. 294). The *Arrowsmith v. The United Kingdom* (1978) decision on the other hand, defined the scope of the definition of religion more broadly by asserting that pacifism qualified as a form of belief on the ground of Article 9 of the ECHR. Evans claims that if the reasoning of the *Arrowsmith* decision had been applied to the *Pretty* case, then the outcome would be different (2008b, p. 295).

The discussion above brings us to the argument of defining religion on two different bases. The first approach, discussed by Sager (2008), values religion along with other freedoms, and not as a separate category⁶¹. According to this argument, religious freedom should be considered and protected as other freedoms are, based on equal and general liberty. Webber (2008), on the other hand, claims that equating religious freedom to other freedoms is a mistake. According to his approach,

⁵⁷ Joppke argues that one of the reasons for the different approaches of the ECtHR is that the origin of the problem was confronted differently (cited in Ungureanu, 2012). When religious freedom became an issue in Europe, two different approaches were offered and implemented: assimilationist (France, Turkey) and multicultural (UK, Holland). According to Evans for example, ECtHR rebuked the approach that conceives religious freedom differently (2008a, p. 7). He asserts that religious claims should not rely on human rights law but engage with the other branches more broadly.

⁵⁸ Schabas argues that extensive definition of religion is not only beneficial for religious believers, but also for atheists, agnostics, skeptics and the unconcerned (Schabas, 2015, p. 420).

religious freedom has a profoundly higher value that should not be lumped together with other freedoms.

At this point, as a road map ahead to the arguments of my thesis, it is beneficial to describe the structure of the remainder of Part III. First, in section 5.2, I discuss the freedom of religion and politics within the context of judicial review and the Court. The main questions I address are “Where does the power of judicial review of the Court come from?”, and “How does the Court exercise this power?” Next, in section 5.3, I examine the Free Exercise Clause in the context of the United States. Here, in a more extensive discussion, I trace the origins of the Free Exercise Clause with respect to the role of the Court and the Congress, and attempt to define the relationship between an individual and a state, rather than between an individual and another individual, or between an individual and a corporate body.

Then in the next chapter of Part III, i.e., Chapter 6, I first exhibit a historical development of the Free Exercise Clause and its relationship with political power. The Sherbert Test (i.e., “the compelling interest” criteria) will be the central subject in this discussion because it demonstrates the links between the Court and the political power. Next, I discuss the *Smith* decision of 1990. *Smith* is the landmark case concerning the Free Exercise Clause because it illustrates the dramatic shift the Court took. In the *Smith* decision, the Court re-interpreted the Sherbert Test and limited its implications. Third, I examine the post-*Smith* period in which legislative remedies took place in an attempt to assuage the effects of the *Smith* decision. This period especially demonstrates how the relationship between the Court and the political branch can swing like a pendulum. Finally, at the end of Chapter 6, I examine the Court decisions in the post-RLUIPA period⁵⁹. However, instead of limiting myself to cases concerning the Free Exercise Clause, I select cases from a broader spectrum of religious freedom. I do this because counter to what one might expect, implications of the interpretation of the Free Exercise Clause are not limited

⁵⁹ RLUIPA: The Religious Land Use and Institutionalized Persons Act.

to the Free Exercise Clause cases. Another reason for including the cases regarding the Establishment Clause in the period of post-RLUIPA is that the Court has not taken the issue of free exercise of religion frequently since the RLUIPA (enacted in 2000). Also, the historical development of the Court's interpretation of the Free Exercise Clause has been profoundly influential in assessing the cases of religious freedom in general.



5.2. The Case for Judicial Review

Before examining the judicial review of the Court, it is necessary to discuss some of the different theoretical frameworks offered by scholars to unearth its origin. The idea of judicial review as a theoretical argument has been a controversial issue in political theory because it is the point of intersection between popular political power, and the power of depoliticized/unelected judicial institutions.

In order to help frame the discussion of the origin of a judicial review within our context, it is first necessary to recall the theoretical argument of Part 2. Pettit's approach, as discussed specifically in Chapter 4, largely resonates with the legal constitutional approach of Rawls and Dworkin⁶⁰. Here, Pettit gives enormous weight to the role of legal institutions (contestatory institutions) with respect to their responsibility for securing freedom from domination. Rather than only using consensual means (voting), his approach also depends on controlling political power via advancing the idea of the common good. Pettit claims that citizens control political power equally by popular influence and popular direction (see Chapter 4). Nevertheless, the scope of the capacity of contestatory institutions (how many cases can be reviewed) may ultimately limit their ability to protect freedom as non-domination.

The republican opposition to judicial review based on legal constitutionalism, on the other hand, came from the work of Bellamy (2007; 2013). Bellamy's opposition rose from the view that de-politicized institutions, conceived as judicial supremacy, undermine political power. Bellamy criticized Pettit's theory on the same basis as what he understands to be Pettit's theory, i.e., that of "...a substantive legal constitutionalist in the Rawls/Dworkin mold," because contestatory institutions

⁶⁰ Hickey argues that Sunstein (1988) and Michelman (1986) advocated the judicial review approach on the basis of the republican view, which is based upon the ideas of civic citizenship and democratic deliberation (2019, p. 289). Hickey also claims that these ideas, without labeling them as republican, also occur in Rawls and Dworkin's works. While Rawls assigns judges a profound role of deliberation under the "veil of ignorance" (1971), Dworkin uses the term "adjudication" for his defense of legal constitutionalism (1986; 2005).

represent an alien source of influence; hence Bellamy “makes the error of substituting an idealized apolitical process for real politics” (cited in Hickey, 2019a, p. 295). Hickey, on the other hand, advocates Pettit’s approach by differentiating it from Rawls’ and Dworkin’s (2019a). The most important additions to Pettit’s theory of republican freedom in his later work, *On the People’s Terms: A Republican Theory and Model of Democracy* (2014b), were the tools he offered for testing republican freedom as non-domination: the tough-luck test and the eyeball test (see Chapter 4.3). Hickey believes that these tests propose a more comprehensive ideal than a substantive legal constitutionalist approach does, and hence their role in advancing the principle of the common good is not complementary but necessary (2019a). At the very least, his defense of Pettit’s approach justifies the role of judicial review of contestatory institutions.

Bellamy responds to Hickey's critiques by discussing two issues. The first issue is that Pettit’s model of judicial review does not offer a balance between strong and weak forms of judicial review (see Tushnet, 2006). Bellamy claims that there needs to be a proper balance between the idea of subordinating courts to democratic processes and the idea of conceiving the courts as independent bodies (Bellamy, 2013). The strong form of judicial review, for instance, engenders a possible problem with respect to the arbitrary power of judges. Hence, the more fundamental republican conception of freedom as non-domination could be compromised by Pettit’s own proposal of strong and independent judicial review. The democratic process, on the other hand, should also not have an absolute, superior power, because such a situation could engender domination by the majority, who would end up controlling the political domain via the elective systems. In order to find the best balance between the two proposals, Bellamy offers solutions that focused on solving the functionality of political means despite the effort of the U. S. Supreme Court to limit their scopes, such as regulating campaign finance and proportional representation (2019, p. 328). In addition, Bellamy’s major work, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy* (2017), proposes the balanced approach of two distinct views. In a nutshell, the

political process of a democratic society functions to continually adjust the laws to meet the long term contextual needs of the society. The longevity of a political system and the judicial mechanisms are two key aspects needed to find the right balance between the ideas of the political process and judicial review.

The second issue that Bellamy points out is the limited benefit that the eyeball and tough-luck tests offer. According to Bellamy, the eyeball test offers nothing but a “heuristic for the degree a system secures public equality,” and the tough luck test “an indication of its neutrality and impartiality” (2019, p. 321). Furthermore, Bellamy objects to the argument formulated by Pettit (2014b) and reiterated by Hickey (2019a) by asserting that legislators have greater legitimacy as interpreters of the eyeball and tough-luck tests than the courts (Bellamy, 2019). In other words, Bellamy views the threat of minority tyranny from the courts to be more dangerous than majoritarian tyranny from the legislature. Finally, in his response, Hickey reiterates the same argument that Pettit proposed for the eyeball and tough-luck tests. According to Hickey, Pettit gives a central role to the “political process” in his argument for the use of eyeball and tough-luck tests (2019b).

In pursuit of finding the right balance between the two approaches discussed above, Yumlu offers a reciprocal approach (2017). First, he advocates the higher principle approach in deciding what type of rights are involved in a democratic system. According to the higher principle approach, substantive rights (classical liberalism) and participatory rights (democratic procedure) have ontologically equal value “in the form of being co-original” (2017, p. 165). Hence, an effort to distinguish these two types of rights and their origins are not fundamental in terms of the role of judicial review, which brings about the second question: which institutional design performs better to protect such rights? Yumlu claims that the pragmatic argument offers a valuable asset, even for the pre-commitment approach, by asserting that the practice of judicial review demonstrates better results than in cases where judicial review is not practiced (2017, p. 165).

In a limited scope, Yumlu's reciprocal approach resonates with Bellamy's argument. To recall, Bellamy argued that the course practiced in the democratic process grants rewriting of laws in the long term, which offers a reciprocal view of the democratic process and judicial review. In other words, the practice of judicial review shows the practical value of the practice. Yumlu, on the other hand, reaches a similar conclusion with his reciprocal approach between the pre-commitment and the pragmatic approaches.

After investigating the theoretical discussion of judicial review, legal literature on judicial review of the Supreme Court is critical for my research, since the cases examined in the next chapter are decided by the Court. As discussed in the previous part, Pettit formalizes his theory of freedom as non-domination on the ground that contestatory institutions play a key role in securing freedom. He proposes three pre-conditions for a functioning contestatory institution: individualized, unconditioned, and efficacious. The idea of judicial review by a constitutional independent institution, hence by the Court, meets these criteria. Since the resemblance between Pettit's ideal and the Court's function is discussed, the rest of this chapter examines the role of judicial review of the U.S. Supreme Court.

The U.S. Constitution does not establish a clear understanding of the practice of judicial review for the Court⁶¹. According to Section 1 of Article 3, the power of the court is not questionable, but the practice of such power is not explained in detail. Does the Court have the power to review legislation? Based on the constitution, there is no clear answer to this question. It took fourteen years for the Court to establish its judicial review with the case of *Marbury v. Madison* (1803).

Before examining the *Marbury v. Madison* case, it is useful to compare the establishment of the U.S. Supreme Court with the establishment of the European Court of Human Rights (ECtHR). Unlike the U.S. Constitution, the European

⁶¹ See Annex 1.

Convention on Human Rights (ECHR) establishes the function of the ECtHR clearly. Article 19 of Section 2 of the Convention⁶² establishes the ECtHR and its function as follows. Although the Convention does not specify the term “judicial review,” the “observance of the engagement undertaken” statement clearly gives the ECtHR the right to review the legislatures of member states.

In the United States, as mentioned above, the Court gained the power of judicial review with its own decision in the case of *Marbury v. Madison* (1803). The events that led to this case started with the presidential election in 1800. Thomas Jefferson won the election against John Adams. Right before Jefferson took office, John Adams passed the *Judiciary Act of 1801*. The act aimed at limiting the power of the coming president on judicial appointments by giving more power to the current president for establishing new courts and appointing new judges⁶³. Although this power would transfer to Jefferson when he took office, the number of judges appointed by Adams would have been predominantly more than what Jefferson would appoint in his term. Adam’s government managed to get the Act approved by the Senate over midnight, but the Secretary of the State did not deliver them to the corresponding commissions.

One of those appointees was William Marbury who had been chosen as the Justice of the Peace in the District of Columbia. Marbury petitioned to the US Supreme Court that his appointment must be delivered by the new Secretary of State, James Madison, which circumstance named the landmark case: *Marbury v. Madison* (1803).

The third question refers to the central importance of the case, which basically asks whether the Supreme Court has the authority to order the delivery of their commissions or not. The court made a unanimous decision and Chief Justice Marshall delivered the opinion of the Court.

⁶² For Article 19 of Section 2 of the ECHR See Annex 2.

⁶³ The Act involved appointing 16 new circuit judges and 42 new justices.

Answering the central question of the case entailed the biggest dilemma for the Court's existence. On the one hand, if the Court delivered the *writ of mandamus* to compel the government to deliver the appointment, Jefferson would have simply denied it. Since the assumed power of the Court was not established in that period, such an act would have been possible. In other words, the Court did not have any power to enforce the decision. On the other hand, if the Court did not deliver the *writ of mandamus*, the power and the prestige of the Court would have been severely damaged in the face of it having yielded to executive power. How Marshall responded to such a dilemma fundamentally established the judicial review power of the Court as the supreme arbiter of the Constitution.

In the lengthy opinion, Marshall first explained why not delivering the commission is illegal because a commission is valid once it is signed by a president. The following steps after the president's approval are mere procedures. The answer to the third question, based on the first two, should have followed as issuing the *writ of mandamus*. However, Justice Marshall argued that the Court could not issue the *writ of mandamus* because the *Judiciary Act of 1789* is unconstitutional. Section 13⁶⁴ of the act enables Marbury to bring his case to the Court; however, this is not compatible with Article III, Section 2⁶⁵ of the Constitution which establishes the U.S. Supreme Court. To put it differently, Justice Marshall, first, criticized Jefferson's government for not obeying the law. However, in order to escape confronting the political conflict, the Court declared the act unconstitutional. In this way, he assumed and established the principle of judicial review of the Court.

Since the power of judicial review was gained by the U.S. Supreme Court's decision in the *Marbury v. Madison* (1803), the Court has been using the power quite extensively to determine whether or not decisions of the other branches are

⁶⁴Sec. 13. *And be it further enacted*, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction (the Judiciary Act of 1789)

⁶⁵For Article III, Section 2, see Annex 1.

constitutional. As discussed above, this practice of the Court stems directly from the power of judicial review. In this regard, scholars have been debating for decades as to the extent of the power of judicial review of the Court. A large number of contributions to this discussion has been extensively argued, especially with regard to the existence and scope of the Court's power for judicial review. Kreis, for instance, categorizes this extensive literature into two competing camps: The constrained court theory and the legitimization theory (2018).

The constrained court theory, in general, argues that the Court has very limited or no capacity to mold political power or change public opinion because it is essentially a part of the broader political system. Hence, the practice of judicial review is limited only to addressing political issues. According to one of the earliest contributions to this approach, also known as the "regime politics approach," Dahl positions the courts in political unity. He argued that the Court could only have an effective role when the national alliance is in the process of changing, which is ephemeral (1957, p. 580). It is because of this role in the political system, that the Court, according to Dahl, has no capacity to act against political power.

In a similar argument, McCloskey also argues that the positions of the Court in a given period could demonstrate some revisions. However, the change could occur only in the presence of national conditions (McCloskey, 2010, p. 230). Moreover, McCloskey claims that the Court can only reflect on the "constellations of power and interest within changing historical contexts" (cited in Bridge 2015, p. 423) because the potency of the Court depends 'in part on a preponderance of friends over enemies' (McCloskey, 1972, pp. 307-8). Martin Shapiro, a student of McCloskey, follows a similar stance and coins the concept of political jurisprudence in order to conceptualize the political aspect of the judicial power in general. He conceives the courts as mere institutions within a broader political system (1964). Finally, it was Alexander Bickel, who coined the term "counter-majoritarian difficulty," which refers to the problem when the Court decides a case against the national political allegiance through the practice of judicial review (Bickel, 1962).

While some scholars argue that the Court sometimes exercises its power against the majoritarian opinion, some claim that such decisions have already been accepted by the majority in society. The discussion between these two approaches is presented at the end of this chapter.

In addition to the earlier contributions to the literature of the constrained court theory, the recent contributions take the position of the regime politics approach and expand it to different contexts. Jeffrey Rosen, for example, claims that the Court, on rare occasions, could act against the political majority. However, Rosen emphasizes that the Court gets itself in trouble when making decisions that place it against the popular majority (2006, p. 185). This view brings us to the short and long term effects of the Court's decisions on society. In this respect, Dorf claims that courts are not able to change public opinion in the long run, because when the Court's decision is in conflict with the political majority (formed by the majoritarian political coalition) the political actors limit the effect of the decision (2010). Consequently, when the Court faces such a reaction from the political domain, justices act in accordance with the political majority instead of pushing the case further. The main reason for their withdrawal is that if the political actors do not support, maintain, and execute the decisions of the Court, justices have no power to enforce it. In order to keep the assumed power of the Court, it is more logical for justices to be friends with political actors rather than enemies.

In a nutshell, the Court is not eager to take the political stance against the majoritarian view. For instance, the Court's reluctance for handling First Amendment issues during the McCarthy era (the period in which anti-communist public opinion was most prevalent), shows a direct correlation between political allegiance and the impotence of the Court (Klarman, 1996). In this respect, Klarman argues the backlash approach which discusses the short term political resistance to a counter-majoritarian decision of the Court as opposed to long term movement in public opinion. According to this contextualist approach, in order to preserve the longevity of the Court's decision, he argues that the Court is unlikely

to act before any cultural and political progress has already been made on a given issue (1996). Similarly, Carter studies two profound social movements of the 20th century, environmental issues and women's rights, both of which were supposedly endorsed by the Court and had an impact on shaping public opinion. Yet even on these issues, Carter concludes that the effect of the court was minimal (1992).

Finally, the issue of the independence of the court is discussed within the claim that the Court is powerful when it can act within the sphere of its political allegiance, but not against it. This question of the independence of courts is one of the greatest criticism directed against Pettit's defense of contestation institutions. But rather than make such a general argument against contestation institutions, Hall, for instance, argues that the Court does some things better than others. It exercises its power of judicial review more independently on administrative and criminal rulings; however, when the decisions are related to public opinions and political ideology, the Court's ability to decide independently is diminished (2013). The observation that the Court has increased relative powers with respect to taking a stance on some particular issues but not others bolsters the hypothesis of my dissertation. When issues are in line with its political allegiances, the Court acts in accordance with its defined role within the political system. This does not demonstrate the power of the Court against the political domain but rather remarks on the limited counter-majoritarian power of the Court. To put it differently, in Pettit's terminology, the Court has only been able to track the interest of the people when it has been able to act in accordance with its broader political allegiances.

The legitimization theory, on the other hand, claims that the Court has the capacity to change and mold public opinion and that it can exercise its power of judicial review against a majoritarian political view. This view is also called the counter-majoritarian approach because it is believed that judicial institutions have the power to act against the majoritarian political coalition. The reasons for such sturdy ground of the judicial institutions vary. For example, Frymer claims that the reason for this distinct nature of the judicial institutions in the United States stems from the

historical role of America's lawyers and judges engaging in the political arena (2007). It is still the case that the ladder reaching the higher echelons of the judiciary in a state and at the federal level is standing on a politically defined ground. This is even the case for appointing judges at the lower state level. To put it differently, in order to become a judge in a state in the United States, one must have engaged extensively in politics because the appointment procedures are heavily dependent on the decisions of political actors. However, Friedman, on the other hand, criticizes the counter-majoritarian approach as an 'academic fixation', not a paradigm (2002). He claims that the overabundance of academic studies on the counter-majoritarian role of the Supreme Court engendered the belief in the influential role of the Court in molding public opinion.

Another significant contribution to the legitimization theory comes from Joseph Daniel Ura. He assesses the effect of the Court's decision in both the short and long terms. In his study, Ura concludes that the short and long term impacts of the Court's rulings on public opinions are different (2014). He refers to the short term effect as "thermostatic," which addresses the more immediate reactions against the ideological directions of the Court. However, in the long term, the response against the standpoint of the Court decays, with a shift in direction toward the court's ideological position (2014, p. 113). There are also various studies illustrating where the Court's position was endorsed by public opinion before decisions were made. Franklin and Kosaki (1989) in the decision on the right of abortion (*Roe v. Wade*, 1973), Johnson and Martin (1998) in three death penalty cases (*Furman v Georgia*, 1972; *Gregg v. Georgia*, 1976; and *McCleskey v. Kemp*, 1987) and subsequent abortion decisions (*Webster v. Reproductive Health Services*, 1989) found that there was an increase of public support for positions endorsed by the Court from the year before the court acted to the year of each decision. On the other hand, Stoutenborough, Haider-Markel, and Allen (Stoutenborough et al., 2006) illustrate the inconsistency of public reactions, as found in the LGBT rights cases (*Bowers v. Hardwick*, 1986; *Romer v. Evans*, 1996; *Boy Scouts of America v. Dale*, 2000; and *Lawrence v. Texas*, 2003). Finally, Marshall (1998; 2008) compares

forty-six pre-decision and post-decision polls taken with regard to the Court's rulings. His study concludes that there are shifts in public opinion away from the Court's position just as often as there are shifts towards the Court's position. While the above findings actively undermine the fundamental argument of legitimization theory, they do not eliminate the fundamental value of the approach.

Finally, in a recent paper, Tompkins considers whether Misher and Sheehan's groundbreaking study⁶⁶ in 1993 is still relevant regarding their findings that the Court was susceptible to public opinion (1993). Tompkins applies the same methodology that Misher and Sheehan used in 1993 to examine the post-1993 period, in order to determine whether or not the Court has become a counter-majoritarian institution, which is the common belief. He uses the Spaeth Supreme Court Database, Stimson's "Public Mood" index, and the Segal and Cover score of the justice's ideological to examine shift over time. His research shows there is not a correlation between the Court's decisions and public opinion. He also shows there is not a strong relationship between the ideological composition of the justices and their decisions (2017, p. 14). Furthermore, he determines justices' ideological values and their decisions especially do not correlate in cases involving the Free Exercise Clause. As mentioned before, almost half of the time, justices decided unanimously on critical cases regarding the Free Exercise Clause. In some cases, justices even crossed to the other side of the aisle to concur or dissent from an opinion, such as in *the City of Boerne v. Flores* (1997).

Even though the legitimization theory grants the Court a great deal of weight in affecting the political domain by having the capacity to change or shape public opinion, it is not an unlimited power that can be used independently without regard to other external factors. Both Kreis (2018) and Keck (2009) defend the position that the Court could only shape public opinion and influence the political domain

⁶⁶ Misher and Sheehan's comprehensive empirical study (1993) examined the relationship between the public opinion and the ideological inclination of the Court for the period of 1956-1989. Their findings indicated a reciprocal relationship.

when the outside factors favor the Court's view, specifically during periods in which the politics are not polarized. What they mean by the external factors are primarily the readiness of the political means, e.g., lobbying, direct action, and most importantly, litigation. Without sturdy support from the legislative branch, decisions of the Courts will have minimal effect in actual practice. In this respect, Kreis and Keck's arguments are in conflict with Pettit's claim. Pettit argued that contestation institutions play a key role in protecting the freedom of minorities. However, according to both Kreis and Keck, contestation institutions could only protect the freedom of minorities if such minorities are aligned with the majoritarian political allegiance.

The literature review above demonstrates there is not a strict dividing line between the constrained court theory and the legitimization theory. This conclusion is reached because, in the long run, the results of the Court's decisions do not produce a definite change in society. What matters most is the *implementation* of the Court's decisions afterward. The court's dependence on the political institutions and leaders for the implementation of its rulings is a crucial aspect of how the U.S government actually works. As Alexander Hamilton pointed out two centuries ago without the "sword" or the "purse", the judiciary "neither FORCE nor WILL but merely judgment" (2014, p. 379).

Pettit's emphasis on the need for depoliticized institutions for securing the republican conception of freedom as non-domination unveiled the fault line of his theory, as pointed out in Part 2. The idea of positioning judicial institutions isolated from democratically controlled political branches diminishes the applicability of republican freedom. Even though he does not directly refer to Pettit's approach, Dave Bridge's study sheds further light on this critique of Pettit's theory. According to this critique, the executive and legislative branches could enhance or diminish the Court's decisions very effectively. Dave Bridge studies the various factors that lessen the effect of the Court's decisions and groups them into three categories from which such influence can be exerted: grassroots majority, congressional majority,

and an electoral majority (2015). Bridge delves into four cases to examine his argument: the communism and free speech cases between 1956 and 1957, the school prayer case (*Engel v Vitale*, 1962), the busing case (*Swann v Charlotte-Mecklenburg Board of Education*, 1971), and the abortion case (*Roe v Wade*, 1973).

Bridge studies the reactions to these Supreme Court decisions through investigations at the grassroots, congressional, and electoral levels. What he finds is that the Court's decisions and the effects of these decisions within society were restricted by establishing subsequent majoritarian reactions to the decisions at the different levels above of the political domain, e.g., local rejection of the ruling, court-curbing, and creating an electoral majority to replace the current political ideology (2015). The findings of Bridge's study are significant for my research because they show just how crucial political support, or the lack thereof, is with regard to the ultimate capacity of the Court to implement its decisions. In other words, the contestatory institutions of Pettit's theory are not capable of acting against political majoritarian allegiance.

The final issue to discuss within the scope of judicial review is that of judicial exemption/accommodation. Ellis considers three interpretations of the relationship between religious freedom and judicial exemption (2019, p. 218). The first interpretation practically claims that persons should not be allowed to disobey civil law, regardless of the practice of their religious freedoms. The second interpretation, in contrast, assumes that through the constitutional rights of religious freedom, affected persons have automatically been granted a legitimate exemption for not obeying the law⁶⁷. Finally, the third interpretation attempts to strike a balance between the first and second, as it requires some criteria to justify such situations of disobeying the law. The third interpretation establishes the idea of "judicial" exemption, i.e., review of exceptions as part of the judicial process.

⁶⁷ This interpretation has been identified with different terms. Ginsburg, for example, remarks the term "judicialization", which refers to the idea of relying on legislative institutions for addressing political issues (Ungureanu, 2012, p. 10).

Furthermore, it is possible to extend the implications of judicial exemption, as a means for providing “exceptions” that specifically protect minority freedom of religion.

