

THE LEGITIMACY OF BORDER CONTROL: POWER AND
ACCOUNTABILITY IN CONTEMPORARY PRACTICE

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ABSTRACT

This thesis presents a republican account of the legitimacy of border control. It thus contributes to two debates in contemporary political theory: first, the debate over whether contemporary border controls satisfy applicable criteria of normative legitimacy and, second, the debate over what the republican commitment to the ideal of non-domination entails for the border regime of a defensible republic.

The thesis offers a critical discussion of the theoretical debate on immigration and border control, which has in large part focused on the question of whether states are in the possession of the so-called right to exclude. It argues that identifying the relevant legitimacy standard for border control is pressing in light of recent changes to the border regimes of the world's most powerful states. These regimes are externalised and coordinated in ways that allow them to exercise power over vulnerable migrants without incurring responsibilities for the protection of their human rights. The contemporary practice of border control is characterised by unaccountable power, posing a challenge to the legitimacy of the implicated regimes.

The thesis then argues that the neo-republican concept of domination convincingly captures the specific wrong involved in the contemporary practice of border control, and that its converse ideal of non-domination can serve as a plausible legitimacy standard for border control. Under contemporary practice, a set of wealthy states exercise arbitrary power over a set of vulnerable individuals, resulting in relations of domination that suffice for illegitimacy. This proposal is defended, first, from the philosophical objection that the concept of domination is radically overinclusive and that the ideal of non-domination therefore cannot serve as a legitimacy standard. Second, the thesis refutes the objection that any attempt to rectify the domination of migrants through supranational institutions will undercut states' capacity for self-determination and thus inevitably lead to more domination.

TABLE OF CONTENTS

ABSTRACT	2
CHAPTER 1 JUSTICE, LEGITIMACY, AND BORDER CONTROL	5
1.1. Border control: a brief description of the contemporary landscape	5
1.2. The research gaps	10
1.3. Legitimacy: concept and conception	15
1.4. Method	28
1.5. The structure of my argument	33
CHAPTER 2 INSTITUTIONAL CONSERVATISM AND THE RIGHT TO EXCLUDE	37
2.1. The right to exclude and the problem of applicability	40
2.2. Moralising the state: freedom of association, liberal nationalism, and collective ownership	46
2.3. Describing the state: institutional conservatism	53
2.4. Practice-dependent state system legitimacy	60
2.5. Disaggregating sovereignty	66
CHAPTER 3 THE PRACTICE AND LEGITIMACY OF BORDER CONTROL	69
3.1. Specifying legitimacy: the power conception	73
3.2. The human right to immigrate and the democratic objection to border control	80
3.3. The case for the minimal standard reconstructed	89
3.4. The contemporary practice of border control	95
3.5. The insufficiency of the minimal standard	102
3.6. What kind of power?	108
CHAPTER 4 DOMINATION AND BORDERS: A RESTATEMENT	110
4.1. Republicanism, non-domination, and the role of institutions	112
4.2. Domination in the contemporary practice of border control	125
4.3. One objection: the conceptual impossibility of dominating borders	134
4.4. Two objections: the incoherence of non-domination and the value of self-determination	137
CHAPTER 5 SYSTEMIC DOMINATION AND THE COALITION PROBLEM	143
5.1. The coalition problem	147
5.2. Diagnosing the problem: domain restriction	152

5.3. Agent-relative and systemic power	158
5.4. Dissolving the coalition problem: the systemic solution	164
5.5. Applying the argument: systemic domination in contemporary practice	175
CHAPTER 6 NON-DOMINATION AND SELF-DETERMINATION	180
6.1. Rectifying domination: the case for the supranational regulation of vulnerable migration	184
6.2. The self-determination objection	196
6.3. Questioning the premise	199
6.4. Relational self-determination and non-domination	204
6.5. Self-determination and supranational regulation	207
CONCLUSIONS: NORMATIVE, THEORETICAL, PRACTICAL	212
BIBLIOGRAPHY	218
ACKNOWLEDGEMENTS	237

CHAPTER 1

JUSTICE, LEGITIMACY, AND BORDER CONTROL

My project in this thesis is to offer a theory of the legitimacy of border control, as distinct from a theory of justice in immigration policy. Moreover, I contend that such a theory of legitimacy needs to be sufficiently flexible to capture the expansive ways in which states currently act to enforce their border regimes. This introductory chapter seeks to motivate the need for such a project and to outline how this thesis seeks to respond to this need.

The chapter will do so in the following way. In section 1, I provide a brief outline of the contemporary politics of migration and to the institutional reality of border control. I will then, in section 2, provide a brief overview of the political theory literature on migration, arguing that it suffers from a neglect of questions of legitimacy. Thus, I arrive at the main research question this thesis will seek to answer: *is the power involved in the contemporary regulation of global migration legitimate?* In section 3, I clarify this research question by outlining my central concept, legitimacy. I will specify how I understand legitimacy conceptually, normatively, and in relation to the concept of justice. In section 4, I offer some methodological remarks which explain how I will approach my research question. Lastly, section 5 provides an overview of how the five remaining chapters of the thesis contribute to answering my research question.

1.1. Border control: a brief description of the contemporary landscape

States wield unprecedented power in the enforcement of their border regimes. As immigration persists as a hotly divisive issue in global politics, governments are under ever-increasing pressure to constrain unauthorised migration. An expression of this

pressure is the renewed interest in border walls. In 1990, only fifteen states had walls marking parts of their borders. At the start of 2016, almost seventy did (Jones 2016, 88). Despite their increasing popularity, border walls have limited efficiency in controlling unauthorised migration. As theorised by Wendy Brown, border walls thus primarily function as symbolic devices, aiming to signal territorial sovereignty but instead demonstrating the vulnerability of the nation state to the forces of globalisation (Brown 2010). However, the resources states devote to the construction of their physical borders are far from exhaustive of the power they wield over potential immigrants. Over the last two decades, states have moved away from conceiving of border control as an activity that is conducted at their physical borders. According to the new logic, border control is seen as an expansive activity that can – and should – be conducted as far away from the state’s territorial borders as possible. As Ayelet Shachar puts it, '[t]he idea, enthusiastically endorsed by governments in relatively rich and stable regions of the world, is to screen people at the source or origin of their journey (rather than at their destination country)', so that the 'traditional static border is thus reimagined as the last point of encounter, rather than the first' (Shachar 2019, 96–97). By necessity, this involves coordination with other states. The '21st century border' is both cooperative and extraterritorial (Longo 2016).

The shift towards new thinking about the institution of border control can be observed through the development of the European Border and Coast Guard Agency, Frontex. When Frontex was founded in 2005, its tasks and budgets were limited, and it was provided offices in Warsaw, making it the first EU agency based in Eastern Europe. Since then, Frontex has rapidly expanded in size and competences, especially after a 2016 regulation which gave the agency a 'right to intervene' with the border regimes of the

Member States by – subject to a Council decision – deploying border guards onto their territories (EU 2016, art. 19). The 2016 regulation was a direct response to the so-called ‘European migration crisis’, which reached a peak in 2015 and has had an immense impact on European politics since then. During the ‘migration crisis’, European states received large amounts of asylum applications from individuals who entered Europe having crossed the Mediterranean Sea. Many of these asylum seekers were fleeing the violence of the civil war in Syria, but the boats reaching European shores also carried individuals from across the Middle East, and Central and Northern Africa. Although European states – in particular the ‘frontline states’ Greece and Italy – receive fewer asylum applications than they did at the height of 2015, the EU and European governments have been clear that the ‘area of freedom, security and justice’ can only be protected by increasing the capacity to control the external border. Hence, Frontex’s 2019 regulation saw the agency receive even more power. Significantly, Frontex will start building its own ‘standing corps’ of border guards. In the words of the agency’s executive director, this makes Frontex ‘the first uniformed law enforcement service of the European Union’ (Frontex 2020a). Thus, Frontex has become an executive agent, coercively enforcing the border regimes of European states but without directly representing any of these states.

The contemporary politics of migration are not solely characterised by a concern for closing borders, however. Indeed, the question of whether immigration controls have become more or less restrictive over the last decades is a contested issue in political science (Helbling and Kalkum 2018). This is because states also actively compete to attract immigrants that they deem beneficial to their own development. Thus, points-based immigration selection; ‘citizenship by investment’; visa waiver and facilitation

agreements; guest worker programs; and active encouragement of ‘internationalisation’ in education and professional sectors, have also become central parts of the contemporary regulation of migration. Consequently, contemporary borders affect different people in different ways. For some, borders are becoming porous boundaries that they are actively assisted in crossing. For others, borders are becoming expansive institutions that seek to hamper their capacities to move long before they even reach the territories of the relevant state. Perversely, though unsurprisingly, this differentiated effect largely tracks individuals’ potential for making economic contributions to receiving states (Shachar and Hirschl 2014; Shachar 2016). G. A. Cohen argued that money and freedom are inherently linked because the former determines what one can do whilst respecting property rights and thus without being liable to state-based sanction (Cohen 2011, chap. 8). As the boundaries between ‘economic potential’ and migration are eroding, contemporary border regimes may be seen as the ultimate expression of the freedom-expanding power of money: those who possess resources that make them desirable economic contributors relate to borders in wholly different ways than those who do not. The institution of border control is thus structured by, and in part reproduces, global inequality.

Migration is a complex phenomenon. Its causes are partly explained by other global issues such as transnational economic integration and interdependence, war and security, communication, and environmental change. Consequently, the politics of migration are complex, not least because the movement of people from one state to another raise fundamental questions about the nature of politics itself. Migration brings forth questions about what constitutes ‘the people’ and is therefore inherently linked with ideas of sovereignty (Anderson 2013; Näsström 2007). Moreover, migration oftentimes gives rise to tensions within our moral codes, as it leads to conflicts where we are

seemingly forced to choose between commitments to universal moral requirements – for example, to assist needy refugees – and to people’s profound interests in nurturing the associations and relationships to which they belong and with which they identify (Scheffler 2001). Its inherent link with these deep political questions helps explain why, despite the complex challenges it gives rise to, migration is a rare case of a truly transnational issue that does not have a ‘coherent, multilateral global governance network’ (Betts 2011, 7). In 2018, the UN General Assembly adopted a Global Compact for migration, which sought to rectify this lack by introducing common frameworks for addressing the unique set of issues that general and forced migration generate. Despite the fully voluntary nature of the compact, however, several states – including the US, Israel, and several EU members – voted against it. Strict sovereignty over immigration persists as a robust feature of the global order, despite successful efforts to liberalise and internationalise other policy areas, such as trade and finance (Goodman and Schimmelfennig 2020).

A successful political theory of migration should be able to respond to the complexities engendered by the contemporary regulation of migration. At the same time, no theory, and especially not a normative theory, can give a complete picture of reality. Theories need to abstract away from particulars. The challenge is to work out which aspects of reality should be bracketed for the purposes of a normative assessment of global migration. As I will explain in the following section, the existing debates in political theory are vulnerable to the charge that they bracket the institutional reality of border control – and that they therefore fail to offer satisfactory legitimacy assessments of the contemporary regulation of migration.

1.2. The research gaps

Given its central place in the contemporary political imagination, it is no wonder that political theorists have turned to questions of immigration and border control in recent years. As we observe the differentiated effects border regimes currently have on individual prospects for living in security and well-being, we should reflect on the substantive qualities of the institutions and policies that bring about those effects. It is not only right-wing populist movements that advocate closing borders for vulnerable migrants in the name of protecting national interests. Also progressive political movements, including social democratic and socialist parties, have started arguing that delivering their political platforms requires strict immigration regimes (Tamir 2019). Are they right to think so? And, if they are, what sorts of institutions must be put in place to enforce such regimes responsibly?

In the analytical tradition, theorists have sought to offer responses to these questions by asking whether states have a right to control immigration, or whether they have ‘the right to exclude’, as it has become known (Fine 2013). Whilst all participants obviously recognise the importance of ‘applied’ issues – such as humane responses to irregular migration; the fair construction of temporary migration schemes; the ethics of naturalisation and citizenship; obligations towards refugees and stateless persons – the question of the state’s right to exclude has been seen as fundamental to all these issues. As a key contributor to the debate summarises the idea,

The question of exclusion is the first question to be asked about the morality of immigration. It is emphatically not the only question that must be asked. It has the same relationship to questions of immigration as the justification of punishment does to a host of more specific questions about criminal law; it sets the scope of acceptable solutions, as it were, by specifying what sorts of practices and policies have a hope of being justifiable (Blake 2014, 521).

The paradigmatic case for the nonexistence of a right to exclude was provided by Joseph Carens (1987), who argued that neither Rawlsian liberalism, consequentialism, nor Nozickian libertarianism could support such a right. On Carens' view, individuals organised under the state simply do not have any moral claim weighty enough to *generally* outweigh the interests of peaceful individuals who seek to immigrate with the intention of taking part in that state's cultural and economic institutions. According to Carens and other 'open borders' theorists, there is no right to exclude which means that borders should generally remain open (Carens 2013; Cole 2000; Kukathas 2005).

In response to this challenge, theorists have developed sophisticated general theories of the right to exclude, the most important of which I will discuss in the next chapter (Blake 2020; Miller 2016; Pevnick 2011; Song 2019; Wellman 2008). Common to all of these is that they aim to identify relations between citizens who share a state that confer a collective right to make decisions about who can cross their state's territorial borders and become members of their political communities, and on what terms. Another trait shared by all these theories is that they see the grounds of the right to exclude as shaping the moral standards that constrain its exercise. States may have the right to exclude, the thought goes, but they cannot use that right however they want. The 'right to exclude' is thus taken to denote both the rightful claim to regulate a given domain and the standard according to which that domain ought to be regulated: it determines both the legitimacy and justice of border control.

It is a familiar thought that the concepts of justice and legitimacy play distinct roles in the evaluation of social and political order. Many subscribe to the view that – at least as conceptual possibilities – a just social order could be imposed illegitimately, and an unjust social order could be imposed legitimately. These possibilities are useful for

normative theorising because they make sense, for example, of how parts of the social order of an authoritarian state can look attractive from the perspective of justice, or of how well-functioning democratic institutions can produce unjust outcomes. Intuitively, there is a distinction between what it would take for a set of rules to be substantially justified – do these rules give each affected party their due weight? – and whether those rules can be permissibly enforced – does this agent have the standing to enforce these rules, even if they are just? As Caleb Yong has pointed out, the dual role given to the right to exclude can thus lead to normative confusion (Yong 2014; 2017). Again, intuitively, there is a difference between the substantive quality of an immigration regime – do these immigration laws give each potential immigrant their due weight? – and the permissible enforcement of that regime – do states have the standing to enforce these laws?

In the literature on the state's right to exclude, the primary locus of debate has concerned the justice of immigration policy. I will defend this claim at length in the next chapter but, as preliminary evidence, consider Christopher Heath Wellman's entry on the debate for the *Stanford Encyclopedia of Philosophy*. Throughout the entry, Wellman invokes the concept of legitimacy only a few times, and primarily in relation to his own thesis that 'legitimate states have a presumptive right to exclude' (Wellman 2020, sec. 1.6).¹ As Wellman emphasises, this means that his account is importantly qualified: 'The condition that only legitimate states are morally entitled to be self-determining is significant because, given the plausible assumption that many existing states are illegitimate, this argument would not justify the immigration policies of many current

¹ The other times Wellman invokes the term 'legitimacy' in the entry can be accounted for by what I call the 'normatively dependent sense' of legitimacy in section 1.3 below.

states' (ibid.). This qualification is interesting because it highlights an assumption that underlies much of the debate on the state's right to exclude: that the legitimacy of border control follows from state legitimacy and that state legitimacy is to be settled independently of, and prior to, the state's border regime. This assumption works to instil a certain picture of border control as a territorially bounded activity, which is conducted at each state's borders. On this view, states claim jurisdiction over a particular territory and, if they are legitimate, they are morally entitled to this claim. This moral entitlement entails certain rights when it comes to immigration. In particular, on this view, states have the standing to enforce immigration law in accordance with their own interpretation of justice in migration and thus enjoy the privilege to decide how to respond to injustice engendered by those laws without outside interference.

The problem with the assumption that the legitimacy of border control is entailed by state legitimacy is that it sits uneasily with the reality of border control I began to describe in the previous section. As border control has become an externalised and coordinated activity, borders are becoming 'thick' institutions and not just 'thin' markers of jurisdiction (Longo 2018, 24). This seemingly raises new questions of legitimacy. Even if we granted for the sake of argument that states have the standing to enforce their immigration laws on their territories, it is not obvious that they have the standing to do so outside of that territory. Moreover, when states coordinate their border regimes, they enforce their immigration laws jointly. Even if states have the standing to enforce immigration law unilaterally, it is not obvious that they have the standing to do so as coalitions acting together. Therefore, given that extraterritoriality and coordination characterise the contemporary regulation of migration, we should ask: is the

extraterritorial and coordinated power involved in the contemporary regulation of global migration legitimate?

The impulse might be to answer that the legitimacy of extraterritorial and coordinated enforcements of border control are fully reducible to the fundamental question of whether territorial and unilateral border control is legitimate. However, this thesis will argue that this impulse is mistaken. By foregrounding the institutional realities of the contemporary regulation of global migration, I aim to demonstrate that the extraterritorial and coordinated aspects of contemporary border control raise concerns that are far from issues of ‘application’. Instead, they raise fundamental and independent questions of legitimacy. Thus, I will aim to show that a lack of discussion of the institutions through which migration is currently managed risks missing, disguising, and ultimately naturalising the full extent of the power that is currently wielded over vulnerable people on the move. A political theory of migration should be able to account for that power and to evaluate it.

I will argue that republican political theory, which is grounded in a fundamental objection to domination, can offer a compelling diagnosis of the power involved in the contemporary regulation of migration. Moreover, I argue that the republican ideal of non-domination supplies firm grounds for a normative evaluation of the legitimacy of border control. Republicanism is, on the surface, an ideal theoretical framework for my purposes because it is centrally concerned precisely with power and its legitimacy. Instead of being primarily concerned with distributions and entitlements in some domain, republican theory focuses on the institutions that have the power to satisfy those claims and asks what checks there are on those institutions. However, there is widespread disagreement between republicans about what their theoretical commitments entail when it comes to

questions of migration. Indeed, one of the world's leading republican thinkers, Frank Lovett, recently argued that '[p]erhaps the greatest challenge to contemporary civic republican theory (...) is the problem of state borders and global migration' (Lovett 2018, sec. 4.4). I will show that, once we shed some assumptions often invoked by republican theorists (and their critics), republicanism can ground a powerful critique of contemporary border regimes. Thus, this thesis also makes an independent contribution to the republican project by showing what the ideal of non-domination entails for a legitimate regulation of global migration.

In summary, this thesis will aim to offer an answer to the question: *is the power involved in the contemporary regulation of global migration legitimate?* In response to this question, I will develop a republican theory of the legitimacy of border control. Thus, my research contributes to two debates in contemporary political theory: first, the debate over whether contemporary border controls satisfy applicable criteria of normative legitimacy and, second, the debate over what the republican commitment to the ideal of non-domination entails for the border regime of a defensible republic.

1.3. Legitimacy: concept and conception

This thesis defends a republican conception of the legitimacy of border control. This conception will be built gradually, each chapter introducing another element to it. Before I can start my arguments in favour of this conception of legitimacy, however, I need to clarify what I take the concept of legitimacy to do. This is important because the concept of legitimacy is given many different meanings within, and outside of, political theory and can thus be slippery when employed in normative argument. I also want to distinguish legitimacy from the closely related concept of justice. Clarifying the distinct roles played

by the concepts of justice and legitimacy is important because that distinction is somewhat underexposed in the contemporary analytical literature. The distinctiveness of these roles matter, however. As I will argue in the next chapter in particular, there are questions which theories of justice leave unanswered, some of which are pressing for an evaluation of contemporary border regimes. Lastly, the following discussion of justice and legitimacy will be useful because it will allow me to introduce the foundations of the various normative arguments I will make throughout the thesis.

Legitimacy. The concept of legitimacy is central to discussions of political order, both in academic writing and in public discourse. In most of these discussions, legitimacy is invoked in a descriptive or ‘sociological’ sense. This sociological sense of legitimacy is that which is invoked in the social sciences and is also common in ordinary language. When invoked in this sense, legitimacy is taken to pertain to the beliefs of agents who are placed under some set of rules and, in particular, whether they accept the source of those rules. As theorised by Max Weber ([1919] 1994, 311–313), this sense of legitimacy contains a normative element in that it tracks whether agents think that they ought to comply by the rules of the relevant authority, as distinct from merely doing so out of fear of coercion. But legitimacy assessments of this kind are still value-neutral in that they seek to capture the extent to which agents actually hold these beliefs, and not whether they ought to. For example, on this understanding, to say that the EU suffers from legitimacy deficits is to make a descriptive claim about the beliefs European citizens have about the institutions of the EU and, in particular, whether they accept these institutions as issuing rules they ought to comply with (Føllesdal 2006, 446).

A different sense of legitimacy, which is also common in ordinary language, as well as in moral and political theory, is to invoke it as what Rainer Forst calls a

‘normatively dependent’ concept. On this understanding, legitimacy invariably derives its content from some other evaluative concept so that talk of legitimacy reduces to talk of permissibility according to that concept (Forst 2017, 133). This sense of legitimacy is familiar from democratic theory and practice, where talk of legitimacy always refers to some institution’s democratic credentials. The normatively dependent sense of legitimacy also accounts for legitimacy understood as ‘legality’ since, in this usage, the term denotes permissibility according to applicable bodies of law (Føllesdal 2006, 445). Moreover, and as I will discuss below, many contemporary political theorists invoke the term legitimacy in a normatively dependent sense by speaking of what states can legitimately do *in relation to* their obligations of justice. As I will explain in the next chapter, much talk of whether states may legitimately exclude unwanted migrants is thus best understood as asking whether justice permits that they do so.

Unlike the sociological and normatively dependent understandings of legitimacy, I take the concept of legitimacy to have a distinctive normative core. However, it is important to emphasise that, in so doing, I do not make the further claim that legitimacy pertains to its own normative domain. This claim is an essential part of the so-called ‘political realist’ school of contemporary political theory. Political realists are a diverse group of thinkers, but they all take their inspiration from Bernard Williams’s (2005) objection to the widespread use of moral values to analyse political states of affairs. According to realists, legitimacy is a normative concept that denotes distinctively non-moral oughts pertaining to political action. As one proponent summarises the idea: ‘Legitimacy here means something like the political arrangements that enable ideas about politics to have purchase, to command support, to precipitate action, to make people *do* certain things and not others’ (Runciman 2012, 66, emphasis in original). Realists thus

present their view as standing in opposition to moralised approaches to political theorising in general. However, the realist project is ultimately unconvincing when interpreted as making a structural critique of the application of moral values to politics. As Jonathan Leader Maynard and Alex Worsnip (2018) have demonstrated, the realist does not have a convincing argument for why her concerns require postulating a distinctive political normativity. That said, however, I am sympathetic to many of those concerns. In particular, I agree with realists that there has been a relative neglect of institutions, and of power, in normative political theory in general and in the political theory of migration in particular. For example, to the best of my knowledge, the only explicit treatment of non-state institutions for regulating migration within political theory has been conducted from a realist perspective (Macdonald 2015). Thus, I agree with realists that political theorising is unsatisfactory to the extent that it is highly idealised, but I disagree that an objection to the idealising tendency of some analytical political theory warrants an objection to the application of moral values to politics.

The concept of legitimacy on which I will rely in this thesis is thus both substantive and moralised: legitimacy has independent normative content and is definitionally tied to concepts we have reason to value. As I will understand it, legitimacy denotes the right to rule. There is a long tradition in political theory for understanding legitimacy in this way. Indeed, arguably the central question in political theory since Hobbes has been to offer grounds for the *state's* right to rule. However, the literature on the state's right to rule is complex, given the extraordinary range of powers the state claims over its citizens. States claim *kompetenz-kompetez*: the right to determine the scope of their own privilege (Laborde 2017, 162). This makes the state a notoriously difficult subject for political theory. A. John Simmons (1999) famously argued that there

is a crucial but often overlooked distinction between claiming that the state is justified and claiming that it is legitimate. The former, according to Simmons, involves giving general reasons for why individuals ought to organise under the state and not some other institution, whereas the latter involves explaining why particular individuals have obligations to obey the commands of their particular states.

Simmons is part of a tradition that analyses the legitimacy of the state in terms of its capacity to generate political obligation for its citizens, that is, general and ‘content-independent’ obligations to obey the law simply because it is the law (Valentini 2018). In response to the concern that this gives rise to an exceedingly demanding picture of legitimacy that almost no existing state could hope to satisfy, theorists like David Copp (1999) and Allen Buchanan (2002) argued that analyses of legitimacy should be decoupled from talk of political obligation. Instead, these theorists argued, assessments of state legitimacy should focus on the various Hohfeldian incidents involved in the state’s claim to territorial jurisdiction.² Building on Copp and Buchanan’s early innovations, a recent strand of political theory holds that the concept of legitimacy should be understood not as a claim with a correlative obligation, but instead as a *power* with a correlative liability (Applbaum 2010; 2019; cf. Copp 1999, 18–21). On this view, to say that the state is legitimate is to say that it has the normative power to change the normative situation of those it subjects to its rules. Conversely, those the state subjects to its rules lack an immunity from having their normative situation so changed. This is the sense in

² On the Hohfeldian analysis, rights are understood as privileges, claims, powers, or immunities (Wenar 2005). A has a *privilege* to ϕ if they have no obligation (or duty) not to ϕ . A has a *claim* that B ϕ if B has an obligation to A to ϕ . A has a *power* if A has the ability to alter her own or someone else’s Hohfeldian incidents. A has an *immunity* if B lacks the power to alter her Hohfeldian incidents.

which I will use legitimacy: as a normative power with a correlative liability, not political obligation.

The main advantage of understanding legitimacy as a normative power is that it allows for a decoupling of the concept of legitimacy from the concept of the state. If legitimacy is not analysed in terms of the conditions under which individuals have content-independent obligations to obey their state's laws, then the concept can be generalised so that it applies to any institution that seeks to regulate action by setting and enforcing rules. This is an appealing way to understand legitimacy because it allows us to ask questions about the legitimacy of a whole host of non-state institutions without having to argue that they are relevantly like states (Adams 2018; Adams, Scherz, and Schmelzle 2020; Buchanan 2018; Erman 2020; Sangiovanni 2019; Scherz 2019). Importantly, it does not require showing that an institution exercises coercion in order to qualify as a proper subject for legitimacy assessments.³ On this general understanding, legitimacy assessments solve what Allen Buchanan calls the 'metacoordination problem' (2018, 55–56). Since individuals inevitably disagree profoundly over how their actions ought to be regulated, it is essential that they can form some agreement over the institutions that are to make those decisions (Adams 2018, 87; see also Valentini 2012b). Legitimacy is the concept that serves this meta-coordination function by providing moral

³ As we shall see in the third chapter in particular, this is important in the context of the debate over border control, since that debate is sometimes presented as reducible to the question of whether states can be said to coerce potential immigrants. As I will argue further in the next chapter, this is also why it is not odd or counterintuitive to insist that the concept of legitimacy we use to evaluate the regulation of global migration should be decoupled from state legitimacy: *even if* states cannot be said to coerce potential immigrants in the narrow sense in which they coerce their citizens, that does not mean that the state-migrant relationship is not a proper subject for a legitimacy assessment (for the concept of narrow coercion, see Valentini 2011a, 129).

reasons for empowering certain institutions (and not others) for overcoming various collective action problems.

Legitimacy assessments thus serve the practical function of unifying our stances towards the institutions that claim authority to regulate our actions in distinct domains. However, when is an institution legitimate? In short: when the benefits of empowering that institution in a given domain outweighs the risks of doing so. If and only if an institution satisfies this general demand is it worthy of our moral reason-based support (Buchanan 2018, 55). I will take it that the practical implication of legitimacy is to supply those who are subject to an institution's rules with weighty moral reasons for complying with those rules, and those who stand outside of the institution's reach with weighty moral reasons for not interfering with that institution's rules.⁴ One might object that this makes the concept of legitimacy I endorse indistinguishable from the traditional concept of legitimacy as generating political obligations. For reasons that will become clear, however, if these practical implications amount to general obligations of obedience for an institution's subjects, then that is for independent normative reasons and not because it is conceptually demanded (see Applbaum 2010, 222). Moreover, I am not committed to the view, which is implied by a claim-obligation concept of legitimacy, that dissenters

⁴ Note that I do not make the further claim that the reasons supplied by legitimacy have stronger, exclusionary status (see Valentini 2018, 140; cf. Buchanan 2018, 57–58; Raz 1986, 46; Sangiovanni 2019, 14–15). It is also worth noting that my reference to reasons for compliance separates my view from recent 'minimal' accounts of legitimacy, on which legitimacy simply grants rights to non-interference (Adams 2018, 89). However, many of my arguments in this thesis will be compatible with such minimal accounts in that for many institutions, including and perhaps especially border regimes, the best way to interfere with their rules is to (assist others in) not comply(ing) with them.

somehow wrong that institution or its officials by failing to comply, or by interfering, with its rules (see Sangiovanni 2019, 15).

A final note of clarification. Many take the term ‘authority’ to denote the capacity to generate political obligation (Buchanan 2002, 691–693; Nili 2018, 74n10; Valentini 2018, 137). I do not adopt this terminology in what follows. When I refer to authority, I will simply refer to the claim to make legitimate commands. My usage is thus primarily descriptive in that it refers to the act of claiming power to regulate a given domain.

Justice and legitimacy. The concept of legitimacy, as I have defined it, is importantly distinct from the concept of justice. Both concepts apply to social order and they both involve rights talk. However, they offer different forms of evaluation of social order. Legitimacy settles the question of whether an institution has moral standing to create and enforce norms that change the normative situation of the agents bound by those norms. Justice, by contrast, evaluates the substantive quality of those norms (Pettit 2012, 130–131). Thus, legitimacy tells us which institutions we ought to empower to interpret the demands of justice and structure social rules according to those demands. Because of this functional link, the substantive requirements of legitimacy and justice will overlap in central cases. Plausibly, given the meta-coordination function of legitimacy, an institution that systematically enforces gravely unjust rules will also be illegitimate: we will not have moral reason to empower such an institution. However, as I will now explain, it is important to insist on the distinction between a theory of legitimacy and a theory of justice.

I agree with Iris Marion Young, who follows John Rawls in arguing that there is an important division of labour between the concept of justice and interpersonal morality (Young 2011, 70–71). Judgements of justice differ from judgements of individual action

in that they ‘are moral judgments that take different points of view on social relations’: they take a ‘more macro view on social processes, considering how the effects of actions within institutions are mediated by the actions of other people in other institutions to produce outcomes we judge as just or unjust’ (Young 2011, 71). The relevant social structures do not only correspond to established legal orders but also looser forms of social orders. Thus, ‘[w]herever people act within a set of institutions that connect them to one another by commerce, communication, or the consequences of policies, such that systematic interdependencies generate benefits and burdens that would not exist without those institutional relationships, then the people within that set of institutions stand in relations of justice’ (Young 2000, 246). Thus, as I will understand it, justice does not depend on the prior existence of formal rule-making institutions, but applies generally to all social structures.

The point that relations of justice can arise in the absence of rule-making institutions is important because it explains legitimacy’s practical meta-coordination function. Since systematic interdependencies generate benefits and burdens that would not exist without social interaction, we may have to *create* formal institutions that can regulate our interaction to bring the benefits and burdens it produces in line with the demands of justice. Hence the division of labour: justice pertains to the evaluation of social structure, whereas legitimacy pertains to the various institutions that seek to regulate social structure through the imposition of rules. Collapsing the one into the other is to ignore legitimacy’s practical function of providing moral reason to support particular institutions despite pervasive disagreements over what justice demands. Disagreement over the substantial requirements of justice is a pervasive fact about social life and the stability of institutions requires recognition of this fact. If everyone were to insist on their

conception of justice and act accordingly, ‘institutions would be unable to establish the sort of sustained, predictable coordination that they require to function effectively and produce goods over time’ (Adams 2018, 87).

Conflating justice and legitimacy does thus not only lead to conceptual confusion. The distinction between legitimacy and justice matters in normative terms. Both illegitimacy and injustice entail a requirement of reform – of the composition of the norm-giving institution and of the substantive norms, respectively. An upshot of this is that if a regime is unjust but legitimate, then the institution enforcing that regime retains two crucial privileges. First, the institution’s membership will retain the privilege of interpreting which reforms are demanded by justice. Second, they retain the privilege to make decisions about how to sequence those reforms. These are significant powers under conditions where an institution is subject to multiple requirements for reform that cannot be simultaneously realised. If an institution fails the test of legitimacy, however, then it loses these core privileges. This means that the agents whose actions the institution seeks to regulate are no longer liable to have their normative situation changed by that institution. Hence, they are justified in acting in opposition to that institution’s norms, and in offering their support to a competing institution seeking to regulate the same domain. I do not make the implausible claim that considerations of legitimacy necessarily trump those of justice, so that vast gains in justice would always be all-things-considered impermissible if they were enforced by an illegitimate institution. However, I do hold that legitimacy enjoys a certain normative priority since it settles who has the standing to interpret and enforce justice – and thus towards whom we ought to direct our complaints

about injustice (cf. Cordelli 2020, 12; Pettit 2019, 8–9).⁵ Put in general terms: if an agent claims a normative power that depends on features of its constitution, then that agent must ensure that those features are in place before it holds anyone liable to that power.

Upholding a distinction between legitimacy and justice allows for the conceptual possibilities of illegitimate imposition of just law, and the legitimate imposition of unjust law. As I will argue in chapters 2 and 3, most of the political theorists who defend states' right to exclude unwanted migrants see the border regimes of the states in the Global North as involving the legitimate imposition of unjust law. Hence, they end up endorsing the view that states retain the privilege to interpret which reforms justice requires of their border regimes, and to make decisions about how they sequence those reforms in relation to other demands of justice they are under. As I will argue, this view faces two serious problems. First, there is a general worry about the ability of the theories of the state's right to establish that the legitimacy of border control follows from state legitimacy more generally. Second, the extraterritorial and coordinated nature of contemporary border regimes uproots central assumptions held by those who want to defend the legitimacy of border control, thus posing specific concerns about the shape current border regimes take.

In practical terms, the requirements of reform engendered by illegitimacy and injustice, especially as they pertain to the regulation of migration, will have to be enacted

⁵ Thus, my argument stands in tension with the most immediate interpretation of Rawls's famous statement that '[j]ustice is the first virtue of social institutions, as truth is to systems of thought' (1971, 3). On my view, justice might be the first virtue of the substantive rules of social institutions, but these institutions must themselves enjoy legitimacy before they are entitled to enforce such rules. Deviations from either justice or legitimacy create requirements of reform. But the reforms required by illegitimacy generally enjoy normative priority because these determine whether an institution is entitled to regulate a domain (in accordance with justice) in the first place.

by states. However, this is merely a reflection of the vast range of powers to which the contemporary nation state makes claim and does not undermine the conceptual distinction between these distinct demands for reform. To the contrary, clarifying the grounds and demands of legitimacy for border control contributes to a broader conversation about whether states ought to have their extensive regulatory powers or whether processes of globalisation have created a need for empowering new institutions at the supranational level (e.g., Føllesdal 1998; Young 2000, chap. 7). By contrast, in evaluating the distribution of benefits and responsibilities engendered by border control, theories of justice in migration are in principle open with regards to the enforcement agent of that distribution (Ypi 2008, 406n38). Moreover, since legitimacy creates moral reasons to comply (and refrain from interfering) with an institution's rules, establishing the legitimacy of border control would also make resistance to immigration decisions much harder to justify (Yong 2018; cf. Hidalgo 2015; 2019). Whether immigration decisions may permissibly be resisted is a live practical issue in many parts of the world and it is one answered more directly by a theory of legitimacy than by a theory of justice.

Normative grounds. As I have already emphasised, I endorse a moralised conception of legitimacy. On my view, although the concepts of legitimacy and justice are distinct, they have the same grounding. As I will understand it, that grounding is individual human agents' central and equal interest in freedom. Thus, in order for an institution to wield legitimate power, the benefits that institution poses to agents' overall freedom must outweigh the risks that institution's imposition of rules inevitably poses to individual freedom. The value of freedom is foundational to the republicanism I draw upon and defend in this thesis (Laborde 2008; Lovett 2010a; Pettit 1997; 2012; Skinner 2010). However, since freedom is central to contemporary liberalism, as well as to critical

theory's objections to relations of oppression (Young 1990; Forst 2017), my understanding of legitimacy is general and in principle compatible with either of these frameworks. As I will explain further in chapter 4, my arguments in this thesis are compatible with both the liberal understanding of freedom as non-interference and the republican conception of freedom as non-domination: I invoke the republican ideal of non-domination as a normative concept that protects freedom, whether it is understood as non-interference or non-domination (cf. Valentini 2011a, 134–135). Thus, although I will make frequent references to the ideal of non-domination, none of my arguments turn on non-domination being the best interpretation of social freedom.

That human beings are of equal moral worth, and that they have central interests in freedom, are foundational premises of my argument. Defending either would take me far beyond the realms of this project. But since they are universally endorsed by the theorists I will engage with, any reader that takes issue with my stipulating either of these premises is going to be sceptical of the debates with which I engage more generally – perhaps because of their scepticism of moralised discussions of politics in general.⁶

Throughout my discussion, and in line with both theory and practice of regulating global migration, I will make frequent reference to the concept of human rights. In line with my understanding of the normative grounding of the concept of legitimacy, I also

⁶ Laura Valentini has argued that, because they have the same grounding, legitimacy and justice are 'not genuinely distinct' but instead expressions of the same concern in the presence or absence of disagreement over justice (2012b, 607). I can accept that, under circumstances of universal agreement, the demands of justice and legitimacy would end up being indistinguishable. However, under such idealised circumstances, it is unclear whether either concept would even apply: the very practice of theorising about either seems to me to respond to precisely such disagreement. Either way, and as I explain further in the methods section below, settling the question of whether legitimacy and justice are distinct 'all the way down' is superfluous for my purposes in this project.

understand human rights as grounded in individual agents' central and equal interest in freedom. In particular, I endorse Valentini's argument that human rights should be understood as 'necessary and sufficient conditions for a reasonable implementation of persons' right to freedom' (2012a, 581). This conception of human rights explains the relationship between human rights and institutional legitimacy: since individuals need institutions to regulate their actions for the protection of their rights to freedom, those institutions lose their right to rule if and when they fare worse in terms of such protection than – institutional or non-institutional – alternatives (Valentini 2012a, 584–585; cf. Buchanan 2018, 59–61). Since such assessments of comparative benefits in terms of freedom are inherently contextual, both human rights and institutional legitimacy are context-sensitive – or 'political' – concepts.

The following chapters will give more content to this freedom-based conception of legitimacy. In chapter 3, I will defend the view that the relevant legitimacy standard for institutions turns on the amount of power they exercise over those who are subject to their rules (Scherz 2019). In chapter 4, I specify this conception further by arguing that the republican concept of domination helps explain when an institution triggers a demand for more stringent standards of legitimation. In explicating the republican position, I will also give further grounds for why freedom should serve as a foundational value of concern for a normative theory of legitimacy.

1.4. Method

This thesis intervenes in debates in analytical political theory and, as my bibliography shows, does so primarily by drawing on the resources of that tradition. Throughout my discussion, I rely on conceptual analysis and normative values to construct arguments that

reach substantive conclusions. Given that the aim of this project is to interrogate the institutional structures that currently characterise the regulation of global migration, however, I will also be concerned with offering a sound description of those structures. In chapter 3, in particular, I thus review and interpret recent work in the empirical social sciences to reconstruct the core features of the contemporary practice of border control. This puts me firmly on the ‘fact-sensitive’ side of the dichotomy between fact-free and fact-sensitive normative political theory (Miller 2013). Although I agree that utopian thinking can be both worthwhile and important – at least to the extent that it can inspire movements for social change – my concerns in this project are not with how we should construct political arrangements if we could start from scratch. This is why, perhaps surprisingly, I will only engage indirectly with the debate over whether borders ought, fundamentally, to be open or closed. Instead of seeking to answer such ‘grand’ questions, I aim to scrutinise a particular set of institutions in terms of the risks and benefits they engender and to ask whether they generate reasons for compliance and non-interference for real agents in the actual world.

In its ambition to offer an adequate account of the sociological practice that serves as the target of my critique, this project is also informed by methodological commitments shared with the critical tradition, at least at the level of general outlook. In particular, I fully endorse Iris Marion Young’s statement – which she lists as an essential feature of a critical theory – that ‘good normative theorising cannot avoid social and political description and explanation’ (1990, 5). This thesis thus seeks to be sensitive to the institutional structures that provide the context and conditions of contemporary border controls. In line with Young’s well-known objection to the ‘distributive paradigm,’ my critique is directed at the social processes that produce certain outcomes and not only at

those outcomes in themselves (Young 1990, chap. 1). Thus, this project aims not only to be empirically informed, but to show how normative reflection ought to be based on a sound social theory (Laborde 2008, 4–6).

This rather thin affinity with the concerns of the critical tradition would perhaps not have been worth mentioning had it not been for the republican part of this project. Contemporary republicanism has become a spacious political ideology that now contains distinctive strands within it (Laborde 2013). This thesis draws on, defends, and aims to make a contribution to the strand of contemporary republican theory that is known as *critical* republicanism (Bohman 2012; Gädeke 2020a; Laborde 2008). All republicans seek to identify power relations that give rise to domination: relations where some agent is structurally vulnerable to the arbitrary will of some other agent. On the basis of this diagnostic exercise, republicans advocate institutional responses that aim to counteract and alleviate such vulnerability by providing voice to dominated agents. The unique characteristic of critical republicanism is that it seeks to ground the diagnostic part of the republican enterprise in a thick understanding of social institutions, giving due weight to the structural forces that enable and constrain agents' capacities to act (Laborde 2008, 9–11). As I will argue in chapter 5, this makes a difference in substantive terms. Unlike more analytically inclined republicans, who conceptualise power in agent-relative terms, critical republicans conceptualise power in systemic terms, which allow them to give a unique response to a pressing philosophical challenge facing republicanism as a whole.

As will become clear as my argument develops in chapters 2 and 3, a key reason for my turning to republican political theory for this project is itself methodological. Contemporary political theory and philosophy in the analytical tradition is still largely conducted from a liberal contractualist perspective, according to which principles for

regulating political institutions are generated by reference to a hypothetical contract to which appropriately idealised participants could not reasonably reject (Rawls 1971; 1999). Liberal contractualism is undoubtedly a powerful political doctrine, but it has increasingly come under criticism, not so much because of its substantive arguments as for its blind spots. Because liberal contractualism sees the subject of political theorising as the rules that should bind reasonable agents engaged in various activities, it matters for the substantive output of such theories how those activities are conceived. However, the conception of the relevant activities is rarely positively defended, but rather assumed from the start. Hence, feminists have objected that much liberal theory masks gendered forms of oppression by conceiving of private life as outside politics, critical race theorists and multiculturalist thinkers have objected that abstracting away from the reality of racial and cultural oppression makes liberal theories badly equipped to respond to these injustices, and democrats and realists have argued that liberals are unable to properly theorise the role of power in politics and hence the need for robust democratic institutions (see Young 1990). When it comes to international questions in general and to questions of migration in particular, liberal political theory has tended to work from a so-called methodological nationalist frame, according to which the nation state is seen as the sole subject for theorising. This, some have argued, has made liberal theory blind to the agents and structures driving migration flows and thus unable to adequately respond to morally salient issues (Sager 2016, 42; cf. Benhabib 2004, chap. 3). Contrary to how these criticisms often are presented, liberals have several ways to try to accommodate these concerns. However, it is still a major advantage of republican political theory that it is attuned to them from the start (Lovett 2010a, 6–7; Pettit 2017). By grounding its theoretical programme in an objection to domination, defined in terms of power to

arbitrarily interfere, republicanism can capture and respond to exercises of power, whether they are enacted by states, individuals, non-state institutions, or coalitions of states and institutions. As I will show in chapters 3 and 4, these are major advantages when it comes to theorising the reality of contemporary border control.

Legitimacy itself is arguably another blind spot of contemporary liberal political theory (Pettit 2012, 144). Because of its concern with how action ought to be regulated, liberal-contractualist theory can lose sight of the prior question of *who* should regulate action. One might think that, when it comes to questions of migration, the answer is obvious. The state seeks to regulate migration and, if its claim to do so can be justified, then we cannot have moral reason to support any other institution in regulating migration. As I will argue in the next chapter, however, this thought is too quick. In order to avoid assuming precisely what is at stake, it is insufficient to show that the state's claim to control migration could receive a hypothetical justification. Instead, we would have to show that states, *as they currently exist*, uphold border regimes that generate moral reasons for compliance and non-interference. That exercise cannot be settled by hypothetical argument but must instead be grounded in an analysis of the power actual states currently hold over the migrants whose action they seek to regulate.

Lastly, this thesis will endorse and argue in favour of a project of more settled institutions above the nation state. Such a project is, of course, unrealistic in the sense of tracking what is likely to happen, given current politics around migration. But, as noted by Young, 'there is no contradiction, however, between being realistic about how things

are and determined to try to improve those realities' (2007, 3).⁷ Indeed, I aim to show that being realistic about the harms and wrongs involved in the contemporary regulation of migration requires that we endorse such an ambitious project of institutional reform.

1.5. The structure of my argument

This thesis seeks to answer the following question: *is the power involved in the contemporary regulation of global migration legitimate?* This section explains how the five remaining chapters of this thesis contribute to an answer to this question.

In chapter 2, I object to the widely held view that the legitimacy of border control can be assumed to follow from state legitimacy more generally. I review the most influential general theories of the state's right to control borders and argue that they suffer from a blind spot when it comes to questions of legitimacy. The theories that rely on *moralised* accounts of the state struggle to explain how their theories confer rights onto the states that inhabit the actual world. Some theorists have sought to avoid this problem by grounding their theories of the right to exclude in non-moralised *descriptive* accounts of the state. But, as I show, their strategy is ultimately unsuccessful. These 'institutionally conservative' theories end up having to *stipulate* that states wield legitimate power in the enforcement of their border regimes. But this clearly makes them unsatisfactory as theories of legitimacy in themselves. Therefore, I conclude, the legitimacy of border control requires a positive defence and cannot be assumed to follow from state legitimacy more generally.

⁷ One tendency of the realist project – from which some realists have seen the need to distance themselves (Finlayson 2017) – has been to object to all substantive normative proposals on the grounds that they are unrealistic and, by so doing, forge a tight link between realism and conservatism.

In chapter 3, I thus ask what would constitute such a positive defence of the legitimacy of border control and argue that border control would be legitimate if it satisfied an appropriate *legitimacy standard*. The question is what the relevant legitimacy standard for border control is. I argue that legitimacy is tied to social power. I then draw on this conception of legitimacy to argue that the extensive power states claim over potential migrants when they externalise and coordinate their border regimes triggers a demand for a more stringent standard of legitimacy than a conventional non-violation of human rights standard. This standard must be able to capture the risks potential migrants are exposed to under the contemporary practice of border control. These risks, I argue, stem from the unaccountable power that characterises contemporary practice.

Chapter 4 introduces the republican element of my theory by arguing that the unaccountable power involved in the contemporary practice of border control is an instance of domination, as republicans understand that term. Contemporary practice allows a set of states to exercise arbitrary power over a set of vulnerable individuals, making the institutional relation that exists between them one we have *prima facie* reason to treat as illegitimate. I articulate two objections to my diagnosis, one philosophical and one institutional, to which the two final chapters work to respond. The first objection holds that my diagnosis of domination – which turns on the power held by states acting together – illustrates a general philosophical problem for the republican ideal of non-domination. This ‘coalition problem’ holds that this ideal is incoherent because, when fully outlined, the concept of domination turns out to be radically inclusive: everyone is constantly vulnerable to the arbitrary will of coalitions of agents with requisite power to constrain our actions. Thus, this objection goes, defending a non-domination standard for

institutional legitimacy is a hopeless task because its central normative concept is impossible to fulfil.

In chapter 5, I give a general diagnosis of why the ideal of non-domination appears vulnerable to the coalition problem. I argue that the problem arises if the power that is relevant to assessments of (non-)domination is understood in *agent-relative* terms. However, understanding social power in *systemic* terms dissolves the coalition problem, thus rescuing the ideal of non-domination. I argue that we have independent reason to endorse a systemic conception of power and then recast my diagnosis of domination in the contemporary practice of border control in these systemic terms.

Lastly, chapter 6 outlines and responds to the second key objection to my overall argument. According to this objection, establishing that the contemporary regulation of global migration involves domination is insufficient for establishing its illegitimacy. This is because, given legitimacy's meta-coordination function, institutional illegitimacy depends on the possibility of preferable alternative institutional arrangements. And, so the objection goes, there are no institutional arrangements that are preferable from the point of view of non-domination. Any attempt to bring the power states currently wield over potential immigrants under institutional oversight would inevitably end up dominating those states by undermining their self-determination. I respond to this objection by targeting its central premise, namely, that the supranational regulation of migration and self-determination stand in fundamental tension. I argue that, under the systemic conditions that characterise the contemporary global order, there is good reason to believe that such a supranational institution would add to, rather than detract from, the institutional capacity of many states. Drawing on Iris Marion Young's relational conception of self-determination, I argue that republicans therefore have reason to see a

supranational regulatory institution for migration as adding to, rather than detracting from, a commitment to self-determination.

The conclusion I draw from these arguments is that the contemporary regulation of global migration is characterised by *illegitimate* exercises of power. In the concluding remarks that follow chapter 6, I discuss some normative, theoretical, and practical upshots that follow from this conclusion and from the arguments I have advanced in the thesis.

CHAPTER 2

INSTITUTIONAL CONSERVATISM AND THE RIGHT TO EXCLUDE

This chapter offers a critical discussion of the main paradigm through which normative political theorists have sought to analyse questions of immigration and border control, namely, by interrogating the case for the so-called ‘right to exclude.’ In particular, I will highlight and examine a presumption that is often made by those who defend this right. This presumption is that the right to exclude applies to legitimate states, implying that the legitimacy of border control ought to be considered independently of, and prior to, the shape of any given state’s border regime. On the theories that make this presumption, the right to exclude is thus best understood as a standard of justice. It tells us when the distribution of benefits and responsibilities stemming from an attempted migration – by an individual agent, from one state to another state – is justifiably frustrated by an agent with relevant standing. The agent with the standing to enforce the relevant distribution of benefits and responsibilities is taken to be the contemporary nation state. Hence, the *state’s* right to exclude.

I will argue that this presumption is unwarranted because it gives rise to a problem of applicability. Proponents of the right to exclude intend for their accounts to be directly applicable to the contemporary politics of migration, and thus to be capable of offering justifications for the restrictive regimes of, for example, the United States (Blake 2020, 79–83) and the member states of the European Union (Miller 2016, 166–173). However, the vast majority of these defences of the right specify baseline criteria of justice in migration that most contemporary states, and especially those in the Global North, fail to meet. But if the right to exclude is a matter of satisfying claims of justice in migration,

why do states retain that right in cases when they systematically violate the conditions that make it defensible in the first place?

The chapter reviews two strategies for avoiding this problem of applicability. The first, which has been most prevalent in the literature, involves offering a moralised account of the state. These accounts appeal to moral characteristics that obtain between co-citizens and which give rise to claims to self-determination, including control over borders. Relying on a moralised account of the state straightforwardly avoids the original problem of applicability because it provides an explanation for why citizens organised under the state have the privilege to decide how and in what sequence they will enact reforms to their border regime when it falls short of applicable standards of justice. However, by relying on a moralised account of the state, these accounts face a different applicability problem. In order to describe states in terms that contain the moral characteristics that ground the right to exclude, proponents of this strategy have to abstract away from certain aspects of states as they currently exist. But having idealised the subject of their theories – the state – the challenge is now to explain how and why these theories can lend support to the border regimes of actual states.

The second strategy has been developed in part as a response to the difficulties associated with moralising the state. Following Michael Blake, who is the main proponent of this strategy, I will call these theories ‘institutionally conservative’. According to institutional conservatism, the right to exclude can be derived from a minimal description of the state. This methodological innovation is interesting because it straightforwardly avoids the second application problem. But it cannot avoid the first. Although institutionally conservative theories arguably do not idealise the state, they are structurally conditioned to presuppose that border control is already legitimate.

Institutional conservatives can respond to my argument by offering a rational reconstruction of the institution of statehood. But, as I will argue, such a rational reconstruction cannot support the strict exclusionary rights these theories seek to establish.

The chapter is structured as follows. Section 1 introduces the right to exclude paradigm, shows how it has tended to neglect questions of legitimacy, and how this neglect gives rise to the problem of applicability. Section 2 reviews three accounts of the right to exclude that moralise the state by reference to association, collective ownership, and nationalism. I argue that these views avoid the first problem of applicability at the cost of introducing the other. Section 3 introduces the institutionally conservative strategy for grounding the right to exclude and argues that it is bound to conflate the concepts of justice and legitimacy. Because of this conflation, it is incapable of explaining how and why actual states wield legitimacy in the enforcement of their border regimes: it faces the first applicability problem. Section 4 considers the rational reconstruction strategy for responding to my objection. I argue that, whilst this strategy is capable of grounding some control over borders, it cannot deliver the authority that institutional conservatives purport that their theory can support. Section 5 concludes.