Similar to the counter-majoritarian arguments, some scholars argue that the Court could legitimately grant exemptions, especially to minorities, when the issues of religious freedom are not answered by the legislative majority. The leading scholar of this camp, who supports the legitimacy of legislative exemption, is Michael McConnell. In his seminal essay, *The Origins and Historical Understanding of Free Exercise of Religion* (1990b), McConnell claims that the arguments for constitutional exemptions are consistent with similar discussions during the founding era. In other words, the practice of judicial exemptions as part of the jurisprudence when it had been established. Philip Hamburger, on the other hand, who is the leading scholar in the latter camp, claims that such exemptions have merely been matters of legislative grace (2008). However, Ellis claims that the arguments proposed by McConnell for the defense of judicial exemptions are not supported by historical facts (2019a, p. 222). Furthermore, Marci Hamilton (2004) also argues against the judicial exemption. She claims that the Court has demonstrated incompetence with respect to granting exemptions for religious freedom. She believes that if there is a need for an exemption for religious minorities, then that need must be met by the legislative branch, not the judicial. In other words, she defends the idea of legislative exemption, rather than judicial. Her reasoning for the defense of legislative exemption relies on the mechanisms the legislative process entails, such as inclusive hearings for both sides, expert opinions, and so on. Finally, the fine line between judicial exemptions and the pitfall of violating the Establishment Clause should be mentioned. If the judicial exemption goes too far and provides excessive rights, then the idea of protecting minority freedom has been overreached, since the Court has now put itself in a position of favoring a religion, which is a violation of the Establishment Clause.

5.3. The Free Exercise of Religion Clause

In this final section, my goal is to provide the historical journey of the Free Exercise Clause of the U.S. Constitution. The historical account of religious freedom in the U.S., including the pre-union period, does not only provide the importance of religious freedom but also demonstrates the changes that religious freedom has encountered with respect to the political domain, and simultaneously challenges the idea of religious freedom having encountered such changes. As in previous chapters, prior to covering the main subject of this section, I will start with a few short introductory remarks followed by a brief review of the theoretical argument.

To recall briefly, in his works, Pettit initially assigns a huge role to "autonomous, professionally informed bodies" with respect to protecting minorities from the majoritarian "legislative representatives of the demos" (2002b, p. 197). But later in his works, he also discusses the importance of democratic influence and democratic control in order to secure republican freedom (2014b). He claims that in a political system where popular control is equally shared with the notion of freedom as non-domination, members of this system acknowledge the losses in a legal battle for protecting their rights as tough-luck, rather than targeted antagonistic intrusions.

As mentioned in the introduction of this chapter, the religious freedom of minorities presents a good case for the test of the limits of republican freedom as non-domination. The main reason for this is that the existing case law of religious freedom, not only in the U.S. but also in Europe, is predominantly comprised of cases affecting minority religions. The main reason for this, is that the majority religions have already established themselves within the affairs of the states. Hence the political power, which reflects the majoritarian views to a greater extent in electoral systems, has similarly been established in such a way as to not pose a threat to the practice of those religions represented by majorities.

Although domination as a societal relationship could occur among or between individuals (horizontally), the republican conception of freedom is best to be tested

by examining the relationship between individuals and the state (vertically)⁶⁸. For this reason, cases in the United States concerning the Free Exercise Clause provide a suitable ground for examining domination. Again, this is because the primary goal of amending the constitution through the addition of the Establishment and Free Exercise Clauses was to protect the religious freedom of individuals from federal congressional interference, which demonstrates a form of vertical interference. In addition to individuals, this amendment also aimed to protect states against interference from the federal government, which would also be a form of vertical interference.

Historically, although it has diminished over time, the power of the Congress was initially established in such a way that it was much stronger than the executive and judicial branches. During the early years of the Union, states sought constitutional protections from the federal government, especially the stronger congressional branch, for their citizens. With respect to religious freedom, the Establishment and Free Exercise clauses provided the protection that states demanded⁶⁹. Nevertheless, these protections were confined to being applied to federal congressional interference against the states and individuals. Interference by state and local governments against their citizens was initially excluded from the constitutional protection for religious freedom. However, the *Cantwell v. Connecticut* (1940) decision extended the scope of the clauses to also include the states. This will be examined later in this section.

Before the union was established, individual states offered their own various forms of constitutional protection for religious freedom. Ellis investigates the constitutional protections of the different states and reaches several conclusions (2019). The first is that the constitutional protections did not represent a monolithic

⁶⁸ With the term “state,” I refer both to local states and the federal state.

⁶⁹ It is imperative to point out that the reason for amending the Constitution at its initial stage was the objection that emerged in Southern states. The Southern states sought constitutional protections for their freedoms. Hence, the first ten amendments of the Constitution, i.e. the Bill of Rights, aimed to provide the protections that Southern states wanted, thus keeping the Union intact.

thought. The differences between the states were more prevalent than their similarities. Yet, the ardent discussions about constitutional protections at the federal level during the establishment period underscores the gravity of the issue. Although the original text of the Constitution did not include such protections, the first ten amendments, i.e., The Bill of Rights, were added soon thereafter in order to meet the needs of the states for securing protections against interference from the federal government. In addition, Holmes and Sunstein also claim that the addition of the Bill of Rights to the Constitution, only two years after its ratification, partially aimed “to appease those who desired a weaker and more constrained national government” (2000, p. 57).

The second conclusion of Ellis’ comprehensive investigation of constitutional state protections, despite many differences between the states, is that they do share some common needs. While there are differences in how it is framed, the basic idea for one such need is: “freedom from certain types of legislation” (2019, p. 196). But the legislative, in this context, only refers to federal congressional legislation imposed on states. For this reason, the common ideal of constitutional protection of religious freedom for the states with respect to the federal government is an application of the argument of vertical domination mentioned above. To emphasize again, the core discussion of constitutional protection for religious freedom in the United States stems from the idea of protecting the individuals and states from federal interference. This notion of vertical interference is also the central discussion of Pettit’s theory of republican freedom as non-domination because domination could occur only in a vertical relationship. However, this does not mean that Pettit ignores the horizontal aspect of domination, i.e. domination between individuals. Pettit argues that freedom as non-domination could be enjoyed both in a lack of vertical and horizontal domination. However, the limits of his claims could be tested best with the study of vertical domination because it is the vertical domination that refers to the relationship of individuals with states. Nevertheless, the robustness of the constitutional protection from vertical interference is the main

discussion of the next chapter, which is the case study of Supreme Court cases regarding the Free Exercise Clause.

In addition to the above, another common feature of the constitutional state protections was the idea of pursuing mechanisms that provide equal treatment and non-discriminatory laws. At the time of drafting the Constitution, the experience of persecutions in Europe was not a distant past. Those memories were still vivid. As such, they influenced the framers when discussing the protection of freedom not just for some, but for all. In this respect, the focus was directed toward the Establishment Clause.

Even though I do not cover cases regarding the Establishment Clause in my case study (Chapter 6), it is imperative to point out that the discussions for non-discrimination and equal treatment are centered on the idea of consent, as opposed to contestation. Ellis, in this respect, uses the phrases of “not authorized law” and “not based on the consent of the governed” to point out the threats which the states sought to avoid (2019, p. 197). The emphasis here is directly related to Pettit’s argument of interference on an arbitrary basis. Pettit claimed that interference on a non-arbitrary basis does not reduce freedom as non-domination. It is explicit that the states also aimed at non-arbitrary interference to protect religious freedom. However, the most significant difference between the two is that while the states seek consent, Pettit puts more emphasis on the contest. The main reason for this difference stems from the understanding of laws in America, both before and after the Union, which were heavily influenced by the liberal conception of freedom proposed by John Locke. Ellis, for this argument, points out that American framers believed the conception of freedom offered by Locke, which required giving up some of the natural freedom for securing the rights of everyone (2019).

While elaborating on the many differences of constitutional protections of all states in the pre-Union period would be an unnecessarily lengthy endeavor for this chapter, focusing on those that influenced the First Amendment most would be an

appropriate approach. Even though states did not have a coherent conception of constitutional protection, their different ideas found commonality in *the Virginia Declaration of Rights*, which was adopted by the Virginia Constitutional Convention on June 12, 1776. The sixteenth section of *the Declaration* aims at providing robust constitutional protections for religious freedom by emphasizing the equality of men for the exercise of religion. that “all men are equally entitled to the free exercise of religion” (*The Virginia Declaration of Rights*, 1776).

The emphasis on “all men”, “equally”, and “the free exercise of religion” are the defining features of the text, which directly influenced the text of the First Amendment later on. Nevertheless, the conception of freedom was a liberal one as non-interference, because the main concern was the vertical interference from the federal state. Ellis points out this aspect of the conception by stating that “They were statements not about what private individuals and groups should be free to do or not do, but about the kinds of laws from which they should be free” (2019, p. 295). This statement is fundamentally the definition of the liberal conception of freedom as non-interference.

The Constitution of the United States was written in 1787 and ratified on June 21, 1788. Furthermore, the constitutional protection for religious freedom was introduced by the First Amendment which was passed by Congress on September 25, 1789, and ratified on December 15, 1791, as part of the first 10 amendments, i.e., The Bill of Rights⁷⁰. The full text of the First Amendment is as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. (U.S. Const. amend. I)

⁷⁰ The definition of “a [writ of] mandamus” according to Cornell Law School, LII, Wex Legal Dictionary, is as follows: it “is an order from a court to an inferior government official ordering the government official to properly fulfill their official duties or correct an abuse of discretion.” <https://www.law.cornell.edu/wex/mandamus>, Retrieved November 24, 2019.

As the text manifests, the First Amendment provides constitutional protection not only for religious freedom but also for freedoms of speech, press, assembly, and petition. One of the significant features of the text is that there is not a qualifier for religious exercise, unlike for instance, the right to “peaceably” assemble. Pepper, in this respect, claims that the Free Exercise Clause of religion has historically provided more comprehensive freedom than others mentioned in the First Amendment (2008, p. 50). The reason behind this historical fact is that the framers of the constitution recognized the significance of religious freedom in the pre-Union period; thus, their work was a reflection of such norms (see Tushnet, 2006; Berg, 2008).

It is necessary to point out that James Madison played a major role in drafting the First Amendment. Pepper even goes so far as to claim that none of the framers contributed to the First Amendment as much as Madison (2008, p.50). Emphasis of the non-discriminatory aspect of the free exercise of religion was at the forefront of Madison's thought. Just as the state constitutions in the pre-Union period emphasized the argument of non-discrimination concerning the protection of religion, Madison and the other framers believed that advancing one religion over another was the equivalent of discrimination toward the others. For Ellis, even the idea of favoring all religions equally would have been problematic for the framers, because even that would be discriminating against non-believers (2019, p. 212).

Madison proposed the “rights of conscience” for constitutional protection of religious freedom; however, Fisher Ames’s proposal, “free exercise of religion”, is what was finally accepted. The difference between the two definitions is critical. While the first one protects the belief, the second one includes practice as well. As mentioned before (see Chapter 5.1), Jefferson made the same distinction between religious belief and practice. The Court eventually accepted the distinction and offered the belief and practice distinction for religious freedom with the *Reynolds v. United States* (1879) decision (McConnell, 1990b).

As I mentioned at the beginning of this chapter, in an attempt to enrich the content of the argument, I will also include cases from the European Court of Human Rights (ECtHR). In order to follow the contextual references in the cases decided by ECtHR, it is first imperative to examine how religious freedom is guaranteed by Article 9 of the European Convention of Human Rights (ECHR). The limitations of the protection defined in section two of Article 9, on the other hand, will be discussed in the following chapter alongside the limitations of the Free Exercise Clause as interpreted in different opinions by the Court.

Article 9 of the ECHR provides religious freedom as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
- (ECHR Article 9)

In addition, Article 2 of Protocol No. 1 to the ECHR also concerns religious freedom, namely the rights of parents for the education of their children with respect to the parents' own religious convictions. The article protects such rights as follows:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. (ECHR, Article 2)

When compared to the First Amendment of the U.S. Constitution, Article 9 of the ECHR differs in two important respects. First, the ECHR defines religious freedom in terms of two different human dimensions, as we observe references to both belief (as an internal dimension) and practice (as an external dimension). Second, the

ECHR differs from the First Amendment in that it places limits on the external dimension, i.e., practice. The limitations on religious freedom with respect to practice forge a direct relationship with the political domain. While the relationship between the judicial and political domains are left vague, undefined, and are not even mentioned in the First Amendment, from the beginning the ECHR has explicitly acknowledged the relationship, and thus implicitly acknowledged the tension between the two. Pettit had difficulties formulating this relationship, and as a result left what I feel to be a weak spot in his argument; a weak spot which I referred to earlier as the fault line of his theory. The cases I examine in the next chapter will demonstrate this conflicting relationship between constitutional protections and the political domain.

The cases I examine in the next chapter begin with *Sherbert v. Verner* (1963), which is the landmark decision for the Free Exercise Clause. Although the Court's interpretation of the Free Exercise Clause changed a couple of times in the 20th century, the pre-Sherbert period did not see any major shifts⁷¹. The only exception to this argument is the *Reynolds* decision in 1879, which was discussed in detail in section 5.1. Nevertheless, it is necessary to review the major historical developments of the Free Exercise Clause in the pre-Sherbert period.

In particular, there were two major developments for the religion clauses before the *Sherbert* decision. The first development was Jefferson's effort to distinguish religious beliefs from religious action/exercise. Jefferson, as President of the United States, mentioned the church-state separation argument in his letter to the

⁷¹ The Supreme Court did not need to take on the interpretation of the Free Exercise Clause because there had not been a case that required such interpretation of the Clause until the *Reynolds v. United States* (1879). One of the arguments for the relatively late involvement of the Court in the issues of the Free Exercise Clause was that there had not been a consensus about the scope of religious freedom until the 1940s. Due to the lack of common conception of religious freedom, severe violations of religious freedom took place, such as the closure of Catholic schools in Oregon with the enforcements of Klu Klux Klan in the 1920s, or confiscation of Mormon properties and disenfranchisement of Mormon people (Berg, 2008, p. 19). According to Berg, it was the consensus of protecting the religious freedom established in the 1940s that led the *Sherbert* and *Yoder* decisions for religious protections even against generally applicable laws (2008).

Danbury Baptist Association in 1802. In this letter, Jefferson offered the First Amendment-based argument in an attempt to assuage any fears that the government might try to establish a state religion.

Furthermore in 1875, in a similar fashion, Maine Representative James Blaine proposed a constitutional amendment that would prevent public funds from being used for religious activities, including parochial schools. The amendment, also known as the Blaine Amendment, aimed to expand Jefferson's church-state separation to also include the use of public funds. While the initial amendment failed to pass Congress, final legislation forced states to include the same provisions in their own constitutions. Finally, as mentioned above, Jefferson's religious belief and religious action/practice distinction became the norm, as established by the Court in 1879 with the *Reynolds* decision.

The second major development of the pre-Sherbert period, following the *Reynolds* decision of 1879, occurred in 1940. *Cantwell v. Connecticut* (1940) changed the course of the Free Exercise Clause of religion in the United States. In *Cantwell v. Connecticut*, the Court reviewed a case concerning a Connecticut statute requiring a permit for religious and charitable solicitation. The Court unanimously ruled against the state, declaring that the statute violated not only the First Amendment but also the Fourteenth Amendment⁷².

The direct consequence of this violation of the Fourteenth Amendment was for the Court to rule that the religious protections afforded by the First Amendment with respect to interference by the federal government, also applied to interference by

⁷² Section 1 of The Fourteenth Amendment of the U. S. Constitution: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const. amend. XIV § 1)

the state governments. In other words, the *Cantwell v. Connecticut* decision was the first case in which the Court applied the Free Exercise Clause to the states.

The application of the Bill of Rights to the states via the Due Process Clause of the Fourteenth Amendment is also known as the Incorporation Doctrine. Originally, the Fifth Amendment of the United States Constitution established Due Process as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (U.S. Const. amend. V)

But the application of the Fifth Amendment was confined to protections only against the federal government (see *Barron ex rel. Tiernan v. Mayor of Baltimore*, 1833). After the Civil War, the Fourteenth Amendment was introduced as part of the Reconstruction Amendments. Accordingly, the application of the Bill of Rights was expanded to state laws and government. Hence, the *Cantwell v. Connecticut* case (1940) established the incorporation of the Free Exercise Clause to states.

The above summary of the historical journey of the Free Exercise Clause reveals two fundamental points regarding the clause. The first is that both religious freedom clauses, Free Exercise and Establishment, had historical backgrounds prior to the Union. The issue of religious freedom had already been discussed and established, to a certain extent, within the state constitutions before the establishment of the Union. This rich and diverse background paved the way for incorporating similar protections within the Constitution of the United States. Although the original text did not have the constitutional protections for religious

freedom, the First Amendment provided such safeguards later demanded by the states against federal interference.

The second point is how late it was in the Union's history before the Court even began to review cases regarding the Free Exercise Clause. If we exclude the *Reynolds* decision in 1879 because the issue of the case was already asserted by Thomas Jefferson, the Court did not review its first important case until 1940. Even then, the *Cantwell* case in 1940 was not about the Court asserting its interpretation of the clause. It was simply applying the Incorporation Doctrine to the Free Exercise Clause. Practically, the first case regarding the Free Exercise Clause was *Braunfeld v. Brown* (1961). In this case, the Court held that a Pennsylvania "blue law"⁷³ did not violate the Free Exercise Clause of the members of the Orthodox Jewish community, since their faith required them to not work on Saturday. The opinion of the Court claimed that the law had a secular basis and did not make any religious practices illegal. The Court's reference to the "indirect burden" of the legislation will become prevalent in future cases. But over time, we will see that the "indirect burden" will be interpreted differently. The change of interpretation of the "indirect burden" of state legislation is the core argument of the case studies I examine in the next chapter. Furthermore, the Court has taken on the issue more frequently and eagerly since the *Sherbert* decision in 1963.

⁷³ "Blue laws" are the laws that permit only certain types of business to be open on Sundays.

CHAPTER 6: THE POLITICS OF THE FREE EXERCISE CLAUSE

6.1. Introduction

Although the First Amendment of the U.S. Constitution secures the freedom of religion explicitly and broadly, different interpretations of the Free Exercise Clause by the Court in the 20th-century highlight the challenge of balancing the power between the state governments and federal constitutional protections. Furthermore, the change of the Court's interpretation also unveils the conflict between political power and the judiciary, in other words, the conflict between popular democratic power and undemocratic judicial power. This conflict is directly related to my argument regarding Pettit's theory of republican freedom. In other words, if the contestation institutions seem to be the last resort for protecting the freedom of minorities, the risk of expecting those institutions to respond to such claims "in a depoliticized way" gives rise to the assumption that judicial institutions act in a depoliticized domain.

Pursuing the basic argument summarized above, I examine in this chapter the cases regarding the Free Exercise Clause of the U.S. Constitution since the *Sherbert v. Verner* (1963) decision. I discussed the pre-*Sherbert* cases regarding the Free Exercise Clause in the previous chapter (Chapter 5). Although before *Sherbert* there were two major decisions, *Reynolds v. United States* (1879) and *Cantwell v. Connecticut* (1940), the conflict between the political government and judicial interpretation of the Clause began in 1963 (Chapter 6.2). The fundamental reason for the Court's attempt to offer different interpretations of the Clause in the mid-20th century is the emergence of both the different practices of religion and the extension of secular laws. In order to adjust to the new context and respond to emerging claims, the Court "made dramatic shifts in positions on the protection of religiously motivated conduct" (Berg, 2008a, p. 57).

The difficulty of attempting to interpret the Free Exercise Clause comes from the fact that the First Amendment provided very broad protection for religious freedom. Because of the broad protection granted by the Constitution, there has been room left for political branches to interpret the text based on their own interest. Due to this difficulty, the Court had to overrule itself several times to find the balance between practicing the power of judicial review and responses from the political branches⁷⁴. McCoy points out this difficulty clearly in the following sentence: “The court has adopted one fundamental doctrinal construct, promptly overruled that construct, adopted a nearly opposite principle, and then ten years later resurrected the original principle” (1995, p. 1335).

The landmark Supreme Court decision regarding the Free Exercise Clause is the *Employment Division, Department of Human Resources of Oregon v. Smith* (1990). The majority opinion in the *Smith* decision, written by Justice Scalia, removed the *Sherbert* Test, which provided strict scrutiny to neutral and generally applicable laws of states⁷⁵. Justice Scalia mentioned the "incidental effect" of the decision three times in the opinion (*Employment Division v. Smith*, 1990). According to this argument, neutral and generally applicable laws might create a burden to some religious practices without explicitly targeting them. It is believed that sometimes the interference of democratic government is unavoidable. This notion of the "incidental effect" of neutral and generally applicable laws reminds us of the tough-luck test discussed by Pettit (Chapter 6.2). The ongoing legislative battle for reinstating the "compelling interest" criterion in the post-Smith era also helps us to understand the limits of Pettit's theoretical argument in practice (Chapter 6.4 and 6.5).

⁷⁴ As opposed to the U.S. Constitution, ECHR had a different approach. While the relationship between the judicial and political domains are left vague, undefined, not even mentioned in the First Amendment, ECHR acknowledges the tension between the two from the beginning (see Chapter 5.3.).

⁷⁵ Nugent has the same categorization for the history of the compelling interest criteria (see 2008).

Because of the conflict above, the Court refrains from making decisions in the post-Smith era that are applicable in other cases (Chapter 6.6). In a recent example, despite the fact that the Court held that refusal of the cakeshop owner for designing a cake for same-sex couple infringed on the freedom of religion, Justice Kennedy, who wrote the majority opinion, stated that the decision does not establish a precedent. For this reason, the future claims will be reviewed again by the Court. I believe a comprehensive historical analysis of this conflict, arguments in the Court's opinions, and reflections on the decisions on the political domain will pave the way for understanding the limits and contingencies of republican freedom as non-domination, as conceptualized by Pettit. However, before elaborating on the cases, it is necessary to define some of the major concepts used in the opinions of the Court. I will also give a few examples that help to embody these concepts and demonstrate how their application changed over time.

The historical development of the different interpretations of the Clause addresses the concepts of neutral and generally applicable law, strict scrutiny, and the *Sherbert* test. A neutral and generally applicable law is a law based on the idea of anti-targeting. In other words, a law that has an effect on religious practice should not target any individual or group. In aspects relating to religious freedom, since laws are social constructs, they must be neutral and aim at targeting all.

For instance, if a law limits the freedom of religion, the first and foremost criteria the Court had looked at was if it was generally applicable and neutral. If a law meets these criteria, the Court used to find no violation of the Free Exercise Clause. The *Braunfeld v. Brown* (1961) decision is an example of such interpretation. Here, the Court reviewed a case regarding a Pennsylvania "blue law"⁷⁶, which permitted only certain stores to operate on Sundays. The Court had to decide whether the law violated the Free Exercise Clause of the members of the Orthodox Jewish community who already do not operate their businesses on Saturdays. Hence, they

⁷⁶ See Footnote 32.

had to be closed for two days, which presumably created a financial burden. The Court reviewed the law and did not find that it targeted specific religious groups and it was neutral and applied to all. The law also did not declare any religious practice illegal.

The interpretation of the Court changed two years after the *Braunfeld* decision. The *Sherbert* decision in 1963 introduced the *Sherbert* test which was a new test to assess the burden created by state legislation on the religious freedom of an individual. The Court required a compelling interest sought by that state legislations. In other words, even if a law is generally applicable and neutral, the state still has to provide an argument that justifies the legislation. This practice is called the application of strict scrutiny. As mentioned above, in landmark decisions, the Court applied different interpretations of these concepts.

As a final note, ECHR also refers to similar concepts. With respect to balancing the relationship between judicial review and state legislations, ECHR settled various concepts which address the justification of its opinions. For instance, the ECtHR decided a case concerning a Quaker who asked immunity from taxes that allocated to limitary budget. Similar to the U.S. Supreme Court, the ECtHR did not find a violation in such case (*C. v. United Kingdom*, 1983). Similarly, with regard to limitations on state interference, the ECtHR seeks the justification of proportionality within the margin of appreciation, as in the *Leyla Şahin v. Turkey* decision⁷⁷. Also, in the same opinion, the emphasis on “pressing social need” and declaring it “necessary” resembles some of the Court’s arguments, already mentioned above⁷⁸.

⁷⁷ For similar arguments in the same issue see *Dahlab v. Switzerland* (2001), *Suku Phull v. France* (2005), *El Morsli v. France* (2008) and *Kervanci v. France* (2008).

⁷⁸ Moreover, the ECtHR refers to similar concepts when deciding a case in favor of the claimant. For instance, in the *Svyato-Mykhaylivska Parafiya v. Ukraine* (2007) decision, the ECtHR found a violation of Article 9 of the ECHR because the state interference was not justified.

Finally, the margin of appreciation is another critical argument to which the ECtHR refers in major decisions. The goal is to assess if the interference by the state legislature is proportionate. Instead of eliminating such a buffer zone, the Convention leaves room for parties (states) to evaluate claims within their jurisdiction (*Eweida and Others v. the United Kingdom*, 2013).

The limitations to state interference are restricted by the Convention itself. Unlike the First Amendment of the U.S. Constitution, the ECHR aimed at drawing the periphery of state interference when limiting the free exercise of religion. Article 9§2 directly refers to conditions that state interference is required to meet, such as public safety⁷⁹ and protection of public order. The concept of arbitrariness also is at the core of the fundamental argument limiting state interference (Shabas, 2015, 436). The ECtHR remarked on the weight of this argument in *Hasan and Chaush v. Bulgaria* (2000) decision by ruling that state interference should not be arbitrary to an extent that infringes upon religious freedom.

The similarities of the arguments used in the justification of decisions by both the Court and the ECtHR is not accidental. To recall, Pettit claims that these institutions should exercise the power of judicial review in a “depoliticized way” without being affected by “the glare and the pressure of public debate” (2002b, p. 197). When reviewing a case regarding the freedom of a minority (freedom of religion in this context), judicial power seeks to balance the relationship with political power. The prevalent use of political concepts in the justification of decisions demonstrates the character of “intertwinedness” with politics. In other words, instead of staying away from politics to decide cases in isolated and depoliticized fashion, by “intertwinedness” I mean that the Court and the ECtHR engage with politics by frequently referring to the above concepts. The cases I study in this chapter provide

⁷⁹ As opposed to other articles of the Convention the limitation about national security is not included in Article 9§2 because the Convention aimed at promoting religious pluralism in party states.

a coherent historical development that unveils the political aspect of the Court's decisions.



6.2. The Compelling Interest Criterion

The opinion of the Court in the *Sherbert v. Verner* (1963) decision launched a new period for the interpretation of the Free Exercise Clause. The Court changed the approach it used in the *Braunfeld v. Brown*⁸⁰ (1961) decision and offered a novel idea for determining whether or not a state's legislation is legitimately restricting religious freedom⁸¹. Another decision that is also representative of the pre-*Sherbert* Court is *Minersville Sch. Dist. v. Gobitis* (1940). In the opinion of the *Gobitis* ruling, the Court claimed that only "deliberate" interference violates the Free Exercise Clause. Nugent highlights this argument regarding the *Gobitis* decision with his claim that the Court set the following new standard: "inadvertent interference with religious practice raised no Free Exercise Clause problem" (2008, p. 1028).

In the *Sherbert* decision, the opinion of the Court, written by Justice Brennan, claimed that states must present a "compelling interest" before they can restrict religious freedoms even for neutral and generally applicable laws. The mandatory application of this strict scrutiny is called the *Sherbert* test. In this chapter, I examine the inception of the *Sherbert* test and its implications, by elaborating on the discussions contained in the opinion. In this endeavor, my review of the discussions will be framed by the theoretical arguments I have already presented in Part II. In particular, I would like to ask and answer the following questions: 1) How does my critique of Pettit's theory of freedom demonstrate the political aspect of the Court's opinions? 2) Has the Court offered "depoliticized" opinions with respect to the religious freedoms of minorities? 3) Have considerations of the political domain and resulting justifications by the Court been intertwined? Finally, in the following sections, I will cover: 1) the radical change in the Court's approach with

⁸⁰ Justice Brennan discusses the disparity with the *Braunfeld* case. In the *Sherbert* case, Justice Brennan points out the fact that the interference with religious freedom via unemployment benefits is indirect, unlike in the *Braunfeld* case which was about an employer and employee. In the dissenting opinion of the *Sherbert* case, Justice Harlan claims that the *Sherbert* decision overrules the *Braundelf* decision, although Brennan's opinion claims a different approach.

⁸¹ In this respect, Laycock claims that although the Court's announcement of the constitutional right to religious exemptions arrived in 1963 with the *Sherbert* decision, this does not mean that there had been numerous exemptions before the *Sherbert* decision, but the Court disregarded them (Laycock, 1995).

the *Smith* decision of 1990, 2) the legislative remedy offered by Congress and 3) the ongoing conflict between the Court's position and the political response from the different branches of government.

Before elaborating on the discussions and the opinion itself, it is useful to recall the political environment and the political changes that occurred during this period of United States history. With the mid-term election in 1958, the Democratic Party gained 49 seats in the House of Representatives. This gave profound momentum to the Democratic Party and its nominee, John F. Kennedy, going into the 1960 presidential election. With Kennedy's victory, this momentum was both solidified and expanded to include the executive office.

More importantly with respect to the U. S. Supreme Court, Earl Warren, who became Chief Justice of the Court in 1953 and served through 1969, decided a series of landmark rulings in the 1960s⁸². The "official" commencement of Justice Warren's time of influence, also known as the Warren Court, began with Kennedy's appointment of liberal Justice Arthur Goldberg. Here, Goldberg's replacement of retiring conservative Justice Felix Frankfurter established a liberal majority on the Court. However, as previously discussed in Chapter 5, having a majority in the Court does not necessarily guarantee complete power to that majority by favoring their ideological bent at the time of making decisions. The political support must be present and strong for the application of the Court's rulings. For these reasons, Kennedy's victory in the presidential election, as an extension of the Democratic Party's congressional influence which started in 1958, marks a critical point in time for the start of dramatic new interpretations offered by the Court for the Free Exercise Clause, and leading up to the *Sherbert* decision.

⁸² Marcie Hamilton claims that it was the civil rights movement during the 1960s that influenced the Court's opinion in the *Sherbert* decision, which broadened the constitutional protection for religious freedom (2005, p. 229).

Let us summarize the background of the case and elaborate on the argument of the opinion. Adeil Sherbert, a member of the Seventh-day Adventist Church, lost her job due to refusal of working on Saturdays, which is recognized as the Sabbath by her religion⁸³. After losing her job, Ms. Sherbert applied for unemployment benefits regulated by the South Carolina Unemployment Compensation Act. According to the Act, there must be a good cause for the application. The State Commission denied the application because Ms. Sherbert refused to select one of the job options presented to her. The presented job offers also required her to work on Saturdays. The reason other jobs also required her to work on Saturdays, was that most of the jobs in her town were in the mill industry, in which Saturday was a regular workday.

Prior to the U.S. Supreme Court, the State Supreme Court of South Carolina decided that the case was not related to religious freedom. The argument of the State Supreme Court was based on the fact that there was no direct interference to Ms. Sherbert's religious freedom, but an indirect one. That is to say, the issue that emerged in the *Sherbert* case was not about Ms. Sherbert's right to freedom of religion, but about her right to obtain unemployment benefits regardless of the cause of her losing her job. For this reason, only the direct interference should be taken into consideration, which is the labor law. In addition, another argument presented by the State Supreme Court was that granting the exemption would dilute the unemployment fund of the State and working on Saturdays are essential due to the nature of the mill industry.

As a response to the arguments offered by the State Supreme Court, the beginning of Justice Brennan's opinion sets the stage for the gravity of the issue presented before the Court. He declares that government regulations should not have any capacity to limit free exercise of religion. In a sense, the Court responded to the State Supreme Court's opinion and declared that even indirect interference must be

⁸³ A comparative study by Gavison and Perez offers a more comprehensive approach because the study includes the cases of Christian, Muslim, and Jewish states. Their findings demonstrated that the issue of official days of rest cannot be resolved by arguments that are based on frequently used concepts such as neutrality or non-discrimination (Gavison & Perez, 2008).

subject to scrutiny. Furthermore, the Court refused the arguments of the State Supreme Court and declared the decision by offering the justification that such interference requires compelling interest, which is absent in this case.

The Court's opinion set a new standard for reviewing cases regarding the Free Exercise Clause. Prior to the *Sherbert* decision, states did not need to provide a "compelling" justification for the regulations they passed, even if such regulations infringed upon religious freedom. Instead, they only needed to screen laws with respect to their regulations being biased and targeted. However, in the *Sherbert* decision, the Court declared that even neutral and generally applicable laws are subject to strict scrutiny. For this reason, the denial of unemployment benefits to Ms. Sherbert violated her religious freedom, i.e. the Free Exercise Clause.

In the dissenting opinion, Justice Harlan and Justice White offered harsh criticism of the Court's opinion. The dissenting opinion, which Justice Harlan wrote and Justice White joined, starts with an argument that had been prevalent in many such prior decisions, in particular, the "further implications" argument. They argued that the *Sherbert* decision establishes a wrong precedent for possible future claims. Justice Harlan then continues with the assertion that the South Carolina Unemployment Compensation Act justifies the granting of unemployment benefits only when work is unavailable. This second point demonstrates that Justice Harlan is in line with the opinion of the State Supreme Court, i.e., he does not perceive the issue to be one of religious freedom. Justice Harlan then goes back to the further implications argument and claims that such narrow prospects of the decision are misleading because the interpretation may cause more problems in the future.

The main concern implied in the dissent was, that if states need to provide a compelling interest even for neutral and generally applicable laws, then in the future the Court might need to grant individual exemptions to an excessive number of cases. As mentioned above, this argument was prevalent in many prior opinions of the Court. In my opinion, in order to support this argument, one must present

empirical studies that show the threat based on past or current data, rather than hypothetically claiming that the decision would lead to something bigger, or at least different, in the future. To be meaningful, such studies would need to gauge public opinion and the response of political actors to past judicial decisions by non-judicial means, e.g., polls, review of supporting legislatures, etc. Hence, this condition would tie the judicial hypothetical opinions of the future, to non-judicial empirical data of the past and present. I believe the frequent reference to the further implications argument by the Court in its decisions was an indication of the intertwined character of the Court's opinions with politics. As politics changed, so would/could the Court.

In another context, the ECtHR decisions for almost identical situations in Europe demonstrate a different approach. The ECtHR found no violation of Article 9 for employees in several cases. The common justification presented by the ECtHR when deciding against an employee's right of religious freedom rested on the idea that there are cases based on reciprocal obligations between employee and employer rather than religious belief (Schabas, 2015). For example, in the *Konttinen v. Finland* (1996) decision, which was a case regarding the dismissal of a state employee, who was also a Seventh-day Adventist, for not being willing to work on Saturdays due to religious beliefs, the ECtHR found no violation of Article 9 of the ECHR. Another example was the *Stedman v United Kingdom* (1997) decision. In this decision, the ECtHR found no violation of Article 9 for the private-sector employee who refused to work on Sundays due to religious conviction. As discussed in the previous chapter, limitations stated in Article 9§2 of the ECHR granted states more room for incidental restrictions of religious freedom. We will observe a similar justification in a 1990 U. S. Supreme Court case. This case will be discussed in the next section.

The second case I examine in this section is *Wisconsin v. Yoder* (1972). As discussed above, the Court introduced the “compelling interest” criterion for neutral and generally applicable laws that infringe upon religious freedom with the

Sherbert decision in 1963. In the *Yoder* decision, the Court maintained the strict scrutiny established in *Sherbert*. The *Yoder* case is not identical to the *Sherbert* case; thus, it presents different contexts, arguments, and justifications. However, the general outcome of the *Yoder* case would be summarized as the continuation of the *Sherbert* test for state legislations.

In *Yoder*, the Court investigated whether Wisconsin's requirement for mandatory education at least until age 16 violates the First Amendment of parents of Amish children⁸⁴. According to the religious convictions of the Old Order Amish religion and the Conservative Amish Mennonite Church, children attend vocational education within the community after middle school in order to adapt to Amish life. For this reason, the parents of Amish children did not allow their children to go to school after eighth grade, thus violating the compulsory attendance law of Wisconsin. The Trial Court in Wisconsin found a violation of religious freedom, but the Wisconsin Supreme Court reversed the decision and decided that there was no violation of the Free Exercise Clause. The U.S. Supreme Court delivered a unanimous decision of violation of the Free Exercise Clause⁸⁵. When justifying the decision, the Court gave a long lecture about the historical and sociological aspects of the Amish community. The justification of the decision is embedded in various arguments that resemble arguments in the *Sherbert* opinion.

⁸⁴ The emphasis on the parents of Amish children is critical. Justice Douglas, in the dissenting opinion, claims that the Court's decision reviews the possible violation of the First Amendment for the parents only, not for the children. According to Justice Douglas, the children present in the *Yoder* case were aged between 13 and 16. For this reason, they should be able to present their own opinions on whether they want to continue their education in the state school system. That is to say, according to the parent, whether they want to stay in Amish society or not. Justice Douglas refers to previous decisions that acknowledged the children as persons, such as *Haley v. Ohio* (1948) and *Tinker v. Tinker v. Des Moines Independent Community School District* (1969). The Court's argument was that, because the case is not directly related to religious freedom of children, but to the parent's religious freedom to nurture their children according to their religious conviction, therefore the issue refers also to the right of parents to control their children's education.

⁸⁵ Justice Powell and Justice Rehnquist did not take part in the decision. Hence, the unanimous decision was joined by seven justices.

The first discussion is about the genuineness of the claim. Chief Justice Burger, who delivered the opinion of the Court, initially explained the origins of the Amish Community and how they have kept their religious convictions intact for a long period of time⁸⁶. The second argument is about the incoherence between the Amish way of life and modern life. Modern education, which Wisconsin law made mandatory until age 16, prepares children for modern life. Yet parents in the Amish Community have been providing a more practical education to their children after middle school. Amish parents argued that the time of their children's adolescence is crucial not only for them to learn the practical skills needed for adaptation to Amish life, but also in the establishment of their commitments to Amish life. The Court defended this argument of Amish families in the opinion.

The Court also defended the possible outcome of such a decision. Further implications of not granting exemption to Amish parents would create a severe burden. The court argued that because Amish families would not be able to educate their children based on the religious convictions dictate. Hence, there could be a big disruption to the continuation of the community, as children would be more likely to abandon the religion, or families might resettle to states that do grant the right to community educate. Thus, the Court established the gravity of the case before the general argument of strict scrutiny.

Why did the Court deem such a course necessary? Because except for within the Amish community, the decision does not deliver any practical results. So the Court gives a long lecture about Amish life and tries to educate its audience in advance of its decision, because without such a compelling justification, the legislative power could easily prevent the decision from being implemented.

⁸⁶ The emphasis on the religious aspect of the conviction is significant. In order to provide an example of non-religious conviction, the opinion addresses Thoreau's decision to live in solitude on Walden Pond. That is because Thoreau's decision is not based on religious conviction and is different in that respect from the decisions of Amish people.

Finally, Chief Justice Burger delivers the opinion of the Court that the Wisconsin mandatory school attendance regulation violates the Free Exercise Clause of the First Amendment. Violation of the Clause emerges from the fact that the state did not provide a compelling interest for the mandatory attendance law. Marcie Hamilton and Stephen Pepper offer two differing critiques of the *Yoder* decision. Hamilton claims that the Court's decision in *Yoder* disregarded the political stance, which reflects a broader perspective of the public good (2005, p. 223). Pepper, on the other hand, claims that providing exemption to such cases, like a parent's right to choose the type of education for their children, should not necessarily be limited to religious conviction (2008, p. 222). For instance, if a parent wants to educate their children according to their own secular belief, the court should be able to deliver the same conclusion. Yet, according to the *Yoder* opinion, only religious conviction grants such exemption.

The ECtHR also reviewed similar cases. Yet, instead of finding violations of Article 9 with respect to religious freedom, the ECtHR found violations of Article 8 on the basis of private and family life. For instance, in the *Deschomets v. France* (2006) decision, the ECtHR reviewed a custody case between a father who left the Amish Community and a mother who remained within. The initial court decision was in favor of the mother, but three years later the lower court changed its ruling and ordered joint custody. Further decisions at the national and appellate court levels considered the case mostly from the perspective of the children's adaptability to modern life, rather than from the perspective of the mother's religious freedom. The decision of the ECtHR held that the application was not admissible according to either Article 8 or 14, and more importantly, it did not find an interference on the mother's religious freedom according to Article 9 (see Uitz, 2012). In conclusion, the *Deschomets v. France* decision favored family rights, rather than narrowly focusing on the religious freedom of the mother.

In another case prior to *Deschomets*, *Hoffmann v Austria* (1993), the ECtHR came to a similar conclusion. Again, it was a custody case between a father and a mother,

but this time the parents held different religious beliefs. Again, the ECtHR found no violation of Article 9. Although disagreeing with the arguments, Uitz points out how some scholars (see Dijk et al, 2018; Arnardottir 2003; Schokkenbroek, 1998) suggested that the ECtHR applied the United States' 'strict scrutiny' principle (2012, p. 186). But in fact, the Court had applied the Article 9§2 restrictions for reviewing this case. The above two references demonstrate the commonality of the arguments in different countries for the freedom of religion with respect to state interference.

Finally, I end this section by examining the Court's rulings regarding the Free Exercise Clause in the 1980s. While there had not been a landmark decision for religious freedom during the 1980s, the Court delivered various opinions that are considered to be setbacks to the *Sherbert* test. Yet, in order to put the Court's new direction into perspective, it is imperative to once again touch base with the political change that had occurred in the United States, but this time in the 1980s.

The year 1980 marked a turning point for American politics. It is the year Ronald Reagan, the Republican presidential nominee, delivered a landslide victory by winning 90.9% of the electoral votes. His overwhelming victory continued into the 1984 election by winning 97.6% of the electoral votes. During his tenure, Reagan appointed four Supreme Court justices, three of whom were profoundly influential in forming a conservative majority within the Court (William Rehnquist, Sandra Day O'Connor, and Antonin Scalia), while one justice (Anthony Kennedy) became a swing vote in cases that polarized the justices into two camps.

The change that occurred in politics in the 1980s, led to the change that occurred in justice appointment and ideology, which coincided with the change in the Court's interpretation of the Free Exercise Clause. While the Court still required the application of strict scrutiny for neutral and generally applicable cases since the *Sherbert* decision in 1963, and firmly maintained the *Yoder* decision made in 1972, decisions in the 1980s represented a very different picture. Although the Court still

applied the *Sherbert* test, the decisions that determined state interest to be compelling became more widespread. In other words, the Court labeled state interest as “compelling” more easily than before 1980. The following are examples from the 1980’s of what the Court affirmed to be ‘compelling’ state interests: rejecting the argument of a member of the Old Order Amish religious community who claimed that according to his religious convictions, contributing to social security was a sin (*United States v. Lee*, 1981); finding no violation of the Free Exercise Clause when the IRS revoked the tax-exempt status of Bob Jones University due to its discriminatory policy (*Bob Jones University v. United States*, 1983); finding no violation of the Free Exercise Clause in a case where U. S. Air Force regulations prohibited an Orthodox Jewish officer from wearing a yarmulke while in uniform, despite the regulation being against his religious convictions (*Goldman v Weinberger*, 1986); finding no violation against a requirement to provide a social security number in order to obtain state and federal welfare benefits, while the claimants argued that obtaining a social security number would violate their Native American religious beliefs (*Bowen v. Roy*, 1986); claiming that a prison, with a policy that limits the Free Exercise of inmates, does not necessarily show reasonable alternatives of a regulation due to associated risk of security (*O’Lone v Estate of Shabazz*, 1987); and finally the case of the United States Forest Service building a road that damaged grounds used by Native Americans for religious rituals, where the Court found no violation of the Free Exercise Clause because the damage was incidental (*Lyng v. Northwest Indian Cemetery Protective Association*, 1988). The justification of the final case, which refers to the incidental effect of neutral and generally applicable laws, is pivotal in yet another landmark decision of the Court regarding the Free Exercise Clause in 1990: *Employment Division, Department of Human Resources of Oregon v. Smith*. I will examine the *Smith* decision in the following section.

6.3. The Shift in the Court's Position: Limiting the *Sherbert* Test

As discussed in the previous section, the *Sherbert* decision introduced strict scrutiny which required states to provide a “compelling interest” even for neutral and generally applicable laws that restrict religious freedom. In the 1980s, several cases demonstrated a gradual retraction from this approach. This gradual change reached its peak in a landmark case for the Free Exercise Clause jurisdiction: *Employment Division, Department of Human Resources of Oregon v. Smith* (1990). Scholars have discussed the *Smith* case and its implications comprehensively. While some perceived the opinion as revoking the anomaly established by the *Sherbert* case (Hamilton 2005; Volokh 1999), others claimed that the Court actually offered a different interpretation to the *Sherbert* opinion, such as reading the jurisdiction narrowly (Holmes & Sunstein, 2000, p. 245) and reclassifying *Sherbert* as to the proper application of strict scrutiny (Duncan 2008: 187). Further, some argued that the *Smith* case removed the *Sherbert* test from the free exercise clause jurisdiction (Marshall, 2008, p. 77).

It is commonly believed that the *Smith* decision marked a milestone for religious liberty in the United States. The decision, its justification in the opinion, the legislative response to “fix” the decision, and the ongoing battle between the legislative branch and the Court characterize just how intertwined the Court’s decisions are with politics. In other words, as Berg states, “[T]he Supreme Court fired the opening salvo in 1990” (2008a, p. 19), and the responses from the political branches to the Court’s salvo unveiled the intrinsic relationship between the Court (a contestation institution in Pettit’s terms) and the politics (legislative branch, i.e. the Congress), which represented “the tug-of-war between these two approaches” of *Reynolds*⁸⁷ and *Sherbert* (Ray, 2018, p. 126).

⁸⁷ The emphasis on the *Reynolds* case is significant, because the defense of the *Smith* decision is connected with the jurisdiction established by the *Reynolds* decision in 1879, which distinguished religious practice from religious belief and granted legal power to states to regulate the former. For a more detailed account of the *Reynolds* decision, see Chapter 5.1.

As discussed in the previous section, reviewing the political context of the times of important decisions paves the way for a more comprehensive understanding of the Court's opinions. The 1980 and 1984 presidential elections marked landslide victories for Ronald Reagan. Another Republican nominee's victory in the 1988 presidential election, George H. W. Bush, maintained the political environment in the United States. For this reason, from the perspective of the effect of political branches on the Court, there is no reason to assume any dramatic change in behavior from the Court. However, what happened in *Smith* would be understood to be the Court's last nail in the *Sherbert* coffin. In other words, with *Smith*, the Court's gradual change during the 1980s with regard to the Free Exercise Clause cases had reached its climax.

When it comes to the case itself, *Smith* seemed to be nothing more than another case concerned with the unemployment benefits of respondents who lost their jobs due to state restrictions that opposed their religious convictions. In 1987, the state of Oregon prohibited the deliberate consumption of "controlled substances" except for use out of medical necessity⁸⁸. The classified drugs in the Oregon law were listed from the federal act, *the Schedules I through V of the Federal Controlled Substances Act*⁸⁹. According to the *Federal Controlled Substances Act*, peyote, a natural product from the peyote cactus, is one of the drugs listed as a "controlled substance".

Respondents Alfred Smith and Galen Black, who were members of the Native American Church, lost their jobs because of "work-related misconduct", as claimed by the State of Oregon. Their misconduct was ingestion of peyote during religious ceremonies⁹⁰. Why they ingested peyote plays a key role in this case. Both respondents ingested the illegal drug for sacramental purposes, i.e., for the sake of

⁸⁸ Ore.Rev.Stat. § 475.992-4, 1987.

⁸⁹ 21 U.S.C. §§ 811-812, 1982 ed. and Supp. V.

⁹⁰ Ingesting peyote, a hallucinogenic drug, is part of the religious practice, serving a sacramental purpose, during a ceremony of the Native American Church.

practicing their religion. However, despite the religious motive, they lost their jobs and applied for unemployment benefits. The State institution classified their act as work-related misconduct; hence it declined their application. The respondents took the case to the upper court. The Oregon Court of Appeals reversed the decision and ruled in favor of the respondents. The appeals court reasoned that the denial of unemployment benefits violated the Free Exercise Clause of the First Amendment. Interestingly but not surprisingly, the appeals court cited the *Sherbert* decision for justification of its decision, claiming that the State of Oregon did not provide a compelling interest for enacting the neutral and generally applicable law.

Furthermore, the State Supreme Court affirmed the Appellate Court's decision, and later in 1988, the case came to the U. S. Supreme Court. The Court's initial decision was to annul the Oregon Supreme Court's decision, and subsequently returned the case to Oregon's lower courts for further revision (*Employment Division, Department of Human Resources of the State of Oregon v. Smith*, 1988). The Oregon Supreme Court returned the case to the U. S. Supreme Court, reasoning that while the use of illegal drugs, even for religious purposes, was prohibited in Oregon, this particular act violated the respondent's free exercise of religion. Finally, the U. S. Supreme Court decided that a state can deny unemployment benefits to people who lose their jobs based on the sacramental use of illegal drugs. With this decision, since the criterion for providing the compelling interest were not sought from the state of Oregon, the Court effectively removed the requirement to apply the *Sherbert* test, as established in *Sherbert* (1963). Justice Scalia wrote the majority opinion, joined by Justice Rehnquist, Justice White, Justice Stevens and Justice Kennedy. Justice O'Connor wrote a concurring opinion, joined by Justice Brennan, Justice Marshall, and partially (parts I and II) by Justice Blackmun. Justice Blackmun wrote the dissenting opinion, joined by Justice Brennan and Justice Marshall.

Justice Scalia (majority), Justice O'Connor (concurring) and Justice Blackmun (dissenting) all wrote extensive arguments for the justification of their decisions and

the various discussions for counter-argument. Instead of summarizing all the arguments, I will primarily shed light on the discussions directly or indirectly concerned with the theoretical argument of my dissertation. However, it is necessary to examine first some of the main arguments in conjunction with the *Sherbert* case and the “compelling interest” argument, in order to understand the gravity of the decision. This is because these arguments are central to further discussions of this chapter.

First and foremost, despite the outcry, Justice Scalia does not argue that *Smith* overturns *Sherbert*. According to Justice Scalia, *Sherbert* in itself is not a wrong decision with its idiosyncratic context. The context of the *Sherbert* test is simply fundamentally different from the *Smith* case because it is concerned with unemployment benefit requirements. Next, Scalia claims that the further decisions of the Court, which are considered to be the continuation of the *Sherbert* test, pose a different context, being instead a hybrid case⁹². Even though the decisions of the Court are based on the violation of the Free Exercise Clause of the First Amendment, Justice Scalia argues that because of the hybrid nature of those cases, they should be considered differently. Justice Scalia provides the following examples of hybrid cases since the *Sherbert* decision, where Free Exercise is in conjunction with freedom of speech and of the press (*Cantwell v. Connecticut*, 1940; *Murdock v. Pennsylvania*, 1943) and with the right of parents (*Pierce v. Society of Sisters*, 1925; *Wisconsin v. Yoder*, 1972).

⁹¹ It is significant to note that the *Smith* decision refers to arguments presented by the Court in the *Gobitis* (1940) and even *Reynolds* (1879) cases (Salmons 1995, p. 1251-52). Ray points out the conflicting interpretation of the Free Exercise Clause between the *Reynolds* and *Sherbert* decisions (2018, p. 126), as the former grants power to the states to restrict religious practice with generally applicable laws. I believe that rather than constructing a middle ground with the distinctive approach of the *Sherbert* case, the Court refers to pre-*Sherbert* cases to discredit the argument established in *Sherbert*, despite the support of the *Sherbert* decision in its own context.

⁹² To recall, two ECtHR cases discussed previously in this chapter, *Hoffmann v. Austria* (1993) and *Deschomets v. France* (2006) are also hybrid cases concerning parent custody and religious freedom at the same time.

As mentioned previously in this chapter, the Court's opinions frequently refer to further implications that decisions may have on society. The *Smith* decision is not an exception for use of the further implication argument. Justice Scalia claims that providing exceptions to religious freedom cases, when neutral and generally applicable laws infringe upon individuals freedom, "would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them" (*Employment Division, Department of Human Resources of Oregon v. Smith*, 1990).

The dissenting opinion, which was written by Justice Blackmun and joined by Justice Brennan and Justice Marshall, first points out the hypothetical fear of the Court's opinion and criticizes it as a purely theoretical approach⁹³. Next, Justice Blackmun claims that the burden of Oregon law is significant enough, such that it might force members of the Native American Church to move to another region where they can enjoy religious freedom⁹⁴. Finally, the three dissenting justices join the concurring opinion made by Justice O'Connor, which is discussed below, but they find that the state interest is not compelling because the central argument of the Court relies on hypothetical consequences of granting exemption without providing any empirical evidence⁹⁵.