Before I begin my series of arguments, it is important to emphasise the limited point this chapter aims to establish. I do not take it that I offer conclusive arguments against the accounts I discuss, nor to claim they have no insights that are relevant for normative assessments of migration and border control. Instead, I aim to expose some central assumptions often made in the debate over the state's right to exclude and, by so doing, to shed light on some theoretical blind spots inherent to that debate. This does not settle anything substantively about the legitimacy of contemporary border controls. But

it does establish the claim that the power currently involved in the governance of migration stands in need of an independent legitimacy assessment. Legitimate authority over borders cannot be assumed to follow from state legitimacy more generally.

2.1. The right to exclude and the problem of applicability

States' border regimes determine who has access to which labour markets, education systems, and social security networks. They also determine who will have their basic human rights protected when their current state is unwilling or unable to perform that task. By serving these functions, the institution of border control sustains and reproduces global inequality, as well as ensures that many vulnerable individuals fail to have their basic human right protected. In light of this, political philosophers and normative political theorists have scrutinised border control and asked whether it can be rendered compatible with the demands of political morality. In particular, they have sought to find a justification for the right states claim to set and enforce their own immigration policies. In the literature, this right has been discussed as the state's right to exclude (Bertram 2018; Fine 2013; Wellman and Cole 2011).

The right to exclude is a power in that it grants states the capacity to change outsiders' normative relationship – their claims, obligations, and liabilities – to the state itself. It is also a privilege in that states can unilaterally decide how they exercise this power. This is reflected in how states grant visas, permanent residency, or citizenship to previous non-members and how they attach distinct bundles of obligations and liabilities to each of these statuses (Fine 2013, 255). Moreover, all states claim the right to enforce the relevant obligations and liabilities by means of force. The right to exclude has been thought so central to our conception of sovereignty that some philosophers have thought

that it is definitionally tied to what it means for states to be legitimate. As David Copp emphasises in his argument to this conclusion, however, having a privilege does not settle the question of how one should exercise that privilege. Thus, even if legitimate states have the privilege to control borders, this does not settle how they ought to regulate those borders (Copp 1999, 23–26). Since a privilege entails the absence of a claim, it might be thought that justified claims for admittance on the part of some migrants – for example, refugees or members of the global poor – undercuts the existence of the right to exclude. However, Copp suggests, even if there are individuals who have claims to emigrate from their current state to wealthier and more stable parts of the world, the states in those parts of the world may retain the privilege to interpret both who has such claims and what constitutes their fair share of the collective obligations to discharge them (1999, 25). Thus, in the absence of a claim on the part of *all* potential immigrants, the thought goes, the right to exclude follows from state legitimacy.

Unsurprisingly, then, the contemporary debate on the right to exclude arose in the wake of arguments seeking to establish that everyone has a claim to immigrate.⁸ The strategy for proponents of the right to exclude has thus not been to deny that states may have obligations to some set of vulnerable migrants. Instead, it has been to show that the privilege states enjoy to control their borders is generally defensible, so long as states

⁸ The seminal piece in this debate is Joseph Carens' first article on immigration and border control, which makes a general argument in favour of open borders (1987, 251; see also Cole 2000; Goodin 1992; Kukathas 2005; Steiner 1992). Carens was, in part, responding to Michael Walzer's explicit defence of the right to exclude, which featured as part of the communitarian theory of justice he developed in *Spheres of Justice* (1983). Walzer defends the right to exclude because he sees it as a precondition of the kind of political membership he deems valuable, making his argument a form of the nationalist strategy discussed below.

abide by applicable principles of justice in migration (e.g. Blake 2020; Miller 2016; Pevnick 2011; Song 2019). To illustrate the general approach to questions of migration this has engendered, consider a recent introduction to the debate by Sarah Fine and Andrea Sangiovanni (2015; see also Wellman 2020).

Fine and Sangiovanni introduce the various issues migration and border control pose for normative political theory as, fundamentally, turning on the question of whether ‘the widely held belief that states have an expansive right to exclude would-be immigrants’ is morally justifiable (2015, 193). To interrogate this belief, they construct what they call ‘the pure case’. This case involves a migrant with strong, but not urgent, interests in immigrating to a state whose institutions are capable of absorbing newcomers. According to Fine and Sangiovanni, this strategy is warranted because it isolates what is essentially at stake in the debate. They write,

(...) to determine whether states have an all-things-considered right to exclude in a particular range of cases, we do best to begin our enquiry by asking: under what conditions, if any, do states even have a pro tanto right to exclude (...)? If we are able to establish such a right, we can wonder, in a second step: how weighty is this right? Is it weighty enough, for example, to override interests deriving from, for example, economic deprivation, family reunification, or political and religious persecution? (Fine and Sangiovanni 2015, 194).

The next step in Fine and Sangiovanni’s analysis is to draw a distinction between an unqualified interpretation of the right to exclude, according to which the right trumps all competing concerns, and a qualified interpretation, according to which the right outweighs a range of competing concerns but not all such concerns.

The picture that emerges from Fine and Sangiovanni’s strategy of setting up the question is indicative of much of the contemporary debate on immigration and borders. Theories of the right to exclude are treated as providing explanations for when and why

immigration law is substantially justified. Authors disagree over what values, and over what evidence, are relevant for such a justification. Important questions of debate include (but are not limited to): Do effects on sending societies matter for the justification of immigration policies of receiving states (Blake and Brock 2015; Oberman 2013) and, if so, how should we understand those effects (Oberman 2015)? Are structural issues about the patterns selective immigration policies engender relevant for assessments of individual states' policies (Ip 2020; Lim 2019; Owen 2020b; Shachar and Hirschl 2014)? How do the histories of racism and colonialism bear on justification of current immigration policy (Fine 2016; Amighetti and Nuti 2016)? Are there obligations towards vulnerable compatriots that count in favour of tighter immigration policies (Macedo 2018; Tamir 2019) and, if so, do these override the obligations we have towards vulnerable people abroad (Abizadeh 2016)? Are family reunification programmes singling out a morally salient category (Ferracioli 2016)? Do guestworker programmes inevitably lead to exploitation (Ypi 2016)?

On this rendering of the debate, the right to exclude should be understood as a standard of justice in migration. Following Lea Ypi's definition of justice in migration, the right to exclude thus 'identifies permissible and impermissible restrictions on freedom of movement and articulates how benefits and responsibilities should be distributed between the affected parties' (Ypi 2008, 391). Whilst this effort is vital, the overall framing of the right to exclude does not address the prior question of whether the privilege to control migration is defensible in the first place. Yet, this is important for an evaluation of border control for the reasons outlined in the last chapter: first, under conditions of pervasive disagreement over what justice in migration amounts to, a privilege to control borders includes the ability to interpret those demands of justice and apply them

accordingly. Second, if states have the privilege to control borders, then they have significant leeway with regards to how they are to sequence the reforms to their border regime so as to satisfy the demands of justice in migration. These twin facts about what it means for states to retain the privilege to structure their immigration regimes (even under fairly stringent demands of justice) matter substantively. As I explained in the previous chapter, if states retain their legitimacy in the imposition of unjust law, then that has practical implications for how individuals ought to relate to those laws. In the case of immigration law, legitimacy would mean that potential immigrants have weighty reasons to comply with the content of those laws, and that dissenting citizens (and others) have weighty reasons not to interfere with the imposition of the laws. Thus, to restate the distinct roles played by justice and legitimacy in an evaluation of border control: justice settles whether there ought to be reforms to a given border regime, but legitimacy settles who ought to have the privilege to make decisions about the sequencing of those reforms. Again, this means that the reforms required by illegitimacy hold a certain normative priority over those entailed by injustice. If a state wields illegitimate power in the enforcement of their border regime, then the reforms entailed by that illegitimacy must be enacted.

However, what can explain the legitimacy of immigration law? Why do contemporary border regimes generate reasons for compliance and non-interference? A plausible suggestion is that the various accounts of what constitutes justified exclusion serve this function. But, if that is the case, then proponents of the right to exclude face a practical problem of applicability. As Fine and Sangiovanni note (2015, 194), all mainstream defences of the right to exclude are qualified defences of that right, which include specified constraints that render the right defensible. Minimally, these theories

converge on the view that states have obligations to do their fair share of protecting refugees who, by definition, do not have their rights protected in their state of origin.⁹ For example, Christopher Heath Wellman, who argues that states may permissibly exclude ‘even refugees desperately seeking asylum’ specifies that this permission is conditional on states satisfactorily acting to ‘export justice’ by ensuring that these individuals are protected in other ways (2008, 109; 128–130). More broadly, most views also include procedural justice requirements which, for example, demand that selection criteria comply with liberal non-discrimination norms and that rejected would-be immigrants are offered sufficient explanation (e.g., Miller 2015, 398–401).

The practical problem this gives rise to is the following. Defences of the right to exclude are invariably presented as offering justifications for why actual states in the Global North are permitted to uphold restrictive border regimes. But, if what makes the right to exclude defensible in the first place is the satisfaction of demands of justice in migration, then they fail in this task. This is because we currently live in a world where all of the states in the Global North systematically exclude refugees, asylum seekers and the global poor, without a plausible claim to do enough to support these vulnerable migrants in other ways – as is evident by the robust presence of overfilled refugee camps controlled by actors with varying capacities for protecting human rights (FitzGerald 2019). At the same time, these states compete to attract the wealthy and the talented, giving rise to vast inequalities between migrants as a group (Oberman 2015; Shachar 2016). This means that, *by the standards set by the defences of the right to exclude*, none

⁹ Many of these theorists also endorse broader definitions of what constitutes refugeehood than that offered in the 1951 Refugee Convention and which is thus operative in current human rights practice (e.g., Miller 2016, 82).

of the states in the Global North have even minimally just border regimes.¹⁰ Therefore, when interpreted as standards of justice in migration, accounts of the right to exclude fail to provide a plausible account for why actual states retain the privilege to control borders, given that they all systematically violate the conditions that are supposed to make the right to exclude defensible in the first place.

However, although much of the discussion of the right to exclude invokes the language of justice in migration, the best general theories of the right to exclude also contain the resources for explaining why states retain the privilege to control borders, despite falling short of applicable standards of justice (see Yong 2014, chap. 2). These accounts appeal to moral relations that obtain between citizens and which give rise to a claim for political self-determination. Because of this, they contain the resources for explaining why states retain the right to exclude even when they violate the constraints that come with it.

2.2. Moralising the state: freedom of association, liberal nationalism, and collective ownership

This section reviews three of the best defences of the state's right to exclude, highlighting their appeal to the moral relations that give rise to claims for self-determination. Since having the privilege to decide how to act on one's obligations of justice is a plausible interpretation of what it means to be self-determining, these accounts avoid the problem

¹⁰ David Miller is currently developing an argument which seeks to explain the authority of immigration law by reference to a Rawlsian natural duty to support just institutions (Miller n.d.; Rawls 1971, 115). Interestingly, Miller is clear that this kind of argument cannot necessarily confer legitimacy onto the border regimes of actually existing states.

of applicability outlined in the previous section. However, I argue that each of these arguments face a different problem of applicability, stemming from how each of these accounts have to rely on idealised accounts of the state.

Freedom of association. One prominent defence of the right to exclude appeals to the central liberal value of freedom of association. According to Christopher Heath Wellman (2008; Wellman and Cole 2011), freedom of association is intimately bound to self-determination and is meaningless if it does not also entail a freedom to disassociate. Freedom of association is clearly important for individuals, as Wellman illustrates by reference to the case of marriage, where we retain the judgement that individuals should be allowed to decide for themselves even when others would benefit immensely from marrying them (Wellman 2008, 110). However, the same is often thought of groups, like religious communities, sports clubs, or orchestras, which may want to restrict their membership so as to ensure that their priorities are reflected by the group's membership. Thus, Wellman argues, groups and individuals alike have rights to self-determination, which includes rights to freedom of (dis)association. The central step in Wellman's argument is to argue that states are like groups in this regard. States also enjoy freedom of association, as is already recognised by our practices of soliciting their consent before seeking to include them in institutions like NAFTA and the EU and by our denial that states can unilaterally insert themselves into such institutions (Wellman 2008, 112). Moreover, their right to freedom of association is weighty enough to trump competing concerns for admitting immigrants (Wellman 2008, 119–137). The reason is the same as in the individual case: although others may have weighty reasons for wanting to associate with us, these do not outweigh our central human interest in deciding our own affairs for ourselves.

Wellman's argument has attracted much criticism along different axes. However, many critics have targeted Wellman's central contention that citizens of contemporary nation states associate with one another in the way that grounds strong freedom of association claims (Blake 2020, 66; Fine 2010, 349–351; Miller 2007, 211; Song, 44–45). As these critics have pointed out, citizens in modern-day nation states do not associate with one another in the way that is protected by the freedom of association law that Wellman appeals to. The strong right to freedom of association Wellman is interested in is granted to intimate and expressive associations, which are the kinds of associations whose purpose would be undermined if they were not capable of controlling their membership. But a similar point does not obviously apply to modern-day states, where individuals are neither freely associating with one another nor likely to ever interact with the vast majority of their compatriots. Thus, in order for the freedom of association argument to deliver its intended conclusion, it has to abstract away from the kind of things states actually are.

Liberal nationalism. I have argued that it is not obvious that there is a sense in which the modern state's purpose would be undermined if it lacked the capacity to control borders in the same way that it is obvious that, say, an expressive association like a church would if it did not have control over its membership. However, an important line of argument seeks to establish that there is a sense in which citizens require the right to exclude in order to sustain valuable bonds between them. According to the liberal nationalist argument developed by David Miller (1995; 2007; 2016), control over borders is paramount because it allows citizens to uphold a valuable kind of national culture.¹¹

¹¹ Note that appealing to this argument is not an available strategy to Wellman, who explicitly seeks to defend the right to exclude on non-nationalist grounds.

Miller's argument is distinctive from cruder appeals to the value of national culture in that it includes a more sophisticated analysis of when and why national culture is desirable – this is the *liberal* part of the liberal nationalism. The function of national culture, Miller argues, is to provide a common identity for compatriots, allowing them to conceive of their political community as a shared project, stretching back in time and into the future. This national identity is a unique source of value, for two main reasons. First, the social cohesion and trust it fosters enables the achievement of the aims of progressive social justice (esp. Miller 1995). Second, that cohesion becomes intrinsically valuable as a vehicle for the expression of collective self-determination. These twin sources of value, and in particular the second, grounds Miller's defence of a state's right to exclude (esp. 2016, chap. 4). Since immigration necessarily changes the composition of the citizenry by introducing new citizens who may not identify with the national culture, the state needs the prerogative to control borders in order to uphold the cohesion that delivers the instrumental and intrinsic goods associated with nationalism.

The liberal nationalist argument offers appealing grounds for exclusion. However, it also faces difficulties explaining how its argument applies to states as they currently exist. First, and as Miller recognises (Miller and Ali 2014), it is difficult demonstrate empirically that national identity can deliver the social cohesion of the kind his argument requires.¹² Second, there is a more general worry about invoking the idea of the nation to describe states as they currently exist. In order for the liberal nationalist argument to lend determinate support to the privilege to control borders, it has to presume that there is relative cultural homogeneity within each nation state. However, as critics have pointed

¹² Indeed, a recent study from Denmark found that multicultural values add to, whilst nationalist values detract from, social cohesion (Breidahl, Holthug and Kongshøj 2018).

out, this is an assumption that does not apply in the Western liberal democracies Miller tends to discuss (Fine 2017). In particular, the existence of multiple nationalities presents a problem for the liberal nationalist, who may seem committed to either deny the normative desirability of multiple nationalities or seek to accommodate them at the cost of sacrificing the normative grounds for their exclusionary arguments (Erez 2020). In either case, the worry is that liberal nationalism has to rely on an idealised account of the state in order to straightforwardly explain why nation states have the privilege to control borders when they fall short of applicable standards of justice in migration.

Collective ownership. The last prominent defence of the right to exclude I will consider works by reference to ownership claims. The most sophisticated version of this theory is developed by Ryan Pevnick, who argues that the right to exclude is located in citizens' joint ownership claims in the state. In particular, Pevnick argues that the creation and maintenance of the state's institutions give contributors ownership claims over those institutions, which, in turn, grants them a pro tanto right to decide what these institutions should look like in the future. Crucially, this involves making decisions about the constitution of membership. This ownership view is appealing because it trades on the widely held intuition that 'those who innocently work to make some good come to have a special claim to it' (Pevnick 2011, 33). Moreover, and interestingly, Pevnick argues that:

(...) positions that hinge on ignoring the historical processes by which state institutions came about and the connection between such institutions and the political community that constructed them (such as open border views) are necessarily incomplete. They unhelpfully abstract from the relationship between state institutions and the concerted collective effort that brought them into existence. In this way, they deny the importance of self-determination (2011, 39).

Thus, the historical nature of this collective ownership view appears especially well-suited for avoiding the problems of abstraction faced by the freedom of association and liberal nationalist view.

Despite his charge against ahistorical theories, however, there are questions to be asked about the stability of Pevnick's historical strategy. This is going to depend on how we interpret the stringency of his claim that the membership of existing states has, through collaboration, contributed to its institutions in a way that neatly allocates ownership claims to current holders of citizenship. As Chandran Kukathas (2012) has argued at length, if we take this to be a 'strict' historical claim, then the bloody history of states makes it highly doubtful. In particular, the histories of colonialism, and of transnational work, pose two challenges. First, given the significant contributions of past colonial subjects and of foreign workers to the construction and maintenance of institutions of current states, it is unclear why only citizenship should determine who has an ownership claim in those states. Second, the fact that 'most of the states of Africa, the Middle East, and Southeast Asia came into existence only in the twentieth century, the vast majority as a consequence of post-war decolonization' might make it look like these states do not have claims to exclusionary rights because many of these states will lack a 'unified' history of cooperation (Kukathas 2012, 662). These points render Pevnick's theory far more parochial than how he presents it: it cannot deliver his intended conclusion for the majority of actually existing states, and certainly not for the United Kingdom and the United States. Only by abstracting away from the transnational, and often exploitative,

origins of actual states can the collective ownership view yield determinate rights to exclude.¹³

To summarise, the common problem for each of these accounts – the freedom of association view, the liberal nationalist view, and the collective ownership view – is that they are open to the following objection. A critic could accept all of their substantive moral claims but deny that they successfully pick out states as they currently exist. Hence, although the critic grants that they are all internally consistent, each account idealises the subject of their theory, the contemporary nation state. In this sense, each theory fails to vindicate a privilege to control borders on behalf of states as they currently exist. The objection, then, is not that each presents implausible grounds for such a privilege, but that they fail to vindicate that privilege for actual states since they do not satisfactorily characterise those states (O’Neill 1996, 40–41; Valentini 2009, 351–355). They face a problem of application, albeit a different one than that facing the justice in migration interpretation of the right to exclude. This is not to say that they cannot tell a story about why actual states have this privilege. Indeed, in the next chapter I reconstruct a powerful version of such a story. However, this problem of application is sufficient for showing that none of these strategies can justify the view that the legitimacy of border control can simply be assumed to follow from state legitimacy.

¹³ Pevnick’s focus on property rights makes his account Lockean, and his conceptualisation of these property rights as collective makes it a collectivist Lockean theory. There are also individualist Lockean theories, according to which the right to exclude is derived from individual property rights in the aggregate (Simmons 2016; cf. Steiner 1992). These individualist theories, however, struggle to explain why states with large areas of public space – like urban spaces – also have the right to exclude (Nine 2019).

2.3. Describing the state: institutional conservatism

The common problem faced by the accounts that invoke moralised conceptions of the state makes a recent development in the political theory of border control especially noteworthy. According to two influential arguments by Michael Blake and Sarah Song, the right to exclude can be derived from a minimal descriptive account of the state (Blake 2013; 2020; Song 2017; 2019). In particular, both of these accounts hold that the privilege to control borders follows from facts that are entailed by sharing the same jurisdiction. The appeal of this methodological strategy should be obvious: if the right to exclude can be supported by an appeal to relations that obtain between citizens of actually existing states, then we have an explanation for why states retain the privilege to control borders even when they fall short of applicable standards of justice in migration. Since Blake has defended this – as he calls it – ‘institutionally conservative’ methodological strategy most elaborately, I will focus on his arguments below. However, my arguments will be equally applicable to Song’s theory insofar as she relies on the same method.¹⁴

Echoing the arguments rehearsed in the previous section, Blake objects to existing accounts of the right to exclude on the grounds that they are insufficiently ‘political’, by which he means that they are unable to explain why states, qua states, have the right to

¹⁴ The differences between Blake and Song stem from the substantive normative principle they invoke to give normative force to the right to exclude (see Blake 2020, 56–60; Song 2019, 47–51). One caveat is that Song appeals to a description of the state which, depending on how one interprets it, can make her account more restrictive with regards to which states can claim rights to exclude: Song makes her account conditional on states possessing territorial rights and notes that such an account must be able to successfully respond to the claims of victims of historical injustice (2019, 63–65). This difference aside, and as both Blake and Song recognise, their shared methodology makes their accounts close siblings (esp. Blake 2017).

exclude (Blake 2020, 51; 56; 59; 66).¹⁵ On Blake's view, 'states exist wherever there is an effective government able to exert political and legal control over a particular jurisdiction' (2013, 110). At a minimum, the state is 'a jurisdictional project, in that it is defined with reference to a particular sort of power held over a particular sort of place' (Blake 2020, 68). If there is a right to exclude, then the grounds for that right must be located in what is distinctive about sharing a jurisdiction.

According to Blake, this distinctiveness lies in the fact that everyone who shares a jurisdiction become collectively responsible for each other's rights (Blake 2020, 71). When a new person enters that jurisdiction, they gain a claim against those who were there from before (Blake 2020, 73–74). The right to exclude is grounded, according to Blake, in a claim to be free from being so obliged. According to his (as we might call it) 'unwanted obligations principle', 'we have a presumptive right to be free from others imposing obligations onto us without our consent' (Blake 2020, 74). On Blake's view, what is particularly objectionable is to impose obligations on others when one already has someone fulfilling that obligation. Blake thus argues that his principle cannot support the exclusion of refugees (since members of this group, by definition, lack adequate human rights protection), but that it can support the deportation of irregular immigrants (2020, 150), as well as the exclusion of candidates for family reunification (2020, 161) and of the global poor (2020, 176). These substantive arguments, and especially the unwanted obligations principle, are controversial.¹⁶ However, what is interesting for the present

¹⁵ Similarly, Song consistently objects that her theoretical competitors (apart from Blake) fail to be sufficiently sensitive to what is distinctive about *political* membership (2019, 31–46).

¹⁶ By implying that it is generally wrong to bring about the triggering conditions of moral norms, the principle might seem to cut against the very purpose of moral norms (see Hidalgo 2014). Moreover, it is unclear whether the principle even applies to the case of immigration, given that the obligations citizens

discussion is the structure the institutionally conservative method gives Blake's theory. As I will show, institutionally conservative theories cannot satisfactorily answer the first applicability problem: they are bound to presuppose the legitimacy of border control.

It is clear from the above description that Blake's theory depends on the existence of states. This dependence is justified by the institutionally conservative method, according to which the theorist takes existing social institutions – in this case, the institution of border control – as their starting-point and ask what they would have to do to be justified (Blake 2020, 10).¹⁷ The reason why the institutionally conservative method is called for, according to Blake, is both pragmatic and normative: 'if we can adjust what we have and meet the tests of justice, then we should do so – where that *should* refers both to the conceptual difficulties in building new institutional forms and to the practical difficulties engendered by revolutionary changes in institutional framework' (Blake 2020, 10, emphasis in original). Only if our current institutions are structurally incompatible with demands of justice do we have reason to think about new institutional forms. This seems to make Blake's account vulnerable to the problem of second-best, according to which theories commit a fallacy if and when they 'infer (à la Superset) from the value-contributing conditions of any given model scenario, that among alternatives

incur towards newcomers are ones they already owe to each other (Kates and Pevnick 2014, 188). Blake responds to this objection by way of an analogy: parents still have more obligations when they gain a new adoptive child, although they are the same obligations they already owe to their other children (2020, 78). This response, however, ignores Blake's purported sensitivity to the kind of institution the state is. Ideally, the state is meant to translate general moral obligations we owe to all of our compatriots into specific obligations owed to the state itself (to pay taxes, to comply with morally innocent law, and so on). However, there is no such mediating institution between parents and their children. Thus, the analogy does not hold and Blake remains vulnerable to the objection that his principle (even if valid) cannot support rights to exclude.

¹⁷ In his earlier work, Blake referred to this method simply as 'institutional theory' (2001, 261–265).

that lack at least some of those conditions, supersets of those subsets are better' (Estlund 2020, 275).¹⁸ Against such appearance, however, Blake suggests that questions of migration and borders are not only especially well-suited for an institutionally conservative analysis, but that they positively demand it:

Indeed, it seems to me that the very question of immigration itself makes sense only under where this assumption holds true; if the world contained only one government, ruling over all habitable land, the concept of the immigrant would seem to be inapplicable (2020, 70).

Thus, Blake holds, a political theory of migration must presuppose the existence of states and should ask what it would require for a state to uphold a just border regime.

Institutional conservative theory on migration resembles John Rawls's approach to questions of justice. As Aaron James has convincingly argued, the seeming tension between Rawls's egalitarian conception of social justice and his sufficientarian conception of global justice can be resolved by assigning to Rawls a particular practice-based methodology. James demonstrates that Rawls identified principles of justice with rules applying to specific practices and that, although he held that individuals held moral priority, Rawls was clear that participants to such practices could also be nations, churches, corporations, and so on (James 2005, 283). Thus, instead of misapplying his own normative logic, Rawls refrained from extending the individualist interpretation of his original position to the global realm because, in that realm, the relevant subject to which principles of justice apply is relations between peoples, not individuals (James 2005, 299; cf. Valentini 2011b, 405–406). This practice-interpretation of Rawls, James argues further, helps explain another novel feature of the Rawlsian approach to justice: it

¹⁸ Although I do not pursue that strategy in what follows, I hope it will become clear to the reader that much of my critique of institutional conservatism could be recast in the language of the problem of second-best.

contains no optimality condition according to which some institution can be rendered more just, for example, by becoming more equal (James 2005, 294). This suggests that, on the Rawlsian view, justice functions as a moral constraint on actions taking place within predetermined practices.