Justice Scalia's central argument in justification of the ruling is the crux of the *Smith* decision. His argument aims at justification of state interference when it is necessary and deems the consequences of such interference to be merely incidental. He gives the following examples for his argument:

⁹³ Salmons claims that previously granted exemptions have never engendered "the type of 'floodgates' problems anticipated by the courts" (1995 p. 1253).

⁹⁴ To recall, a similar argument was pointed out in the *Yoder* decision to justify the exemption granted by the Court (see Chapter 6.2).

⁹⁵ About the discussion of the Court's approach for granting exemptions, McConnell (1990a) argues that granting exemptions to religious minorities is a historically coherent approach due to its significant role in the founding era. On the other hand, Hamburger (1992) claims that exemptions had been matters of legislative grace, just like in the *Smith* case; hence they are not a part of the constitutional norm.

[P]rohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax, but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. (*Employment Division, Department of Human Resources of Oregon v. Smith*, 1990)

The gravity of the emphasis on “necessary” and “incidental effect” is apparent. To recall, Pettit argued that not all interference is limiting freedom as non-domination. Unlike the liberal conception of freedom, which argued that all types of interferences reduce freedom, the republican conception of freedom as non-domination asserts that authorized interference does not reduce freedom. Pettit called this type of action “non-arbitrary interference,” because it is authorized by the people who are affected by it.

Justice Scalia offers the same argument we observed in Pettit’s theory. According to Justice Scalia, the following question justifies the restriction of religious freedom: While we think of a tax as a necessary interference without violation of freedom, why are other authorized legal interferences considered to be a violation of freedom? The state of Oregon does not impose a narrowly decided prohibition on the citizens of Oregon. The law is generally applicable and neutral. The list of substances is taken from the Federal Act, which provides another layer of protections for neutrality.

As seen in previous sections, *Sherbert* granted protection for religious freedom even from generally applicable and neutral laws. According to the *Sherbert* test, states must provide a compelling interest for justification. Yet, Justice Scalia argued that it is okay for neutral and generally applicable laws to burden religious freedom as an “incidental effect” of the interference. Moreover, Justice Scalia’s “incidental effect” argument reminds us of Pettit’s tough-luck discussion. According to Pettit’s argument, when freedom is reduced by authorized and legitimate interference, affected agents should have access to contestation institutions in a functioning democratic system. If the final outcome of the contestation institutions is not in

favor of the people whose freedom is reduced, then the affected people should be able to perceive and accept the decision as tough-luck, rather than as a targeted attack. Justice Scalia offers a similar argument as follows: If neutral and generally applicable laws reduce the religious freedom of individuals, the effect of such laws is not targeted but merely incidental. Having followed contestation through to the end via the U.S. Supreme Court, should the respondents of the *Smith* case now perceive and accept the Court's decision as tough-luck or in Justice Scalia's terms, as an incidental effect of the law? Let us examine other arguments in the opinion and further legislative responses in the following section and discuss this question at the end of this chapter.

Justice Scalia, in majority opinion, effectively disregards the liberal conception of freedom conceptualized by classical liberal thinkers, such as Constant and Berlin (see Chapter 2.2). In order to protect the negative conception of freedom, positive laws must be enacted on a non-arbitrary basis as Pettit also discussed extensively. It is because of this need for positive laws, as Justice Scalia pointed out, that there will always be "unavoidable consequence of democratic government" (*Employment Division, Department of Human Resources of Oregon v. Smith*, 1990)⁹⁶. Using such an argument as the basis for decisions, McConnell remarks that the justification of the *Smith* ruling becomes heavily centered on the emphasis of "unavoidable" aspects of such decisions (1990a, p. 66).

Justice O'Connor joined the judgment of the Court but not on the same basis presented by Justice Scalia and the majority of the Court. In fact, her partial dissent to the opinion of the Court was joined by dissenting Justice Brennan, Justice Marshall, and Justice Blackmun. First, according to Justice O'Connor, the opinion of the Court defines the application of the *Sherbert* test in further cases as a "constitutional anomaly". Justice O'Connor disagrees with this opinion, and instead claims the *Sherbert* applications represent the constitutional norm, rather than an

⁹⁶ For a more detailed study of documenting the effects of the *Smith* decision see Adamczyk et al. (2004).

anomaly. For this reason, she defines the *Sherbert* test as the Free Exercise jurisprudence (*Employment Division, Department of Human Resources of Oregon v. Smith*, 1990). Conceiving the *Sherbert* test as the basis of the Free Exercise Clause jurisdiction is critical, because it is the primary argument of the liberal justices in the Court. But note that Justice O'Connor is considered to be a conservative justice, not a liberal justice. As discussed in Chapter 5, the ideological positions of justices in the Court often become blurred and less significant when deciding a case regarding the Free Exercise Clause, as justices often cross to the other side of the aisle. Justice O'Connor's arguments below are an example of this behavior.

Justice O'Connor argues that the Court's opinion is heavily based on the arguments of "unavoidable consequence of democratic government" and "incidental effect". This notion has an explicit motive to let the political branches decide on such cases. In other words, the *Smith* opinion gives determinative power to the legislative branch in cases when religious freedom is burdened due to neutral and generally applicable laws. The interest of the state does not have to be compelling in this argument. Justice O'Connor claims that the sole reason for adding the First Amendment to the U. S. Constitution was to protect the freedom of minorities from majoritarian legislative interference, that is to say, solving problems in a depoliticized way. For this reason, Justice O'Connor does not join the opinion of the Court, but still finds Oregon's restriction as "compelling" due to issues related to societal interest and health concerns; hence no violation of the Free Exercise Clause found.

Justice O'Connor's argument provides a useful ground for understanding the theoretical argument of this dissertation. The final decision of the Court rules in favor of Oregon State, which can be summarized as, neutral and generally applicable laws that restrict religious freedom need not necessarily be justified by compelling interests. With this decision, the Court effectively ruled that political power, i.e. the legislative branch, should resolve such problems, not the Court. This

is counter to Pettit's theory of contestation institutions. On the other hand, Justice O'Connor believes that the Court should offer non-political protection in such cases, which is the basis of Pettit's theory. So as seen in *Smith*, the conservative Court ruled that it should be through the political means and not the judicial that such problems are solved. This then became the case three years later when a Democratic (liberal) Congress enacted the *Religious Freedom Restoration Act* (RFRA) as a means of restoring the *Sherbert* Test. Yet, the conflict would not abate, as the Court responded to RFRA by calling the act unconstitutional (with *City of Boerne v. Flores*, 1997). This continued conflict will be discussed in the following sections.

Finally, while Marci Hamilton supported the *Smith* decision because it removed the anomaly established by the Court in *Sherbert* (Hamilton 2005), critics of the Court's ruling offered harsh objections (see Pepper 2008; Arnold 1997; Driman 1997; McConnell 1990a). The most prominent legal scholar who criticized the *Smith* ruling is Michael W. McConnell, who claimed that the Court's decision practically characterized the doctrine of free exercise exemptions as a "luxury" (1990a, p. 67)⁹⁷. For him, this approach removed the traditional role of the court as the protector of minority rights from majoritarian oppression (1990, p. 1109, 1129). Similarly, Berg defended the function of the compelling interest standard, despite its defects, because it is necessary to protect the religious minority by granting exemptions (2008, p. 226). For Berg, granting exemptions for the protection of religious freedom does not risk the underlying interest of the government. In other words, such exemptions are not disruptive to the government's functionality (2008, p. 228).

Consequently, the *Smith* decision opened a new era with respect to jurisdiction of the Free Exercise Clause. The strict scrutiny requirement established in *Sherbert* was effectively removed. The *Smith* decision granted states power such that their

⁹⁷ Duncan refers to the stance that Scalia's opinion settled as free-exercise-phobia (2008, p. 184).

neutral and generally applicable legislation can “incidentally” infringe upon religious freedom. Additionally, states would not be obliged to provide a “compelling interest” and show that less restrictive are not possible. As discussed, while the *Smith* decision was a landmark decision for religious freedom, it was not in itself the cause of an abrupt change in the course of jurisdiction. A gradual change started in 1980 and continued as the Court decided more and more cases in favor of states. *Smith* was not the final act though, as Congress fought back with the *Religious Freedom Restoration Act*. The RFRA, with its sole aim to restore the *Sherbert* test, is the subject of the following section.



6.4. The Legislative Remedy: The Religious Freedom Restoration Act, RFRA

The *Smith* decision instituted a new phase for the Free Exercise Clause jurisdiction. The opinion of the Court, written by Justice Scalia, asserted that states do not have to provide a “compelling interest” when neutral and generally applicable laws infringe upon freedom of religious exercise. This represented a rupture of the constitutional norm established by the *Sherbert* decision in 1963. In response to *Smith*, the political actors promptly mobilized to provide a legislative remedy. Three years later, in 1993, the U. S. Congress passed the Religious Freedom Restoration Act (RFRA); bipartisan legislation that effectively restored the *Sherbert* test. In this section, I discuss the background of the legislative response from Congress and its further effect on ensuing Court cases.

To begin, it is necessary to establish the political context in which the RFRA was passed by Congress. In the aftermath of the *Smith* decision, fifty prominent law professors asked the Court to rehear the case (Layock, 1990), yet the Court denied the petition. Not only law professors, but also large groups of civil organizations representing opposite ideological opinions, objected to the Court’s decision. This broad coalition of political actors pushed Congress to offer a remedy for the issue. Despite the outcry from the civil organizations, George H. W. Bush’s administration was reluctant to pass any law regarding religious freedom, unless it also contained anti-abortion language (Berg, 2008, p. 247). The administration’s indifference toward offering a remedy for *Smith* halted the Congressional response. Eventually, the 1992 elections resulted in Bill Clinton’s victory, which gave Congress an impetus. In an unusual bipartisan effort, which was unanimous in the U. S. House and nearly unanimous in the U. S. Senate (only three votes against), Congress passed the Religious Freedom Restoration Act. President Bill Clinton then signed the bill, and the RFRA became effective on November 16, 1993.

With the RFRA, Congress fundamentally aimed to rectify the *Smith* decision. Here, rectification meant finding a way to provide some form of the old norm for safeguarding the Free Exercise Clause, i.e., the application of strict scrutiny based

on the *Sherbert* test. In this regard, the RFRA did not seek to provide anti-targeting provisions, i.e., prohibiting the enforcement or non-enforcement of laws against certain religious groups. Instead, and more in line with the original provision of *Sherbert*'s protections, the RFRA was based on the preferred freedom approach, i.e., recognition of rights established by the First Amendment. However, despite optimal desire, the legal basis for protection of religious freedom through the RFRA would now rely on statutory law, rather than constitutional law, i.e., the Free Exercise Clause of the First Amendment. Even though it was not a constitutional protection, the scope of the Act would provide durable and robust protection for religious freedom. There was no time limit for the Act, and it was effective at both the federal and state levels.

The prompt response to *Smith* by legislating RFRA is a direct reflection of the effect the *Smith* decision had on the political atmosphere. When the Court makes a unanimous decision, it is often an explicit demonstration of how the Court as an institution has prioritized the importance of an issue. It is the same for the legislature. A unanimous U. S. House and a nearly unanimous U. S. Senate approval of the Act is also a reflection of *Smith* on the political atmosphere. While it is almost impossible to implement the Court's rulings without political support, it is also impossible to rely on a Court judgment that mobilized such a bipartisan congressional objection. These relationships again unveil the intertwining of the Court's rulings with political means.

The text of RFRA addressed the *Smith* decision and the *Sherbert* test explicitly⁹⁸. The purposes of the Act in Section 2(b) referred directly to the restoration of the *Sherbert* test. Douglas Laycock, a leading academic advocate and member of the team that drafted RFRA, argued that creating piecemeal exemptions to protect religious liberty would not be a sustainable solution for balancing the relationship between state interests and religious freedom claims. This is because religious

⁹⁸ For the full text of RFRA, see Annex 3.

minorities generally lack an effective means to press their issues against the majoritarian political powers (1995). Laycock also argued that Congress has the legal and legitimate authority to enact RFRA under Section 5. This power became a controversial issue after the enactment of RFRA, resulting in the 1997 U. S. Supreme Court case of *City of Boerne v. Flores*. However, before I further elaborate on that controversy, it is also necessary to discuss the objections that RFRA engendered.

Despite the effort put into restoring the *Sherbert* test, advocates of RFRA neglected the ambiguity of the test in the pre-*Smith* era. The application of strict scrutiny for generally applicable laws had not provided a sustainable and politics-resistant solution to the Free Exercise Clause cases regarding the minority religions. The incoherent interpretations of the *Sherbert* test during the 1980s demonstrated just how vulnerable it was to different treatment and ways of being handled in various political contexts⁹⁹.

According to those who objected to the *Sherbert* test, the main reason for its inconsistent application was that it established an extreme precedent against freedom of religious practice. They argued that requiring states to provide a “compelling interest” for neutral and generally applicable laws created an imbalance between state interests and individual freedom of religion. In this respect, Salmons claimed that because there had not been a consistent and balanced approach before the *Smith* decision, “RFRA neither resolves nor addresses this more fundamental error: an incomplete understanding of what religious exercise entails, particularly for less conventional minority religions” (1995, p. 1244). In addition, Hamilton also offered harsh criticism for RFRA. She claimed that “RFRA’s draconian requirements” (2005, p. 236) paved the way for constitutional

⁹⁹ For a similar argument, see Nugent (2008, pp. 1051-53).

catastrophe¹⁰⁰. A more detailed account of her criticism is discussed in the following section.

Enacting RFRA was not the only legislative remedy provided by Congress. The following year, in 1994, Congress amended the *American Indian Religious Freedom Act* (AIRFA) in order to correct the “mistake” engendered by the *Smith* decision. Section 3(a)(1) of the amendment included the use of peyote as a religious sacrament; hence granted legal protection, i.e., exemption, for the individual case for the Native American Church. Additional legislative protections after RFRA occurred at the state level. These are known as mini-RFRAs, because their legal scope was limited to the jurisdiction of each state. I examine mini-RFRAs in the following section. There we will see just how vital their roles became, when in 1997 the Court declared that RFRA was unconstitutional at the federal level.

As the premise of this dissertation suggests, the Court’s decisions and their results cannot be understood in isolation. Also, it must be understood that the results are not static, but dynamic; at any point in time one must consider the current political context and the current relationship between the judiciary and the legislative branch. The political environment when the Court ruled on the *Smith* case was different from the political climate in which the *Smith* ruling needed to be implemented. The change in the executive branch and the continuation of Democratic majorities in both the House and the Senate (1992 Elections) reshaped the political climate in the United States. The most significant indicator of this change was the broad bipartisan political coalition to “correct” the *Smith* decision. This united political effort shaped the content of RFRA.

¹⁰⁰ One of the problems of RFRA that Hamilton pointed out, is the extent of RFRA’s application, which emerged in *Burwell v. Hobby Lobby Stores* (2014). While before *Burwell* the Court opinions included only non-profit organizations (such as *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 2006; *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 2012; *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 1993), the *Burwell* case determined inclusion or exclusion in RFRA of for-profit organizations. I discuss this issue in more detail in Chapter 6.6.

While the political actors had been hard at work to come up with a remedy, the Court was also sending vague messages in further decisions. The Court's ruling in *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993) was the first case in which the Court had to "deal with" its new jurisdiction established in *Smith*. The Church of Lukumi Babalu Aye followed the Afro-Caribbean-based religion of Santeria. According to their religious convictions, animal sacrifice is a part of their spiritual practice. Following the establishment of The Church of Lukumi Babalu Aye in their municipality, the city of Hialeah, Florida enacted an ordinance that effectively banned the possession of animals for sacrifice or slaughter.

Although the city of Hialeah's ordinance was neutral and generally applicable, it prohibited the religious practice of the members of the Church of the Lukumi Babalu Aye. Under the new Free Exercise jurisdiction established in *Smith*, the city ordinance did not violate the Free Exercise Clause because it did not target the religious community specifically. Nonetheless, the Court ruled that the city ordinance did violate the Free Exercise Clause. Justice Anthony M. Kennedy, joined by six other justices, wrote the majority opinion. Moreover, the remaining justices concurred in the decision but for different reasons, effectively making the decision unanimous. Interestingly, Justice Souter's concurring opinion mentioned reexamination of the *Smith* decision, because the justification of the current case was within the jurisdiction established by *Smith*.

Justice Kennedy's opinion subjected the law to strict scrutiny and found that state interests were not "compelling" (*Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 1993). Furthermore, even if the state interests were compelling, they were not "drawn in narrow terms" (Berg, 2008d, p. 226). According to the opinion, despite the ordinance being facially neutral and generally applicable, it was explicitly meant to target the Santeria religious community. The Court's opinion for a return to the application of strict scrutiny, i.e., the *Sherbert* test, effectively changed once again the course of Free Exercise jurisdiction. As discussed above, I believe that the sudden change of the Court's approach stemmed from the fact that the political

environment had significantly changed since the *Smith* decision. The least desirable conflict the Court would ever want to be in, was pushing the *Smith* jurisdiction into a context where almost all of the political branches of government were united against such a ruling. For this reason, I argue that, with the *Church of the Lukumi Babalu Aye* case, the Court attempted to “correct” its *Smith* decision, because the implementation of *Smith* became impossible in the new political context¹⁰¹.

Besides the Court’s motivation for avoiding conflict with political actors, the Free Exercise jurisdiction as reshaped in the *Smith* ruling, was itself a challenge to implement. Similar to the *Church of the Lukumi Babalu Aye* case discussed above, lower courts were reluctant to apply the *Smith* jurisdiction for claims regarding the Free Exercise Clause. There are lower court cases that exemplify the difficulty of implementing the *Smith* jurisdiction: *Rader v. Johnston* (U.S. District Court for the District of Nebraska, 1996) and *Fraternal Order of Police v. City of Newark* (Court of Appeals, 3rd Circuit, 1999).

The *Rader* case was about a college student who refused to stay in on-campus housing units. The reason his claim became a Free Exercise issue, was that he wanted to be off campus in order to live in a Christian Student Fellowship which provided a housing unit that was made available only to Christian students. The U.S. District Court of Nebraska ruled that the university discriminated against the Christian student when imposing the on-campus housing rule, because the student’s claim depended on his religious conviction. Although the university policy was facially neutral, it affected the freedom of religious practice by the Christian student.

The second case, *Fraternal Order of Police v. City of Newark*, was concerned with the policy of the Newark (N.J.) Police Department. Department policy prohibited officers from wearing beards, except for medical reasons. The opinion, which was

¹⁰¹ For the historical account of the Court’s responses to avoid conflict with political actors, such as during the Reconstruction Period and the New Deal Era, see Ackerman (1998).

delivered by Judge Alito, who was a Circuit Judge at the time, argued that the Department's policy for granting exemption only for secular purposes violated the Free Exercise Clause, because it did not offer substantial justification, i.e., the "compelling interest" needed for not including religious exemptions. These two examples demonstrate the difficulty of implementing the *Smith* jurisdiction in lower cases as well.

What about lower court cases before the election in 1992? According to my argument, the lower courts would have followed the jurisdiction reshaped by the *Smith* decision in 1990. Accordingly, unlike the *Rader v. Johnston* and *Fraternal Order of Police v. City of Newark* cases, where the lower courts were reluctant to apply the *Smith* jurisdiction, in *Yang v. Sturner* (US District Court for the District of Rhode Island, 1990), *Cornerstone Bible Church v. City of Hastings* (US District Court for the District of Minnesota, 1990), and *St. Bartholomew's Church v. City of New York* (U.S. District Court for the Southern District of New York, 1990), lower courts did not apply the strict scrutiny, i.e., the *Sherbert* test, and found no violation of the Free Exercise Clause when neutral and generally applicable laws infringed upon religious freedom.

In summary, the main goal of RFRA was to bring back the *Sherbert* test. In this limited sense, one can argue that RFRA achieved its goal. However, RFRA did not address the already problematic implementation of the *Sherbert* test in the pre-*Smith* period—more precisely in the 1980s, when the application of the *Sherbert* test became less strict. In this sense, Ryan's critique of what RFRA did and of what else it could have done, is enlightening. The *Sherbert* test was brought back by the broad bipartisan coalition after *Smith*, letting the Court once again be the one to decide such claims. This was a disappointment for Ryan, as he felt Congress had had the chance to finally solve the problem through comprehensive legislation (1992). With unprecedented bipartisan power at hand, Congress could have done more than merely bring back the *Sherbert* test, e.g., Congress could have begun a list of legalized exemptions. However, while Ryan's critique is valuable, there are

two big problems with his proposal. First, just because the broad bipartisan coalition was present when the Act was passed, we cannot assume that the alliance would still be there in the future to support other propositions and/or exemptions. The second issue centers on the legalization of exemptions related to religious practice, as the Establishment Clause prohibits Congress from using its power to favor religion.

According to Pettit's theory (Part II), such minority claims should be resolved within contestation institutions. The critiques of Pettit's approach in this respect (Bellamy, 2010; Honohan, 2002; Forst, 2013) argue that such claims should be addressed by political means. The *Smith* decision attempted to better resolve the issue of minority claims (judicial remedy), but instead it created a vague jurisdiction, which was challenging to implement. Congress responded by trying to clarify the ambiguities of *Smith* with RFRA (legislative solution). As we see, during this time of the late 1980s and early 1990s, the pendulum of “ultimate decider” with respect to issues of religious freedom was swinging back (judicial), and forth (legislative).

The main argument of conservative justices on the Court with respect to such matters has been then, if the Constitutional textual reference does not provide an answer, to leave rather the Court to provide interpretation for each new context, letting the “politics” address the issues. In a way, the *Smith* decision led the political actors to offer such a solution to the problem. In a perfect world, that would have been the end of it. But unfortunately, the legislative solution was itself problematic. These judicial decisions, legislative responses, and the further conflict between them in the second half of the 1990s, demonstrate the challenges faced by both Pettit and his critics. Although I emphasize the fault line of Pettit's theory in my arguments, the counter-approach (political/legislative) has its own pitfalls as well. While Pettit's approach has the potential of domination by the judicial establishment, similarly, the political constitutionalism approach (Bellamy, 2010) runs the risk of domination by the popular majority. One might assume that the

response from Congress should have ended the conflict in 1993. Nevertheless, the final act will be played out by the Court in 1997 by declaring RFRA unconstitutional, which is the discussion of the next section.



6.5. The Court Fights Back: Overturning the RFRA

As the discussions of the previous sections of this chapter demonstrated, the Free Exercise jurisdiction has always been evolving. This is because of the incohesive relationship between the judiciary and the political branches. In other words, the Court has been adapting to the evolving political climate by redefining how it shares jurisdiction of the Free Exercise clause. This raises the question, “Does the Court need to adapt to political change?” If this constitutional protection had been granted with numbered limitations and a definition of the precise extent of religious freedom, then this need to interpret and reinterpret the Clause would not exist. However, as previously discussed in this chapter, the Court’s Free Exercise jurisdiction had to work with politics. Otherwise, the legitimacy of the Court would be endangered if the political actors refused to implement the Court’s decisions.

For this reason, the Free Exercise jurisdiction was first established (*Sherbert*), shaped (*Smith*), and re-established (RFRA) by both the judiciary and legislative branches. Enacting RFRA was the determinative response from Congress to re-establish the *Sherbert* test for both federal and state levels. However, the *City of Boerne v. Flores* (1997) decision manifested the final act of the Court. In a way, the *Boerne* decision echoed the *Marbury v. Madison* (1803) decision when the Court established its power for judicial review (see Chapter 5). By declaring RFRA unconstitutional, the Court restored its power for judicial review and reignited the conflict with Congress. The ideological differences between the justices of the Court became less notable when the issue was about the legitimacy and re-establishment of the authority of the Court. Justice Stevens and Justice Ginsburg (liberal justices) sided with Justice Scalia, Justice Rehnquist, and Justice Thomas (conservative justices) for the majority opinion, which was written by Justice Kennedy. Before elaborating on the *Boerne* decision and its repercussions, it is again necessary to review the political environment in the United States, but now during the time when the Court ruled that RFRA was unconstitutional.

As discussed in the previous section, the course of politics in the USA changed in 1992 with the election of a Democratic president, coupled with Democratic control of both the House and Senate. Only two years later, in contrast, the 1994 midterm election became known as the “Republican Revolution,” as the Republican Party for the first time since 1952, gained enough seats to control both Houses of Congress. Moreover, the Republican Party maintained control of both houses through the 1996 elections, despite the loss in the presidential race against Clinton. The composition of the Congress that had enacted RFRA in response to *Smith* had changed dramatically. I argue that this change in political climate emboldened the Court to re-establish its power by examining the constitutionality of RFRA in 1997.

Initially, the case of *Boerne* gave no hint that it would become another important case for the Free Exercise Clause. In order to expand its seating capacity, St. Peter the Apostle Catholic Church in the City of Boerne, Texas, wanted to triple its size. The church filed its application for a permit with the local zoning board. However, the application was rejected, based on the argument that the church was located in a landmark-preservation district. The Archbishop of the Church, respondent Flores, sued the city arguing that this ordinance violated his rights under RFRA. To counter Flores’ argument, the city claimed that RFRA itself was unconstitutional because it usurped the authority of local regulation. The Federal district court hearing the case sided with the city. It held that Congress had exceeded its power under Article 5 of the Fourteenth Amendment, thereby violating the Constitution. However, the United States Court of Appeals for the Fifth Circuit overturned the decision, as it found RFRA to be constitutional.

The central argument in *Boerne* was whether Congress exceeded its constitutional power when enacting RFRA in 1993. Article 5 of the Fourteenth Amendment granted Congress the ability to enforce the terms of the amendment. According to Article 5, Congress has no power to alter the constitutional right while enforcing it. Justice Kennedy asserts this argument that Congress does not have authority to define, but simply enforce a law.

Congress's power to "enforce" the provisions of the Fourteenth Amendment came to the Court with the *Carolina v. Katzenbach* case in 1966. In the *Katzenbach* decision, Justice Earl Warren, who wrote the majority opinion for the Court, defined the power of Congress as "remedial" (*Carolina v. Katzenbach*, 1966). The discussion above refers directly to the ratchet theory established in *Katzenbach v. Morgan* (1966). According to this theory, Congress can increase the protection provided by the Constitution but cannot reduce it. Laycock, who advocated the case for respondent Flores, defends this theory in the context of RFRA. He argues (1995) that when the judicial branch fails to provide freedom of religion protected by the Constitution, it is the duty of Congress to get involved and offer a remedy. For Laycock, Congress's involvement is consistent with the theory of separation of powers. He explained the historical importance of such participation by discussing that Congress had been the most active branch of the government during the Reconstruction Period.