Blake identifies Rawls as an institutional conservative, but does not explain why (2020, 228n10). The practice-interpretation of Rawls explains why. On both approaches, we identify some existing practice and ask what it would require for that practice to be substantially justified. Further, as both Blake and James emphasise, invoking practices in this sense is independent of Rawls's well-known distinction between the ideal and the non-ideal, since we can describe the subject of our theory in more or less idealised terms (Blake 2001, 263n7; James 2005, 291–293). The point is to draw on moral values to give a rational reconstruction of the subject of our theory and – if that subject is not fundamentally incompatible with those values – thereby providing a normative benchmark from which we can identify permissible and impermissible actions within our currently existing practice. Rawls and Blake are thus both committed to the reform of existing institutions over institutional innovation. Institutional conservatism is a form of the 'practice-dependent' methodology James assigns to Rawls.¹⁹

Moreover, the constraint interpretation of Rawlsian principles of justice coheres well with many of Blake's central claims, for example, his argument that states cannot permissibly exclude refugees: Blake's account of the right to exclude places constraints

¹⁹ On practice-dependence as a metaethical position about the grounding of principles of political morality, see Sangiovanni (2008) and James (2012, chap. 4).

on the kind of policies states may permissibly adopt when they set their immigration policies.²⁰ This also explains the following passage:

Even if legitimate states have a right to exclude unwanted would-be immigrants, much work needs to be done to figure out (...) the contours of that right. It is possible to have the right to exclude, after all, and still question whether or not that right is able to ground a particular exclusionary policy (Blake 2020, 79).

Here, the term ‘right’ is clearly invoked in the sense of ‘rightfulness’ that is associated with justice. However, the cited passage also raises a question: can institutionally conservative theories like Blake’s also establish the sense of ‘right’ that is associated with legitimacy, namely, of the privilege to retain control over borders when obligations of justice are systematically violated? Or is the legitimacy of border control simply assumed to follow from state legitimacy more generally? Despite the suggestions to the contrary, Blake ultimately ends up having to stipulate that border control follows from legitimacy more generally, as becomes explicit in his discussion of irregular migration:

I will assume that the state trying to exclude is the sort of state to issue authoritative commands; however we identify the line of decency below which states lose the right to expect obligation, our state is above that line. (...). I will not assume (...) that the law mandating exclusion is itself just; I will merely assume that the state is the sort of entity that might create an obligation to obey the law, regardless of whether or not that law is just (2020, 167).

Although Blake’s defence of the right to exclude does not assume that immigration restrictions are just, it does assume that states wield legitimate power in the enforcement

²⁰ The constraint interpretation also coheres well with the other part of Blake’s overall project, which is to make conceptual space for evaluating immigration policies in terms of whether they are merciful (2020, chap. 10). The thought is that, although we might recognise that an immigration policy is just, we might still find it objectionable because it is unmerciful (2020, 213). Thus, on Blake’s final view, justice places baseline constraints and mercy places further constraints on immigration regimes, narrowing the scope of morally virtuous policy.

of their border regimes. It is thus vulnerable to the first applicability challenge outlined above. It cannot explain *why* the state is the sort of entity we should trust with regulating global migration according to the relevant principles of justice in migration, given that its current instantiations systematically fail to successfully do so.

Note that this is not a local problem to Blake's theory. It is a structural problem pertaining to institutional conservatism. Employing the language of practice-dependence, we can see why. For any political theory, we can ask: does this theory aim to identify principles for regulating a given practice; to justify that practice; or, more fundamentally, to identify an existing practice as subject for justification and/or regulation? This systematisation is useful because it allows us to see how theories that, in a Rawlsian mode, seek to answer the first of these questions contain no resources for justifying the practices they take as their starting point. Thus, the principles they generate are importantly limited, for the simple reason that if 'a principle applies to the world only insofar as an appropriate kind of social practice exists, that principle cannot itself be used to criticize either the existence or non-existence of the kind of practice that conditions its application' (James 2005, 313). The problem with institutionally conservative approaches to the right to exclude – as with all approaches that interpret that right purely in terms of justice in migration – is that they treat their theories as *also* responding to the second question when they only contain the resources for responding to the first.

Therefore, the institutionally conservative strategy does not respond to the legitimacy question, as I defined it the last chapter. According to the fairly uncontroversial metacoordination interpretation I outlined there, legitimacy assessments depend on giving an argument for why individuals have moral reason for compliance, and outsiders have moral reason for non-interference, with the actual institutions that

claim the authority to regulate their actions. Constructing an argument to the effect that these institutions could be rendered compatible with the demands of liberal justice if they were organised in ways that they currently are not does not yield a convincing answer to that question. Thus, the institutional conservative framework turns out to lack a key function that its proponents need their theories to perform: to explain why states have the privilege to sequence reforms of their border regimes when those regimes fall short of justice.

To anticipate the likely response from institutional conservatives, is it not possible to draw on the resources of institutional conservatism to evaluate the practice of border control itself, as distinct from the rules that ought to regulate that practice as it currently exists? Thus, by way of response, the next section argues that, although such an evaluation of border control itself is coherent on the institutionally conservative methodology, it cannot plausibly deliver the kind of strict control over borders that Blake and other institutional conservatives want. I will also respond to a likely objection to my argument against Blake, namely, that I fail to take seriously his concern for feasibility.

2.4. Practice-dependent state system legitimacy

To summarise the overall argument thus far, I have shown that the institutionally conservative approach to border control is promising because it straightforwardly avoids a core problem facing approaches that work by moralising the state. However, I have also shown how institutional conservatism is bound to be unsuccessful as a theory of legitimacy, as distinct from a theory of justice, because it cannot explain why states retain the privilege to sequence reforms when they fall short of applicable justice requirements. I also identified the similarities between institutional conservatism, as defended by Blake

and Song, and practice-dependence as a normative method. This section draws on the resources of practice-dependence to demonstrate why a reconstructed version of institutional conservatism, whilst coherent, cannot yield the strict privilege over borders that proponents of the right to exclude seek to establish.

A potential rejoinder to my argument against institutional conservatism grants that it is true that the appeal to institutional conservatism in the current debate is unsuccessful in its aim of establishing the legitimacy of border control, as distinct from what it would take for immigration law to be just. Still, one might wonder, could not those who are sympathetic to institutional conservatism seek to justify the practice of border control by drawing on a practice-based method? On this view, the only mistake the institutional conservatives have made is to identify the wrong level of analysis. If we gave a rational reconstruction of the *state system* and convincingly showed that the privilege to control borders would be part of such a reconstruction, then we would seemingly have an account that could confer legitimacy onto border control. Could a similar strategy be used to offer a practice-based justification for the state system?

The short answer to this question is that, yes, one could offer a practice-based justification for the state system. However, although a practice-dependent account of the state system is coherent – even plausible – it is unlikely to deliver the substantial conclusions institutional conservatives are after.²¹ Indeed, it has become increasingly popular to draw on precisely this kind of argument to show that strict territorial sovereignty as it currently exists is indefensible (e.g., Pavel 2014).

²¹ The argument in this section thus mirrors the related debate of whether a practice-dependent argument can be used to justify constraining obligations of justice to the nation-state (Valentini 2011b).

Two recent and influential arguments, offered by Gillian Brock (2020) and David Owen (2016; 2020a), aim to show that a rational reconstruction of the state system demonstrates that the privilege to control borders is conditional on the existence of a proper system for protecting vulnerable migrants. These ‘state system legitimacy’ theories, as Daniel Sharp (2020) has usefully labelled them, actually start in a very similar way to Blake’s institutional conservatism: by noticing that the state system essentially functions to determine who is responsible for protecting whose human rights (Brock 2020, 36; Owen 2020a, 45).²² However, where Blake goes on to argue that this observation can ground rights to exclude (by way of a right to *avoid* being responsible for others’ human rights), Brock and Owen draw on it to argue that a justified state system depends on the successful protection of human rights. Insofar as there are individuals who lack the robust protection of their rights, the entire state system falls short of its purpose. This purpose has a direct relation to questions of border control because, when an individual finds herself in a state where her rights fail to be protected, then emigration is an obvious remedy for her situation. Brock and Owen then use these claims to make the following argument (Brock 2020, 38–40; Owen 2020a, 45–47; Sharp 2020, 3–6). States depend for their legitimacy on a state system that is premised on protecting human rights. When there are states that fail in their task of protecting the rights of those for whom they

²² Sharp also attaches the ‘state system legitimacy theory’ label to Christopher Bertram (2018). However, as Sharp recognises (2020, 4), although Bertram also invokes the concept of legitimacy to discuss border control and ends up endorsing conclusions similar to Brock and Owen, his account is distinct from theirs in that he does not rely on the reconstruction of the state system. Instead, Bertram identifies the legitimacy problem in contemporary border controls with the power each state claims over each potential immigrant (2018, 52–53). In this way, his account shares the structure of the argument I will begin in the next chapter, although – as we shall see – our respective critiques have substantial differences.

have been allocated responsibility, this creates a legitimacy problem for the system as a whole and, by extension, for the legitimacy of the individual states that depend on that system for their various competences. This legitimacy problem can be solved by erecting effective institutions which ensure that those who require protection through migration receive that protection – hence, Owen’s description of the refugee regime as a ‘legitimacy repair mechanism’ (Owen 2016, 275; 2020a, 47).

On the state system legitimacy views, the various privileges that are associated with sovereignty – including control over borders – is conditional on each state making contributions to the erection and maintenance of global institutions for securing migrants’ rights (Brock 2020, 226–227; Owen 2020a, 107). Far from providing a justification for the sovereign privileges states enjoy under the current state system, these sophisticated arguments hold that a rational reconstruction of the state system demonstrates that sovereignty over borders comes with positive obligations towards vulnerable migrants. Insofar as states fail to perform these obligations, they lack the privilege to control borders. Therefore, it is far from obvious that the strategy of offering a rational reconstruction of the state system can give institutional conservatives a way out of the problem I identified in the last section. According to the best available versions of this kind of argument, the legitimacy of border control is dependent on institutionally securing the protection of migrants’ human rights. Thus, it is not clear that the practice-dependent methodology can explain why states retain the privilege to sequence reforms to their border regimes when they fall short of the standards of justice in migration. Quite to the contrary, by way of their conclusions for erecting more powerful international institutions for regulating migration, these arguments suggest that a practice-dependent method would deliver substantive conclusions that strip states of precisely such a privilege: at

least when it comes to some immigration decisions, the interpretation of applicable principles of justice, and the sequence in which the reforms they give rise to, would be determined by a supra-national institution.

Institutional conservatives can object to the relevance of this line of argument by pointing to the infeasibility of moving away from the state system.²³ According to this objection, I have misunderstood the main point about institutional conservatism, namely, that it takes seriously the fact that there are ‘conceptual and practical’ difficulties associated with creating new institutional forms (Blake 2020, 9–10). Thus, given these difficulties, it will always be better to prioritise the reform of states than to advocate the delegation of parts of their competences to new institutions above (or below) the state level. This appeal to feasibility is unsatisfactory as it stands, however. This is because it is vulnerable to the following counter-charge. Since institutional conservatives accept that the primary function of states is to protect human rights, and that this gives them obligations towards refugees, the appeal to feasibility cannot simply be that it is easier to keep states as they are. Instead, it must be that it is *more* feasible to secure the human rights of migrants from within the current state system than it is under some alternative system. However, this is a controversial claim that requires justification. In particular, the institutional conservative would have to provide a convincing argument for why it would be more feasible to secure these human rights from within the current state system, given the incentive structure inherent to that system. As is clear from the contemporary politics of migration, governments have far more to gain from responding to anti-immigration

²³ It is worth noting that, when making this argument, Blake only considers the creation of a world state as the alternative to the current state system (2020, 228n30). He does not explain why he thinks this is the only alternative, however.

sentiments within their domestic constituencies than they do from taking responsibility for refugees and asylum seekers. One might thus wonder whether the appeal to feasibility actually counts *against* the conclusions favoured by institutional conservatives.

Again, this is not to say that things are settled determinately against the conclusions favoured by institutional conservatives. However, the arguments in the last two sections show that the appeal to institutional conservatism cannot satisfactorily vindicate the view that the legitimacy of border control clearly follows from state legitimacy more generally. By effectively revoking the distinction between justice and legitimacy, the institutional conservative methodology cannot deliver a plausible answer to the question an account of legitimacy must be able to answer, namely, why do states retain the privilege to sequence the reforms demanded by principles of justice when they fall short of those demands? A possible conclusion to draw from this would be to say that, on that methodology, all border regimes that fall short of justice are thereby illegitimate and thus fail to generate reasons for compliance and non-interference. However, this is clearly not the conclusion institutional conservatives want to draw, given that they present their accounts as capable of speaking to contemporary debates about immigration (Blake 2020, 6–10; Song 2019, 2–3).

Thus, institutional conservatives face a dilemma. They must either say that their accounts presuppose that states wield legitimate power in the enforcement of their border regimes and that they are, more narrowly, concerned with how that power should be justly exercised. However, then they would be unable to deliver a case for the right to exclude, as that right is naturally understood: as one which entitles states to regulate despite falling short of applicable standards of justice. Alternatively, they must engage in a direct defence of the legitimacy of border control.

2.5. Disaggregating sovereignty

This chapter has argued for a limited but foundational claim of my overall project, namely that states' border regimes require independent legitimacy assessments. I have argued for this conclusion by reviewing two prevalent strategies for establishing the state's right to exclude. Moralised accounts of the state, I argued, can offer plausible grounds for the legitimacy of border control, but they struggle to explain why those grounds can vindicate the border regimes of actually existing states. Institutional conservatives avoid this problem by way of seeking to derive the right to exclude from a thin descriptive account of the state. However, these accounts struggle to offer plausible grounds for the legitimacy of border control, as distinct from justice in migration. I therefore conclude that, in order to move the debate forward, we should reject the view that the legitimacy of border control can be assumed to follow from state legitimacy more generally. Instead, we should scrutinise the power states claim over potential immigrants to see whether it generates moral reason for compliance and non-interference and, if not, how it might do so. This exercise matters in practical terms because, if we establish a legitimacy deficit in the contemporary regulation of migration, then the relevant border regimes fail to generate the reasons supplied by legitimacy unless and until they are reformed.

The rest of this thesis will aim to provide such an assessment of the border regimes of the states in the Global North. I will argue that these regimes do suffer from legitimacy deficits, diagnose that deficit as a problem of domination, and then draw on the resources of republican political theory to offer a normative argument for how those deficits could be rectified.

Before I go onto these arguments, it will be useful to distinguish my approach to these questions from the state system legitimacy theories introduced in the last section. I am broadly sympathetic to Brock and Owens concerns. Most obviously, I am in full agreement with both of them that the concept of legitimacy is crucial for the political theory of migration. However, I take issue with their approach to questions of legitimacy. In particular, I disagree with their central assumption that the state system is an appropriate subject for legitimacy assessment and thus, by extension, that individual states can incur legitimacy deficits by virtue of the failures of that system. On my view, legitimacy pertains to the institutions that seek to regulate the actions of others through the imposition of rules. The state system clearly structures the actions of the states, individuals and institutions contained within it. However, it is not a unified institution and, consequently, does not actively regulate. There is no sense in which the state system, as distinct from the states and institutions that constitute it, claims authority. Thus, I hold that a legitimacy assessment of border control cannot start from the state *system*. Instead, it must start from an analysis of the actual claims to authority involved in the contemporary regulation of global migration.

Lastly, I want to emphasise that nothing I have said in this chapter runs counter to David Copp's (1999) claim that the *concept* of legitimate statehood invoked by political theorists and philosophers – and scholars in other disciplines – has included the right to exclude. What I am disputing is that the sovereign privileges Copp identifies can satisfactorily be evaluated as one bundle. Instead, we ought to disaggregate these sovereign privileges and scrutinise the justification for each. This thesis contributes to one part of such a project by scrutinising the claim states make to control access to their territories. As I have begun arguing, evaluating the legitimacy of that claim involves

being clear on the kind of power states wield over potential immigrants. The next chapter develops this argument more fully by outlining the general relationship between social power and legitimacy, and by arguing that the contemporary practice of border control involves power that triggers a demand for a higher standard of legitimacy than what tends to be assumed. I will show that, although many of the arguments that can be brought to the defence of a minimal legitimacy standard for border control may not idealise the state, they end up idealising border control.

CHAPTER 3

THE PRACTICE AND LEGITIMACY OF BORDER CONTROL

In the last chapter, I argued that the current literature on the state's right to exclude fails to provide a convincing justification for the view that the legitimacy of border control can be assumed to follow from state legitimacy more generally. Thus, I concluded, the power states claim over potential immigrants stands in need of an independent legitimacy assessment. This chapter begins this task by asking what legitimacy standard the power involved in border control should be held to.

It is universally acknowledged by normative political theorists that states are subject to a non-violation of human rights standard of legitimacy in their relations to non-citizens who reside outside of their territory. Hence, proponents of the right to exclude emphasise that, since the legitimacy of border control follows from state legitimacy more generally, border regimes are subject to a non-violation of human rights standard. For example, David Miller writes that 'an illegitimate immigration policy would be one that exposed the state not just to censure but to outside sanction: presumably it would involve severe breach of immigrants' human rights, and therefore one that the state had no right to implement' (2015, 392).

There are two important critiques of this widely held view in the literature. The first critique accepts that border control is held to a non-violation of human rights standard but denies that this fact grants states the privilege to unilaterally interpret and enforce the demands of justice in migration. This is because, so this critique goes, there is a human right to immigrate (Carens 2013, Oberman 2016). The second critique holds that, through the unilateral enforcement of their border regimes, states coerce potential immigrants and

thereby trigger a demand for democratic standards of legitimation (Abizadeh 2008; 2010; 2012; Lepoutre 2016). Thus, even if there is no human right to immigrate, simply refraining from violating human rights is insufficient for conferring legitimacy onto the power involved in border control. Instead, on this view, constraints on international movement would require authorisation from a democratic institution with a global constituency.

These critiques of the legitimacy of border control have been hugely influential. Indeed, the most sophisticated accounts of the right to exclude invariably address and reject a human right to immigrate and the democratic objection to border control.²⁴ However, both of these critiques set a high bar for showing that contemporary border regimes suffer from legitimacy deficits – at establishing the necessity of expanding the concept of human rights, and at demonstrating that border controls coerce outsiders in the narrow sense relevant for democratic enfranchisement, respectively. In the debate surrounding each, it can thus be easy to lose sight of the otherwise obvious point that showing that either of these arguments fail only lends indirect support to a minimal interpretation of the non-violation of human rights standard for border control. But, given that such a minimal interpretation rarely receives a positive defence, the reigning assumption seems to be that its appropriateness follows directly from successful responses to either of these radical critiques. Thus, the debate has become rather polarised. Some voice radical legitimacy critiques of border control, and others object to

²⁴ On the human right to immigrate, see Blake (2020, 37–45); Miller (2016, 49–56); Pevnick (2011, 86–96); Song (2019, 94–98). See also Wellman and Cole (2011, chap. 7). On the democratic objection to border control, see Blake (2020, 45–47); Miller (2010; 2016, 70–75); Pevnick (2011, 47–51); Song (2019, 70–71); Wellman and Cole (2011, 93–104).

these critiques on the assumption that establishing their failure vindicates a minimal interpretation of the legitimacy requirements of border control.

This chapter has two principle aims. The first is to open conceptual space for a legitimacy-based critique of border control that invokes neither a non-violation of human rights standard nor a democratic legitimacy standard. To this end, I further specify the conception of legitimacy I started describing in the introductory chapter. I will argue that the legitimacy standard an institution is required to meet is a function of the power that institution wields over those it subjects to its rules. According to the power conception I will defend, the non-violation of human rights constitutes the least, and democracy the most, demanding legitimacy standards to which an institution can be subject. However, they are not the only possible options. In particular, I will draw on existing contributions to the debate on international institutions to argue for the independence of a middle legitimacy standard, set at the promotion of human rights.

The second aim of the chapter is to show that, even if there is no human right to immigrate, and even if they do not narrowly coerce could-be immigrants, many contemporary border regimes exercise sufficient power to trigger a demand for such a middle standard. Specifically, this is true for the set of states that normative political theorists, explicitly or implicitly, have concerned themselves with: wealthy and stable democracies in the Global North. My argumentative strategy for establishing this substantive claim will be negative. I first draw on important contributions to the literature on the state's right to exclude to reconstruct a positive case in favour of holding border control to a non-violation of human rights standard. I then argue that, even if this case is valid, it presupposes an image of border control as a territorially bounded activity conducted by individual states. I will show that this assumption fails to hold true of the

border regimes of the world's most powerful states. These states uphold border regimes that are characterised by a practice that is both extraterritorial and coordinated. Hence, the case for holding them to a non-violation of human rights standard no longer applies. Indeed, and further, I will argue that even if no migrants suffered violations of their human rights under this practice, that would be insufficient for its general legitimacy. The contemporary practice of border control is structured around a perverse incentive that exposes vulnerable migrants to a specific risk of unaccountable power. Removing that risk requires the participants to contemporary practice to satisfy a higher standard of legitimacy.

My argument is structured as follows. Section 1 outlines the power conception of legitimacy and defends the claim that legitimacy standards are tied to power. Section 2 draws on this conception to clarify the specific objections raised by advocates of the human right to immigrate and of the claim that border controls require democratic authorisation from could-be immigrants. Section 3 draws on objections to these radical views to reconstruct a case in favour of holding border control to a minimal non-violation of human rights standard. I argue that this case must turn on a claim about the limited power each state exercises over each migrant. Section 4 reviews recent empirical work to describe, in value-neutral terms, the contemporary practice of border control. Section 5 then argues that the extraterritorial and coordinated nature of that practice undercuts the case in favour of holding it to a minimal legitimacy standard. This means, as I will show, that the states involved in that practice are required to satisfy a higher legitimacy standard.

3.1. Specifying legitimacy: the power conception

In the first chapter, I argued that legitimacy is a practical concept. The function of legitimacy assessments is to solve the ‘metacoordination problem’ (Buchanan 2018). Legitimacy thus allows us to unify our stance towards the institutions that seek to regulate our actions, despite pervasive disagreement over how our action should be regulated. I also argued that legitimacy, conceptually, should be understood as a power right and not as a claim right. Hence, legitimacy does not confer obligations to obey but, instead, liabilities to have one’s normative situation changed. A legitimate institution ‘has the moral power to author legal, institutional, or conventional rights and duties, powers and liabilities, and to create social facts and mechanisms of coordination that change the legal, institutional and conventional situation or status of subjects’ (Applbaum 2010, 221). Thus, whilst it is tautologically true that legitimacy confers institutional (or legal) obligations to obey the rules of an institution, legitimacy does not yet determine whether those obligations are moral (Applbaum 2010, 222). The moral quality of the institutional obligations to comply depend on further factors, such as the substantive justice of those rules. However, I also wrote that legitimacy generally confers moral reasons for compliance to those subject to an institution’s rules, and for non-interference for external parties. This section will explain why this is the case by fleshing out the specific conception of legitimacy that I will invoke to analyse border control: the power conception.

According to the concept of legitimacy I have defended, an institution is legitimate when the benefits of empowering that institution with coordinating action within a specific domain outweighs the risks that empowerment gives rise to. In the first chapter, I argued that these benefits and risks should be understood by reference to freedom.

Human beings have central and equal interests in freedom and any institution that sets and enforces rules poses a risk to that interest. On the basis of this uncontroversial premise, Antoinette Scherz (2019) has perceptively argued that legitimacy stands in a special relationship with power. The more power an institution wields, the greater the risk it poses to the freedom of its subjects. Institutions claim authority over the domain they seek to regulate and exercise power in order to so: they seek to bring about certain states of affairs and are, insofar as they are functioning, generally able to do so even despite resistance from dissenting subjects.²⁵ However, given that different institutions claim authority over different domains, they exercise different degrees of power over those they subject to their rules. This means that different institutions pose different risks to the freedom of those subjects. Therefore, the standard an institution is required to meet in order for its power to qualify as legitimate is tied to the degree of power held by that institution (Scherz 2019, 4). The more power an institution exercises, the more stringent its standard of legitimation. When an institution satisfies its applicable legitimacy standard, the power it relies upon to set and enforce its rules obtains a moral quality: legitimacy turns ‘mere’ social power into normative power.²⁶

²⁵ This thin definition is compatible with a variety of conceptions of social power, including the influential ‘power-over’ and ‘power-to’ conceptions. For a very useful conceptual map, as well as a defence of a conception of social power as capacity to effect outcomes *with* the assistance of others, see Abizadeh (2021). My discussion here is open to either of these understandings, since my subject matter – the influence states exercise over migrants – qualifies as power on any plausible conception.

²⁶ Scherz uses the term ‘political power’ to describe the power exercised by institutions that regulate by the active setting and enforcement of rules. I avoid that terminology here in order to distinguish my argument from accounts that, following Rawls’s usage, take the term ‘political power’ to denote coercive power (see Blake 2001, 285–286). I want to make this distinction clear because the point of the present discussion is precisely that discussions of legitimacy are not exhausted by determining whether or not an institution is coercive.

One reason this power conception of legitimacy is appealing that it can unify and explain widely held views about legitimacy. Normative political theorists are in almost unanimous agreement that the relevant legitimacy standard for the state's relationship to its citizenry is democratic. As the democratic story goes, the extraordinary range of power states wield over their citizens poses a risk to their freedom that can only be rectified by giving them equal status as norm-givers (e.g., Buchanan 2002; Pettit 2012). However, the same cannot be said about many of the other institutions that aim to regulate action, below and above the state level. For example, few defend the view that food regulation or telecommunication agencies should be under direct democratic control. For these kinds of institutions, it is generally taken to suffice for their legitimacy that they abide by a non-violation of human rights standard (Scherz 2019, 10). However, the same is not true for all technical agencies, as recent debates over the legitimacy of the European Union clearly demonstrate. Although the EU is often keen to emphasise that its agencies only regulate technical domains and are therefore outside of politics, critics object that the kind of influence these agencies exercise makes them inherently political and thus subject to democratic standards of legitimacy (Bellamy 2010). The power conception can straightforwardly explain this difference in attitude. Although some agencies, including some of the EU's agencies, exercise a limited form of power over technical domains, others exercise wide-ranging powers in sensitive domains.²⁷ The risk agencies of the former kind pose to our freedom is more easily outweighed by the benefits they produce

²⁷ Indeed, I will argue below that the EU's Border and Coast Guard Agency, Frontex, is an agency of the latter kind and therefore subject to a higher standard of legitimacy. It speaks to the present point, however, that both the EU and Frontex itself take every opportunity to emphasise the technical and apolitical nature of the agency's conduct (Fjørtoft 2020).

than is the risk posed by the latter form of agency. Thus, in order for agencies of the latter sort to earn our moral reason-based support, they are subject to more demanding criteria than simply refraining from violating human rights.