Stephen Gey (2008) and Marci Hamilton (1998) criticized Laycock's argument. Gey (2008) argued that granting exemptions only for religious freedom violates the Establishment Clause of the First Amendment. Similarly, Eisgruber and Lawrence (1994), Duncan (2008), Marshall (2008), and Hamburger (2008) also point out the problematic assumption of singling out religious freedom over the non-religious freedoms. On the other hand, Marcie Hamilton (1998), who argued the cause for petitioner in *Flores*, objected to RFRA by directly asserting that Congress exceeded its constitutional power. For her, Congress attempted to define religious liberty instead of enforcing what had already been described and granted (Hamilton, 1995, p. 705).

Finally, in discussing the historical development of the *Sherbert* test, Nugent's critique is significant. He asks the following question to unveil the never-ending conflict between the judiciary and legislative: "[H]ow does one interpret a statute that attempts to overrule a case that itself overruled previous case law by

mischaracterizing it and setting up a straw man? (2008, p. 1030). Nugent (2008) claims that "a true compelling interest" (p. 1030) should not be applicable for all incidental interference because of disproportional protection for religious freedom. As in the case of *Smith*, disproportional protection backlashes in political domain. As suggested, religious freedom claimants who seek exemptions should find the protection they seek through state level legislation, instead of federal level (p. 1030).

Despite the fact that Justice Kennedy mentioned the *Sherbert* test and compelling interest¹⁰² requirement in response to Justice O'Connor's dissenting opinion¹⁰³ (which brought back the same argument in the *Smith* decision), the core of the argument rose on a different ground. From this different perspective, when the Court was reviewing the power of Congress, as granted by Article 5 of the Fourteenth Amendment, the decision would directly affect the legitimacy of the Court. If the Court decided that Congress has the power to change rights while enforcing them, then the Court's authority with respect to judicial review would diminish. For this reason, the Court claimed that RFRA was not proportional, since it offered a substantive change to the provisions of the Fourteenth Amendment.

In summary, the Court ruled RFRA unconstitutional in *Boerne*, because Congress had exceeded its power to enforce a constitutional right by also attempting to define it. What kind of provisions did the Free Exercise Clause jurisdiction entail after *Boerne*? The Court's decision tied RFRA's hands for states only, not for federal laws. In other words, RFRA remained effective against federal laws that are neutral and generally applicable but infringe upon religious freedom. In response, many

¹⁰² Instead of "compelling interest", Justice Kennedy uses the "stringent test" to emphasize the inapplicability of the test.

¹⁰³ Justice O'Connor, with whom Justice Breyer joined, reiterates her dissenting argument in the *Smith* decision. For her, the Court uses the justification in the *Smith* decision as a "yardstick" for the *Boerne* case. The Free Exercise Clause, according to Justice O'Connor, is "rather best understood as an affirmative guarantee" (*City of Boerne v. Flores*, 1997). Her dissenting opinion addresses the theoretical argument of negative and positive liberty. While liberties, in general, could be conceived as a negative right, the exercise of such rights needed to be protected by affirmative, i.e., positive, safeguards.

states passed their own mini-RFRAs to provide RFRA-like protections at the state level. These state level protections, plus another Congressional remedy (the Religious Land Use and Institutionalized Persons Act of 2000, RLUIPA), led to consequent cases that limited not only the Free Exercise Clause but also the Establishment Clause. I will examine these resultant protections and consequent cases in the next section.



6.6. The Free Exercise Clause Cases after *City of Boerne v. Flores*

As discussed in the previous section, the Court had the last word with respect to the scope of the Free Exercise jurisdiction. Despite the fact that the *Boerne* decision maintained the protection for religious freedom from federal interference¹⁰⁴, it created a rift that opened the possibility for state legislations to infringe upon religious freedom without applying any scrutiny. According to Nugent (2008), the rift opened by *Boerne* was first filled by mini-RFRA legislation enacted by states and then by another Congressional Act, the Religious Land Use and Institutionalized Persons Act (RLUIPA).

In this section, accordingly, I first examine mini-RFRA(s) and RLUIPA. After that, I scrutinize the Court decisions regarding the Free Exercise Clause and Establishment Clause which followed the *Boerne* decision¹⁰⁵. Although there has not been a landmark decision since that one changed the course of the Free Exercise jurisdiction, the Court decisions following *Boerne* demonstrate to a certain extent, just how intertwined the Court's opinions are with politics. When RFRA became unconstitutional at the federal level, states began to find alternative ways to provide legal protections for religious liberty against the incidental effects of neutral and generally applicable laws. Although states basically echoed RFRA when drafting their own legislation, there have been differences among them. Fundamentally though, the main goal was to provide scrutiny, to a certain extent, for generally applicable laws when they infringe upon religious freedom. According to the National Conference of State Legislatures, as of 2015, there have been twenty states that passed RFRA-like legislation to protect religious freedom¹⁰⁶. Most of these are Southern states, where conservative ideology dominates under the banner of the Republican Party. This seems ironic because the conservative justices denied

¹⁰⁴ The applicability of RFRA at the federal level was confirmed by the Court decision in 2006, *Gonzales v. O Centro Espírita Beneficente União do Vegetal*.

¹⁰⁵ The reason for adding some controversial cases concerned with the Establishment Clause is expanding the religious freedom discussion to a broader scale. Although the main focus of this chapter was the historical development of the Free Exercise jurisdiction, its relationship with politics has been present in other cases regarding religious freedom as well.

¹⁰⁶ For the list of states that have passed RFRA-like legislations, see Johnson & Steinmetz (2015).

opponents of RFRA-like legislation in the Court. This paradoxical situation not only shows the intertwined nature of the Court's rulings with politics but also just how unpredictable the relationship can be.

The second improvement for religious freedom came from Congress. Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA¹⁰⁷), which granted protection to individuals, houses of worship, and other religious institutions from discrimination caused by zoning and landmark-preservation laws. Similar to RFRA, Congress enacted RLUIPA with a coalition from both parties. Both the House and the Senate voted unanimously for RLUIPA. Unlike RFRA, though, RLUIPA's extent was minimal. As the title of the Act suggests, the Act offered protection only for religious rights against state land-use and prison regulations.

RLUIPA included all the keywords indicated (emphasized as italicized in citation) found in the *Sherbert* test: a compelling governmental interest, even, general applicability, and the burden of persuasion. We have seen these keywords in RFRA as well. In this sense, RLUIPA is the successor of RFRA. However, the scope of RLUIPA is exponentially limited compared to RFRA. For this reason, the Court's review of RLUIPA was affirmative. In *Cutter v. Wilkinson* (2005), the Court reviewed the constitutionality of RLUIPA. In a unanimous decision, Justice Ginsburg, who delivered the opinion of the Court, stated that the goal of Congress by enacting RLUIPA was making an accommodation to alleviate the burden of religious freedom of prisoners, which was permitted by the First Amendment.

The rest of this section consists of examining the Court's rulings on issues regarding the Free Exercise Clause since the *Boerne* decision. As mentioned above, none of these cases are considered to be landmark cases. Nevertheless, the fundamental argument of this chapter, which exposes the relationship between the judiciary and

¹⁰⁷ For the full text of RLUIPA, see Annex 4.

legislative branches, has been present in those cases, too. Congress's final, and relatively modest, move of enacting RLUIPA in 2000 and the Court's confirmation of its constitutionality in 2005 (*Cutter v. Wilkinson*) allowed time enough for the dust to settle. Although the following cases did not initiate another constitutional/political crisis concerning the Free Exercise jurisdiction, the historically ongoing tension between the two approaches to jurisdiction has not abated completely.

In this section, instead of analyzing the Court cases chronologically, I believe it is more useful to classify them with respect to their salient arguments. With this in mind, organizing the cases under four topics would fulfill this goal: 1) claims regarding the application of RFRA at the federal level (*Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 2006; *Burwell v. Hobby Lobby Stores*, 2014; and *Zubik v. Burwell*, 2016), 2) cases regarding RLUIPA (*Holt v. Hobbs*, 2015), 3) cases concerning the exclusion of public aid for religious organizations (*Locke v. Davey*, 2004; *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 2017), and 4) cases that address specific issues connected with the Free Exercise Clause (*Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 2002; *Christian Legal Society Chapter v. Martinez*, 2010; *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 2012; and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 2018).

The first category assembles cases concerning the application of RFRA. As discussed above, the *Boerne* decision ruled that RFRA was unconstitutional at the state level because Congress exceeded the limited power it was given in the Constitution at that level. As a result, it remained in effect at the federal level. In other words, the *Sherbert* test would still be in effect for applying strict scrutiny to federal legislation that is neutral and generally applicable but infringes upon religious freedom. The next case concerned with RFRA after *Boerne* was *Gonzales*

v. *O Centro Espírita Beneficente União do Vegetal* (2006). Similar in background to the *Smith* case, the religious organization (O Centro Espirita Benficiente Uniao do Vegetal, UDV) was using a psychotropic substance for sacramental purposes. The substance, *hoasca*, was prohibited by the Controlled Substances Act.

First, while the government accepted the limitation the Act creates on the free exercise of religion, it also argued that the burden did not violate RFRA. Using the same terminology established in the *Sherbert* decision, the government asserted three arguments. The first argument was that the Act was "the least restrictive means" of promoting governmental interests for protecting the health and safety of UDV members. Second, the Act was blocking access to the substance for other non-religious reasons, i.e., recreational use. Finally, the government claimed that the Act was in accord with the 1971 United Nations Convention on Psychotropic Substances.

The Court, in a unanimous decision (Justice Alito not participating), held that the government's arguments summarized above did not satisfy the compelling interest criteria established by *Serbert* and mandated by RFRA. Chief Justice Roberts, who delivered the opinion of the Court, argued that the government failed to provide a compelling interest for neutral and generally applicable law. For this reason, the religious exemption had to be granted. In effect, the Court affirmed both its *Boerne* decision and RFRA in this case, by discussing the compelling interest criteria explicitly, and how the government has to meet it, when generally applicable laws burden the free exercise of religion.

The second case concerning RFRA, *Burwell v. Hobby Lobby Stores* (2014), is more controversial. Due to the different contexts of these cases and other arguments pointed out by the Court, the justifications were more distinctive than those in *Gonzales*. The *Burwell* case was about the extent of RFRA. The Green family, who owns Hobby Lobby Stores, Inc., runs their business based on the convictions of Christian faith. According to their religious belief, the use of contraceptives is

immoral. The Patient Protection and Affordable Care Act (ACA), on the other hand, mandates that except for religious employers and non-profit organizations, employment-based group healthcare plans must provide a type of preventive care and screenings for pregnancy without any cost. Hobby Lobby Stores, Inc., as a for-profit organization, was not exempted from the Act.

The Green family sued the Secretary of the Department of Health and Human Services, i.e., the government, because they claimed that the Act violated the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA). The question now before the Court was whether or not RFRA applied to for-profit organizations. In a 5-4 vote, the Court ruled that according to Congress's intent in RFRA, "persons" included for-profit institutions, too. Justice Alito, who delivered the majority opinion, wrote the following argument concerning the definition:

[N]othing in RFRA suggests a congressional intent to depart from the Dictionary Act definition of "person," which "include[s] corporations, . . . as well as individuals." 1 U. S. C. §1. The Court has entertained RFRA and free-exercise claims brought by nonprofit corporations. See, e.g., *Gonzales v. O Centro Espírita Beneficente União do Vegetal* (*Burwell v. Hobby Lobby Stores*, 2014)

Justice Ginsburg, in her dissenting opinion, argues the significance of contextual differences when discussing definition. For her, the assertion that RFRA's reference to "a person's exercise of religion" includes corporations, requires supporting evidence from case law so that the contextual argument could be made. However, as Ginsburg argues that there had been no ruling that recognized a for-profit organization within the jurisdiction of religious freedom. Furthermore, she argues that the Court demonstrated this logic in 2001 when the implication of Congressional legislative authority needed to be clarified. In *Whitman* decision, the Court refrained itself from defining supposedly vague term offered in Congress by saying that "[Congress] does not hide elephants in mouseholes".

Justice Alito, moreover, argued that businesses, in fact, can exercise religion; hence, the jurisdiction of the Free Exercise Clause is relevant to the *Burwell* case (*Burwell v. Hobby Lobby Stores*, 2014). Justice Alito references to two critical cases in his justification: *Braunfeld v. Brown* (1961) and *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990). Both of these cases are controversial in the history of the Free Exercise jurisdiction. As discussed before (Chapter 6.2), the *Braunfeld* case belongs to the pre-*Sherbert* period. In other words, the new jurisdiction established by *Sherbert* to apply strict scrutiny was not yet present when the *Braunfeld* case was decided. In her dissenting opinion, Justice Ginsburg criticized the reference to *Braunfeld* because claimants are not identical because owner of the business and the business itself as an entity are not the same thing.

Similarly, the reference to the *Smith* case is also controversial because RFRA effectively “overruled” the *Smith* decision by restoring the *Sherbert* test. Although the *Boerne* decision invalidates RFRA at the state level, RFRA has still been in force at the federal level. Since the ACA is a piece of federal legislation, it is subject to restrictions (the *Sherbert* test) established by RFRA. The Court does not avoid scrutiny altogether, though. The argument presented by Justice Alito focused on the condition of criteria for “least restrictive means” of burdening the free exercise of religion. The ACA offers “least restrictive means”, but only to religious employers and non-profit organizations. Yet, the government does not provide a “compelling interest” as to why the restriction has to be applied only to for-profit organizations.

Finally, as mentioned before, the Court frequently argues the further implications of its decisions either in the Court’s opinions or in dissenting opinions. The concern about how the public in general, and how the political actors in particular, would perceive the Court’s rulings, usually demonstrates the connectedness of the Court’s decisions with the non-judicial components of society. Accordingly, the threat of further implication of the decision is also addressed by the opinion of the Court. For

this reason, Justice Alito assured the limits of the Court's decision only to contraceptive mandate¹⁰⁸.

The second category of cases addresses those regarding RLUIPA. Although there had been more than one case in which the Court reviewed RLUIPA (see *Sossamon v. Texas*, 2011; *Cutter v. Wilkinson*, 2005), it was not until *Holt v. Hobbs* (2015) that the Court addressed the Free Exercise Clause in a decision. An inmate of the Arkansas Department of Corrections, Gregory Holt (also known as Abdul Maalik Muhammad), was a Muslim. He claimed that his religion required him to grow a beard. The Arkansas Department of Corrections' grooming policy forbids growing a beard due to security reasons. Holt claimed that the department's policy violated RLUIPA, because it significantly burdened his free exercise of religion.

The Court, in a unanimous decision, held that the Arkansas Department of Corrections' grooming policy violated RLUIPA. Justice Alito, who delivered the opinion of the Court, pointed out that prison officials were required to provide a "compelling interest" of such policy for security concerns, and to show that the procedure is the least restrictive means of interference. Yet, the necessary burden of proving such justifications was not met by the prison officials. For this reason, the Court decided that the policy, although neutral and generally applicable, violated the free exercise of religion, as defined in RLUIPA.

Initially, the *Cutter v. Wilkinson* (2005) decision affirmed the constitutionality of RLUIPA, while the *Holt* decision interpreted the act with reference to the requirement established by the *Sherbert* decision in 1963. We observed a similar approach to RFRA at a federal level with the *Gonzales* case in 2006. In general, if

¹⁰⁸ Two years after *Burwell v. Hobby Lobby Stores*, another case came to the Court for review: *Zubik v. Burwell* (2016). Even though the Court decided the *Burwell* case in 2014 in favor of the religious organizations run as a for-profit, ACA required some regulations to facilitate the condition (providing notification) that the provision is based on religious grounds. The petitioners claimed that such requirements violate RFRA because it creates a burden on the free exercise of religion. The Court vacated the case because insurance companies declared that they could provide services without the organizations required to provide the notification.

a claim is strictly concerned with the restrictions mandated by the acts (RFRA and RLUIPA), then the Court does not hesitate to grant the freedom of religion associated with such claims by unanimous decision. The cases previously mentioned were “easy” for the Court. The exemptions they sought were strictly limited to the context of each case, i.e., they did not have “further implications” to consider. However, if a case was related to other issues, such as corporate law or different types of freedoms, then the Court's approach was not quite so predictable. The next cases I examine will provide various examples of such unpredictability, as they were not just about the free exercise of religion.

We shall juxtapose now several international examples in order to complement our appreciation of what takes place in U.S. legislation.

In situations similar to those we have just examined, the ECtHR approach was different. The ECtHR reviewed two cases concerning inmates; one for growing a beard (*X. v. Austria*, Commission decision of 15 February 1965) and another for not wearing a prison uniform (*X. v. the United Kingdom*, Commission decision of 6 March 1982). Both cases were decided in favor of the government regulations because they intended to protect public order and the prisoner's health. Since Article 9§2 of ECHR provided explicit restrictions to religious freedom, the ECtHR did not hesitate to decide the cases in favor of the state regulations. As mentioned above at various times, the First Amendment of the U. S. Constitution does not provide such restrictions to the Free Exercise Clause. For this reason, the interpretation of the Clause has been constantly changing, as a reflection of the responses from the political side of government.

The third category of cases under the general heading of post-*Boerne*, Free Exercise, assembles those cases concerned with the issue of whether using public resources violates the Establishment Clause, or not being able to avail such programs violates the Free Exercise Clause, due to a possible basis of discrimination. With reference back to *Walz v. Tax Comm'n of City of New York*

(1970), the Court described the relationship between the two Clauses as “play in the joints” (*Locke v. Davey*, 2004). The Court reviewed two cases regarding the conundrum above and decided differently in each. Before discussing the possible reasons for the Court's different decisions in those cases, it is first necessary to review their details.

The first case, (*Locke v. Davey*, 2004) concerns the State of Washington's scholarship program (Promise Scholarship) for students who meet certain criteria. One of the requirements of eligibility was not pursuing a degree in "devotional theology". It is the education institute that defines the degree, not a student or the State. Respondent Joshua Davey, was awarded a Promise Scholarship and was then admitted to Northwest College, which is a Christian college affiliated with the Assemblies of God denomination. In order to complete the required documentation, the institute asked Davey to sign a paper stating that he did not intend to pursue a degree in devotional theology. Davey refused to sign it and took the case to court, claiming that this requirement of the program by the State of Washington was unconstitutional, as it violated his free exercise of religion.

In a 7-2 vote, the Court ruled that Washington's exclusion of devotional theology degrees from the program does not violate the Free Exercise Clause. The central argument of the opinion, which was delivered by Justice Rehnquist, is that Washington's statute does not impose legal sanctions on any religion. The opinion argues that the gold standard for deciding whether or not a statute is unconstitutional, is a review of its animosity toward religion (Hamilton, 2005). The Court's majority opinion was that Washington's statute does not target any religion in a hostile way. The *Lukumi* case (discussed below) was a landmark with respect to religious discrimination and targeting. It concerned the ritualistic sacrifice of animals during religious ceremonies, and the criminalization of such acts by the state. Justice Rehnquist notes that the context of *Locke* is very different from that of *Lukumi*. Due to this difference, the ruling of *Lukumi* as discriminatory does not imply that *Locke* is also discriminatory.

Justice Scalia, with whom Justice Thomas joins, writes the dissenting opinion. This opinion offers some compelling arguments. First and not surprisingly, Justice Scalia argues that the Court's opinion contradicts the *Lukumi* case. The majority opinion in *Lukumi* (unanimous decision delivered by Justice Kennedy) claimed that "[a] law burdening religious practice that is not neutral [...] must undergo the most rigorous of scrutiny," and that "the minimum requirement of neutrality is that a law not discriminate on its face." (*Locke v. Davey*, 2004). Clearly, *Locke* singles out "devotional theology", which on its face targets religion. Also, according to Scalia, in *Locke*, the respondent demands nothing but equal treatment, which was not considered by the Court's opinion. Scalia writes the following argument to emphasize that the issue of discrimination has been of pivotal importance in the Court's landmark decisions: "When we declared racial segregation unconstitutional, we did not ask whether the State had originally adopted the regime, not out of "animus" against blacks, but because of a well-meaning but misguided belief that the races would be better off apart" (*Locke v. Davey*, 2004).

As seen above, Justice Scalia does not believe that the existing prohibition of funding for devotional degrees, as specified in the Washington state constitution, should give weight to the Court's decision. In an ironic way¹⁰⁹, Justice Sotomayor will emphasize Justice Scalia's arguments above in her dissenting opinion in the *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017) case, which reached a different conclusion for a similar case.

The second case in the third category is the above-mentioned *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017). Trinity Lutheran Church of Columbia, Inc. (Trinity) is a religious institution that also operates a preschool and daycare (The Learning Center). The Missouri Department of Natural Resources (DNR) has a grant program that provides funds for recycled tires to resurface playgrounds.

¹⁰⁹ The irony stems from the fact that Justice Sotomayor and Justice Scalia, who died in 2016, represent two opposite ideologies in the Court.

Trinity applied for the program, but the application was denied based on Article I, Section 7 of the Missouri Constitution. According to the statute, "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, section or denomination of religion" (*Trinity Lutheran Church of Columbia, Inc. v. Comer*, 2017). Trinity claimed that the exclusion from the aid program violated the First and the Fourteenth Amendments; in particular, both the Free Exercise Clause and the Equal Protection Clause.

The aid was a neutral and secular program. However, the "compelling" character of the interest of the state for not including religious institutions was questionable. In a 7-2 vote, the Court held that the program violated the Free Exercise Clause of the First Amendment. Chief Justice Roberts, who delivered the opinion of the majority, argued that excluding a religious institution from a public benefit, solely on religious status, violates the Free Exercise Clause. He states that "[T]he Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character" (*Trinity Lutheran Church of Columbia, Inc. v. Comer*, 2017). There are two critical arguments in the *Trinity* decision. The first one is the similarity with *Locke v. Davey* and why the opinion of the Court is different in *Trinity*. The second one is about the footnote in the opinion, which limits the implications of this case for future claims. Justice Gorsuch, in his concurring opinion, stresses the reference in the footnote and argues the further impact of the Court's ruling in *Trinity* (discussed below).

The two cases of *Locke* and *Trinity* are quite similar. As mentioned above, the Court found no violation of the Free Exercise Clause in *Locke*, because Washington's statute does not impose sanctions on any religion out of animus. If we replicate the same argument in *Trinity*, it is difficult to find the animus motivation in Missouri's regulation. However, in order to point out the differences between *Locke* and *Trinity*, Chief Justice Robert states that the fundamental reason of Trinity Lutheran's rejection was its religious status (*Trinity Lutheran Church of Columbia,*

Inc. v. Comer, 2017). In the dissenting opinion, Justice Sotomayor, with whom Justice Ginsburg joins, reemphasizes Justice Scalia's argument in *Locke*, which focused on the view of discrimination.

The second argument was about the footnote in the opinion. Chief Justice Roberts highlights the scope of the decision in the footnote. He declares that the *Trinity* ruling is limited to the area of discrimination occurs with relation to playground resurfacing. Since the Court's ruling in the *Trinity* decision is in contrast with the *Locke* decision, Chief Justice Roberts refrains from the possible interpretation that *Trinity* overrules *Locke*. Instead, he confines the opinion of the Court to a strictly limited jurisdiction. In a concurring opinion, Justice Gorsuch points this out and does not join the majority opinion on this respect. He asserts that the ruling should not be interpreted as confined solely to the claims regarding playground resurfacing. Moreover, he states the following concerns.

Chief Justice Roberts's argument and its critique by Justice Gorsuch, reflect a significant attitude that the Court has been taking consistently since *Boerne*. After the *Boerne* decision, Congress again responded to the Court's latest move by enacting RLUIPA. I argue that the limited scope of RLUIPA paved the way for a period where conflict between the judiciary and legislative is less tense. Since the storm abated in the post-*Borne* period with RLUIPA, consequent decisions made by the Court on RFRA or RLUIPA have not taken any abrupt departures from the Free Exercise jurisdiction based on the *Sherbert* test. However, whenever the Court seems to be making what could be a controversial decision, e.g., deciding differently on an issue that is similar to a previous one, the Court now explicitly limits the scope of its decision with respect to future claims. Limiting adjudication of its decisions to an exceptionally confined case law demonstrates a trepidation of the Court toward future conflict. As discussed above, this approach was apparent in the *Trinity* case; and it will be applied again in the *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) decision, which will be examined at the end of this chapter.

Finally, the fourth category assembles cases that address specific issues connected with the Free Exercise Clause. Here, I examine the following cases in order: *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton* (2002), *Christian Legal Society Chapter v. Martinez* (2010), *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012), and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018).

The *Watchtower* case is about whether or not an ordinance of the Village of Stratton, Ohio places a burden on the free exercise of religion. According to the statute, canvassers are required to get prior permission from the mayor's office if they aim to enter private properties for the sake of promoting an idea (or belief). The petitioners, members of Jehovah's Witnesses, claim that the ordinance violates their free exercise of religion. Initially, the District Court found the ordinance valid because it was content-neutral. Furthermore, the Sixth Circuit affirmed the lower court decision. Finally, the case moved up to the Supreme Court.

In an 8-1 vote, the Court held that the ordinance violated the Free Exercise Clause. Justice Stevens, who delivered the majority opinion, argued that the Court historically protected door-to-door canvassing from governmental restrictions (see *Murdock v. Pennsylvania*, 1943). Additionally, Justice Stevens applied the *Sherbert* test. The state argued that the ordinance was neutral and generally applicable, and it was a response to the concerns of fraud and protection of private property. However, despite the neutrality of the ordinance, the Court did not find the state argument "compelling." Besides, the application process violates the anonymity of the canvassers as well, because the applicant had to disclose certain identifying information.

The *Watchtower* decision muddled the water after the *Boerne* decision. To recall, the *Boerne* decision declared the unconstitutionality of RFRA at the state level. RFRA legislation practically restored the *Sherbert* test after the *Smith* decision. That

is to say, the application of the *Sherbert* test (seeking a "compelling interest" in neutral and generally applicable state legislations) in state legislation became unconstitutional. Yet, the *Watchtower* decision indirectly referred to the *Sherbert* test. Instead of mentioning "neutral and generally applicable" laws, Justice Stevens preferred to use the term "content-neutral". Although the justification of the decision is strongly connected to the *Sherbert* test, there is no mention of the case.

As the argument of this chapter suggests, in the post-*Boerne* era, the Court has seemed to intentionally avoid conflict with Congress, especially after Congress's modest move in enacting RLUIPA. In the *Watchtower* decision, we observe this behavior in the argument of the Court. Instead of bringing back past contentions based on the *Sherbert* Test (in *Sherbert*, *Smith*, *RFRA*, and *Boerne*), as it could have, the Court essentially applies the test without a single reference to the case. But another strong reason to avoid a fight was that in this case, the freedom of religious exercise for canvassers was already established in the *Murdock v. Pennsylvania* (1943) decision; a time well before *Sherbert*. As the opinion states, "for over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering," especially for the members of Jehovah's Witnesses. Reigniting a conflict with Congress over a historically established issue did not produce a "compelling" case for the Court.

As observed in previous discussions, the ECtHR gives room to states for deciding state interference on religious freedom. However, the ECtHR took a stance against state interference with respect to the religious practice of Jehovah's Witnesses that is similar to what is found in the U.S. In the landmark case *Kokkinakis v. Greece* (1993), the ECtHR found that *Greece* had violated the Article 9 rights of *Kokkinakis*, a Jehovah's Witness. In other words, the Greek state's legislative interference was outside the margin of appreciation both deemed appropriate and anticipated by the ECtHR, so the ECtHR assumed jurisdiction.

Despite the different approaches used to address claims regarding the same rights associated with the Free Exercise Clause, similar decisions were reached by both the U.S. Supreme Court and the ECtHR with respect to Jehovah's Witnesses' for these two cases, i.e., *Watchtower* and *Kokkinakis*. Surprisingly, though, both approaches led to decisions that were not necessarily expected. Historical accounts of the Court and the ECtHR suggest that both would have denied their claims. The Court would have rejected the claim based on the *Smith* decision, while the ECtHR would have easily found a "margin of appreciation" shown by the Greek law. These observations emphasize the importance of being able to tailor exemptions to specific claims regarding religious freedom, where both the Court and the ECtHR used different special means to achieve the same effective end.

The second case in the fourth category is *Christian Legal Society Chapter v. Martinez* (2010). The Christian Legal Society Chapter of the University of California, Hastings College of Law (CLS), claimed that the University's Nondiscrimination Policy violated the CLS's First Amendment rights. The University offered the Registered Student Organization (RSO) program that provides several benefits to student groups that are recognized with the program.

However, in order to be recognized, RSOs had to meet certain criteria. One of the requirements was to comply with the Non-Discrimination Policy, which requires recognized student groups to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs" (*Christian Legal Society Chapter v. Martinez*, 2010). The CLS, on the other hand, requires its members to sign a statement that says the following:

I believe in: The Bible as the inspired word of God; The Deity of our Lord, Jesus Christ, God's son; The vicarious death of Jesus Christ for our sins; His bodily resurrection and His personal return; The presence and power of the Holy Spirit in the work of regeneration; [and that] Jesus Christ, God's son, is Lord of my life. (*Christian Legal Society Chapter v. Martinez*, 2010)

The University denied the application of CLS. Accordingly, CLS claimed that the University's Nondiscrimination policy violated its rights under the First and Fourteenth Amendments.

In a 5-4 vote, the Court found no violation of the Free Exercise Clause. Justice Ginsburg, who wrote the majority opinion, held the District Court's ruling that the University "merely" assigned restrictions on the benefits at stake. Justice Ginsburg, furthermore, claimed that the University's requirement "that *all* student groups accept *all* comers is textbook viewpoint neutral" (*Christian Legal Society Chapter v. Martinez*, 2010). Justice Alito, with whom Chief Justice Roberts, Justice Scalia, and Justice Thomas joined in a dissenting opinion, emphasized the further implications of the Court's decision on this case. He stated the following argument for the Court's decision for further claims: "Brushing aside inconvenient precedent, the Court arms public educational institutions with a handy weapon for suppressing the speech of unpopular groups" (*Christian Legal Society Chapter v. Martinez*, 2010). As mentioned before, discussions of the implications of the Court's decisions on future claims have been admitted at various times without the provision of any supporting empirical data. Justice Alito again echoes this type of argument.

The third case of the fourth category is *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012). The petitioner Hosanna-Tabor Evangelical Lutheran Church and School is a member congregation of the Lutheran Church's, Missouri Synod. According to the structure of the organization, the teachers who work in the school are classified into two groups: "called" and "lay". The "called" status is given to the teachers who are "regarded as having been called to their vocation by God through a congregation" (*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 2012). In order to acquire the "called" status, a candidate must have some experience and go through a series of interviews to prove the sincerity of the application. Once it is granted, the status could only be revoked by a supermajority vote of the congregation. The "lay" teachers, on the other hand, are contract-based workers who have their status renewed annually.

Respondent Cheryl Perich, who began her teaching career under the "lay" status and later progressed to the "called" status, had to go on temporary disability leave due to her diagnosis of narcolepsy. After spending a year on disability, Ms. Perich gave notice to the Church that she was, with her doctor's approval, again eligible to return to work. However, Hosanna-Tabor denied her application to return to work. Despite knowing that the Church denied her return, Ms. Perich went back to the school to teach, which caused disputes over the rights of the Church. Moreover, the Church canceled her "called" status and fired her.

The Church alleged that Ms. Perich's insistent behavior and threats of legal action against the Principal, formed the grounds for her termination. In the termination letter given to Ms. Perich, the Church stated that her "insubordination and disruptive behavior" on that day damaged the "working relationship" she had with the school administration (*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 2012). The Equal Employment Opportunity Commission (EEOC) claimed that the Church's decision to terminate Ms. Perich's status violated the Americans with Disabilities Act of 1990. Hosanna-Tabor, on the other hand, claimed that their action was sanctioned by doctrine known as the "ministerial exception". According to "ministerial exception", if there is an employer-employee dispute between a religious institution and its ministers, civil laws do not apply to this type of situation because the "ministerial exception" protects the relationship between a religious institution and its ministers. In other words, the "ministerial exception" gives religious institutions immunity from civil law when choosing their ministers.

In a unanimous decision, the Court found that the relationship between Hosanna-Tabor and Ms. Perich was within the understanding of the "ministerial exception". Chief Justice John Roberts, who delivered the opinion of the court, stated that Ms. Perich was a minister in the *Hosanna-Tabor* case because her duties included

teaching religious subjects¹¹⁰. Although Ms. Perich claimed that her status was not a ministerial one, the arguments presented by the Church seemed convincing to the justices of the Court. Ms. Perich studied for six years to obtain the "called" status. Once she gained that status, she used various financial programs for financial benefit, self-identifying as a "minister".

In addition to the "ministerial exception" granted to religious institutions by the Free Exercise Clause, Chief Justice Roberts also pointed out the argument that ministerial protections provided by the Establishment Clause. He asserted that state governments are not allowed to interfere with who will serve as a minister. Such interference would be qualified as a violation of the Establishment Clause. As emphasized, the "ministerial exception" is not only protected by the Free Exercise Clause but also by the Establishment Clause. The interplay between the two clauses, which was discussed in the previous chapter, sheds light on the argument of this decision.

When it comes to the argument of further implications of the decision, the claimant points out that the Court's decision would be "a parade of horrors that will follow our recognition of a ministerial exception to employment discrimination suits" (*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 2012). The EEOC asserted that granting the "ministerial exception" to Hosanna-Tabor could give religious organizations a shield against labor claims that require liability for unlawful actions. Although a case for the "ministerial exception" was not a novel idea, EEOC and the opposition showed concerns about the danger of the Court's decision, which could provide immunity to religious institutions. Whether Ms. Perich is a minister or not was the central discussion of the Court in order to determine whether in this case the "ministerial exception" applied. However, the objections of EEOC omitted the historical approach for such claims. They pointed

¹¹⁰ According to Ms. Perich, her duties as a titled "Minister of Religion, Commissioned," and therefore under the "called" status, were teaching based on religion convictions.

out the danger which the decision of the Court could bring if it lacked all support from an empirical study¹¹¹.

Finally, the last case of the fourth category is *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018). In July 2012, sometime before the landmark decisions on same-sex marriage¹¹², Charlie Craig and David Mullins requested a cake for their wedding from Jack C. Phillips, owner of the Masterpiece Cakeshop, in Lakewood, CO. Phillips refused to design a cake for Craig's and Mullins' same-sex marriage because of his religious belief. Craig and Mullins filed a claim with the Colorado Civil Rights Commission (Commission) arguing that Phillips' refusal to decorate a cake for their wedding violated the Colorado Anti-Discrimination Act (CADA), which forbids discrimination based on sexual orientation. The commission agreed that Phillips was in violation of CADA. Furthermore, the Colorado Court of Appeals subsequently affirmed the Commission's ruling.

Phillips claimed that the decision of the Appellate court violated the Free Speech and Free Exercise Clauses of the First Amendment. In a 7-2 vote, the Court reversed the Appellate court's decision and held that the Commission's conduct in evaluating Phillips's arguments violated the Free Exercise Clause. In other words, the Court's ruling did not find that the decision of the Appellate court violated the Free Exercise Clause. Yet, during the investigation of the case in the Commission, the way that Phillips's reasons were evaluated did violate the Free Exercise Clause.

Justice Kennedy, who delivered the majority opinion of the Court, declared that the Commission's actions during the examination of the case demonstrated an

¹¹¹ Although ECtHR had similar cases on the defense of the "ministerial exception", the rulings based on Article 8 of ECHR, which guarantees the right to respect for private life (see *Obst v. Germany*, 2010; *Schüth v. Germany*, 2010).

¹¹² See *United States v. Windsor* (2013) and *Obergefell v. Hodges* (2015). In this regard, Justice Kennedy emphasized the fact that by the time the event happened in 2012, and the *Masterpiece* case came before the Court (2017), legal rights for same-sex marriage law in the country has changed.

aggressive and hostile approach toward Philip's religious beliefs. Justice Kennedy states the following for this argument. Because of the lack of neutral treatment stated above, the Court found that the Commission's actions violated the Free Exercise Clause. On the other hand, Justice Ginsburg, who was joined by Justice Sotomayor, delivered a dissenting opinion. Justice Ginsburg claimed that the Commission's remarks do not qualify for disparate treatment for the justification of Philip's anti-gay stance.

The decision of the Court did not answer whether the denial of designing a cake for same-sex marriage because of religious belief violated the Colorado Anti-Discrimination Act. Also, the Court did not rule in favor of the owner of the cake shop, which would have affirmed that compelling him to design a cake would have violated his religious freedom, as protected by the Free Exercise Clause. It can be argued that the Court did not want to address a sensitive issue that would have required an interpretation of jurisdiction¹¹³. Since legal rights for same-sex marriage have just recently been established in the United States, examination of how such rights reflect on laws throughout the country will need to occur, along with, most probably, an interpretation of Constitutional rights. Yet, the Court refrained from making any bold decision. In a narrowly written opinion, judgment for such claims would be deferred for later (Bravin, 2018).

As many of the Court's decisions have demonstrated, in this and the previous chapter, when the Court has delivered a ruling on a landmark issue, it has first taken a cue from Congress. Without such a prompt from Congress, the Court has not delivered any landmark decisions concerning the Free Exercise Clause. In this sense, while the *Masterpiece* case could have become a landmark case for religious freedom, the Court instead decided to postpone the issue for another day. Why? The reason, I believe, was the hectic political environment during that time. Since the

¹¹³ From a different perspective, Phipps (2019) analyzes the outcomes of RFRA and the Court's cases, specifically *Masterpiece Cakeshop*, and how they affect the accommodation of religious belief in workplaces.

2016 election, in which Donald J. Trump became president, politics in the United States became much more polarized¹¹⁴. Despite the Republican Party having control of both houses of the Congress, it was not a "suitable" period for the Court to issue a landmark decision.



¹¹⁴ According to Jones (2020), who analyzed the Gallup polls between 1945 and 2020, President Trump's approval rates demonstrates clear rift, which is a clear indication of higher political polarization in the United States.

CONCLUSION FOR PART III

The theoretical argument of this dissertation (Part II) suggests that Pettit's theory of republican freedom as non-domination has a significant fault line. Pettit's emphasis on the necessity for contestation institutions for securing republican freedom as non-domination unveiled the fault line of his theory. The idea of positioning contestation institutions such that they are isolated from democratically controlled political branches, in practice diminishes the applicability of republican freedom. In this part (Part III), I examined the theoretical propositions of Pettit's republican conception of freedom from the perspective of judicial practices in the United States. Studying the claims of religious minorities with regard to the Free Exercise Clause of the First Amendment provides a reasonable ground for the case study for two reasons. The first reason is that cases making their way to the United States Supreme Court regarding the Free Exercise Clause are usually concerned with the claims of religious minorities. The demand for the free exercise of religion in the United States has always been thought to be one of the founding principles of the Constitution. Yet, the historical account of the Clause indicated that the free exercise of religion has always been intertwined with the political branches of the government, i.e., Congress and the Presidency. The second reason is that the U. S. Supreme Court fits the profile of a contestation institution envisaged by Pettit, especially concerning its role of judicial review (Section 5.2).

What does the case study provide for the test of the theoretical argument of this thesis? The historical account of the Free Exercise Clause (Chapter 6) demonstrated that there is a close relationship between the Court's decisions and politics. Merely indicating a relationship between the judiciary and politics is not a sufficient argument for the theoretical critique of Pettit's proposal. However, presenting a historical account that demonstrates how the Court's decisions have been intertwined with politics is a compelling one.

The claims of religious minorities with respect to the Free Exercise Clause of the First Amendment began in 1879. The Court returned to the belief-and-action distinction with the *Reynolds* decision in 1879. After a long break, the Court applied in 1940 the Incorporation Doctrine to the Free Exercise Clause with the *Cantwell* decision, which bound the states as well to the Clause. In *Sherbert*, the Court delivered its first controversial decision concerning the Clause. *Sherbert* became a landmark decision, as it applied strict scrutiny for neutral and generally applicable laws that burden the free exercise of religion. Since *Sherbert*, the justification arguments presented by the Court in its delivered opinions on similar claims have always been intertwined with politics. The historical account of that relationship provided us with abundant evidence (Chapter 6).

The intertwined character of the relationship between the Court's opinion and politics, especially with respect to Congress, reached its zenith in 1990 with the *Smith* decision. In a controversial decision, the Court removed the *Sherbert* test from the Free Exercise jurisdiction and rendered the claims of religious minorities vulnerable to political majorities. Although Justice Scalia's "incidental effect" argument reminded us of Pettit's tough-luck discussion (Chapter 4.3), the political aspect of the Court's decision and the resulting back-and-forth conflict with Congress unveiled the intertwined character of the Court's opinions with politics. First, Congress attempted to "correct" the Court's *Smith* ruling with RFRA legislation in 1993, and then the Court limited the jurisdiction of RFRA in 1997 to only include federal statutes. Finally, Congress offered relatively modest and limited relief to religious minorities with RLUIPA in 2000. It would be naive to state that the Court has been protecting religious minorities against majoritarian political power by deciding the claims in a "depoliticized" fashion. For this reason, the comprehensive historical analysis of this conflict, the arguments presented in the Court's opinions, and a description of how these decisions have reflected on the political domain, all combine to demonstrate the limits and contingencies of republican freedom as non-domination in practice.

The analysis in Chapter 6 demonstrated the Court's intertwined relationship with politics in cases concerning the Free Exercise Clause. What about the relationship in a broader context? Although each topic would require another study, Bruce Ackerman proposed an argument in his seminal work, *We the People* (1998). He discusses how in order to maintain its longevity; the Court has always been adapting itself to new political environments. It was the Court's ability to adapt to new political situations that provided constitutional durability in the United States (Ackerman, 1998).

Ackerman points out three periods where "*the People*" of the United States needed to unconventionally adapt to a new era: during the 1780s, 1860s, and 1930s. The adaptation in the 1780s concerned ratifying the Constitution of the United States. The Framers did not play by the established rules when ratifying the Constitution, as the existing Articles of Confederation made no accommodation for such change or amendment. The adaptation in the 1860s was about the post-Civil War Era. The reconstruction of the Union after the Civil War had reached a deadlock due to the reluctance of the Southern States to amend the Constitution. Ackerman claims there were five stages to that period, the net result leading to unconventional transformation. First, there were impasses between Congress and the President in terms of who represented "*We, the People*". The second stage was when republicans claimed a mandate for the 14th Amendment, while conservatives denied that the *People* had spoken. This was followed by stage 3, with an attack on dissenting institutions and enactment of the reconstruction. Stage 3 was concluded with the impeachment of President Andrew Johnson, who represented the conservatives. Ackerman states that "During this period, Congress claimed a popular mandate to destroy the autonomy of any institution that opposed the legitimation of the 14th amendment: the southern governments, the presidency, and the Supreme Court" (1998, p. 20). The fourth stage was when the President decided to accept Congress's authority to effectively annul the veto power of the Southern States with respect to amendments, as provided by Article 5 of the Constitution. Article 5 allows for the proposal of amendments by either a two-thirds vote of

Congress, or a special convention called for by two-thirds of the state legislatures. Finally, the fifth stage was the consolidating election in 1868, which was the first election of the Reconstruction Era. Here, Republican nominee Ulysses S. Grant defeated Horatio Seymour of the Democratic Party. During stage 3, i.e., the start of the Reconstruction Era, the Court resisted the Constitutional amendments being proposed by Congress. However, with Congress appropriating its mandate from the *People*, Congress ratifying amendments and the consolidating election of 1868, the Court had no choice but to adapt to the new period.

Ackerman's identifications above lead to a general five-stage approach for adapting to new periods as follows: 1) constitutional impasse, 2) electoral mandate, 3) a challenge to dissenting institutions, 4) switch in time and 5) consolidating elections (1998, p. 20).

This five-step transformation replicated itself during the 1930s with the New Deal. It happened as follows: 1) The Court struck down New Deal legislations proposed by Roosevelt. 2) The President assumed the mandate from *the People* in the election of 1936, which was a landslide victory for the President and Congress. 3) The President assaulted the dissenting institution, the Court, by threatening it with court-packing. 4) The Court made a "switch in time" and supported the fundamental New Deal legislations. 5) Roosevelt's unprecedented third term victory again left the Court with no other choice but to adapt to the new political environment and go along with the politics (Ackerman, 1998, pp. 24-25).

The case studies presented in Part 3 of this thesis can be considered to be offshoots of Ackerman's argument above. The adaptation of the Court during critical times of American history provides compelling support for the critique of Pettit's theory. In other words, when push comes to shove, i.e., when the political actors do not respect the "depoliticized" judicial review of the court, the highest judicial institution will follow the direction of politics. The historical account of the Free Exercise Clause, beginning with the *Sherbert* decision in 1963 and reaching the

relative equilibrium in the *Boerne* decision in 1997, draws a picture that shows just how intertwined with politics the Court's rulings have been. In order to adjust to the new context and respond to emerging claims throughout this period, as Berg pointed out, the Court “made dramatic shifts in positions on the protection of religiously motivated conduct” (2008a, p. 57).

Since the conflict between the Court and Congress abated in the post-*Boerne* period, both sides have been reluctant to ignite the debate again. From the Court's perspective, analysis of the cases in the post-*Boerne* period indicate that the Court has refrained from bringing back the *Smith* approach with regard to the Free Exercise Clause jurisdiction. Even when some cases urged the Court to re-establish the Free Exercise Clause jurisdiction, as in *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017) and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018), due to the fear of backlash in a more polarized political environment, the Court delivered decisions that were limited to specific situations only. From Congress's perspective, the unsuccessful attempt to reinstate the *Sherbert* test in 1993 by RFRA taught them a lesson. Instead of "responding" more generally to the Court's decision, as it did after the *Smith* case, Congress attempted to offer a more applicable remedy tailored to the needs of religious minorities, i.e., RLUIPA. In addition to Congress's workable solution despite its limited scope, states also individually enacted mini-RFRA legislations. While RFRA remained in effect at the federal level, leaving the issue in the hands of state governments for implementation at their level has seemed to provide appropriate relief.

As a final note to demonstrate the ongoing conversation between the Court and Congress regarding the Free Exercise jurisdiction, Democratic members of Congress have proposed an amendment to RFRA, in the form of the *Do No Harm Act*. The idea behind *Do No Harm* is to give protection to other civil rights when they are impinged upon by claims of religious freedom. One of the supporting Senators of the Act, Sen. Mazie Hirono (D-Hawaii), stated that "While our country was founded on the value of religious liberty, that freedom cannot come at the expense of others' civil rights" (Cited in Zauzmer, 2018).=

Although the Democratic Party gained control of the House in 2018 following the midterm elections, Congress has not enacted the *Do No Harm Act*. Even if it passes the House, it will likely be denied in the Republican controlled Senate. Time has a way of not standing still, even if concrete progress is not being made. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018), the Court had a chance to offer its own interpretation of the issue that *Do No Harm* aims to shape. As discussed in Chapter 6.6, the Court deferred such a bold move to another day.



CONCLUSION

This dissertation, as with any study in political theory, aims to study a specific concept within a particular context. The endeavor itself can be followed by using an analogy: that of a magnifying glass for looking up close at some phenomenon¹¹⁵. Following this analogy, the context of this dissertation is the Court's rulings on claims regarding the Free Exercise Clause. With each case I looked at the same phenomenon except from a different perspective, as I held the "magnifying glass" and moved it around. But not all magnifying glasses are the same; they have different shapes, where each shape allows a different focus or contextual framework of consideration. While my lens was freedom, its focus was republican freedom as non-domination. It is through that lens, and with that focus, that I studied the cases quoted.

The goal of Parts I and Part II for this dissertation was to design the lens with my particular focus in mind. For this reason, before creating the lens itself, it was necessary to determine its shape; by that I mean the contextual framework. Part I offered a coherent storyline that contained four fundamental commitments of republican thought: the master-slave dichotomy, the importance of the rule of law to preserve liberty, the concept of arbitrary power, and the role of civic citizenship. These thematic discussions determined the outward periphery of the more general lens (the concept of republican freedom) because, although such principles were not shared by all, the general argument of republican freedom has been shaped by these themes. Developing a coherent storyline that included the contributions of all was meaningful, because it paved the way for a more comprehensive understanding of republican freedom, particularly when discussing its limits in practice.

Furthermore, Part I also included the contributions of Benjamin Constant and Isaiah Berlin. Even though they constructed the liberal conception of liberty (i.e., negative

¹¹⁵ For the metaphor of magnifying glass as observing political concepts in a specific context, I am indebted to Prof. Dr. Murat Borovalı, who mentioned it once during a lecture.

freedom as the absence of interference, as opposed to positive freedom as self-mastery), Skinner and Pettit benefited from their approaches when forming their third alternative conception of liberty. It was important to point out the relationship between republican freedom and negative freedom because many critics begin their defense of the liberal conception of freedom, and thus their criticism of republican freedom, through a critique that presents positive freedom and its ideal of political participation as beneficial. Because the republican idea of political participation is concerned with a consequential goal, rather than with valuing participation as an end in itself, it is good to both acknowledge and accept this distinction. Finally, another worthy aspect provided by Berlin and Constant was their particular understanding of freedom as a negative concept. They understood the negative conception of freedom to be simply the absence of interference. On the other hand, Skinner and Pettit took Berlin and Constant's understanding of negative freedom and turned it into a new concept by replacing interference respectively with dependence (Skinner) and dominance (Pettit). In other words, and different fundamentally from the way it was presented by liberal thinkers, republican theory now attached the condition of arbitrariness to the act of interference.

As I already said, the above discussions in Part I make up the outer—and thinner—portion of the lens, as it first begins to assemble different background thoughts that will be helpful to the reader. Part II then provides the arguments that produce the more substantial center and focus of the lens itself. As stated above, my “lens” is freedom, while the focus is on the republican conception of freedom. Pettit calls the concept “republican freedom as non-domination.” His theory of republican government, of which freedom as non-domination is a development, relies heavily upon “proper” functioning of the contestation institutions. I believe a fault line of Pettit's republican liberty is exposed when one considers the faith he places in contestation institutions to function properly. Pettit refers to those institutions as “professionally informed bodies that are not exposed to the glare and the pressure of public debate and [their] responses must be determined in a depoliticized way” (2002b, p. 197). In other words, if contestation institutions seem to be the last resort

for protecting the freedom of minorities, then the risk of expecting those institutions to respond to such claims "in a depoliticized way" gives rise to the assumption that judicial institutions act in a depoliticized domain.

Just as Parts I and II formed the magnifying glass in my analogy, Part III provides the subjects under study. Here I introduce court cases which rule on claims of religious minorities concerning the Free Exercise Clause. I then use my magnifying glass, the lens of republican freedom, to look at these cases with a focus on freedom as non-domination. In a general sense, the historical account of the Free Exercise Clause (Chapter 6) displayed concrete indications of the relationship between the Court's decisions and politics. However, merely indicating a relationship between the judiciary and politics would not have been sufficient material on which to base my theoretical critique of Pettit's proposal. Part III went on to examine that relationship and found that the Court's decisions were not only related to, but intertwined with politics, especially with respect to the United States Congress. My comprehensive examination of the Court's opinions on the claims of religious minorities noted that the Court, as a contestation institution, has a minimal capacity to practice the power of judicial review in a "depoliticized" way. In addition, reading the Court's decisions from the perspective of republican freedom highlighted some discussions that referred to other concepts proposed by Pettit, such as the "incidental effect" argument which came up in the landmark *Smith* decision. As the backlash of the judgment accurately exposed, the *Smith* decision did not end the debate. Counter to what Pettit theorized, the respondents of the claim did not accept the ruling as a case of tough-luck, i.e., the incidental effect. In fact, *Smith* started a new phase of conflict between Congress and the Court that lasted throughout the 1990s.