To make this more precise, I adopt Scherz's account of the four dimensions that determine an institution's power (2019, 8–10). First, an institution's power increases with the scope of issues over which it can set rules. All else being equal, the larger the domain over which an institution claims authority, the more power wielded by that institution. Second, an institution's power is also a function of the sensitivity of the domain over which it claims authority. The more central a domain is to individual freedom, the more power wielded by the institution seeking to regulate that domain. Institutions that regulate technical issues, like fire safety, wield authority over less sensitive domains than institutions that regulate issues concerning individual rights, like marriage (Scherz 2019, 9). Third, an institution's power is also a function of whether its rules are directly applicable or whether they are mediated by other institutions. This dimension is especially important in the international arena where 'indirectly' applicable rules must first be ratified by states, allowing them to retain some leeway in how to interpret the rules of international institutions. Lastly, an institution's power is also determined by the impact that institution has on individuals beyond its jurisdiction. Institutions whose rules more profoundly affect the conditions of the actions of institutional outsiders are, other things being equal, more powerful (cf. Young 2000, 250).

For institutions that are low across these dimensions, it suffices for their legitimacy that they refrain from violating the human rights of institutional insiders or outsiders. Such institutions will generate comparative benefits compared to the non-institutional alternative, but do not require expansive powers to do so. Hence, the risk

they pose to freedom is outweighed by the benefits so long as individual human rights are respected. For institutions that are high in all or most of these dimensions, however, the same is not true. When institutions issue directly applicable rules over a wide scope of sensitive issues, the power they claim over individuals constitutes a risk to their freedom that cannot be outweighed by simply refraining from violating their rights. Such powerful institutions – paradigmatically, the state – pose a risk to freedom that cannot be outweighed by simply ensuring that their rules do not violate human rights. Instead, subjects must be granted participating rights in those institutions, allowing them to become equal norm-givers in addition to ensuring that the norms they are placed under are compatible with their human rights. The relevant legitimacy standard for these institutions is therefore democratic.²⁸ Thus, institutions that exercise low levels of power should be held to a non-violation of human rights standard of legitimacy, whereas institutions that exercise high levels of power should be held to a democratic standard (Scherz 2019, 12).

The non-violation of human rights and democracy are by far the two most commonly invoked legitimacy standards in political theory and practice. However, they are very far apart in terms of stringency. The first represents a fairly minimal demand on the content of rules, whereas the latter makes stringent demands on the procedural authorisation of rules. As many participants in the debate on the legitimacy of international institutions have pointed out, a perceived dichotomy between minimal

²⁸ There is also robust empirical support for the view that democratic forms of government are more effective at respecting and fulfilling human rights than non-democratic forms of government (see Christiano 2011), offering an additional explanation for why these institutions ought to be held to a democratic standard.

human rights and democratic standards yields a fairly unsatisfactory picture of legitimacy because it suggests that any institution that is not state-like in its competences (and hence subject to democratic standards) is only subject to a minimal standard. Yet, this fails to account for the fact that many institutions, whilst not state-like, wield significant power over its subjects and might therefore be thought subject to more stringent standards of legitimation (e.g., Adams 2018, 84–85; Erman 2020, 1002–1004; Scherz 2019, 2). For example, even if we were to grant that financial institutions like the World Bank or the IMF are not subject to democratic standards of legitimacy because their rules are not directly applicable, the vast influence they exercise over individuals makes it unsatisfactory to *only* demand that their rules do not violate human rights (Scherz 2019, 17; Lafont 2018).²⁹

In response to cases like this, some have argued for the independence of a middle standard of legitimacy, set at the promotion of human rights (e.g., Buchanan 2018, 60–61; see also Lafont 2016, 443). Another virtue of the power conception is that it allows for the formulation of a principled case in favour of such a middle standard. Institutions that wield significant power across some, but not all, of the four dimensions outlined above pose a risk to individual freedom that is not outweighed by simply demanding that they refrain from violating human rights. Instead, such institutions must *promote* human rights: they must act to ensure that their rules do not have corrosive effects on human rights, against a standard of reasonable foresight.³⁰ Although this does not require the

²⁹ To be clear, ‘democratic’ is here understood as the requirement that each *individual* agent is entitled to cast a vote in the authorisation of the rules of these institutions.

³⁰ As Scherz notes (2019, 13), when theorists writing on issues of international legitimacy invoke the language of respecting human rights, their substantial arguments often entail an endorsement of a promotion (rather than mere non-violation) standard (e.g., Lafont 2010, 203).

individual participation rights that follow from democratic standards, it does trigger a demand for more robust checks on the relevant institutions to counter the risk associated with empowering them. In particular, it generates demands for creating mechanisms through which subjects can voice their concerns over how they are affected by institutional rules and which provide some possibility for contesting those rules (Scherz 2019, 18). What this entails in substantive terms will, of course, vary from institution to institution, as institutions vary in terms of their functions and competences (e.g., Adams, Scherz and Schmelzle 2020; Erman 2020). However, what matters at present is just the simple point that showing that an institution fails to be subject to a (maximally demanding) democratic standard of legitimacy does not entail that simply refraining from violating human rights suffices for that institution's legitimacy. Such an institution might still be subject to a promotion of human rights standard.

To conclude this section, let me briefly explain how legitimacy can generate moral reasons for subjects and for outsiders. Institutions allow individuals to coordinate their actions in ways that are beneficial to their freedom, we have reason to respect those institutions because, insofar as an institution is stable, its rules may be seen as an expression of the *commitments*, and hence the agency, of the institution's members (Valentini 2019). This generates a normativity of social institutions: since the institutions' existence depend on their stability, moral reasons to respect institutions generate reasons for subjects to comply with an institution's rules and for outsiders not to interfere with those rules. The pressing question for a legitimacy assessment of any institution, however, is whether the risk its rules poses to the freedom of subjects is outweighed by the benefits that institution creates. If so, then we have moral reason to support that institution in its claim to authority over a particular domain. Therefore: do we have moral reason to

support states' claim to authority in the domain of global migration in light of the risks involved with empowering them to perform this regulatory task?

3.2. The human right to immigrate and the democratic objection to border control

As we saw in the last chapter, the most common assumption in contemporary political theory is that we have moral reason to support states in their claim to authority in the domain of migration, so long as they are generally legitimate. Whatever else is thought to confer this general legitimacy – adherence to principles of liberalism, of democracy or, more minimally, to domestic promotion for human rights – theorists universally agree that the violation of the human rights of non-citizens jeopardises a state's claim to such legitimacy (for an overview, see Nili 2018). Thus, even if states may uphold restrictive border regimes, so the thought goes, they are bound by the same considerations that apply generally to their dealings with non-citizens: respect for their human rights. On this view, even if states are required to reform their border regimes in light of demands of justice in migration, they retain the privilege to make decisions about how to sequence those reforms so long as they do not violate the human rights of migrants. Against the standard view, two important lines of argument have objected that we do not have moral reason to support states in their claim to regulate migration. They do so for distinct reasons, invoking, respectively, the minimal and maximal legitimacy standards outlined above.

The human right to immigrate. The first critique can accept the general premise of the standard view, namely, that border control is bound by a non-violation of human rights standard. However, it then argues that border control systematically violates this standard because there is a human right to immigrate. The argument for a human right to immigrate has been developed most clearly by Kieran Oberman (2016), but it is also made

by other proponents of open borders, notably Joseph Carens (2013, 237–252) and Philip Cole (2000, chap. 3). Oberman’s argument for the human right to immigrate deploys a direct justificatory strategy, arguing that a human right to immigrate is required by central human interests.³¹ According to Oberman, our central human interests in personal and political freedom must be protected by a human right to immigrate, since the activities through which we express those interests – to marry who we want, or to support the causes with which we sympathise – are not bound by borders (2016, 37). Moreover, he argues that these interests are already recognised by other human freedom rights – such as internal freedom of movement, freedom of religion, freedom of association, freedom of expression, freedom of occupational choice, and the freedom to marry (Oberman 2016, 35) – and that they cannot be adequately protected by simply ensuring that individuals have an adequate range of valuable options (2016, 44).

Although Oberman does not make this point, establishing a human right to immigrate is especially significant because of the intimate relationship between human rights and state legitimacy.³² Although human rights may be justifiably violated in

³¹ David Miller helpfully draws a distinction between direct, instrumental, and cantilever strategies for justifying human rights (2016, 49–50). According to the first, a human right to immigrate is justified ‘directly’ by the same grounds that give rise to other human rights. According to the second, a human right to immigrate is required in order to satisfy human rights we already recognise. For example, Cole argues a human right to immigrate is required in order to satisfy the human right to exit one’s state of residence (2000, 44). Sarah Fine is also developing an argument of this kind, according to which a human right to immigrate is required in order to satisfy the human right to seek asylum (Fine n.d.). According to the third, a human right to immigrate is a logical extension of a right we already recognise. For example, Carens argues that there is no non-arbitrary reason to constrain the human right to internal freedom of movement to the borders of nation-states (2013, 238).

³² Instead, Oberman invokes legitimacy in the normatively dependent sense, speaking first of ‘the legitimacy of immigration restrictions’ (2016, 32) and, from then on, of the justice of immigration policy (e.g., 2016, 33). The same goes for Carens and Cole, neither of whom note the point that human rights stand

specific circumstances, establishing something as a human right is to establish its violation as generally impermissible (Oberman 2016, 52–53). What this means is that any restrictive border regime stands in fundamental tension with what is universally acknowledged as a baseline condition for state legitimacy, namely, the non-violation of the human rights of outsiders. Thus, an implication of a human right to immigrate is that the enforcement of border control generally fails to confer reasons for compliance and for non-interference. Therefore, and further, most existing states are required to reform their border regimes in a specific way: by abolishing them.

The human right to immigrate is controversial. This is so for substantive moral reasons relating to the difficulties facing the various strategies for establishing the demanding kind of right a human right to immigrate would be (Miller 2016, 50–56). However, a human right to immigrate will also be controversial on any view that understands human rights as essentially political (e.g., Buchanan 2013). On these political views, the main issue with advocating a human right to immigrate is not that there are no sufficiently weighty moral arguments in support of the view that everyone ought to be able to travel freely across borders. Instead, from this perspective, the problem with advancing revisionary arguments in favour of demanding new human rights is that such arguments fail to appreciate the specific function of human rights practice, which is to offer benchmarks for how states respond to each other's conduct *within* the current state system. Hence, advocating something as a human right requires a sensitivity to the way human rights talk currently operates. That sensitivity, one might think, rules out adopting

in a particular relationship with state legitimacy. That discussions explicitly cast in the language of human rights do not comment on this relation speaks to the relative neglect of the legitimacy of border control, as distinct from justice in migration, in the normative literature generally.

a human right to immigrate, given the state-centric way in which human rights talk currently functions and the centrality of the right to control immigration within the current state system.³³ Further, building on the arguments of those who favour a fairly minimal definition of refugeehood, one might think that advocating such a radical human right might be counterproductive because, by protecting everyone's interests in immigrating, the human rights regime would cease to give special concern to those whose interests in immigrating are urgent (see Owen 2020c).

To be clear, Oberman is explicit about making a moral human rights argument (2016, 33–34). Moreover, and more importantly, I am not endorsing any of these critiques against the human right to immigrate. My point is, rather, that the right faces steep substantive, conceptual and practical-strategical challenges. As a consequence, it sets a high bar for a legitimacy-based critique of border control.

The democratic objection to border control. The second critique of the general legitimacy of border control does not have to invoke a human right to immigrate. Instead, it holds that merely refraining from actively violating migrants' human rights is insufficient for the legitimacy of border control. Far more demandingly, the power involved in border control triggers a demand for a democratic standard of legitimacy.

The democratic objection to border control has been made most forcefully by Arash Abizadeh (2008; 2010; 2012). Unlike Oberman, Abizadeh explicitly invokes the distinction between justice and legitimacy in the construction of his argument:

³³ This is not to say that that state-centrism is good or justified. Indeed, I will argue in subsequent chapters that we should reject the state-centrism of immigration-related human rights (for a general critique, see Lafont 2010; 2016).

(...) justice in the liberal sense is not a sufficient condition for democratic legitimacy: a set of laws may pass the liberal test of hypothetical justification but still lack democratic legitimacy if the laws were simply the edicts of an enlightened autocrat (Abizadeh 2008, 42).

Thus, according to the democratic critique, even if the substantive distribution of benefits and responsibilities engendered by a border regime satisfies the requirements of justice in migration, the unilateral imposition of that distribution will always be illegitimate. Border control could only be rendered legitimate if it received democratic authorisation from both members and non-members of the relevant state. As Abizadeh writes, his argument ‘for this apparently radical thesis is surprisingly simple’ (2008, 44). The argument has two premises, the first being that democratic theory requires that the ‘coercive exercise of political power be justified democratically to all those over whom it is exercised’ (Abizadeh 2008, 45). The second premise is the ‘obvious empirical fact’ that ‘the regime of border control of a bounded political community subjects both members *and nonmembers* to the state’s coercive exercise of power’ (Abizadeh 2008, 45, emphasis in original). In conjunction, these premises entail that border control, far from being subject to a minimal non-violation of human rights standard, is bound by a democratic standard of legitimacy: border law could only generate reasons for compliance and non-interference if it were democratically authorised by a constituency that includes potential immigrants.

This argument gives rise to a question of scope. Which potential immigrants would have to be enfranchised in order for the legitimacy problem engendered by border coercion to go away – those who are actually coerced at the border? Those who would have attempted to immigrate had the border been open? Or everyone? Abizadeh’s argues for the maximally inclusive option. His argument also appeals to the value of freedom and its relation to power. In particular, Abizadeh adopts Raz’s definition of autonomy,

according to which an individual is autonomous when they: 1) have appropriate mental capacities to form plans and act on them; 2) enjoy an adequate range of valuable options; and 3) are ‘independent, that is, free from subjection to the will of another through coercion or manipulation’ (Abizadeh 2008, 39–40; Raz 1986, 372–378). Border law, according to Abizadeh, often violates the second and always violates the third of these conditions. This is because, by being inherently addressed to both insiders and outsiders, the set of laws that constitute a state’s border regime seek to influence the will of outsiders by a threat of coercion. According to what Abizadeh calls ‘the unboundedness of subjection,’ it is a conceptual truth about membership rules that ‘the power required to constitute political boundaries is an essentially outward-extending power’ (Abizadeh 2012, 877; cf. 2008, 65n59).³⁴ When that power is coercive, as it is in the case of border control, it is subject to a democratic legitimacy standard. This is for the same reason we think that coercively enforced law is generally subject to such a standard: the threat of coercion poses a risk to independence – and hence freedom – that can only be rendered acceptable if individuals are given status as equal-norm givers. Thus, everyone, globally, have a claim to be enfranchised in the authorisation of every state’s border regime.

Like the case for the human right to immigrate, the democratic objection to the unilateral imposition of border control is controversial. To start, there are general worries pertaining to the move Abizadeh makes from the existence of the democratic boundary problem to a moral case for institutional reform (see Nili 2017, 110–116). More

³⁴ This is why Abizadeh’s argument is specific to border law and not a general argument for global democracy. The argument does not entail that outsiders should be included in the authorisation of laws that are not outward-extending in the sense of unbounded subjection – although they would, following the democratic logic, be entitled to such enfranchisement after they immigrate (see Abizadeh 2012).

pressingly, however, authors have objected to Abizadeh's central claim that the enforcement of border control amounts to the general kind of coercion that triggers a demand for democracy. In the next section, I outline and draw on the most influential version of this objection, offered by David Miller (2010), to reconstruct the case for holding border control to the non-violation of human rights standard. For the present point, however, it suffices to say that there are questions to be asked about whether Abizadeh bends the concept of coercion so that his conception ends up displaying an inadequate fidelity to ordinary-language use. In particular, it is contestable whether independence in the Razian sense is generally compromised by having an option forcibly removed from one's option set, even when that option is one she has no reason to pursue (see Kolodny 2017, 96; cf. Lamond 2000, 61). Abizadeh's reply to this concern is that there is no difference in principle between border law and, say, a prohibition on murder. Neither may remove an option of worth to most agents to whom they apply. But the claim to enforce them still qualifies as what Laura Valentini calls 'narrow coercion': the state forces the subjects of both sets of law to refrain from doing something through a command backed by the threat of sanctions (Valentini 2011a, 129; Abizadeh 2008, 57–58; 2010, 122–125; see also Lepoutre 2016). Yet, there is a rejoinder to this argument, which works by putting pressure on Abizadeh's analogy through the observation that states which claim the authority to set and enforce criminal law do not only claim this competence but, instead (and far more expansively), *kompetenz-kompetenz*. These states thus claim the privilege to regulate all areas of their citizens lives and, moreover, to determine the scope of their own privilege to do so. Thus, there is a question about whether the *general* worry about the coerciveness of law stems from this unique power

states claim over their citizens – since this power enables states to make citizens act in a host of different ways and not only refrain from acting in one specific way.

Again, my aim in listing these challenges to the democratic objection to border control is not to reject it. Instead, it is to highlight the fact that establishing that border controls are subject to democratic standards of legitimacy is difficult. Amongst other things, it depends on providing convincing answers to questions of the nature of coercion and its relation to law – an especially steep challenge, given that many have thought that coercion qualifies as an essentially contested concept (see Valentini 2011a, 126).

Lastly, it is worth considering a related, but different objection to the legitimacy of border control, offered by Christopher Bertram (2018). According to Bertram, border control as it currently exists is objectionable, not primarily because of its coercive nature, but because of its unilateral imposition. Bertram thus draws on Kant's objection to unilateralism, arguing that 'nobody should simply impose their will on somebody else, unilaterally dominating them and limiting their freedom and autonomy' (2018, 53). Instead, Bertram argues that the regulation of migration has to be made in accordance with a set of rules that is impartial and justifiable to all. Bertram argues that 'the most plausible form such a regime would take would involve an international convention arrived at after discussions that would involve a range of different actors, including states, NGOs, and a representative selection of affected persons, including, most importantly, migrants themselves' (2018, 70). As Bertram notes (2018, 127n11), this makes his argument weaker than Abizadeh's version of the democratic objection, which demands democratic authorisation from a demos with universal scope. However, it still makes strong procedural demands by locating the basic legitimacy problem with the current

regulation of global migration in states' capacity to make unilateral decisions about the structure of their border regimes.

Despite arguing for a weaker conclusion than Abizadeh, and despite invoking an objection to unilateralism as opposed to coercion, Bertram's objection to the legitimacy of border control is controversial for similar reasons. In particular, a general objection to unilateralism is contested and, for non-Kantians at least (e.g., Kolodny 2019), it will be unclear precisely what the problem of unilateral will imposition consists in (Sharp 2020, 6). That said, I should emphasise that the account I will defend in the following chapters has a similar structure to Bertram's, moving from an identification of an illegitimate exercise of power to a case for reforms to the global governance of migration. Moreover, my account will also refer to the concept of domination. However, I aim to identify a less controversial basis for making this sort of argument by grounding my conception of domination in a context-sensitive analysis of the specific risks vulnerable migrants are currently exposed to.

As I have already emphasised, I do not endorse the above objections to the human right to immigrate and the democratic case for border control. My reason for wanting to move away from them is, instead, meta-theoretical. Both of these critiques of the legitimacy of border control are general and claim universal scope. Since both set such a high bar for contesting the legitimacy of border control, they can lead to a somewhat narrow debate, where showing that either fails can be taken to suffice for showing that border control is subject to a non-violation of human rights standard. Hence, the question of whether there is a human right to immigrate, and the question of whether the power states claim over potential immigrants is relevantly similar to that they claim over their citizens, can be seen as exhaustive of the space of possibility for a legitimacy-based

critique of contemporary border regimes. However, given that those regimes are characterised by enormous investments and political backing, it is worth asking whether there are *specific* reasons to question the legitimacy of border regimes *as they currently exist*. This is the kind of critique I will advance in the rest of this thesis. But this does not mean that my arguments compete with either of these accounts. Indeed, Oberman, Abizadeh and (especially) Bertram could draw on my arguments to offer additional support for their distinctive theses. Moreover, by offering a critique that neither relies on the human right to immigrate, on Abizadeh's coercion claim, nor on the Kantian objection to unilateralism, my arguments demonstrate the robustness of the most immediate conclusion reached by all of these accounts: that many contemporary border regimes are scarred by illegitimacy.

As the first step in this critique, the rest of this chapter shows why adherence to a non-violation of human rights standard is insufficient for conferring legitimacy onto an important set of border regimes.

3.3. The case for the minimal standard reconstructed

As I noted above, all of the best theorists of the right to exclude take care to reject the human right to immigrate and the democratic objection to border control (Blake 2020, 37–47; Miller 2016, 49–56, 70–75; Pevnick 2011, 47–51, 86–96; Song 2019, 70–71, 94–98; Wellman and Cole 2011, 93–104). However, none of these theories offer an explicit defence of the view that is taken to follow from these objections, namely, that border control is subject to a non-violation of human rights standard. This makes a recent contribution to the debate by Caleb Yong (2018), which offers precisely such a defence, especially noteworthy. This section outlines Yong's argument, offers an objection to it,

and then reconstructs a response to that objection by drawing on David Miller's influential argument about the non-coerciveness of border control. In line with the power conception of legitimacy, I will argue that the case for holding border control to a non-violation of human rights standard must turn on successfully showing that states claim a limited form of power over potential immigrants.

Yong offers a positive defence of the view that the legitimacy of border control flows from 'international legitimacy,' which is the standard states are required to meet in order to enjoy a 'principled toleration' for their domestic political decisions (Yong 2018, 467). Since border control flows from general state legitimacy, Yong argues, it is subject to the same standard as the rest of the state's dealing with non-citizens and non-residents: the non-violation of human rights. Yong's argument for this thesis begins in a way that is familiar from the literature on the right to exclude, namely, with the observation that states would be significantly constrained in pursuing their chosen policy goals if they lost the capacity to unilaterally set their own immigration policies. Because of this link between immigration policy and domestic political decision-making, Yong argues, border control falls within the range of domains that is picked out by the principled toleration conferred by international legitimacy (Yong 2018, 469). This kind of argument is vulnerable to the objection that it erroneously treats border control as a purely self-regarding policy area. Unlike the state's domestic legal order, a critic might object, border law directly targets outsiders and subjects them to power. Thus, to infer from the fact that control over border law impacts the state's ability to push its domestic agenda to the claim that it should be protected by general principles of international legitimacy is to presuppose precisely what is at stake: that the power involved in border control poses no particular justificatory challenge.

The novelty and innovation in Yong's argument lies in offering a rejoinder to this objection. On his view, to suggest that there is a difference in kind between the state's domestic policies and its border regime is, in effect, to assume the truth of cosmopolitanism: the view that all states have the same obligations to treat everybody's interests in autonomy similarly. But 'if we instead hold, following *internationalist* views of global justice, that shared membership in a state is a morally significant social and political relation that grounds duties of justice that co-citizens owe specifically to each other, then there is a basis to resist the abovementioned assignment of duties' (Yong 2018, 471, emphasis in original). Thus, Yong holds that his critic's objection is, at best, conditional. It depends on the non-trivial task of defending cosmopolitanism against internationalism. If such a defence cannot be mounted, then it is irrelevant whether states directly target could-be immigrants, since their responsibilities for protecting the interests of citizens and outsiders are asymmetrical.

Invoking the conception of legitimacy outlined above allows us to point to a shortcoming in Yong's line of reasoning, however. What is at stake in legitimacy assessments is not primarily the obligations of justice an institution has in a given domain but, instead, the specific risks and benefits associated with granting states the privilege to enforce justice in that domain. To illustrate this point, consider an argument Yong makes by analogy with customs law. A state that enacts an unjust tariff on import may be described as treating non-citizens unjustly but surely, Yong argues, it seems too strong to say that outsiders would be justified in smuggling goods into the state's territory to avoid that law. This suggests, according to Yong, 'that the international legitimacy of a state is not defeated whenever its political decisions threaten to unjustly harm outsiders' (2018, 470). Yong infers from this that the same goes for border control. But a different

explanation is available: customs law and immigration law differ in terms of their power over outsiders and, hence, the risks they impose on those outsiders. If this is true, then we can justify asymmetrical legitimacy assessments of the power states claim over outsiders through their import and border regimes, respectively.

Yong's argument therefore needs a substantive explanation for why the power states hold over outsiders is sufficiently limited to fall under its general right of non-interference in international society. Such an explanation can be extrapolated from Miller's influential objection to Abizadeh's claim that border controls are coercive (Miller 2010; 2016, 70–75).

Miller's argument works by drawing a distinction between acts of coercion and acts of prevention. This distinction is made by reference to option sets. Whereas an act of prevention functions to remove a restricted range of options from an agent's full set, an act of coercion effectively reduces that option set to one. Thus, whereas prevention hinders an agent from undertaking some 'relatively specific' course of action, coercion forces an agent to undertake a specific course of action (Miller 2010, 114). This means that preventive acts, and not coercive acts, allow those subject to them to retain an adequate range of valuable options. Further, prevention leaves room for a degree of independence from the will of the preventer. Therefore, the preventer does not have the same kind of responsibility for those subject to their power as does coercers. To utilise a concept Miller has developed elsewhere, we can say that a coercer is *outcome responsible* for the situation of the coerced: the coercer brings that situation about (Miller 2007, 84). For this reason, outcome responsibility for some situation often entails remedial responsibility when that situation falls short of standards of justice (Miller 2007, 100–101). States are remedially responsible for the situation of those who reside on their

territories because they rely on a coercive apparatus to enforce its rules: those subject to that power cannot but obey.

The distinction between coercion and prevention applies, Miller argues, to border control. When states act to control access to their territories, they remove one option from could-be immigrants' full set. But they do not make could-be immigrants do anything else.³⁵ Thus, for Miller, border control would only be coercive in the case where there was a 'collective intention to confine' particular individuals to their current state of residence (Miller 2010, 117–118). Importantly, Miller argues that this remains the case also when those excluded do lack an adequate set of valuable options. No state intends this result. Each state can only be described as restricting access to its territory, not anyone else's. As Ben Saunders puts this point, the 'U.S.A. does not, for instance, seek to prohibit Mexicans from entering Guatemala, but only from entering the U.S.A.' (2011, 71). Outcome responsibility for the situation of could-be immigrants without an adequate range of options does not fall on any particular state. Instead, it is shared between all states.

On this analysis, the power states claim over could-be immigrants is importantly limited. To draw on Scherz's criteria, that power is directly applicable and wielded over a sensitive domain, but both its range and impact are far less consequential than how they might first appear. No state lays claim to competences that hinder individuals from

³⁵ Interestingly, a very similar argument was recently invoked in defence of former Italian interior minister Matteo Salvini after a judge ordered him to stand trial for his 2019 decision to refuse a Spanish rescue ship to port in Lampedusa, causing the ship and the migrants on board to stand off the coast for three weeks. Salvini's lawyer, Giulia Bongiorno, argued that he could not be convicted of kidnapping the migrants because '[t]here was no limitation on their freedom. (...) The ship had the possibility of going anywhere. There was just a prohibition on going into port. But it had 100,000 options' (Associated Press 2021).

immigrating elsewhere. When excluded migrants find themselves in precarious situations, outcome responsibility is thus shared between all states.³⁶ Each has left the other options of that migrant unscathed. In light of this limited claim to authority, it can be argued that the state's international legitimacy is the right frame for understanding the legitimacy of border control. By extension, border control – like trade policy – is rightly held to a non-violation of human rights standard. Therefore, so this argument goes, whilst states are certainly subject to requirements of justice in migration, the power they wield in the enforcement of their border regimes is rightly held to a non-violation of human rights standard. Thus, and further, provided that they adhere to that standard, they retain the privilege to interpret the demands of justice in migration and to sequence any required reforms.