The analogy of a magnifying glass not only applies to what and how we see, but also to what we do *not* see. When using a magnifying glass to analyze a phenomenon, one's attention concentrates upon the details provided within the limits of the lens. What is missing or still a bit blurred could be another point of

interest to a researcher who might be interested in a better understanding. Accordingly, before concluding my thesis, I would like to mention one of such “missing items” that caught my eye. However, due to my particular focus, i.e., the objective of my particular argument, not enough conceptual evidence can be brought into view to allow for it to be fully reasoned and understood. I am referring to the concept of the common good.

As explained in Part I, republican thinkers dealt with four thematic discussions that shaped the idea of the republican conception of freedom. However, there is a fifth but less clear concept that could also be considered, and which is the common good. Despite its pivotal role in establishing and maintaining republican freedom, the questions of how to identify and maintain the common good have not been fully answered explicitly before. To end my thesis with an eye on the future, I attempt to highlight now the references to the concept of the common good in republican literature. In this way I would like to set the stage, and suggest that further study of this concept would be significant in order to understand the limits of republican freedom in practice.

The idea of “common good” is referenced in various related concepts, such as “common interest” and “commonwealth” or *res publica*. They all address more or less the same goal: individuals, as citizens of the republic, share something in common that holds them together¹¹⁶. For instance, Machiavelli, in the following quote, emphasized the direct correlation between the greatness of Rome and the need to promote the common good (1979, p. 175).

In addition to Machiavelli, whose contributions are pivotal in republican thought, T. H. Green (2007) also argued how the free exercise of rights is dependent upon

¹¹⁶ For the essential condition of the common good for republicanism, Kramer states that “[y]et, while sharing a negative conception of freedom with present-day theorists, the civic republican writers ostensibly differed from those theorists in setting great store by the common good—because the civic republicans unflinchingly understood that the promotion of the common good is a *sine qua non* for the preservation of individual liberty” (2003, p. 105).

individuals, who despite their own personal needs, will at least minimally contribute to the idea “good” as something commonly shared with others. He wrote, "It is the presumption that a man in his general course of conduct will of his own motion have respect to the common good, which entitles him to rights at the hands of the community" (2007, p. 31). In addition, both Skinner and Viroli also pointed out the core value of the common good in republican thought. Skinner (2003) noted this distinct understanding of good to be present in republicanism, but not necessarily in the liberal understanding of the concept. In republican thought, the willingness to sacrifice personal good or interest should be a voluntary act that people aspire to. Instead of solely pursuing personal interest, individuals as citizens of the republic should also be looking for ways to contribute to the common good. Viroli (1995), also highlights the importance of the common good in defining patriotism, a value which plays a significant role in republicanism, particularly in the eyes of Machiavelli. Viroli states, "the republican way of common freedom that makes men virtuous, who are able to see their interests as parts of the common good, basically means patriotism in Machiavelli's writings" (1995, p. 31). In this respect, Taylor (1989) also argues that patriotism can only be understood as something commonly shared. Taylor states that citizens are not "dedicated to defending the liberty of just anyone, but I feel the bond of solidarity with my compatriots in our common enterprise" (1989, p. 166)¹¹⁷.

In addition to republican thinkers, liberal thinkers, as part of their critiques of republicanism, also noted the importance of the common good in republican thought. For example, Constant (2011) associated the common good with the liberty of ancients, because the liberty of ancients was conceived as something to share with others. Similarly, Berlin (1969) furthered the objection of Constant by claiming that when liberty becomes a communal ideal, it loses its essence. Berlin argues that understanding liberty to be a communal ideal is antagonistic to the value of liberty itself (1969, p. 158).

¹¹⁷ In relation to the American context, Berg (2008) notes that the weight ascribed by the Framers to the role of religion is connected to the promotion of the common good.

In other words, while the republican thinkers valued the idea of the common good as a necessary condition toward establishing political unity, thus as an ideal that promotes republican freedom, liberal thinkers objected to the understanding of freedom as something to be shared with others. The main difference stems from the definition of two distinct conceptions of freedom. The liberal conception of freedom is freedom from interference. From this definitional standpoint, freedom is not something that is socially shared or socially promoted. Republican freedom, on the other hand, defines freedom as non-domination. While it is an absence of something, in order to achieve non-domination, being active in politics is still a necessary condition. For this reason, it requires people interacting with one another and people pursuing together a goal toward a desired common end. As discussed in Part I, the republican conception of freedom takes the exercise aspect of positive freedom and benefits from it as a consequential idea, rather than from solely exercising politics for its own sake.

Pettit also recognizes the primary importance of the common good for republican freedom and refers to the concept regularly¹¹⁸. In his theory of republican government, in which republican freedom as non-domination could be attained, the state is "forced to track the common good" (2004b, p. 150) via the constitutional constraints "designed to further certain public ends" (2002b, p. 173). Pettit explicitly stresses the pivotal importance of promoting the common good in protecting freedom as non-domination. In contrast to the liberal conception of freedom, Pettit argues that interference could be non-dominating, if it is authorized in a way that is non-arbitrary. For this reason, constitutional constraints (republican institutions) and civic citizenship, even if conceived as consequential, are the principal means to promote the common good.

¹¹⁸ Pettit defines the cooperatively avowable considerations as follows: "They are considerations such that were the populations holding discussions about what it ought to cooperate in collectively providing, then they could not be dismissed as irrelevant" (2000, p. 108).

Pettit's defense of institutional approach to promote common good has two sides. The first is the negative side. Pettit states that the personal interests of the state officials should be avoided by "a regiment of separate powers, checks and balances, rotation in office, and limitation of tenure, the rule of law, and other devices" (2005, p. 198-99). The second is the positive side. This side is about constraining them by "the requirements of publicity, discussions, justifications, and election, and by the invigilation of an active, contestatory, even mistrustful citizenry" (p. 1999).

How do we identify common interests? Pettit advocates that deliberative public discussion and institutional settings of electoral democracy are facilitating means of republican government that identify common interests (2004b). However, in such a political system, the danger of tyranny from the majority and/or the elite is still credible. In response to this threat, Pettit asks and answers the following question: How is the common good promoted? Pettit advocates the function of contestatory institutions in the republican government. Since contestation institutions only serve *after* a public decision or law is determined, their role is similar to an insurance policy. The facilitating institutions for such functions include "courts of law, administrative appeals tribunals, and ombudsman arrangements" (Pettit, 2004b, p. 167).

In response to how the common good is promoted, the above argument suggests that Pettit offers a judicial means. To recall, Pettit offered the same solution to the threat of domination of religious minorities, which is the case study of this dissertation. Examination of the U. S. Supreme Court decisions regarding the Free Exercise Clause (Part III) demonstrated that the Court's power of judicial review in securing the constitutional protections could not be applied in a way that is isolated from the politics. Analysis of the Court's rulings on the Free Exercise Clause pointed out the intertwining relationship of the Court with politics, particularly with the legislative branch of the government.

If judicial means are not able to promote the common good, then what other means might there be? Marci Hamilton, who argued the case for the petitioner in *City of Boerne v. Flores* (1997), claims that courts do not have the capacity to identify and promote the common good. On the other hand, the legislative branch of the government, i.e., Congress, has access to means for assessing the common good. For example, Congress has the ability to investigate issues that are of concern to its constituents through the use of different committees and subcommittees (Hamilton, 2005). Because of their institutional setting, courts are reluctant to engage with public opinion. Similarly, because of their political setting, members of Congress are always ready to engage the court of public opinion, as they are periodically held accountable to their constituents through periodic elections.

Similar to the above argument of Hamilton, Richard Bellamy also advocates the role of political means in promoting the common good in his book *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy* (2010). He claims that "the democratic process is more legitimate than the judicial process at resolving disagreements" (2010, p. 4). He proposes a compelling argument about the limits of legal constitutionalism in resolving minority claims. He states that when the members of the courts, for instance, the Supreme Court justices, "typically resolve their not uncommon disagreements by the very democratic procedures they claim to supersede" (2010, p. 166). In other words, the decisions of the Court are usually ones decided by the majority. For this reason, Bellamy claims that the decision made by the Court can be arbitrary and dominating. Although Pettit and Bellamy agree on the functionality of the political means, such as electoral arrangement, ombudsman, an independent judiciary with power of review, Pettit asserts that they differ on who will have the last word for making decisions for disagreements: the judicial or the legislative (2016, p. 700). Finally, in this respect, Bellamy still advocates for "weak" judicial review, which is

"consistent with the legislature remaining sovereign" (2006, p. 676) because it offers better solutions than "strong" judicial review¹¹⁹.

Following the discussion above, one can claim that the timeless question in the history of political thought is about whether the legislative or the judiciary branch has a greater legitimacy to promote the common good. Is it the judiciary as Pettit's theory of contestatory democracy asserts, or the legislative as Bellamy proposes? My answer to this fundamental question is conditional. Instead of offering a universal proposition that applies to all different situations, I believe that the answer to the question above depends on the historical and political context. For instance, judicial institutions could offer durable solutions to the claims of minorities and promote the common good when they have the capacity to isolate themselves from political discussions. However, as the study of this dissertation pointed out, such a condition is challenging to attain in the United States.

Nevertheless, because the legislative branch (Congress) in the United States functions properly by using various mechanisms vested in the political system, defending the legitimacy of the legislative branch against the judiciary has solid grounds. Such claims would not have been compelling in a context where the legislative branch does not have the political power to check the executive branch of government. For instance, in the last decade, the legislative branch in Turkey has been subordinated to the power of the executive branch. Hence, it has lost its capability to check the government's abuses of power. In such a case, it could be logical to expect the judicial branch to offer remedies and to promote the common good when the legislative branch fails to do so. However, even if we assume that both branches have the same legitimate position, I believe that the legislative branch has more capacity to promote the common good. The main reason is that the decision-making process is more inclusive than any contestation. Properly functioning legislative branch enables different parties to raise their voices and

¹¹⁹ For the argument of "weak" and "strong" judicial review, see Waldron (2006)

promotes deliberation before any decision is made. The deliberative process of decision making, which includes interaction between different parties, provides a chance not only to raise one's own voice but also to hear the other side. On the other hand, the judicial process refrains itself from public opinion and aims to make decisions in an isolated manner. Since it decreases the interaction between the parties in society, it has a limited capacity to enhance the togetherness, hence also to enhance the idea of the common good.

Finally, I attempt to conclude this part by discussing another concept, which, I argue, paves the way for a better understanding of the role of the common good: friendship. As discussed above, republican thinkers sporadically refer to the concept of the common good. My provisional argument as to why the republican thinkers I studied did not adopt this concept as one of the core values of republican theory, is that it is a difficult one to identify and promote. For this reason, republican thinkers referred to the concept of the common good only as a last resort, particularly when arguments about how to protect republican liberty seemed to reach a deadlock. It is at such a point that I believe the notion of friendship could help facilitate an understanding of the role of the common good in republican freedom. In this respect, the analysis of Aristotle's *The Nicomachean Ethics* (2009) is enlightening.

Aristotle considers three different types of friendship: those based on utility (1156a10), the ones based on pleasure (1156a10), and the perfect friendship (1156b5). The friendships based on either utility or pleasure are superficial, commercially minded (1158a20), and ephemeral (1156a15). They depend on the callous feelings of people, where even bad people of character could be friends, based on those two types of friendships. In other words, those who love others for their utility, do so in seeking what is good for themselves (1156a15). On the other hand, the friendship based on goodness of character is the best and the most enduring one. Aristotle stresses that it is even permanent (1156b20), as two friends love each other not because they benefit from one another, but because their friendship is the friendship of men who are good and alike in virtue (1156b5). He

also asserts that people cannot live together, if they are not pleasant and do not enjoy the same things, as friends who are companions seem to do (1157b20).

In general, Aristotle in *The Nicomachean Ethics* depicts not only a well-regulated and functioning *polis* but also happy citizens as part of it. However, this should not be misinterpreted as romantic optimism. The last three chapters of the book suggest that happiness is not a private affair of individuals, but rather a reflection of citizens' duties in a *polis* that is based on fulfilling these duties by living the aspired virtues in one's day to day life. Living as a virtuous man, hence as a good man, could be part of Aristotle's grandiose idea of friendship between virtuous men in the *polis*, as a result, again, of a person's excellence. The relationship between two virtuous and good men could easily be managed through the ideal network within the *polis*: friendship. On the other hand, if the relationship between men, in other words, the bonding mechanism of the subjects of the *polis*, is not based on the right and noble form of friendship, then their relationship would be based on utility and pleasure; qualities which generally do not have the capacity to sustain the existence of the *polis*.

If we conceive *The Nicomachean Ethics* without the two books on friendship (Book VIII and IX), it is relatively non-realistic in comparison to the work as a whole. That is to say, without the books on friendship the entire book cannot be applied to the current state of politics in Greek *polis*. Just as today's republican thinkers use the concept of the common good whenever republican theory becomes inapplicable, similarly, I believe, Aristotle added the argument of friendship to his theory of a well-regulated and functioning *polis* in order to turn that theory into a workable hypothesis.

The theoretical discussions of republican freedom offer a compelling yet ostensible explanation for the case of the religious freedom of minorities. A case study on the Court's rulings concerning the claims of religious minorities in the United States has revealed something unexpected with respect to supporting this specific theory

of republican freedom. Returning to the analogy, the analysis of the Court's decisions regarding the Free Exercise Clause highlighted a crack in the lens which caused our vision to blur instead of helping to make it clearer, when the case study was applied to the theory of republican freedom. I believe that a new “lens”, one which includes the study of the common good or friendship, would help correct that blur, and make the vision more defined and precise.



REFERENCES

Ackerman, A. 1998, *We the People*, The Belknap Press of Harvard University Press, Massachusetts.

Adamczyk, A. Wybraniec, J., & Finke, R. 2004, “Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA”, *Journal of Church and State*, Spring 2004, 46, 2, pp. 237-262.

Arendt, H. 1993, “What Is Freedom?” in *Between Past and Future: Eight Exercises in Political Thought*, H. Arendt, Penguin Books, New York.

Aristotle, 2009, *The Nicomachean Ethics*, Oxford University Press, Oxford.

Arlow, R., & Adam, W. 2011, *Obst v Germany; Schüth v Germany: European Court of Human Rights: September 2010 Employment – dismissal – church doctrine – Article 8. Ecclesiastical Law Journal*, 13(1), pp. 126-127.

Arnold, C. A. 1997, “Religious Freedom and a Civil Rights Struggle”, *Nexus Journal of Opinion*, 2, p. 149.

Barnard, F. M. 1997, “Review of Review of *For Love of Country: An Essay on Patriotism and Nationalism*, by M. Viroli”, *Review of Politics*, 59(1), pp. 141–143.

Baron, H. 1955, *Crisis of the Early Italian Renaissance*, Princeton University Press, Princeton, NJ.

Bellamy, R. 2019, “The republican core of the case for judicial review: A reply to Tom Hickey, Why political constitutionalism requires equality of power and weak review”, *International Journal of Constitutional Law*, Volume 17, Issue 1, January 2019, pp. 317–328.

Bellamy, R. 2010, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy*, Cambridge University Press, Cambridge.

Bellamy, R. 2011, “Political constitutionalism and the Human Rights Act”,

International Journal of Constitutional Law, Volume 9, Issue 1, January 2011, pp. 86–111.

Bellamy, R. 2013, Democracy as Public Law: The Case of Constitutional Rights, *German Law Journal*, 14(8), pp. 1017-1037.

Bellamy, R. 2016, Which Republicanism, Whose Freedom? *Political Theory*, 44(5), pp. 669–678.

Bentham, J. 2007, “Of Laws in General” in I. Carter, M. Kramer & H. Steiner (eds.) *Freedom: A Philosophical Anthology*, Blackwell Publishing.

Berg, T. 1994, "What Hath Congress Wrought? an Interpretative Guide to the Religious Freedom Restoration Act." *Villanova Law Review*, 39: 1.

Berg, T. 2008a, “Introductory Essay” In Berg (ed), *The Free Exercise of Religion Clause*, Prometheus Books, New York, pp. 17-33.

Berg, T. 2008b “Defining Religion” In Berg (ed), *The Free Exercise of Religion Clause*, Prometheus Books, New York, pp. 49-56.

Berg, T. 2008c, “Editor’s Introduction: Supreme Court Rulings on Legislative Accommodations and the Establishment Clause” In Berg (ed), *The Free Exercise of Religion Clause*, Prometheus Books, New York, pp. 49-56.

Berg, T. 2008d, “The New Attacks on Religious Freedom Legislative, and Why They Are Wrong” In Berg (ed) *The Free Exercise of Religion Clause*, Prometheus Books, New York, pp. 226-231.

Berlin, I. 1969, “Two Concepts of Liberty”, in *Four Essays on Liberty*, I. Berlin, Oxford University Press, London.

Berlin, I. 1978, “From Hope and Fear Set Free”, in I. Berlin, *Concepts and Categories. Philosophical Essays*, ed. H. Hardy, London: Hogarth Press; Oxford: Oxford University Press.

Bickel A. 1962, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Indianapolis: Bobbs-Merrill

Biro, A. 1997, 'Review of Review of The Legacy of Rousseau, by N. Tarcov', *Canadian Journal of Political Science / Revue Canadienne de Science Politique*, 30(4), pp. 788–789.

Bohman, J. 2008, "Nondomination and Transnational Democracy," in *Republicanism and Political Theory*, eds C. Laborde & J. Maynor, Wiley-Blackwell, Malden, MA.

Braithwaite, J. & Pettit P. 1990, *Not Just Deserts: A Republican Theory of Criminal Justice*, Oxford University Press, Oxford.

Bravin, J. 2018, "Supreme Court Ruling Ducks Conflict between Religious, Gay Rights." *Wall Street Journal*, June 5. <https://www.wsj.com/articles/supreme-court-sidesteps-a-decision-onwhether-Merchants-can-deny-services-to-gay-customers-on-religious-grounds-1528123172>

Bridge, D. & Nichols, C. 2016, "Congressional Attacks on the Supreme Court: A Mechanism to Maintain, Build, and Consolidate", *Law Soc Inq*, 41: 100-125.

Bridge, D. 2015, "The Supreme Court, Factions, and the Counter-Majoritarian Difficulty", *Polity*, Vol. 47, no. 4, pp. 420-460.

Carter, S. L. 1992, 'Do Courts Matter?', *Faculty Scholarship Series*. 2255.

Carter, I. 1999, *A Measure of Freedom*, Oxford University Press, Oxford.

Carter, I. 2016, "Positive and Negative Liberty", *The Stanford Encyclopedia of Philosophy* (Fall 2016 Edition), Edward N. Zalta (ed), URL = <<https://plato.stanford.edu/archives/fall2016/entries/liberty-positive-negative/>>.

Christman, J. 1991, "Liberalism and Individual Positive Freedom", *Ethics*, 101, pp. 343–59.

Clark, T. 2005, “Measuring Ideological Polarization on the United States Supreme Court”, *Political Research Quarterly*, Volume 62 Number 1, pp. 146-157.

Clark, T., Lax, J.R., & Rice D. 2015, “Measuring the Political Salience of Supreme Court Cases”, *Journal of Law and Courts*, Vol. 3, No. 1, pp. 37-65.

Coffee, A. M. S. J. 2015. Two spheres of domination: Republican theory, social norms and the insufficiency of negative freedom, *Contemporary Political Theory* 14, (1) (02): 45-62.

Cohen. G. A. 1995, *Self-ownership, Freedom, and Equality*, Cambridge University Press, Cambridge.

Constant, B. 2011, *The Liberty of Ancients Compared with that of Moderns*, The Online Library Of Liberty, Retrieved from <http://oll.libertyfund.org>.

Costa, M. V. 2013, “Is Neo-Republicanism Bad for Women?”, *Hypatia*, 28, pp. 921–936.

Dagger, R. 1997, *Civic Virtues: Rights, Citizenship, and Republican Liberalism*, Oxford University Press, New York.

Dagger, R. 2008, ‘Republican Punishment: Consequentialist or Retributivist?’, in *Republicanism and Political Theory*, eds C. Laborde & J. Maynor, Wiley-Blackwell, Malden, MA.

Dahl, R. 1957, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker in *Journal of Public Law*, Vol. 6.

Davis, K. C. 2010, “America’s True History of Religious Tolerance” in *Smithsonian Magazine*, October 2010.
<https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/>

Day, J. P. 1970, ‘On Liberty and the Real Will’, *Philosophy*, 45, pp.177–192.

De Wispelaere, J. & Casassas, D. 2014, 'A Life of One's Own: Republican Freedom and Disability', *Disability and Society*, 29: 402–16.

Dijk, P. van; Hoof, G.J.H. van; Rijn, Arjen van; Zwaak, L. 2018, *Theory and Practice of the European Convention on Human Rights*, 5th edn., Kluwer Law International, The Hague.

Dorf, M. 2010, 'Majoritarian Difficulty and Theories of Constitutional Decision Making' in *University of Pennsylvania Journal of Constitutional Law*, vol. 13, no. 2.

Driman, R. F. 1997, "Reflections on the Demise of the Religious Freedom Restoration Act", *Georgetown Law Journal* 89: pp 101-120.

Duncan, R. 2008, "Free Exercise is Dead, Long Live Free Exercise! *Smith*, *Lukumi*, and the General Applicability Requirement, In Berg (ed) *The Free Exercise of Religion Clause*, Prometheus Books, New York, pp. 226-231.

Dworkin, R. 1986, *Law's Empire*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts.

Dworkin, R. 2005, *Freedom's Law*, Oxford University Press, New York.

Eisgruber, C. L. & Sager, L. G. 1994, "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct", *University of Chicago Law Review* 61, 1245-1315.

Eisgruber, C. L. & Sager, L. G. 2007, *Religious Freedom and the Constitution*, Harvard University Press, Cambridge, MA.

Epstein, L & Knight, J. 1998, *The Choices Justices Make*, CQ Press, Washington, DC.

Epstein, L. & Segal, J. A. 2006, *Advise and Consent: The Politics of Judicial Appointment*, Oxford University Press, New York.

Epstein, L., Segal, J. A., Spaeth, H. J. & Walker, T. G. 2007, *The Supreme Court Compendium: Data, Decisions & Developments*, CQ Press, Washington, DC.

Evans, C. 2008a, Introduction. In P. Cane, C. Evans, & Z. Robinson (Eds.), *Law and Religion in Theoretical and Historical Context*, Cambridge: Cambridge University Press, pp. 1-15.

Evans, M. 2008b, Freedom of religion and the European Convention on Human Rights: Approaches, trends and tensions. In P. Cane, C. Evans, & Z. Robinson (Eds.), *Law and Religion in Theoretical and Historical Context* (pp. 291-316). Cambridge: Cambridge University Press.

Flathman, R. 1999, Book Review: Richard Dagger, *Civic Virtues*, *Ethics*, 109(3), 659-661.

Forst, R. 2013, "A Kantian Republican Conception of Justice as Nondomination", in *Republican Democracy: Liberty, Law and Politics*, A. Niederberger & P. Schink (eds), Edinburgh University Press, Edinburgh.

Franklin, C. H. & Kosaki, L. C. 1989, "Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion", *The American Political Science Review*, 83(3), pp. 751-771.

Friedman, B. 2002, 'The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five' in *The Yale Law Journal*, V. 112, no. 2.

Frymer, P. 2007, *Black and Blue African Americans, the Labor Movement, and the Decline of the Democratic Party*, Princeton University Press.

Gavison, R., & Perez, N. 2008, Days of rest in multicultural societies: Private, public, separate? In P. Cane, C. Evans, & Z. Robinson (Eds.), *Law and Religion in Theoretical and Historical Context*, Cambridge: Cambridge University Press, pp. 186-213.

Gey, S. 2008, “Why is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses”, In Berg (ed) *The Free Exercise of Religion Clause*, Prometheus Books, New York, pp. 226-231,

Gibson, J. L. & Caldeira, G. A. 2009, *Citizens, Courts, and Confirmations*, Princeton University Press.

Ginsburg, T. 2008 “The Global Spread of Constitutional Review” in Keith Whittington and Daniel Keleman (eds), *Oxford Handbook of Law and Politics*, Oxford University Press, UK.

Giorgini, G. 2013, “Three Visions of Liberty: John Stuart Mill, Isaiah Berlin, Quentin Skinner” in *John Stuart Mill: A British Socrates*, Demetriou, K. N. and Loizides, A. (eds), Palgrave Macmillan, UK.

Gisela B., Skinner Q. & Viroli M. (eds), 1990, *Machiavelli and Republicanism*, Cambridge University Press, Cambridge.

Gourevitch, A. 2010, *Servitude and independence: Rethinking liberty, virtue and the republican tradition*. Ph.D. diss., Columbia University, <https://search-proquest-com.libezproxy2.syr.edu/docview/858613761?accountid=14214> (accessed February 13, 2020).

Green, T. H. 2007, “On the Different Senses of ‘Freedom’ as Applied to Will and to the Moral Progress of Man and Lectures on the Principles of Political Obligation” in Carter, I., Kramer, M. H. & Steiner, H. (eds), *Freedom: A Philosophical Anthology*, Blackwell, Oxford.

Habermas, J. 1994, ‘Three Normative Models of Democracy’, *Constellations*, 1: 1-10.

Habermas, J. 1996, *Between facts and norms : contributions to a discourse theory of law and democracy*, William Rehg (trans.), MIT Press, Cambridge, MA.

Hall, M. E. 2013, ‘The Semiconstrained Court: Public Opinion, the Separation of

Powers, and the U.S. Supreme Court's Fear of Non Implementation', *American Journal of Political Science*, 58(2), pp. 352-366.

Hamburger, Philip A. 2008, "A Constitutional Right of Religious Exemptions: An Historical Perspective", In Berg (ed) *The Free Exercise of Religion Clause*, Prometheus Books, New York, pp. 99-106.

Hamilton A., Madison J. & Jay, J. 2014, *The Federalist Papers*, Dover Publications, New York.

Hamilton, M. A. 2005, *God vs. The Gavel: Religion and the Rule of Law*, Cambridge University Press, New York.

Hamilton, M. A. 1998, "City of Boerne v. Flores: A Landmark for Structural Analysis" *William and Mary Law Review*, 39 (3): pp. 699-723.

Hamilton, M. A. 2004 "Religious Institutions, the No-Harm Doctrine, and the Public Good", *Brigham Young University Law Review*, 4; ProQuest Centralpg, pp. 1099-1216.

Hankins, J. 1995, 'The "Baron Thesis" after Forty Years and Some Recent Studies of Leonardo Bruni', *Journal of the History of Ideas*, 56(2), pp. 309–338.