This argument offers an intuitively powerful explanation for why border control is only subject to a non-violation of human rights standard of legitimacy: each state's border regime is preventative, removing only one option from a potential migrant's full set. However, as I will argue in the rest of this chapter, it cannot establish its intended conclusion. Even if we grant that border controls *as described by Miller's prevention argument* are subject to a non-violation of human rights standard, that description does not capture the full extent of contemporary border control. That argument thus fails to apply to an important set of border regimes. As I will show, those border regimes impose

³⁶ Note that this is not the same as saying that all states share remedial responsibility for rectifying any bad associated with that outcome. Remedial responsibility can also be assigned on the basis of, for example, capacity to rectify the outcome (Miller 2007, 103; cf. Young 2011). Determining remedial responsibilities for the outcomes associated with border control is the task of theories of justice in migration.

risks on migrants that cannot be outweighed by merely refraining from violating their human rights.

3.4. The contemporary practice of border control

The Millerian argument outlined above depends on a description of border control as a bounded activity. States wield power where they have jurisdiction, which is on their respective territories. Hence, when they enforce border control, they block off access to the goods conferred on those who reside on that territory. However, and importantly, they do not block off access to the territories of other states. This section argues that this description of border control fails to adequately capture the border regimes of an important set of states. Moreover, these states are precisely those discussed by normative political theorists in the analytical tradition: wealthy and stable democracies in the Global North. As I will argue, the border regimes of these states are characterised by a practice of border control that is both extraterritorial and collaborative.

As questions of immigration have risen on political agendas over the last two decades, states have devised a host of different strategies for increasing their control over borders. The most inventive and effective of these strategies invoke legal tools that enable states to decouple their jurisdictional borders from their territorial borders. As Ayelet Shachar and Matthew Longo have demonstrated in their recent work, the border that is relevant for border control shifts in place and time according to the state's particular interest (Longo 2017; Shachar 2019; 2020).³⁷

³⁷ Shachar also argues that this 'spatial statism' is not local to the regulation of migration, but a central part of how states seek to increase their capacity to exercise power in a range of policy areas (Hirschl and Schachar 2019).

A key trend that can be observed is that states let their borders ‘bleed inward,’ defining increasingly expansive areas of their territories as a border zone in order to increase scope of immigration law enforcement. The limit case of this trend is Australia, which now defines its *entire* territory as a border zone (Shachar 2020, 41–42). This legal invention gives the Australian state two distinct powers: law enforcement officers can demand that individuals prove their right to be on Australian territory anywhere on that territory and, in the case of individuals who want to seek asylum, the Australian legal system can deny that those individuals qualify for asylum since they were ‘technically’ never on Australian territory.³⁸

The border in border control does not only bleed inwards, however. An even more pronounced trend in the contemporary regulation of migration is that the border is pushed outwards. States invoke several strategies to externalise their border controlling functions, with the explicit aim of allowing them to screen migrants ‘at the source’ rather than on the state’s own territory (Shachar 2020, 5).³⁹ To illustrate this externalisation

³⁸ As Longo shows, such internally expansive border regimes necessarily entail increased policing and surveillance and decreased legal checks on state power. Thus, these regimes pose risks to the freedom, not only of unauthorised immigrants, but also of citizens, raising concerns about their legitimacy vis-à-vis those citizens (Longo 2017, chap. 2; see also Cohen 2020; Kukathas 2021). To be clear, those concerns are independent of the argument developed here, which concern the legitimacy of the power states wield over migrants. However, they are clearly relevant for an overall assessment of the institution of border control and raise interesting questions about whether, for example, the EU’s commitment to protecting ‘the area of freedom, security and justice’ through increased border controls is potentially self-defeating.

³⁹ Longo (2018) offers a very useful historical account of the development of these ideas and practices, the source of which he locates in the post-9/11 political climate when immigration control rapidly started to be seen as a security issue. Longo’s study is also noteworthy for its interviews with border controlling officers, offering an insight into how these officers interpret the overall aims their mandate is meant to serve.

process, consider the European Union's 'Integrated Border Management' strategy – or IBM as it is known for short.

In a set of guidelines ordered by the European Commission, IBM is described in the following way:

Simply put, [IBM consists in] *what* should be done (border control, risk analysis, crime intelligence, detection and investigation of cross border crime), (...) *how* this should be done (through coordination, coherence, inter-agency cooperation and international cooperation), and (...) *where* it should be done (European Commission 2010, 20, emphasis in original).

The 'where' is comprised by the 'four-tier access control model', described as 'the core of IBM' (European Commission 2010, 20). That model seeks to track 'the movement of third-country nationals from the point of departure in countries of origin, all throughout transit, and up to their arrival in the EU' (Moreno-Lax 2017, 3). At each juncture, the EU deploys so-called remote-control techniques in order to frustrate unauthorized movement towards Europe. An important remote-control measure is the imposition of uniform visas, required for accessing the Schengen Area, even when the purpose of entering is to change flights at an international airport. Other measures include the imposition of carrier sanctions, which make transport companies liable for the visa status of their passengers, and operations at sea and at the external border, co-ordinated by Frontex, the EU's Border and Coast Guard agency (FitzGerland 2019, 164–168). In a 2019 regulation, Frontex received a mandate to start building its own standing corps, which would have its own equipment (EU 2019). As the agency's executive director, Fabrice Leggeri, proclaimed, this makes Frontex 'the first uniformed law enforcement service of the European Union' (Frontex 2020a). In other words, in the domain of migration, the EU has become an enforcement agent in itself.

In addition, the EU places ‘immigration liaison officers’ in third countries outside of Europe. Although the status and mandate of these officers is somewhat vague, they administer visa applications – typically by overseeing the operations of private contractors – and advise transport companies and governments on European ‘immigration priorities’ (Moreno-Lax 2017, 133–142).⁴⁰ Further, and crucially, the EU partners with these third countries to create so-called ‘migration compacts,’ especially in active migration hubs and transit countries. Migration compacts involve the transfer of financial resources, political benefits (including visa facilitation schemes), and operational assistance in exchange for agreements to host refugees and asylum seekers and to assist in the facilitation of returning migrations from Europe (Reslow 2018). Contracting states also agree to take action to shut down known migration routes on their territories. This is why the EU’s neighbouring partners are sometimes described as ‘buffer states’ (FitzGerald 2019, 8). The best-known migration compact negotiated to date is the 2016 EU-Turkey deal, which has become the model for how the EU intends to advance its interests in migration control (e.g., Terry 2021). These agreements blur the lines between the domain of migration and other foreign policy domains, so that conditionality has become an important part of border control: European states, acting in combination or unilaterally, rely on wider foreign policy tools when negotiating migration compacts and, conversely, consistently put migration on the agenda in their foreign affairs more generally (Reslow 2018, 395).

⁴⁰ The creation of the immigration liaison officer, coupled with the imposition of carrier sanctions, gives rise to a question of whether this advising amounts to coercive law enforcement (Moreno Lax 2017, 134; Bloom and Risse 2014; cf. Blake 2020, 101–102). Since my argument does not turn on coercion, I leave this question to one side.

The main characteristics of IBM are not local to European border control. They form the cornerstone of current attempts to manage and control global migration throughout the Global North. Different states emphasise different elements to suit their geographical location: the US and Canada heavily relying on ‘buffering’ in Mexico and Central America, Australia creating migration compacts by way of its ‘Pacific Solution’ of hosting asylum seekers and refugees in small island states like Nauru, and South Africa making moves towards erecting a joint border regime with Botswana (see FitzGerald 2019, Gammeltoft-Hansen 2011; Longo 2017, chap. 4). In addition, these states have established networks of information-sharing between them. For example, Shachar notes that the old ‘five eye alliance’ – the US, Canada, the UK, Australia, and New Zealand – have created ‘a wide-ranging intelligence and data-sharing network with extensive surveillance capabilities, which focuses, amongst other things, on “remote control” border and migration control’ (Shachar 2020, 34).

We can generalise from these characteristics to articulate a *contemporary practice of border control*. This practice has two core features. First, these efforts to externalise border controls mark a shift from a primary concern with controlling immigration. Instead, states are now primarily concerned with controlling migration flows: they act to control movement towards their territories. Second, the various strategies states employ for controlling migration flows have made border control a distinctively collaborative enterprise. States form coalitions in order to increase their collective capacity to control common borders, and they work with other states through agreements where immigration-related interests are exchanged for other foreign policy interests. The contemporary practice of border control is *extraterritorial* and *collaborative*. The most basic interpretation of the function of this practice is that it allows states to regulate

migration more effectively. That efficiency has a particular explanation, however. As I will now argue, the contemporary practice of border control is closely bound with the operationalisation of a non-violation of human rights standard of legitimacy.

The arguably most important migration-related human right is the right to seek asylum. In the aftermath of the Second World War, states agreed that a major failing of the international order during the war had been the systematic lack of protection offered to European Jews. Hence, the 1948 Declaration of Human Rights included a right to seek and enjoy asylum from persecution in other countries (FitzGerald 2019, 32). This right was then formalised in the 1951 Refugee Convention and later its 1967 Protocol, to which most states have explicitly consented. The right to seek asylum grounds the principle of non-refoulement, according to which states are prohibited to expel individuals seeking asylum. As David Scott FitzGerald argues, the principle was ‘the core of the [Refugee] Convention’ (2019, 33), and it has since become a strong norm of the contemporary human rights regime (Gammeltoft-Hansen 2011, chap. 3). Consequently, states that aim to signal allegiance to that regime are thus careful not to violate the principle. But compliance is costly. Due to the state-based nature of the human rights regime, states are fully responsible for accepting and adjudicating asylum claims launched on their territories. The duty to accept and adjudicate asylum claims translates into a further duty of hosting and protecting asylum seekers whilst their claims are being assessed. Performing this task, especially to the standards set by advanced domestic legal systems, is costly – both financially and politically. Amidst growing scepticism about unskilled immigration in general and about the motives of asylum seekers in particular, voters in Western democracies have increasingly rewarded parties promising ‘hard stances’ on border control (see Helbling and Kalkum 2018). Governments thus face a pressing

political problem: in a world of migration, how can they avoid being punished by voters for complying with a set of rules they would rather avoid breaking?

The contemporary practice of border control functions as a solution to this problem. By externalising their border regimes, and thereby frustrating migration flows before they reach their territories, states avoid incurring the set of costly responsibilities associated with adherence to the principle of non-refoulement. At the same time as they actively avoid discharging those responsibilities, however, they also avoid the sanctions that follow from breaking with the international human rights regime. Hence, the crucial link with the non-violation of human rights standard of legitimacy. The externalised nature of contemporary practice allows the participants to that practice to enforce their border regimes without the risk of violating the central immigration-related human right to seek asylum. This, then, is what explains the efficiency of contemporary practice. It allows governments to respond to anti-immigration sentiments in their domestic constituencies *whilst at the same time* signalling compliance to the human rights regime.

To conclude this section, note that the contemporary practice of border control diverges from the description of border control that grounds the Millerian argument. In particular, the reality of contemporary practice puts pressure on two key aspects of that description. First, it puts pressure on the claim that border controls work to remove individual options from a migrant's full set. Second, it puts pressure on the claim that each state enforces border control independently, without intending that other states do the same. By forming coalitions with such other states, and by taking measures to ensure that migrants do not leave well-known states of transit, participants to contemporary practice intendedly remove several options from migrants' full set. Thus, those who want to rely on the Millerian argument to ground Yong's claim that the border regimes of

powerful states in the Global North are rightly held to a non-violation of human rights standard face their own application problem. They have to explain why their argument applies not only to states with borders that can be conceptualised ‘like barriers’ going around their territories (Miller 2010, 112), but also to states that have externalised their border regimes through extensive transnational collaboration. In other words, proponents of that argument have to provide a convincing case for how they avoid idealising the very activity of border control. Of course, this is not yet an argument that contemporary practice is not rightly held to a non-violation standard of legitimation. The next section, however, gives such an argument.

3.5. The insufficiency of the minimal standard

The function of Miller’s prevention argument, as I have appropriated it, is to show that, contrary to how things might appear, states actually wield a fairly limited power in their claim to regulate migration. The enforcement of border control is direct and regulates a sensitive domain. But its range and impact, and hence its overall power, is importantly limited. Therefore, the risks it poses to freedom are generally outweighed so long as it adheres to a non-violation of human rights standard. I have argued above that the description of border control underlying this argument fails to capture the full extent of what I have called the contemporary practice of border control. That practice, I have argued, is both extraterritorial and collaborative in a way that uproots central premises in the case for holding border control to a minimal legitimacy standard. The question, then, is whether the contemporary practice of border control increases the range of control states claim over migrants and, if so, if that increase in range also increases the impact that control has on the freedom of migrants.

To begin with the question of range, the contemporary practice of border control does plausibly increase the range of participating states' claim to regulate movement. By impelling buffer states to close down migration routes; by imposing uniform visas for transferring flights and carrier sanctions; and by introducing immigration liaison officers and offering operational assistance in the border regimes of third countries, states are not only acting in ways that hinder access to their own territories. They also block individual migrants from accessing other states. To take Saunders' example from above, whilst it may be true that the US does not act to prevent Mexicans from entering Guatemala, the opposite is not the case: 'buffering' migration from Central America in Mexico is one of the most important priorities in US border control and a task for which there is allocated significant resources (FitzGerald 2019, 131). The same is true of US efforts to frustrate migration from Caribbean states, where aggressive coastal patrolling has often prevented individuals from 'from leaving their own island countries to go *anywhere*' (FitzGerald 2019, 71, emphasis in original).⁴¹ Moreover, by forming coalitions seeking to control common borders, individual states are partaking in institutions that intentionally seek to control access to areas far larger than the areas of each member state.

The next and crucial question is about impact. Does the contemporary practice of border control impose risks of abuse onto migrants that would not have been present in the absence of that practice? Again, the various strategies that comprise contemporary practice do plausibly increase the impact of participating states' border regimes. As FitzGerald emphasises, these strategies are enacted against a particular background, namely, one in which – since 1994 – 'annual refugee resettlement flows as a percentage

⁴¹ It is unclear whether this qualifies as coercion on Miller's view. Arguably, so long as the option of leaving by flight is open, coastal patrolling is preventive only (cf. Miller 2010, 117–118).

of the global refugee population have never exceeded 1%' (2019, 3). Thus, individuals who qualify as worthy of protection under international law cannot rely on receiving such protection through the international refugee regime. The upshot of this is that, by relying on contemporary practice, states bring about a set of circumstances where individual migrants are exposed to a perverse incentive: remain in your state of origin or in a buffer state with limited capacity (or willingness) to robustly protect your rights or set out on increasingly dangerous routes to apply for asylum once territorially present in a state that can offer such protection. This fact challenges the claim, central to the reconstructed case for holding border control to a minimal legitimacy standard, that the outcome responsibility for migrants who suffer under the current system is shared between all states. As Miller argues, outcome responsibility is demarcated by a 'standard of reasonable foresight: an agent is outcome responsible for those consequences of his actions that a reasonable person would have foreseen, given the circumstances' (Miller 2007, 96). Hence, even if the outcome responsibility of the inefficiency of the refugee regime could be seen as shared between all states, the consequences brought about by contemporary practice cannot. Against the background of an inefficient refugee regime, implementing remote control techniques predictably leads migrants to embark on dangerous journeys to reach stable states in which to seek asylum – as can be observed by the persistence of deaths reported at the edges of Europe, North America, and Australia (IMO 2021). Moreover, there have been persistent worries about the capacities (and also willingness) of selected buffer states – for example, Turkey, Libya, Nauru – to protect the rights of the migrants they agree to host. Insofar as the states behind these delegations of responsibility satisfy the standard of reasonable foresight, which I take it there is every reason to think that they do, then they have a larger share of the outcome responsibility

for resulting failures to protect vulnerable migrants than do states that do not partake in contemporary practice.

These considerations, I conclude, entail that the states that participate in contemporary practice exercise more power over migrants than they otherwise would. Therefore, and further, they impose additional risks onto those migrants. The crucial question, however, is whether that increased power and corresponding risk is sufficient to trigger a demand for a more stringent legitimacy standard. Answering this question is crucial because my argument so far can look vulnerable to the following objection: contrary to how I have presented things, those who think that border controls should be held to a non-violation of human rights standard do not primarily see that standard as getting states ‘off the hook’. Instead, they see it as a critical standard, which guide us in our evaluations of our state’s border regimes. Thus, why can we not simply say that, rather than triggering a demand for a more stringent legitimacy standard, the contemporary practice of border control leads to the violation of the minimal standard? In other words, why do the externalisation and collaboration involved in contemporary practice give rise to concerns from the perspective of legitimacy that the non-violation of human rights standard cannot capture?

The reason why the contemporary practice of border control gives rise to such additional concerns is that, contrary to what the objection suggests, the human rights concerns currently associated with contemporary practice are not mere contingencies of that practice. Instead, they are robustly linked to the logic of that practice itself. To see this point, it is important to note that the externalisation of border control is not only territorial, but also bureaucratic. States delegate authority to administer border controlling tasks, including visa application and the processing of claims for asylum, to other states

and to private actors. This delegation of authority inevitably gives these third parties liberties to interpret how the relevant set of immigration law applies in individual cases (see Cordelli 2020, chap. 4). This means that there is an additional institutional layer between migrants and the state(s) with whom they are ‘officially’ in a relation. This additional institutional layer exacerbates the vulnerability of these migrants, who do not have many routes for contesting any maltreatment they may be subject to at the hands of immigration officials (Sager 2017). In the case where migrants depend on private contractors for the protection of their rights, these contractors are, due to their non-governmental status, not subject to international human rights law and are also far less transparent in their procedures. States are, of course, technically responsible for the conduct of actors exercising governmental authority. However, once that authority has been delegated to an external agent, what constitutes such acting on their behalf is always open to interpretation and contestation (Gammeltoft-Hansen 2015, 210–211). This creates barriers for holding states responsible for possible rights violations of the migrants whose movement they nonetheless constrain: these states can always rely on legal mechanisms to contest that they are responsible for maltreatment of individual migrants. It is worth emphasising that this dynamic is observable even with Frontex, which has been notoriously hard to hold responsible, precisely because of the unclear boundaries between the agency and the Member States (Fink 2020).

Therefore, the migrants who are exposed to the power involved in the contemporary practice of border control are not only exposed to a general and contingent risk of human rights violations. They are also exposed to the additional risks associated with *unaccountable power*. Having externalised border controlling functions, both physically and institutionally, states can rely on legal contestation to avoid full

responsibility for the enforcement of their border regimes. This dynamic has the systematic effect of compounding the vulnerability of already vulnerable persons – who face further obstacles to contesting potential abuse in detention centres, at the hands of border guards, by bureaucrats processing their asylum claims, and so on (UN 2020). The risk associated with this unaccountable power cannot be outweighed by holding states to a non-violation of human rights standard because it is the operationalisation of that standard in a world of territorial states that explains *why* states engage in the practice to begin with. Philip Pettit puts the relevant concern well in his argument for corporate responsibility: ‘let human beings operate outside of such a regime [of corporate responsibility], and they will be able to incorporate, so as to achieve a certain bad and self-serving effect, while arranging things so that none of them can be held fully responsible for what is done’ (Pettit 2007, 196). That is, given that they operate in a context without a regime to effectively hold them responsible for their delegated actions, we must hold states to a standard of legitimacy that blocks them from relying on externalisation in order to exercise power with being subjects to the constraints that otherwise would pertain to that power. The demand that each state simply refrain from violating human rights is, paradoxically, the source of the additional risk migrants are currently exposed to.

To summarise, the point of tying legitimacy standards to power is to render the risk that power poses to freedom assessable and controllable. The efficiency of the contemporary practice of border control turns precisely on its ability to avoid both scrutiny and control. This ability to avoid scrutiny and control is enabled by the demand that each state merely refrain from violating human rights. Therefore, holding contemporary border regimes to a non-violation of human rights standard is insufficient

for their legitimacy: the operationalisation of that standard currently allows states to strategically manipulate their borders in a way that ensures that they satisfy that standard but still impose further risks onto the migrants.

3.6. What kind of power?

A reader might still be sceptical of my argument. They might wonder why, precisely, unaccountable power poses an additional risk to freedom. Moreover, they might wonder what an alternative arrangement for the regulation of global migration would look like. My argument suggests that the regulation of global migration should be held to what I called a promotion of human rights standard of legitimacy. However, my specification of that standard was somewhat vague and included a disclaimer that its satisfaction would vary contextually. On the meta-coordination view of legitimacy I have endorsed, it matters what it would take to satisfy an applicable legitimacy standard. If the satisfaction of that standard would require dramatic revisions to our institutional arrangements, then we have to evaluate whether those revisions give rise to new risks that would, on balance, be worse than those I have identified in the contemporary regulation of migration.

The next three chapters seek to address these questions. I will do so by drawing on the rich theoretical resources of the republican tradition of political theory. First, I will offer a further explanation of why the unaccountable power involved in contemporary practice is objectionable. I will argue that this power qualifies as *domination* in the sense republicans object to. This diagnosis is useful because it provides further resources for understanding when and why accumulations of power trigger demands for more stringent standards of legitimation. Second, I will defend the usefulness of this diagnosis from a set of philosophical objections which question the coherence of grounding a normative

political programme in the ideal of non-domination. These objections are especially pressing for my argument, since my diagnosis of domination turns on the power held by coalitions of states, and these objections insist that reflecting on the power held by coalitions shows that non-domination is an incoherent normative ideal. Third, having defended the coherence of the concept of domination, I will draw on my diagnosis of domination to sketch a normative proposal for the regulation of global migration.

CHAPTER 4

DOMINATION AND BORDERS: A RESTATEMENT

The last chapter argued that, even if the power involved in the contemporary regulation of migration does not qualify as coercive in the sense that triggers a demand for democratic legitimacy, it is insufficient to hold border control to a minimal non-violation of human rights standard. This stems from the fact that states are currently capable of exercising power over migrants in unaccountable ways that expose migrants to risks of abuse that are not captured by the non-violation of human rights standard. These risks of abuse are, in fact, explained by the prevalence of the non-violation of human rights standard: under norms of strict territorial sovereignty, holding border control to a non-violation of human rights standard gives rise to an incentive for powerful states to externalise their border regimes, so that they can constrain migration without incurring the responsibilities that otherwise would be attached to migration control.

However, what is the correct legitimacy standard for border control? My arguments in the last chapter suggested that contemporary border regimes depend for their legitimacy on the satisfaction of what I called a promotion of human rights standard. However, what that standard requires in substantial terms was underspecified: as I emphasised, those who have defended the promotion of human rights as an independent legitimacy standard hold that its satisfaction varies contextually given the specific functions played by the relevant institutions (Buchanan 2018; Scherz 2019). This chapter begins articulating what it would require for states to promote human rights in their regulation of global migration. To do so, I will draw on the rich resources of neo-republican political theory. I will argue that the republican concept of domination,

understood as subjection to arbitrary power, explains and illuminates the power conception of legitimacy. I will argue that the ideal of non-domination serves as a plausible normative standard for a theory of the legitimacy of border control, as it provides the resources for fleshing out what it would mean to promote human rights in the contemporary regulation of migration. My thesis will be that an institution triggers a demand for a higher standard of legitimacy when the power it wields becomes *dominating* power. Thus, the primary concern of this chapter will be to establish the first step in this analysis, namely, that the power involved in the contemporary practice of border control is correctly diagnosed as domination in the sense that concerns republicans. As I will argue, contemporary practice involves domination because it gives (1) a set of states (2) the capacity to arbitrarily interfere with (3) a set of vulnerable people beyond their borders.

My arguments in this and the following chapters are not only of interest to the debates on border control and institutional legitimacy outlined so far in this thesis. It is also of central interest to the republican project itself. Despite its rich resources for analysing the relationships between power, freedom and legitimacy, border control has posed a hard problem for republicans. This is reflected by the fact that, whilst both border control and republicanism have become intensely debated areas of contemporary political theory, there have been relatively few attempts to combine the two.⁴² Indeed, Frank Lovett, one of the world's leading republican thinkers, has described 'the problem of state borders and global migration' as 'perhaps the greatest challenge to contemporary civic

⁴² Important exceptions include Costa (2016; 2020), Fine (2014), Honohan (2014), Hoye (2017; 2021) and Sager (2017). Applications of the neo-republican conception of domination to other migration-related issues include Benton (2014), Draper (2020), Lenard (2015), Owen (2014) and Sager (2014).

republican theory' (Lovett 2018, sec. 4.4). The challenge migration poses for the republicans is both diagnostic and normative. As I will explain, it can appear unclear whether the power involved in border control plausibly qualifies as domination. Moreover, it can also be unclear whether republicans should support a project of reform of the global regulation of migration *even if* it is shown that migrants are dominated. Thus, by offering an argument to the effect that the contemporary practice of border control involves domination, this chapter makes a novel contribution to the republican literature. It demonstrates that the ideal of non-domination can ground a determinate critique of border control.

The chapter is structured as follows. Section 1 further motivates my turn to republicanism by, first, contrasting it with the dominant liberal approaches to theorising migration. Second, the section then outlines the republican ideal of non-domination and its relation to institutional legitimacy. Section 2 outlines and explains each step in my diagnosis of domination in the contemporary practice of border control. Section 3 outlines and rejects a prominent republican objection to my argument. Section 4 outlines two further objections to my argument, which are not so easily rejected, and explains how the next two chapters will respond to each of them.

4.1. Republicanism, non-domination, and the role of institutions

Liberal political theorists have tended to analyse questions of migration and border control in terms of the moral claims held by migrants and by political communities. As I have argued in the preceding chapters, this way of conceiving of the normative terrain can give rise to a blind spot when it comes to legitimacy. On the one hand, when arguing for moral claims held by political communities organised under the state, it is easy to

invoke an idealised image of what states are actually like. On the other hand, those who have sought to avoid this problem by grounding their arguments in descriptive accounts of the state end up stipulating that the legitimacy of border control follows from state legitimacy more generally. I have argued that we have reason to resist both of these tendencies. States seek to control the movement of people outside of their territories in increasingly expansive ways and are heavily investing in novel strategies to boost their capacities to do so. This makes it pressing to reconsider the risks engendered by the enforcement of contemporary border control and not only the distribution of benefits and responsibilities that arise from the immigration laws that are enforced.

My argument has stressed that the extraterritorial and coordinated nature of contemporary border controls challenge central assumptions made by political theorists writing about migration. In this respect, it relates to a cluster of recent critiques of ‘mainstream’ liberal approaches to migration and border control. As I mentioned in the first chapter, Alex Sager (2016) has argued that liberalism’s focus on the moral claims held by individual agents and by states, respectively, has left mainstream political theory on migration blind to important drivers of global migration. Similarly, Lea Ypi (2016) has argued on similar grounds that liberal theories are incapable of offering a compelling analysis of, and hence normative recommendations for, labour migration because it fails to capture the class-based dynamics of contemporary migratory flows. A third critique also argues that liberal theories have obscuring tendencies when it comes to questions of migration, but on slightly different grounds. According to Valeria Ottonelli and Tiziana Torresi (2013), since involuntary migration is widely held to trigger particularly stringent moral claims, much debate in the normative literature tends to pin questions of migration on the concept of voluntariness. This, they argue, has had two unfortunate implications

(Ottonelli and Torresi 2013, 785–788). First, it has led many who want to vindicate rights on the parts of migrants to suggest that all migration that happens under conditions of global inequality and injustice amounts to an involuntary choice. Second, it has led many of those who want to vindicate rights on the part of excluding states to suggest that voluntary migration is simply a matter of personal preference and thus not something that warrants moral concern. Both implications are unfortunate, Ottonelli and Torresi argue, because they work to distort the fact that migration is oftentimes a paradigm case of an expression of agency: a voluntary choice which nevertheless serves important aims in an agent's life and which deserves special moral concern for that very reason.

Liberalism is a flexible normative framework, and these critiques are by no means conclusive against it. However, the blind spots resulting from its portrayal of the relevant subjects of analysis in migration, and its tendency to pin debate on the question of voluntariness, are important challenges liberals should address. Against this backdrop, it would therefore be a significant advantage if a competing normative framework could convincingly avoid these challenges. Republicanism is precisely such a framework – or so I will argue. The republican concept of domination can yield a convincing analysis of the contemporary practice of border control because it is in principle flexible with regards to which institutions qualify as dominating agents. Moreover, given its emphasis on power, a republican analysis does not turn on voluntariness: the primary concern of such an analysis is not why an agent acts but, rather, the institutional environment in which she acts.

Where normative liberalism works by reference to the moral claims of agents, republicanism is grounded in a fundamental objection to the evil of domination.⁴³ On the republican definition, an agent dominates another if they hold arbitrary power over them. This means that the dominator can interfere in the dominated's life as they please, without having to consider their interests or opinions (Pettit 1997, 55; Young 2000, 258). Whether the dominator actually interferes does not matter. That they could interfere suffices for the domination of those who are vulnerable to that power. According to republicans, this is why we do not think that a regime of slavery would fail to be objectionable if all slave holders were benevolent towards their slaves and never interfered in their actions: it is objectionable that some have the unchecked capacity to simply decide whether others should be capable of acting as they want.

Because of this focus on what could happen if only individuals changed their minds, analyses of domination are not only concerned with what happens in the actual world, but also what happens in nearby possible worlds. Non-domination thus entails the robust absence of arbitrary interference. As Cécile Laborde writes, I am free from domination 'only if I am recognised by others as enjoying a status that protects me

⁴³ Since my concerns in this thesis are critical and normative, I focus on republicanism's distinctive conceptual architecture. That architecture has been developed most comprehensively by Philip Pettit, who will serve as a reference-point throughout my discussion. Pettit's conceptual work builds on important work in the history of ideas, especially by Quentin Skinner (1990; 1998) and J. G. A. Pocock (1975). It is important to recognise that there are important debates over the historical roots of republicanism and, in particular, over what (if anything) distinguishes Pettit and Skinner's 'neo-Roman' republicanism from Pocock's 'neo-Aristotelian' republicanism (see Bellamy 2016). Despite the intricacies of disentangling the origins of these traditions, I will treat them as distinct because they are, by now, quite different in their normative outlooks: the neo-Aristotelian strand mirrors the collectivist concerns of the communitarian tradition, whereas the neo-Roman strand is agent-centred. For here on, any reference to 'republicanism' will be to the neo-Roman strand.

resiliently from arbitrary interference’ (Laborde 2008, 2). Morally and politically, we have fundamental reason to object to relations of domination because they are incompatible with such equality of status. This is clear from the example of the master and slave and from other paradigm cases of domination, such as systems of coverture and dictatorships. In these cases, the masters, husbands, and dictators have full control over their slaves, wives, and political subjects’ agency. However, the concept of domination applies to all relations of social power. Thus, it is possible for an agent to dominate along one dimension but not another (Lovett 2010a, 82–83). For example, a factory owner in a society without labour protections dominates their workers but may not be capable of exercising power over them in all spheres of their lives (Pettit 1997, 74–77).⁴⁴

Republicans see domination as the quintessential state of unfreedom. They thus endorse a conception of freedom as non-domination, which is meant to capture the meaning of social freedom better than all competing conceptions and especially the liberal conception of freedom as non-interference (Pettit 1997, part 1; 2012, 20–21). The question of whether republican freedom as non-domination succeeds in this ambition has spurred a large literature.⁴⁵ When domination is interpreted along the lines I will argue for in the next chapter, I think freedom as non-domination holds superior explanatory power to the liberal conception and that some of the key objections that have been raised against it miss their mark (Sandven 2020; see also Gädeke 2020b). However, for the

⁴⁴ Social hierarchies intersect but can also function independently of each other. Thus, it is conceptually possible for one agent to dominate another in one domain, whilst suffering domination from that other agent in another domain. In practice, of course, social spheres tend to overlap (e.g., Walzer 1983). When they do, domination in one sphere often suffices for domination in another, rendering that domination extensive.

⁴⁵ For an excellent overview of the debate, as well an account that seeks to synthesise virtues from both the liberal and republican conceptions, see List and Valentini (2016).

purposes of this thesis, I will not engage in this debate. Instead, I invoke domination as a critical concept and non-domination as a normative ideal: domination is something we have fundamental reason to object to and non-domination is therefore something we have fundamental reason to promote. None of my arguments turn on the claim that non-domination offers the best account of who is free to act in the social world, and why. I am committed, however, to the claim that dominating power poses a particular threat to freedom that we have fundamental reason to object to. These claims might appear identical, but they are not: as proponents of the liberal conception of freedom as non-interference have persistently argued, the key cases of domination can also be accounted for on the liberal theory, for example by appeal to probabilities (Carter 2008; Kramer 2008).⁴⁶ As will become clear, the power involved in the contemporary practice of border control poses a clear threat to freedom as non-interference, as well as freedom as non-domination.

One further reason why domination is objectionable is that it is inseparable from subordination. When social arrangements give one (set of) agent(s) dominating power over another, it is bound to become a matter of common knowledge that the one lives at the mercy of the other. This will, in turn, give rise to states of affairs where the dominated live in constant uncertainty, not knowing whether and when their dominators will interfere. Thus, the dominated will have reason to anticipate and bend to the will of their

⁴⁶ Note, however, that List and Valentini question the capacity of freedom as non-interference's appeal to probabilities to capture the relevant concerns of non-domination's appeal to robustness (List and Valentini 2016, 1052–1055). Insofar as their argument is correct, my argument is narrower than how I have presented it here, since it will appeal to conceptions of social freedom that include a robustness requirement. However, it would clearly not be a problem for me if List and Valentini's argument is correct since my argument would then appeal to the best interpretations of social freedom.

dominators' will, so as to make the interference less likely (Pettit 1997, 85–88). Moreover, since they are embedded in social relationships in which others have the ability to arbitrarily change their option sets, dominated agents, by definition, command less control over the social practice which bestows power onto their dominators. Their dominators' decisions systematically outweigh theirs. To be dominated is to be regarded as less than equal in the common space of reasons (Pettit 2010, 76). Domination is thus not *primarily* the lack of robust non-interference. Rather, it is the lack of a voice with which to command respect regarding the shape of common social practices (Gädeke 2020a; Laborde 2008, 152–155; see also Young 2000, 32–33). In Philip Pettit's words, the 'terrible evil brought about by domination, over and beyond the evil of restricting choice, and including a distinctive uncertainty, is that it deprives a person of the ability to command attention and respect and so of his or her standing among persons' (2002, 351, cited in Gädeke 2020a, 27). When an agent enjoys non-domination, they enjoy a particular power, namely, the power to command respect and thereby 'prevent various ills happening to them' (Pettit 1997, 69). The lack of power to prevent these ills impacts an agent's freedom, regardless of how we understand that concept. Thus, non-domination should be understood as a *status* that allows an agent to relate to others freely and as equals.

The status-based nature of the concept of domination makes it essentially political. It is built on the recognition that human beings live with, depend on, and are therefore vulnerable to, each other (Garrau and Laborde 2015, 52–54; Pettit 1993, part III; Young 2000, 258–265). By necessity, human interactions will create social institutions, both formal and informal. Domination arises when a social institution is skewed in ways that exasperate and intensify the vulnerability of a subset of the institution's members to the

rest of its members (Lovett 2010a, 120). Relations of domination thus prohibit equality of status (Laborde 2014, 74–76; Pettit 1997, 113–114). Hence, Pettit’s introduction of what he calls the ‘eyeball test’, which is a heuristic device for testing when an agent enjoys non-domination. A person passes the eyeball test when they ‘can look others in the eye without reason for the fear or deference that a power of interference might inspire; they can walk tall and assume the public status, objective and subjective, of being equal in this regard with the best’ (Pettit 2012, 84). This point – that domination is fundamentally incompatible with relations of social equality – is important to stress because it is lost on critics who object that there is nothing wrong with being subject to the arbitrary power of another so long as that power does not give rise to social inequality (Kolodny 2019). These critics miss the explanatory power inherent to the concept of domination and thus that domination can explain *which* instantiations of social inequality we have reason to object to.⁴⁷ Far from being superfluous, the concept of domination tells us which forms of social inequality are pressing from the point of view of institutional reform.

Since it is built around the fundamental objection to domination, the republican project is an institutional project at its core: ‘[n]on-domination in the sense that concerns us, then, is the position that someone enjoys when they live in the presence of other people and when, by virtue of social design, none of those others dominates them’ (Pettit 1997, 67). This institutional project naturally splits in two. First, there is the critical-diagnostic project of identifying relations of domination. Since this is clearly a hopeless task without

⁴⁷ The next chapter gives a diagnosis of this mistake, arguing that it arises from the presupposition that the concept of domination is best understood in agent-relative terms. As I will argue, however, domination should be understood in a systemic sense.

some preconception of actual power structures, the critical-diagnostic component counts against highly idealised modes of theorising. A major advantage of republicanism is thus that, by grounding its theoretical architecture in the objection to domination, it can make normative recommendations starting from sociological analyses of social practice – something the subsequent sections and chapters aim to demonstrate by offering a critical analysis of the contemporary practice of border control.

Since domination occurs when social institutions are skewed in ways that give some the power to arbitrarily interfere in the acting of others, the normative task for republicans is to devise institutions that revoke capacities to dominate. This makes republicanism distinct in outlook from liberal theory, where debate tends to proceed by, first, asking what each agent is owed as a matter of right and then, second, asking how we can design institutions that consistently deliver on the content of those rights (Ronzoni 2017, 188).⁴⁸ Republican institutions are concerned with non-domination along two dimensions. First, they must act to promote relations of non-domination between the agents whose actions they are in place to regulate. Second, the institutions must embody the ideal of non-domination by ensuring that they do not themselves dominate the agents whose actions they regulate. These two dimensions correspond to justice and legitimacy (Pettit 2012, 139). Institutions are just to the extent that they produce social conditions that prohibit status imbalances of the kind that grant some arbitrary power over others. Like Kantians, republicans hold that the rule of law is necessary for enjoying non-domination and the freedom associated with it (Forst 2017, 158–159; List 2006; Pettit 1997, 36). A system of law enforced by the state or its functional equivalent is necessary

⁴⁸ To recall, my objection to institutional conservatism in chapter 2 was that it tries to derive an answer to the first of these questions by impermissibly stipulating an answer to the second.

for enshrining the kind of status that can offer robust protection from arbitrary interference. Institutions are legitimate to the extent that they do not enforce their rules arbitrarily. Republicans therefore place emphasis on checks and balances in the form of devolution and the separation of sovereign powers (Ronzoni 2017, 195). Further, republicans stress the need for democratic institutions ensuring that states are accountable to their citizens and, conversely, that citizens collectively control their states.⁴⁹

The diagnostic and the normative parts of the republican project are not independent of each other. Identifying domination will not always be sufficient for justifying institutional responses. Given social complexity and ever-evolving patterns of human interaction – think, for example, of the new avenues of power created by technological advancements – there will always develop new avenues of power which can grant some capacity for arbitrary interference. Some domination is therefore inevitable (Lovett 2010a, 111). This means, first, that the fight against domination is constant. There is no conceivable end-state to the republican enterprise. In addition to the general observation that power tends to corrupt, this is why republicanism is centrally concerned with the institution of citizenship. In order to guard against it, citizens must remain vigilant and actively work against domination in all of its forms (Erez and Laborde 2020; Pettit 1997, esp. chap. 8). Further, the fact that some domination is inevitable also means that we may have to accept some degree of domination if all institutional alternatives would likely be worse from the perspective of domination. Thus, republican theory invokes a meta-coordination perspective on legitimacy: the legitimacy of an institution depends not only on the risks of domination associated with empowering that

⁴⁹ In Pettit's terminology, citizens should take both an 'authorial' and an 'editorial' role, taking part in the collective authoring of law and standing ready to contest the content of laws (Pettit 2012, 218).

institution but also on the risks associated with empowering a different institution to regulate the same domain. This point is crucial to understanding the application of the republican framework to the global level.

Because the republican framework both starts normative analyses from the facts on the ground *and* assigns normative weight to the state as a guarantor for freedom from domination, it naturally puts states at the centre of analysis. However, since the framework is dynamic, it recognises – indeed, warns – that new forms of domination will always follow new forms of social interaction (see Pettit 1997, 146). Thus, in an increasingly globalised world, the ideal of non-domination naturally extends beyond borders. The thought that international relations matter for non-domination has a long tradition. As Quentin Skinner (2010) argues, republicans have always insisted that one can be free from domination only if one belongs to a free state, that is, a state that is not vulnerable to arbitrary interference at the hands of external agents, be they states or powerful corporations. If I stand in relations of non-domination with my fellow citizens but our state is subjected to foreign rule, then that status as a citizen of a subjected state bears on my standing in the way captured by the concept of domination. In that case, I lack the power to contest social forces that act upon me in the precisely the way that republicans object to. This recognition that states as well as individuals can be dominated gives republicanism a straightforward objection to colonialism.⁵⁰ Similarly, it also

⁵⁰ Cf. Lea Ypi's (2013) argument that colonial practices embody a distinctive procedural wrong. This argument is compatible with a purely procedural conception of non-domination, according to which arbitrariness is simply the lack of sufficient institutional checks on power (Lovett 2010a, 120). Laura Valentini's (2015) objection to Ypi mirrors the concerns of those who – like Valentini herself (List and Valentini 2016) – think that freedom as non-domination requires moralisation in order to deliver plausible results in central cases.

supplies the basis for a firm objection to asymmetries of power at the global level, since these cause many states, and thus their citizens, to lack a voice with which to contest the social forces that shape their lives (Gädeke 2016; Laborde 2010; Laborde and Ronzoni 2016). In James Bohman's (2015) apt phrase, citizens of dominated states thus have 'silent citizenship'.

It is essential to point out, however, that analyses of domination are not committed to naturalising the state in the sense of treating its current form as necessary or as intrinsically valuable. In Pettit's words, 'there is nothing sacred from the republican point of view about the state or about the state's sovereignty' (1997, 152). Although the state will be a central part of any republican analysis so long as it remains the most feasible way of securing interpersonal non-domination, the ideal of non-domination may well demand that states cede competences to other political authorities, at the sub- or supra-state levels (Pettit 1997, 178–179). What matters is that individual agents live under institutions that provide the voice required to contest and shape the social forces that structure their lives. The ideal of non-domination is tightly bound to a principle of subsidiarity (Laborde and Ronzoni 2016, 286; Ronzoni 2017, 195). Therefore, it is not only the case that republicans are not committed to naturalising the state. More strongly, the ideal of non-domination actively demands that we avoid naturalising the state. New forms of social interaction may render the normative case for the state obsolete if (and when) they give rise to power relations that cannot effectively be controlled by states. Moreover, under changing background conditions, the state itself may become a dominator in areas where it previously lacked capacity for arbitrary interference.

The point that the ideal of non-domination demands that we avoid naturalising the state is important because it allows the republican approach to avoid the problems

associated with methodological nationalism, whilst at the same time offering a plausible explanation for why the state must play a central role in any progressive programme of global reform (Erez and Laborde 2020, 198). To put it in the terms of the last chapter, a republican framework has in principle no problem explaining why institutions like Frontex are relevant for legitimacy assessments whilst at the same time recognising that it is ultimately governments that drive the contemporary practice of border control: both states and the coalitions of which they are part qualify as independent subjects of power and may thus dominate.

This section has only provided a rough outline of the concept of domination and its role in republican political theory. However, it suffices for introducing the set of claims that I will defend in the rest of this thesis, which are the following. The contemporary practice of border control gives

- (1) a set of states
- (2) the capacity to arbitrarily interfere with
- (3) a set of vulnerable individual agents, resulting in relations of domination that
- (4) suffice for institutional illegitimacy and therefore gives rise to a demand for reform of the regulation of global migration.

The next section outlines and explains (1), (2) and (3). The following section then begins my account of (4) by way of outlining and responding to a republican objection to the claim that border controls can dominate. I then outline two stronger objections to my argument, which the remaining two chapters of this thesis will respond to.

4.2. Domination in the contemporary practice of border control

Republicans object to states of affairs where an agent has the capacity to arbitrarily interfere in the acting of another. Any diagnosis of domination must therefore clarify who dominates whom, and how. This section answers each of these questions as they pertain to the contemporary practice of border control, demonstrating that the power involved in border control qualifies as dominating power of the kind that concerns republicans. The contemporary practice of border control gives a set of states the capacity to arbitrarily interfere with a set of vulnerable agents.

Who dominates? As we saw in the previous chapter, the contemporary practice of border control is characterised by extraterritorialisation and by collaboration. Prosperous states keen to avoid migrants reaching their territories to launch asylum claims externalise their border regimes by collaborating with so-called third countries. These agreements have various components, ranging from visa processing and hosting of asylum seekers to policing known migration routes. Their primary function is to shift responsibility for rights protection from the initiating states to contracting states which, in return, receive other benefits. The efficiency of this arrangement turns on what both initiating and contracting parties bring to the table. Individual migrants are thus subject to the power of coalitions consisting of both the states with externalised regimes and the states to which those regimes are externalised. The relevant agents of power in contemporary practice, I argue, is thus the *coalitions* of states that act together to control migration flows.

One might object to this idea on the grounds that these coalitions are themselves characterised by domination. For example, it can be argued that part of the reason why Australia's 'Pacific Solution' of detaining asylum seekers in contracting island states is

problematic is because states like Nauru do not have the capacity to do what they are contractually obliged to do, namely, protect migrants' human rights.⁵¹ Yet, given the benefits that hosting migrants brings with it, Nauru stands in a relation of dependence with Australia that makes exiting extremely costly, thus compelling the state to continue that relation, despite being incapable of meeting a contractual obligation and, moreover, a precondition for international legitimacy. The result is that migrants suffer, and that Nauru is rendered liable to outside interference due to that suffering, despite doing Australia's bidding. This looks like a clear case of domination, as I have defined it: one party has the capacity to dictate the terms of joint action, treating the other as less than equal in the common space of reasons. However, the fact that a coalition is itself characterised by relations of domination does not constitute an objection to its capacity to dominate. Indeed, the paradigm cases of dominating collectives – imperial states, mafia organisations, oversized multinational corporations – often rely on internal relations of domination. So long as the coalition acts together, in a coordinated way, they constitute an agent of power and, thus, a potential dominator. Although the fact that the collective is characterised by internal relations of domination clearly bears on the question of how we distribute culpability and responsibility for its action between participating agents, it cannot undermine a charge that the collective exercises dominating power.

In the case of the EU's migration compacts, and to a lesser extent in the US-Canada border collaboration (see Longo 2017, 78–85), there is a double coalition dynamic at play in that the initiating parties are themselves coalitions. Again, however, whilst this fact bears on how we think about culpability and responsibility, it is irrelevant

⁵¹ For an overview of Australia's 'Pacific Solution', see Bakshi (2020).

for identifying relations of power that give one party the capacity to arbitrarily interfere with another. The diagnostic task of identifying domination is in principle independent of, and prior to, the practical task of assigning blame and responsibility for rectifying that domination. What matters for diagnosing domination is that we can identify some (set of) agent(s) with the capacity to introduce constraints on the acting of others, at will and without reliably expecting sanctions. To put the same point differently, diagnosing domination is partly a matter of identifying the (set of) agent(s) whose decisions explain why some other agent faces some set of constraints on their action. When it comes to the contemporary regulation of migration, the constraints faced by migrants is explained by the coalitions of states that act together to manipulate their ability to cross borders.

Who is dominated? The next task for a diagnosis of domination is to identify some (set of) agent(s) that may or may not face constraints, depending on the will of some other agent. Who is subject to the power exercised by the coalitions of states involved in the contemporary practice of border control? Since the concept of domination includes a robustness requirement, it is not only going to be those who actually attempt to migrate who count as dominated. However, in order for domination to be useful as a critical concept for evaluating border control, it must be able to discriminate between the agents that might possibly attempt to cross some distinct border. (After all, anyone might decide to try to cross any border). I argue that the contemporary practice of border control subjects – and thus dominates – the subset of agents who are targeted by the policies of participants to that practice. As I explained in the last chapter, a central feature of contemporary border management is so-called ‘risk analyses’ of migration flows, based on extensive data sets. For example, a central part of Frontex’s mandate is to monitor and create risk assessments of the European Union’s ‘migratory situation and various

challenges to border management' (Frontex 2020b), which are released in annual reports. These analyses seek to predict migration flows ahead of time, so as to better be able to target these with remote control techniques. In so doing, they analyse economic conditions and political turmoil in sending countries, as well as factors such as weather conditions, to calculate expected emigration and direction of travel (FitzGerald 2019, 16–27). The constituency of the agents who are dominated by the coalitions of states that partake in contemporary practice is, I argue, constituted by those agents who are singled out as agents of concern in these risk analyses.

As is the nature of the continuous analyses by excluding states, the agents of concern for my analysis will shift contextually, depending on the relative stability of life in potential countries of emigration. However, in general terms, what characterises the individuals who are subject to the power involved in contemporary practice is vulnerability to domination in their current state of residence. If an agent is subject to domination, she lacks a status that allows her to command the respect necessary to be protected from arbitrary interference. This vulnerability to arbitrary interference can take one of two forms. Due to the weakness of her state's institutional capacity, the agent may be vulnerable to domination at the hands of individuals or collectives below or above the state. Alternatively (or additionally), due to her state's lack of effective enfranchisement for all of its citizens, she may be vulnerable to the state itself. Either way, the agent cannot rely on her state for robust protection from external agents. This vulnerability also changes her relationships with other states, for the following reason.

The contemporary practice of border control takes place against a backdrop of an ineffective refugee regime: as we saw in the last chapter, for over 20 years, annual refugee resettlement flows as a percentage of the global refugee population have never exceeded

1%. Thus, the refugee regime does not perform the role that would straightforwardly justify it on republican grounds, namely, to provide a safety mechanism on which agents can rely in the face of an unresponsive or oppressive state. Thus, under current conditions, the most reliable way of receiving protection outside of one's state is to move across borders without authorisation and to seek status as an asylum seeker once territorially present. Obviously, one's capacity to do this turns on the obstacles faced by those who emigrate without an authorised status, since this is a necessary condition for launching an asylum claim. In this context, vulnerability to domination in one's state of origin becomes directly important. Agents with citizenship in powerful or at least relatively functioning states – agents with so-called strong passports – are also able to rely on those states abroad: drawing on diplomatic resources, they can contest various forms of maltreatment they may receive outside their state's borders (Benton 2014). It should go without saying that the same is not true for those who are vulnerable to domination in their own state, who thus become doubly vulnerable to arbitrary power. In a world of states, silent citizenship is consequential also outside of one's own state. Given that silent citizenship is a consequence of the domination of states (Bohman 2015, Laborde and Ronzoni 2016), the relevant agents for my analysis will often be members of dominated states. However, membership in a dominated state is not necessary for qualifying as dominated on the view defended here: agents can suffer domination without their state being dominated, as is the case with oppressed minorities.

It is also important to distinguish the view defended here from a revisionist account of refugeehood, which holds that political oppression is the relevant normative criterion for determining who ought to be granted status as a refugee. I am sympathetic to many of the arguments that motivate this view, and in particular the point that what

matters normatively for determining who ought to receive protection from the international community is not primarily a function of the threat of harm, but rather of the presence or lack of the means to control remedies to such potential harm (Bender 2020, 12). However, my argument does not endorse, nor turn on, the claim that people who are vulnerable to such domination ought to be granted refugee status. In addition to the general concerns about the practical function of human rights talk mentioned in the last chapter, the debate about the definition of refugeehood raises specific concerns about the need for a legal category for protecting especially vulnerable migrants (Owen 2020c). In contrast to these arguments, I am only committed to the more minimal claim that those who are vulnerable to domination in their own state, and who are targeted by the remote-control techniques that characterise contemporary practice, are also dominated by the power involved in that practice. This subset of agents do not enjoy the robust capacity for exiting relations of domination, thereby locking in and intensifying their condition.

Lastly, there may be other forms of domination that pertain to individual agents across the world, qua potential migrants.⁵² However, since my account is specifically concerned with the new forms of institutional power that characterise contemporary practice, it is necessary for my analysis that agents may face the unique constraints involved in that practice in nearby possible worlds. And, as I will argue in section 3 below, there are particularly compelling reasons for republicans to be especially concerned with this subset of potential migrants.

How does the domination occur? In order to diagnose a relation of power as one of domination it does not suffice to identify a set of agents that hold power to introduce

⁵² For a sophisticated account highlighting the role border control plays in global relations of economic domination, see Honohan (2014).

constraints over others. Dominating power is arbitrary power: it is the capacity to interfere in a way that can be chosen or rejected without regard for the interests of those subject to the interference (Pettit 1997, 55). Dominated agents lack even minimal discursive control and thus lack the capacity to contest power that is being exercised over them (Laborde 2008, 152). In what sense is this true of the individuals who are targeted by contemporary practice?