Harrington, J. 2019, *The Commonwealth Of Oceana*, Anodos Books, Whithorn.

Hayek, F. A. 1978, *The Constitution of Liberty*, The University of Chicago Press.

Hegel, G. W. F., & Knox, T. M. 1977, *Hegel's Philosophy of Right*, Clarendon Press, Oxford.

Held, D. 2006, *Models of democracy*, Stanford University Press, Stanford, CA.

Hickey T. 2019a, "The republican core of the case for judicial review", *International Journal of Constitutional Law*, Volume 17, Issue 1, January 2019, pp. 288–316.

Hickey T. 2019b, “The republican core of the case for judicial review: A rejoinder to Richard Bellamy”, *International Journal of Constitutional Law*, Volume 17, Issue 1, January 2019, pp. 329–331.

Hill, John Lawrence. 2018. The Father of Modern Constitutional Liberalism, *The William and Mary Bill of Rights Journal*, 27, (2) (12), pp. 431-499.

Hobbes, T. 1982, *Leviathan*, Penguin Classics, Harmondsworth.

Holmes, S. & Sunstein. C.R. 2000, *The Cost of Rights: Why Liberty Depends on Taxes*, Norton, New York.

Holmes, S. 1948, *Benjamin Constant and The Making Of Modern Liberalism*, Yale University Press, New Haven.

Honohan, I. 2002, *Civic Republicanism*, Routledge, London.

Jefferson, T. 1998, *Jefferson's Letter to the Danbury Baptists: The Final Letter, as Sent*. *The Library of Congress Information Bulletin*, June 1998. Lib. of Cong., June 1998. <https://www.loc.gov/loc/lcib/9806/danpre.html>.

Johnson, D., and K. Steinmetz. 2015, “This Map Shows Every State with Religious-Freedom Laws.” *Time*, April 2. <http://time.com/3766173/religious-freedom-laws-map-timeline>.

Johnson, T., & Martin, A. 1998, ‘The Public's Conditional Response to Supreme Court Decisions’, *The American Political Science Review*, 92(2), pp. 299-309.

Jones, J. M. 2020, “Trump Third Year Sets New Standard for Party Polarization” January 21, 2020 <https://news.gallup.com/poll/283910/trump-third-year-sets-new-standard-party-polarization.aspx>

Keck, T. M. 2009, ‘Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights’, *Law & Society Review*, Vol. 43-1, pp. 151-186.

Keck, T. M. 2014, *Judicial Politics in Polarized Times*, University of Chicago

Press, Chicago.

Klarman, M. J. 1996, 'Rethinking the Civil Rights and Civil Liberties Revolutions', *Virginia Law Review*, Volume 82, Issue 1, pp. 1-67.

Kramer, M. H. 2003, *The Quality of Freedom*, Oxford University Press, Oxford.

Kramer, M. H. 2008, 'Liberty and Domination', in *Republicanism and Political Theory*, eds C. Laborde & J. Maynor, Wiley-Blackwell, Malden, MA.

Kreis, A. M. 2018, 'Stages of Constitutional Grief: Democratic Constitutionalism and the Marriage Revolution', 20 *U. Pa. J. Const. L.* 871.

Laborde, C. & Maynor, J. 2008, "The Republican Contribution to Contemporary Political Theory", in *Republicanism and Political Theory*, eds C. Laborde & J. Maynor, Wiley-Blackwell, Malden, MA.

Larmore, C. 2004, 'Liberal and Republican Conceptions of Freedom', in *Republicanism: History, Theory and Practice*, D. Weinstock & C. Nadeau (eds), Frank Cass, London.

Laycock, D. 1995, "RFRA, Congress, and the Ratchet", *Montana Law Review*, 56, pp. 145-170.

List, C. & Pettit, P. 2006, 'Group Agency and Supervenience', in *Southern Journal of Philosophy*, Vol 45, pp. 85-105.

List, C. & Valentini, L. 2016, 'Freedom as Independence', *Ethics*, 126., pp. 1043–74.

Locke, J. 1960, *Two Treatises of Government*, Cambridge University Press, New York.

Long, D. 1977, *Bentham on Liberty: Jeremy Bentham's idea of liberty in relation to his utilitarianism*, University of Toronto Press, Toronto.

Lovett, F. 2010, *A General Theory of Domination and Justice*, Oxford University Press, Oxford.

Lovett, F. 2012, “What Counts as Arbitrary Power?”, *Journal of Political Power*, 5, pp. 137–152.

Lovett, F. and Pettit, P. 2018, Preserving Republican Freedom: A Reply to Simpson, *Philosophy & Public Affairs*, 46, pp. 363-383

Machiavelli N. 1979, *The Discourses*, Penguin Books, Middlesex, UK.

Marshall, T. 1988, *Public Opinion and the Supreme Court*, Harper Collins Publishers Ltd, Boston.

Marshall, T. 2008, *Public Opinion and the Rehnquist Court*, SUNY Press, NY.

Marshall, William P. 2008, “In Defense of Smith and Free Exercise Revisionism”, In Berg (ed) *The Free Exercise of Religion Clause*, Prometheus Books, New York, pp. 77-83.

Marti, J. L. and Seleme, H. 2015, “Three Comments on Philip Pettit’s “On the People’s Terms””, *Philosophy and Public Issues*, Vol. 5, No. 2 (2015), pp. 25-42.

Martin, A., & Quinn, K. 2002, Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999. *Political Analysis*, 10(2), pp. 134-153.

Martin, R. R. 2019, ‘Compelling interests and substantial burdens: The adjudication of religious free exercise claims in U.S. state appellate courts’, *Sage Open*, 9(2).

Marx, K. 1978, “On the Jewish Question” in Marx, K., Engels, F., & Tucker, R. C. (. C. (1978). *The Marx-Engels reader* (2d ed.). Norton, New York.

Maynor, J. 2002, ‘Another Instrumental Republican Approach?’, *European Journal of Political Theory*, 1(1), pp. 71–89.

Maynor, J. 2003, *Republicanism in the Modern World*, Polity, Cambridge, UK.

Maynor, J. 2006, 'Modern Republican Democratic Contestation: A Model of Deliberative Democracy', in eds I. Honohan and J. Jennings, *Republicanism in Theory and Practice*, Routledge, New York.

McCloskey, R. G. 1972, *The Modern Supreme Court*, Harvard University Press.

McCloskey, R. G. 2010, *The American Supreme Court*, University of Chicago Press.

McConnell, M. W. 1990a, "Free Exercise Revisionism and the Smith Decision", *Chicago Law Review*, 57.

McConnell, M. W. 1990b, "The Origins and Historical Understanding of Free Exercise of Religion", *Harvard Law Review*, 103, pp. 1409-1517.

McConnell, M. W., Garvey, J. H. & Berg, T. C. 2011, *Religion and the Constitution*, Wolters Kluwer Law & Business, New York.

McCoy, T. 1995, "A coherent methodology for First Amendment speech and religion clause cases", *Vanderbilt Law Review*, Vol. 48-5.

Michelman, F. 1986, 'Foreword: Traces of Self-Government', *Harv. L. Rev.*, 4, 100.

Mill, J. S. 2015, *On Liberty, Utilitarianism and Other Essays*, Oxford University Press, United Kingdom.

Miller, D. 1983, 'Constraints on Freedom', *Ethics*, 94, pp. 66–86.

Miller, D. 1996, 'Review of Review of For Love of Country: An Essay on Patriotism and Nationalism, by M. Viroli', *The American Political Science Review*, 90(4), pp. 885–887.

Miller, R. T. 2018, 'What Is a Compelling Governmental Interest?', *Journal of Markets & Morality*, 21(1).

- Milne, A. J. M. 1968, *Freedom and Rights*, George Allen and Unwin, London.
- Mishler, W., & Sheehan, R. S. 1993, The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions, *The American Political Science Review*, 87(1), pp. 87–101.
- Montesquieu, C. 2004, *The Complete Works of M. de Montesquieu*, (London: T. Evans, 1777),. 1/8/2020. <<https://oll.libertyfund.org/titles/837>>
- Natelson, R. G. 2005, ‘The Original Meaning of the Establishment Clause’, *Wm. & Mary Bill Rts. J.*, Volume 14, 51.
- Nederman, Cary 2019 "Civic Humanism", *The Stanford Encyclopedia of Philosophy* (Spring 2019 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/spr2019/entries/humanism-civic/>>.
- Niederberger, A. & Schink, P. 2013, ‘Introduction’, in *Republican Democracy: Liberty, Law and Politics*, A. Niederberger & P. Schink (eds), Edinburgh University Press, Edinburgh.
- Nugent, N. 2008, ‘Toward a RFRA that works’, *Vanderbilt Law Review*, 61(3), pp. 1027-1066
- Nyholm, S. 2014, ‘Review of Just Freedom: A Moral Compass for a Complex World, by P. Pettit’, *Res Publica*, 20(4), pp. 441–445.
- Oppenheim, F. E. 1981, *Political Concepts: A Reconstruction*, Blackwell Publishing, Oxford.
- Patten, A. 1996, “The Republican Critique of Liberalism”, *British Journal of Political Science*, Vol. 26, No.1, pp.25-44.
- Pepper, S. 2008, “Taking the Free Exercise Clause Seriously”, In Berg (ed) *The Free Exercise of Religion Clause*, Prometheus Books, New York, pp. 49-56.
- Pettit, P. 2019, ‘Neo-liberalism and neo-republicanism’, *Korea Observer*, 50(2), pp.

191-206.

Pettit, P. 1999, 'Republican Freedom and Contestatory Democratisation', in *Democracy's Value*, eds I. Shapiro & C. Hacker-Cordon, Cambridge University Press, Cambridge.

Pettit, P. 2000, "Democracy, Electoral and Contestatory", *Nomos*, 42, pp. 105-144.

Pettit, P. 2001, *A Theory of Freedom: From the Psychology to the Politics of Agency*, Polity Cambridge.

Pettit, P. 2002a, 'Keeping Republican Freedom Simple: On a Difference with Quentin Skinner. Political Theory', *Political Theory*, Vol. 30, No. 3, June, pp. 339-356.

Pettit, P. 2002b, *Republicanism: A Theory of Freedom and Government*, Oxford University Press, Oxford.

Pettit, P. 2003a, 'A Dilemma for Deliberative Democrats' in *Deliberation and Decision*, A. van Aaken, C. List & C. Luetge (eds), Ashgate Publishing Aldershot.

Pettit, P. 2003b, 'Agency-Freedom and Option-Freedom', *Journal of Theoretical Politics*, Vol 15, pp. 387-403.

Pettit, P. 2003c, 'Deliberative Democracy, the Discursive Dilemma and Republican Theory', in *Philosophy, Politics and Society*, J. Fishkin & P. Laslett (eds), Vol 7, Cambridge University Press, Cambridge.

Pettit, P. 2004a, 'Depoliticizing Democracy', *Ratio Juris*, 17, pp. 52-65.

Pettit, P. 2004b, 'The Common Good', in Keith Dowding, Robert E. Goodin and Carole Pateman, eds, *Justice and Democracy: Essays for Brian Barry*, Cambridge University Press, 2004, pp. 150-69.

Pettit, P. 2005, "From Republic to Democracy: A Comment on Henry Richardson", *Philosophy and Phenomenological Research*, 71, pp. 196-203.

Pettit, P. 2011, 'The Instability of Freedom as Non-Interference. The Case of Isaiah Berlin', *Ethics*, 121, pp. 693–716.

Pettit, P. 2013, "Two Republican Traditions", in *Republican Democracy: Liberty, Law and Politics*, A. Niederberger & P. Schink (eds), Edinburgh University Press, Edinburgh.

Pettit, P. 2014a, *Just Freedom: A Moral Compass for a Complex World*, Norton, New York.

Pettit, P. 2014b, *On the People's Terms: A Republican Theory and Model of Democracy*, Cambridge University Press, New York.

Pettit, P. 2015, "On the People's Terms: A reply to five critiques", *Critical Review of International Social and Political Philosophy*, 18:6, pp. 687-696.

Pettit, P. 2016, "On the People's Terms: A Reply to Bellamy, Levy and Lovett", *Political Theory*, Vol. 44(5), pp. 697–706.

Phillips, A. 2000, "Feminism and Republicanism: Is this a Plausible Alliance?", *Journal of Political Philosophy*, 8, pp. 279–293.

Phipps, K. A. 2019, "The limitations of accommodation: the changing legal context of religion at work in the United States", *Journal of Management, Spirituality & Religion*, 16:4, pp. 339-347.

Pitkin, H. F. 1988, 'Are Freedom and Liberty Twins?', *Political Theory*, 16(4), pp. 523–552.

Pocock, J. G. A. 1975, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, Princeton University Press, Princeton, N.J.

Pocock, J. G. A. 1995, *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century*, Cambridge University Press, New York.

Price, R. 2018, *Two Tracts on Civil Liberty, the War with America, and the Debts and Finances of the Kingdom With a General Introduction and Supplement*, T. Cadell, London.

Rawls, J. 1971, *A Theory of Justice*, Cambridge, MA: Harvard University Press

Rawls, J. 1996, *Political Liberalism*, Columbia University Press, New York.

Ray, L. 2018, Reasonable Action: Reproductive Rights, The Free Exercise Clause, And Religious Freedom in The United States And The Republic Of Ireland. *St.John's Law Review*, 92(1), pp. 121-148.

Richardson, H. S. 2003, *Democratic Autonomy: Public Reasoning About the Ends of Policy*, Oxford University Press, Oxford.

Rosen, J. 2006, *The Most Democratic Branch: How the Courts Serve America*, Oxford University Press.

Ryan, J. (1992). Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment. *Virginia Law Review*, 78(6), 1407-1462. doi:10.2307/1073457

Sager, L. 2008, "The moral economy of religious freedom", in P. Cane, C. Evans, & Z. Robinson (Eds.), *Law and Religion in Theoretical and Historical Context*, Cambridge: Cambridge University Press, pp. 16-25.

Salmons, D. 1995, "Toward a Fuller Understanding of Religious Exercise: Recognizing the Identity-Generative and Expressive Nature of Religious Devotion", *The University of Chicago Law Review*, 62(3), pp. 1243-1274.

Schabas, W. A. 2015, *The European Convention on Human Rights: A Commentary*, Oxford University Press, UK.

Schokkenbroek, J. 1998, "The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation", *Human Rights Law Journal*, pp. 20-21.

Schuppert, F. 2015, "Non domination, non alienation and social equality: towards a republican understanding of equality", *Critical Review of International Social and Political Philosophy*, 18:4, pp. 440-455.

Segal, J. A., & Cover, A. D. 1989, "Ideological values and the votes of U.S. supreme court justices", *The American Political Science Review*, 83(2), 557.

Segal, J. A., and Cover A. D. 1989, "Ideological values and the votes of U.S. Supreme Court Justices", *American Political Science Review*, 83 (2), pp. 557-65.

Segal, J., Epstein, L., Cameron, C., & Spaeth, H. 1995, "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited", *The Journal of Politics*, 57(3), pp. 812-823.

Sen, A. 1992, *Inequality Reexamined*, Oxford University Press, Oxford.

Shapiro, M. 1964, *Law and politics in the Supreme Court; new approaches to political jurisprudence*, Free Press of Glencoe, New York.

Sidney, A. 2009, *Discourses concerning Government*, Thomas G. West, Indianapolis.

Simhony, A. "Beyond Negative and Positive Freedom: T. H. Green's View of Freedom", *Political Theory*, 21, no. 1 (February 1993), pp. 28–54.

Simpson, T.W. 2017, "The Impossibility of Republican Freedom", *Philosophy & Public Affairs*, 45, pp. 27-53.

Skinner, Q. 1978a, *The Foundations of Modern Political Thought, Vol. 1: The Renaissance*, Cambridge University Press, Cambridge.

Skinner, Q. 1978b, *The Foundations of Modern Political Thought, Vol. 2: The Age of Reformation*, Cambridge University Press, New York.

Skinner, Q. 1990, "The Republican Ideal of Political Liberty" in Gisela B., Skinner Q. & Viroli M. (eds), *Machiavelli and Republicanism*, Cambridge University Press,

Cambridge.

Skinner, Q. 2000, *Machiavelli: A Very Short Introduction*, Oxford University Press, Oxford.

Skinner, Q. 2002, 'A Third Concept of Liberty', *Proceedings of the British Academy*, 117(237): pp. 237–68.

Skinner, Q. 2003, *Liberty before Liberalism*, Cambridge University Press, Cambridge.

Skinner, Q. 2011, "Quentin Skinner: "A Genealogy of Liberty", 25 October 2011, online video, viewed March 18 2019, <https://www.youtube.com/watch?v=ECiVz_zRj7A&t=1327s>.

Skinner, Q. 2012, "On the Liberty of the Ancients and the Moderns: A Reply to My Critics", *Journal of the History of Ideas*, Vol. 73, No. 1, pp. 127-146.

Steiner, H. 1994, *An Essay on Rights*, Blackwell Publishing, Oxford.

Stoutenborough, J. W., Haider-Markel, D. P., & Allen, M. D. 2006, 'Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases' in *Political Research Quarterly*, 59(3), pp. 419–433.

Sunstein, C. R., Schkade, D., Ellman, L. M., & Sawicki, A. 2006, *Are judges political?: An empirical analysis of the federal judiciary*, Brookings Institution Press, Washington, DC.

Sunstein, C.R. 1988, 'Beyond the republican revival', *Yale Law Journal*, 97, pp. 1539–90.

Tarcov, N. 1976, 'Review of Review of The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition, by J. G. A. Pocock', *Political Science Quarterly*, 91(2), pp. 380–382.

Tarcov, N. 1982, 'Quentin Skinner's Method and Machiavelli's Prince', *Ethics*,

92(4), pp. 692–709.

Tarcov, N., & Orwin, C. (eds.) 1997, *The Legacy of Rousseau*, 1st edition, University of Chicago Press, Chicago.

Taylor, C. 1979, 'What's Wrong with Negative Liberty', in *The Idea of Freedom*, ed A. Ryan, Oxford University Press, UK.

Taylor, C. 1989, "Cross-Purposes: The Liberal - Communitarian Debate", in Rosenblum, N. (ed), *Liberalism and the Moral Life*, Cambridge University Press, Massachusetts.

Taylor, C. 1994 *Sources of the Self*, Harvard University Press, Cambridge, Massachusetts.

Tocqueville, A. 2000, *Democracy in America*, Hackett, Indianapolis.

Tompkins, E. 2017, *The Supreme Court's Countermajoritarianism? What Impact Does Public Opinion Have on the Supreme Court Decisions?*, Political Science Dissertation, Bemidji State University.

Tushnet M. 2006, "Weak-Form Judicial Review and "Core" Civil Liberties", *Harvard Civil Rights-Civil Liberties Law Review*. 2006;41(1), pp. 1-22.

Uitz, R. 2012, "Rethinking Deschomets v. France: Reinforcing the protection of religious liberty through personal autonomy in custody disputes" in E. Brems (Ed.), *Diversity and European Human Rights: Rewriting Judgments of the ECHR*, Cambridge: Cambridge University Press, pp. 173-191.

Ungureanu, C. 2012, "Introduction", in L. Zucca & C. Ungureanu (Eds.), *Law, State and Religion in the New Europe: Debates and Dilemmas*, Cambridge: Cambridge University Press, pp. 1-18.

Ura, J. D. 2014, 'Backlash and Legitimation: Macro Political Responses to Supreme Court Decisions' in *American Journal of Political Science*, v. 58, pp. 110-126.

Van Den Brink, B. 1999, 'Review of Review of Civic Virtues. Rights, Citizenship and Republican Liberalism, by R. Dagger', *Ethical Theory and Moral Practice*, 2(1), pp. 67–69.

Viroli, M. 1995, *For Love of Country: An Essay on Patriotism and Nationalism*, Oxford Press., Oxford, UK.

Viroli, M. 1998, *Machiavelli*, Oxford University Press, Oxford.

Viroli, M. 2001, *Republicanism*, Hill and Wang, New York.

Viroli, M. 2002. *Jean-Jacques Rousseau and the Well-Ordered Society*, Cambridge University Press, Cambridge.

Volokh, E. 1999, "A Common-Law Model for Religious Exemptions", *UCLA Law Review*, 46 (5): 1465.

Waldron, J. 2006, "The Core of the Case Against Judicial Review", *The Yale Law Journal*, 115, pp. 1346-1360.

Webber, J. 2008, "Understanding the religion in freedom of religion", in P. Cane, C. Evans, & Z. Robinson (Eds.), *Law and Religion in Theoretical and Historical Context*, Cambridge: Cambridge University Press, pp. 26-43.

Wollstonecraft, M., Abbey, R., & Botting, E. H. (2014), *A Vindication of the Rights of Woman*, Yale University Press, New Haven.

Yumlu, O. 2017, *Judicial Review: Sources of Legitimacy and the Case of Turkey*, (Unpublished doctoral dissertation), Istanbul Bilgi University, Istanbul, Turkey.

Zauzmer, J. 2018. "Top Senate Democrats Introduce Bill to Amend Religious Freedom Restoration Act." *The Washington Post*, May 22. <https://www.washingtonpost.com/news/actsof-faith/wp/2018/05/22/top-senate-democrats-introduce-bill-to-amend-religious-freedomrestoration-act/>.

ANNEXES

Annex-1

Article III of the U. S. Constitution

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Annex-2

Section II – European Court of Human Rights

Article 19 – Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

Article 20 – Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Article 21 – Criteria for office

1- The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.

2- The judges shall sit on the Court in their individual capacity.

3- During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

Article 22 – Election of judges

The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

Article 23 – Terms of office and dismissal

1-The judges shall be elected for a period of nine years. They may not be re-elected.

2- The terms of office of judges shall expire when they reach the age of 70.

3- The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

4- No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.

Article 24 – Registry and rapporteurs

1- The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court.

2- When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court's registry.



Annex-3

Religious Freedom Restoration Act of 1993

[Congressional Bills 103th Congress]

[From the U.S. Government Printing Office]

[H.R. 1308 Enrolled Bill (ENR)]

H.R.1308

One Hundred Third Congress
of the
United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday,
the fifth day of January, one thousand nine hundred and ninety-three

An Act

To protect the free exercise of religion.

Be it enacted by the Senate and House of Representatives of the
United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ``Religious Freedom Restoration Act of
1993".

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) Findings.--The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws ``neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes.--The purposes of this Act are--

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) In General.--Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of

general applicability, except as provided in subsection (b).

(b) Exception.--Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial Relief.--A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

(a) Judicial Proceedings.--Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting "the Religious Freedom Restoration Act of 1993," before "or title VI of the Civil Rights Act of 1964".

(b) Administrative Proceedings.--Section 504(b)(1)(C) of title 5, United States Code, is amended--

(1) by striking "and" at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting ", and"; and

(3) by inserting "(iv) the Religious Freedom Restoration Act of 1993;" after clause (iii).

SEC. 5. DEFINITIONS.

As used in this Act--

(1) the term "government" includes a branch, department,

agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term ``State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term ``demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term ``exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

SEC. 6. APPLICABILITY.

(a) In General.--This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) Rule of Construction.--Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) Religious Belief Unaffected.--Nothing in this Act shall be construed to authorize any government to burden any religious belief.

SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the ``Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term ``granting", used with respect to government funding,

benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.



Annex-4

Religious Land Use and Institutionalized Persons Act of 2000

An Act

To protect religious liberty, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Religious Land Use and Institutionalized Persons Act of 2000”.

SEC. 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

(a) SUBSTANTIAL BURDENS.—

(1) **GENERAL RULE.**—No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) **SCOPE OF APPLICATION.**—This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes,

even if the burden results from a rule of general applicability;

or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) DISCRIMINATION AND EXCLUSION.—

(1) EQUAL TERMS.—No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) NONDISCRIMINATION.—No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS.—No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction;

or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

SEC. 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

(a) GENERAL RULE.—No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest;
and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) SCOPE OF APPLICATION.—This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 4. JUDICIAL RELIEF.

(a) CAUSE OF ACTION.—A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) BURDEN OF PERSUASION.—If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) FULL FAITH AND CREDIT.—Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) ATTORNEYS' FEES.—Section 722(b) of the Revised Statutes

(42 U.S.C. 1988(b)) is amended—

(1) by inserting “the Religious Land Use and Institutionalized Persons Act of 2000,” after “Religious Freedom Restoration Act of 1993,”; and

(2) by striking the comma that follows a comma.

(e) PRISONERS.—Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT.—

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) LIMITATION.—If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 5. RULES OF CONSTRUCTION.

(a) RELIGIOUS BELIEF UNAFFECTED.—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) RELIGIOUS EXERCISE NOT REGULATED.—Nothing in this Act

shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) CLAIMS TO FUNDING UNAFFECTED.—Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED.—Nothing in this Act shall—

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE.—A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) EFFECT ON OTHER LAW.—With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with

Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) BROAD CONSTRUCTION.—This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) NO PREEMPTION OR REPEAL.—Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.

(i) SEVERABILITY.—If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the “Establishment Clause”). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term “granting”, used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

(a) DEFINITIONS.—Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb–2) is amended—

(1) in paragraph (1), by striking “a State, or a subdivision of a State” and inserting “or of a covered entity”;

(2) in paragraph (2), by striking “term” and all that follows through “includes” and inserting “term ‘covered entity’ means”; and

(3) in paragraph (4), by striking all after “means” and inserting “religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.”.

(b) CONFORMING AMENDMENT.—Section 6(a) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb–3(a)) is amended by striking “and State”.

SEC. 8. DEFINITIONS.

In this Act:

(1) CLAIMANT.—The term “claimant” means a person raising a claim or defense under this Act.

(2) DEMONSTRATES.—The term “demonstrates” means meets the burdens of going forward with the evidence and of persuasion.

(3) FREE EXERCISE CLAUSE.—The term “Free Exercise Clause” means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) GOVERNMENT.—The term “government”—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any

other person acting under color of Federal law.

(5) LAND USE REGULATION.—The term “land use regulation” means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) PROGRAM OR ACTIVITY.—The term “program or activity” means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d–4a).

(7) RELIGIOUS EXERCISE.—

(A) IN GENERAL.—The term “religious exercise” includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) RULE.—The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

Approved September 22, 2000.