Many republicans have noted that the power involved in border control looks like a paradigm case of arbitrary power: it is institutionalised power exercised over individuals with no control over the proceedings, despite oftentimes having acute interests in the outcome (Costa 2016; Laborde and Erez 2020, 199; Laborde 2010, 59). As my arguments above have suggested, however, there are good reasons for resisting this as a universal description of border control. Contrary to the suggestion that border controls generally constitute arbitrary power, a subset of individuals do have protections offered to them by virtue of the strength of their citizenship, including visa facilitation agreements between their state and others, as well as diplomatic representation that protects against gross maltreatment by foreign governments and bureaucracies.⁵³ Whilst these baseline protections do not, of course, guarantee successful immigration, they do offer something of paramount importance to non-domination. They count in favour of *procedural fairness*, of treating immigration applications according to predetermined rules, over which rule takers have some formal influence, and to treat all cases similarly according

⁵³ The EU's internal 'area of freedom, security and justice' is the obvious example, but also observe the list of countries that can apply for a visa waiver for travel to the US (US Department of Homeland Security 2016).

to those rules.⁵⁴ Individuals with silent citizenship obviously lack this advantage. Their states are too weak to be able to offer diplomatic assistance, let alone negotiating immigration facilitation agreements. And, in the case where silent citizens come from stronger states, they are, by definition, oppressed and can therefore not rely on their government to represent their interests.

What singles out the agents who are targeted by contemporary practice, however, is that they also lack access to stable states in which they can launch asylum claims, if and when they have the need to exit their current state. As we saw in the last chapter, the extraterritorial nature of contemporary practice functions to block access to parts of the world where individual agents can be reasonably certain that their basic human rights will be protected. Thus, they are confined to areas where they are, once again, vulnerable to domination due to their lack of legal protections and lack of informal support networks. Moreover, and crucially, this vulnerability is exasperated by the extraterritorial and (especially) outsourced nature of immigration administration under contemporary practice. As Alex Sager (2017) has recently argued, the lack of voice on behalf of migrants with silent citizenship means that even ‘official’ means allowing them to contest immigration decisions will be ineffective. Therefore, he argues, the bureaucracy surrounding contemporary immigration regulations cannot be rendered non-dominating, especially in light of their dispersed and externalised nature (Sager 2017, 47–48; cf.

⁵⁴ On the distinction between procedural and substantive definitions of arbitrariness, see Lovett (2010, 112–117). Note that Lovett’s definition is even more minimal than mine in that, on his view, *any* predetermined and publicly available rule suffices for procedural fairness and thus non-arbitrariness. On my view, formal capacity to contest those rules are necessary for rendering them non-arbitrary.

Honohan 2014, 40). I am sympathetic to many of the points Sager raises.⁵⁵ However, his discussion stops short of making the structural point that makes my analysis distinctive. Contemporary practice is dispersed. But it is also unified. Not only do remote-control techniques like outsourced immigration administration render individual migrants vulnerable to the will of unaccountable officers and the like: at a macro-level of analysis, we can argue that migrants are rendered vulnerable to the states that rely on these dispersed and externalised procedures in order to bring about their own agendas.

Lastly, the contemporary practice of border control works to create an opaque structure of accountability. By externalising their border regimes, the initiating participants to contemporary practice avoid formal legal responsibility for the protection of the human rights of the migrants that they, nonetheless, exercise power over. This matters both for the legal cases that can be brought against these states in human rights courts, as well as for citizens who want to keep their state's human rights record in check. Thus, the states that externalise their border regimes exercise power over vulnerable migrants whilst avoiding the technical rules that would otherwise constrain that action. In other words, a (set of) agent(s) are enabled to exercise power over another, to advance their own interests and without being constrained by rules. The power involved in contemporary practice satisfies the criteria for dominating power.

⁵⁵ Though not all of them: there are questions to be asked about whether Sager's scepticism towards bureaucracies in border control proves too much by way of casting doubt on the possibility of non-dominating bureaucracy at all. As a result, and further, it is unclear whether republicans should endorse his recommendation to keep borders largely open rather than advocating for stronger international institutions. The latter option is what I will argue for in chapter 6.

4.3. One objection: the conceptual impossibility of dominating borders

Having established a relation of domination in how our institutions are structured, the next step in a republican analysis is to offer an account of how those institutions could be reformed so that domination is removed. Correspondingly, there are two ways in which one might resist the conclusion that my argument above grounds a case for reforms to the regulation of global migration. One could, first, reject my diagnosis of domination, offering reasons why the relation I have identified is not actually characterised by arbitrary power. Second, one could appeal to the fact that all complex social relations will inevitably involve some degree of domination and then argue that any institutional means seeking to rectify the domination I have identified will inevitably lead to more domination. The two following chapters will deal with what I take to be the strongest possible versions of these respective critical strategies. Before I turn to these critiques, however, it will be instructive to see why a prominent version of the first strategy fails.

In his latest book-length defence of republicanism, Pettit makes an argument to the effect that domination through border control is, simply, a conceptual impossibility. His argument holds that the state is currently the only feasible institution capable of securing relations of non-domination and, further, that the infeasibility of moving to another regime undercuts the dominating character of border control:

(...) as a matter of political necessity, every state has to place limits on who can enter and in what numbers. This means that states have to institute selective policies about who to admit. Let us suppose, then, that a state adopts a policy that is not discriminatory and dominating from the point of view of anyone. The policy will mean that it does not have a choice, as such, between admitting you and not admitting you, depending on its will. And if under that policy it refuses you admission, then this should not count as fully voluntary interference. It will be a by-product of an independently necessitated, otherwise unobjectionable policy (Pettit 2012, 161–162).

Pettit's suggestion is thus that, since each state cannot help but have a restrictive immigration regime, no individual migrant can claim to be subject to domination. This remains the case even when the combination of those regimes result in individuals being confined to their current state: 'it need not be due to the dominating power of any state (...) that you have to live in this political society in particular. These circumstances may be exasperating but they do not testify to the presence of a dominating will in your life' (Pettit 2012, 162). Domination always involves agency. Agency entails volition. States are forced to exclude at least some migrants and must, consequently, have the ability to exclude all migrants. Therefore, there is no migrant who can claim to be dominated by any one state. Under these conditions, the constraints imposed by border control become 'like having to live in the presence of gravity' (ibid.). Despite the other forms of domination that occur at the global level, there is no domination of migrants qua migrants. Elsewhere, Pettit makes clear that a virtuous republic will 'not show itself indifferent to the plight of immigrants and refugees, or to the difficulties endured by those countries who are struggling to cope with the movement of peoples' (Pettit 1997, 152). But this demand must be grounded in a general ethos of charity, rather than demands of justice or legitimacy, since he thinks domination by border control is a conceptual impossibility.

Although Pettit's argument is framed as an objection to the basic question of whether border control can, in principle, be rendered compatible with the ideal of non-domination, it also bears on my argument that the current practice of border control gives rise to new and specific forms of domination. If the necessity of border control undercuts its capacity of being dominating – making its presence is 'like gravity' – then it can look like it does not matter how states act to control their borders.

The problem with Pettit's argument, however, is that it naturalises the state. Pointing to the necessity of some form of regulation of immigration for achieving internal relations of non-domination does not settle the question of how states act to achieve such stability. Indeed, the motivation behind the republican theory of legitimacy is precisely that although the state or its functional equivalent is required for securing relations of non-domination, the state can also dominate. This is why, as Pettit argues at length, a republic that is to honour the ideal of non-domination must satisfy demanding democratic legitimacy standards (Pettit 2012). But this makes it impermissible to infer from the relatively minor point that some forms of regulation are required to secure non-domination to the conceptual claim that those regulations cannot dominate. Moreover, Pettit's argument seems to implicitly rely on a historically predetermined people, organised under the state and striving for internal relations of non-domination.⁵⁶ But this is to invoke a conception of peoplehood based on social identification, rather than a shared commitment to non-domination. This runs counter to the republican commitment of critically engaging with, and taking responsibility for, their state's actions because social identification can foster uncritical support (Erez and Laborde 2020, 195–196). Thus, there are also reasons internal to the republican notion of active citizenship that count against relying on a naturalised conception of the state.⁵⁷

These objections are short but since Pettit's thesis – domination through border control is a conceptual impossibility – is so stark they are sufficient for refuting his arguments. A possible response on Pettit's behalf goes like this. His argument is intended

⁵⁶ In his earlier work, Pettit echoes liberal nationalist considerations by arguing that the community requires closure in order to sustain its republican character (1997, p. 152; cf. Walzer 1983, p. 62).

⁵⁷ For a different argument to the same conclusion, see Hoye (2018).

to speak to the deep philosophical question of whether non-domination is compatible with the existence of borders and is thus not directly relevant for contemporary debates about migration. This argument can be supported by pointing out that Pettit's remarks about borders appear, not in a discussion of migration, but rather as a response to an imagined anarchist critic who objects that no state can be legitimate because individuals do not have the option *not* to live under a state (Pettit 2012, 160–161). Thus, the response goes, I am wrong to follow other commentators in inferring that the remarks discussed above should be taken as an argument about migration (e.g., Costa 2016, 405–406; Lovett 2018, sec. 4.4). This rejoinder is insufficient as it stands. Rather than pointing out that Pettit might not have intended to take a stance on the debate on border control, those who are sympathetic to it must instead offer relevant reasons for why Pettit's response to the anarchist does not commit him to the view I have assigned to him. However, whatever these reasons may be, they do not bear on my overall argument, since any such reason would simply confirm my general point: it is implausible to think that domination through border control is a conceptual impossibility.⁵⁸

4.4. Two objections: the incoherence of non-domination and the value of self-determination

Claiming that domination through border control is conceptually impossible is obviously not the only way to object to my argument. There are two particularly pressing challenges to my view. These can be stated as objections invoking each of the two critical strategies

⁵⁸ Alternatively, Pettit could argue that what I have shown is that the contemporary practice of border control violates the condition that the state 'adopts a policy that is not discriminatory or dominating from the point of view of anyone' (2012, 161–162). To this I would say: my point exactly.

outlined above. The following two chapters will be concerned with rejecting each of these objections and, by so doing, specifying the distinctiveness of my critical argument, and drawing out its normative implications for the legitimate regulation of global migration. This section thus sets the stage for the rest of the thesis by outlining each of these objections.

The first challenge to my view is philosophical and targets my employment of the concept of domination. I argued above that my diagnosis of domination is not universal: it is not the case that everyone is dominated under the contemporary practice of border control. Instead, I argued that the set of agents who are dominated under contemporary practice is determined by the ‘risk analyses’ underlying the policies of the states that partake in that practice. However, one might wonder about the basis for this restriction. The concern has to do with the ideal of non-domination’s robustness requirement. How, exactly, are we to understand that requirement? My argument has appealed to facts about nearby possible worlds by singling out individuals who would be constrained by the tools and techniques involved in contemporary practice *if* they decided to attempt to leave their current state of residence to seek asylum elsewhere. But is there a principled basis for this restriction of relevant possible worlds? If not, then my argument might be thought ad hoc, and problematically so. The possible world in which an individual from the Horn of Africa is hindered from making their way to Europe by border guards in Libya is close to the actual world. However, there are also possible worlds in which a Norwegian migrant is hindered by similar mechanisms in Spain or Italy on their way to the Horn of Africa. But why does this not entail that Norwegians are also dominated under the current state system? After all, what matters on the republican view is what agents have the power to do and not what they are currently motivated to do.

This problem is more severe than it might first appear. I have located the source of domination engendered by contemporary practice in the power held by coalitions of states acting together. However, a recent strand of critics of republicanism invokes precisely this kind of argument to show that domination is useless as a critical concept and thus, conversely, that non-domination is equally useless as a normative ideal. On these arguments, reflecting on the power held by coalitions of agents shows that republicans are forced to hold that *everyone* is constantly dominated (Dowding 2011; Simpson 2017). Thus, the ideal of non-domination is susceptible to a ‘coalition problem’ that makes it incoherent: there is no point in promoting a normative ideal that is inevitably frustrated. Therefore, and further, my central claim that the concept of domination can function as the critical concept which tells us *when* an institution has accumulated sufficient power to trigger a demand for a more stringent standard of legitimacy turns out to be unsustainable.

This objection is important for the stability of the republican project as a whole. Therefore, the next chapter will be concerned with showing why the ideal of non-domination is not vulnerable to the coalition problem. Responding to the coalition problem will be instructive beyond ‘merely’ showing that the ideal of non-domination is not an incoherent, however. My response to the coalition problem will invoke a particular *systemic* conception of domination, which I contrast with an *agent-relative* conception. As I will show, the agent-relative conception of domination is standardly invoked in discussions of the tenability of the ideal of non-domination by proponents and critics alike. Arguing for my alternative systemic conception thus clarifies the distinctiveness of my argument and helps explain why my analysis of border control diverges so drastically

from Pettit's. Moreover, and more importantly, I will argue that the systemic conception of domination yields a more attractive version of the ideal of non-domination.

Defending the coherence and attractiveness of the ideal of non-domination is insufficient for my overall purposes, however. In order to evaluate the question animating this thesis – whether states wield legitimate power in the enforcement of their border regimes – it is necessary to consider whether the domination I have identified in the contemporary regulation of migration suffices for establishing institutional illegitimacy. As I have explained, this is not a straightforward matter. On the conception I have endorsed, legitimacy assessments are always contextual: the legitimacy standard an institution is rightly held to depends in part on whether the power wielded by an institutional alternative would generate more benefits than risks to freedom.⁵⁹ This can be explained by the republican insistence that some domination is inevitable, and that the role of republican institutions is to minimise domination. Therefore, what needs to be established is whether revoking states' unilateral control over borders would add to, or detract from, the ideal of non-domination.

Given that republicans place a central emphasis on self-determination (Laborde and Ronzoni 2016; Skinner 2010), there are powerful republican reasons for being sceptical of revoking sovereign competences. This scepticism is reflected by the existence of deep disagreement between republicans over questions of global governance, where radical calls for rectifying global relations of domination by institution-building (e.g.,

⁵⁹ Recall that, although my conception of legitimacy is grounded in freedom, my use of the ideal of non-domination is agnostic with regards to whether that ideal constitutes the best interpretation of the concept of freedom. This agnosticism is warranted because the cases of domination with which I am concerned could also plausibly be interpreted as risks to freedom as non-interference (e.g., Goodin 2003).

Bohman 2004) have been met by insistence that the ideal of non-domination is tightly bound to state sovereignty (e.g., Pettit 2010). In the context of migration, the threat to sovereignty can appear dual. On the one hand, a supranational institution with a mandate to regulate global migration might be thought to amount to a concentration of power that simply cannot be rendered non-dominating. On the other hand, immigrants may themselves be thought of as agents of domination by virtue of their potential for forming large diaspora communities with capacities for influencing the politics of a given polity.⁶⁰ Richard Bellamy alludes to both concerns when he argues that a sovereign people ‘risks being dominated and interfered with by the decisions and actions of different kinds of externally located agents – be they other polities, wealthy financiers, multinational corporations, armed groups, *or poor migrants*’ (Bellamy 2019, 82, emphasis mine; see also Fine 2014, 25–26). Thus, this thesis must respond to the following objection. Even if the power I have identified in the contemporary practice of border control qualifies as domination, we should accept this domination because any attempt to rectify it would inevitably lead to more domination. Therefore, so this objection goes, I have failed to offer a critique of the legitimacy of the contemporary regulation of migration.

The sixth and final chapter of this thesis will be devoted to addressing this challenge. Synthesising the various arguments I have made throughout this thesis, including and especially the systemic conception of domination I will develop in the next chapter, I will show that the republican reasons for valuing sovereignty do not count against stronger forms of supranational regulation of migration. To the contrary, the concern for self-determination that has traditionally led republicans to defend the value

⁶⁰ Note that this second concern is a version of the coalition problem that grounds the conceptual challenge to the ideal of non-domination.

of sovereignty now pulls in the opposite direction. As I will argue, there are good reasons for thinking that revoking certain privileges to control immigration in favour of stronger forms of supranational regulation would not detract from self-determination but would, instead, add to it.

CHAPTER 5

SYSTEMIC DOMINATION AND THE COALITION PROBLEM

The last chapter diagnosed the power involved in the contemporary practice of border control as domination, understood as the capacity of coalitions of states to arbitrarily interfere in the acting of a set of vulnerable migrants. I suggested that this diagnosis is useful for the purposes of identifying the relevant legitimacy standard for the contemporary regulation of migration because the republican tradition from which this conception of domination is drawn contains rich resources for theorising the relationship between power, freedom, and legitimacy. Before I can move to this normative task, however, I have to respond to a key philosophical challenge facing domination as a critical concept and thus, conversely, non-domination as a normative ideal.

According to a set of critics, the ideal of non-domination cannot serve the function my argument intends for it to serve, for the simple reason that it is useless as a normative ideal. This is because, on inspection, the ideal turns out to be overdemanding to the point of incoherence: the domination from which it demands protection is simply impossible to avoid. Critics arrive at this conclusion by pointing out that non-domination's insistence that non-interference be robust seems to conflict with the republican claim that groups can be agents of dominating power. For any action, there will always exist a possible world in which its realisation is frustrated by a group of agents acting in a coordinated manner. But if this is the case, then the very idea of non-domination appears incoherent. There is nothing we could do to minimise domination because everyone is constantly vulnerable to the arbitrary will of groups that might form. This is, as Keith Dowding calls it (2011), the *coalition problem* for the ideal of non-domination. The coalition problem is

standardly invoked to show that non-domination fails to provide the best conception of social freedom. However, since the critique targets the conceptual coherence of non-domination, it clearly also applies to the ideal of non-domination, as I have relied upon it.⁶¹ It is therefore essential that I to respond to the problem, not least because my diagnosis of domination in the contemporary practice of border control turns precisely on the power held by coalitions of agents acting together.

If it can be shown that not all coalitions of agents hold power as a potential group, then domination fails to be ever-present in the way claimed by the coalition problem. Therefore, dissolving the coalition problem is a matter of finding a way to constrain the relevant domain of possible worlds that is picked out by non-domination's robustness requirement. Restricting the relevant domain of possible worlds is difficult, however. It is crucial that the domain restriction does not end up making republicans incapable of diagnosing central cases of domination as such. If the concept of domination loses its critical capacity, then its converse ideal loses its normative appeal. Non-domination would then be incapable of grounding an institutional programme that allows individuals to relate to each other freely as equals.

Moreover, making the conditions for which coalitions of individual agents can hold power as a potential group too demanding can reproduce the original problem. It is important that the republican institutions in place to secure relations of non-domination between their subjects do not accumulate so much power that they themselves start dominating those subjects. The agents whose actions any given institution seeks to regulate must therefore have the means to hold its power in check. The typical republican

⁶¹ However, in Sandven (2020), on which the present chapter draws, I defend the republican conception of freedom as non-domination from the coalition problem.

response to this concern has been to argue that citizens control their state by virtue of their capacity to act together (Pettit 2012).⁶² But, in modern states, the citizenry is a diverse coalition of agents and thus not likely satisfy any demanding condition of potential group agency. Hence, so the objection goes, any attempt to solve the original coalition problem, according to which individual agents are structurally vulnerable to each other by virtue of their capacity for group formation, will inevitably make those agents vulnerable to their state (Simpson 2017; 2019). In other words, attempts to dissolve the coalition problem can make it reappear, seemingly leaving republicans no choice but the Scylla of *dominium* – domination by one’s fellow citizens – or the Charybdis of *imperium* – domination by one’s state.

This chapter will demonstrate that the ideal of non-domination, contrary to what is claimed by these critics, is not necessarily vulnerable to the coalition problem. To make this argument, I will offer a diagnosis of the coalition problem, which shows that the problem arises only when social power is conceived in *agent-relative* terms. Conceiving of power in *systemic* terms, by contrast, dissolves the coalition problem and does so in a way that retains the concept of domination’s critical capacity. Over the course of making these arguments, I will object to a recent solution to the coalition problem offered by Lovett and Pettit precisely on the grounds that it is insufficiently systemic. Thus, the present discussion will also be useful for locating the source of disagreement between the view I began developing in the last chapter and those of republicans who argue for stricter norms of territorial sovereignty. Since the debate on the coalition problem has – to the

⁶² Republicans will model their response to symmetrical problems at the global level on their response to the state-citizen relation. Given that republicans disagree about the forms of global governance that are demanded by the ideal of non-domination, those responses will vary accordingly.

best of my knowledge – not been applied to relations of power beyond the state, and since the problem is a general problem for the very coherence of the ideal of non-domination, I will follow the rest of the literature in discussing the problem as it arises between citizens and their state. Doing so will be beneficial in that it will allow me to discuss the same examples as participants to the debate and thus to emphasise the distinctiveness of my argument. However, I will end the chapter by clarifying and applying my argument to the contemporary practice of border control.

The rest of the chapter is structured as follows. Section 1 further outlines the coalition problem. Section 2 offers my diagnosis of the problem, locating its source in non-domination's robustness requirement. I outline Lovett and Pettit's solution to the coalition problem and argue that it unduly limits the critical capacity of their final account of domination. I then, in section 3, argue that the problems faced by Lovett and Pettit can be avoided by invoking a systemic, as opposed to agent-relative, conception of social power. I argue that a systemic conception of power demands placing explanatory emphasis on social institutions and that such institutions are consequential for the feasibility of individual and collective action. Section 4 extends this point by showing how the presence social norms enables and constrains abilities to bring about certain states of affairs in ways that undermine the coalition problem. In making this argument, I object to the common claim that republicans are bound to deem norms irrelevant from the perspective of non-domination. Lastly, section 5 shows how my systemic conception

of domination explains the dynamics of power involved in the contemporary practice of border control, and thus grounds a normative argument for institutional reform.⁶³

5.1. The coalition problem

To recall, the ideal of non-domination requires the robust absence of arbitrary interference, where arbitrariness is understood in terms of the unconstrained ability to choose or reject options on behalf of others. If an agent is dominated, then their unrestricted acting can always be explained by the decision of another agent not to interfere with that acting. The slave has a Sunday off because their master lets them, the wife invites friends over because her husband allows it, the subjects of a military dictator can sell goods in the market because it pleases their leader. If either of these dominators changed their minds, then those vulnerable to their power would no longer be able to do these things. By definition, dominated agents lack institutional means for exercising any form of control over the processes that enable and constrain their action. On the republican social ontology, it makes no difference if the dominator is an individual or a collective agent: a village subject to a mafia organisation is dominated even if there is no individual don whose will is decisive for the rules the villagers have to live by. That the organisation can act systematically according to identifiable interests suffices for it to be an agent of power and thus a dominator.

These elements of the concept of domination generate the coalition problem for the ideal of non-domination. If the absence of arbitrary interference must be modally

⁶³ Though, to recall, an inconclusive argument. To establish the need for institutional reform, it must also be shown that such reforms will not introduce more extensive and severe relations of domination: this is the task of chapter 6.

robust and collectives can be agents of dominating power, then it looks like the ideal of non-domination is impossible to even approximate, let alone fulfil. This is for the simple reason that ‘for any individual *i* at any given time, there is always a coalition of others $\{j, k, l\}$ who could stop *i* from doing *x*’ (Dowding 2011, 310). Thus, it looks like we will always be subject to the will of coalitions of agents who might organise as a collective and constrain our acting, making domination ever-present. But if domination is inevitable, there is hardly any point in grounding a normative institutional programme in an objection to it. Hence, if the coalition problem stands, the ideal of non-domination is useless.

The coalition problem can appear easy to dissolve. For example, Pettit recognised the problem in his earliest articulations of the ideal of non-domination and responded to it by drawing a distinction between actual and potential abilities to interfere (Pettit 1996, 580; 1997, 54–55; see also 2008, 218). In these early writings, Pettit simply argued that only actual capacities to interfere constitute dominating power and that only those coalitions of individuals who have already constituted themselves as a collective have actual capacities to interfere. This response is weak, however. Non-domination’s robustness requirement makes the appeal to groups that have actually formed arbitrary, since there are possible worlds – maybe even nearby – in which the potential group members do incorporate and interfere. Therefore, at least some potential groups must count as holding dominating power. That potential groups are capable of holding dominating power is not only conceptually demanded. It is also independently appealing, as it gives the concept of domination a distinctively critical edge. For example, it allows republicans to explain why, in a racist society, a black person might be dominated by his neighbours in a predominantly white neighbourhood: although these neighbours are

currently uncoordinated, their capacity for forming a group with the requisite power to arbitrarily interfere with that person's acting renders him vulnerable to their will.⁶⁴

A more promising response to the coalition problem works by reference to the necessary conditions for group agency. While a coalition of individuals would have had the power to arbitrarily interfere with me if they formed a coherent agent, they will not always be able to do so. Establishing group agency is demanding. It requires that the individuals who constitute the agent are capable of meeting standards of rationality as a collective (List and Pettit 2011). Once incorporated, they must be capable of displaying stable and consistent attitudes in their interpretation of, and acting in, the world. Not all coalitions of individuals would be able to meet these standards and thus not all coalitions of individuals hold dominating power by way of their potential for acting together.

This group agency response seems plausible, but it raises a new – or, rather, reintroduces an old – problem. Holding group agency as the relevant standard for determining which coalitions of individuals hold power by way of their potential for acting together seems incompatible with the republican insistence that institutions are necessary for non-domination. Republicans hold that institutions, and in particular the state, are necessary to secure relations of non-domination between individual agents (List 2006). This is because an effective order of law revokes the possibility of interfering with the acting of others without facing material sanctions. Thus, a state enforcing such law functions as an external constraint on individual wills. The state requires vast powers to carry out this mandate and it must be organised in ways that allow it to deploy these powers stably and consistently. When the state is organised in this way, it meets most

⁶⁴ I will explain further when that person would, and not only might, be dominated by his neighbours below.

standards of group agency (List and Pettit 2011, 40). Thus, in order to avoid that the state itself dominates its citizens, there is need for a mechanism that allows citizens to exercise power over the state. Pettit's influential argument is that the citizenry avoids domination by their state when it holds popular control over that state (Pettit 2012, 160). The people enjoy popular control when they have the ability to contest the state's decisions and, in the limit case, interfere with its actions. This control is secured when the citizenry possesses a resistive character that enables organisation in the face of an unresponsive or oppressive government (Pettit 2012, 174; see also 1997, chap. 8).

As argued by Thomas Simpson (2017), the problem with this response, which highlights the power of the people, is that 'the people' cannot plausibly be thought to qualify as a potential group agent. Thus, in order to allow for non-domination under the state (which itself is required in order to secure non-domination), there must be room in republicanism's social ontology for a category of collective agency that is less cohesive and demanding than full group agency. Simpson calls this category 'team':

Teams have a degree of coordination that makes their action distinct from that which emerges from individuals interacting without any joint intention. But they do not have the degree of coordination that group agents require (Simpson 2017, 40).

Teams can only act when the wills of their members converge. However, this still makes them capable of engaging in boycotts, protests and, in the limit case, revolution. But, Simpson argues, if it is true that the people can exercise power over the state as a potential team, then the coalition problem resurfaces. Accepting that the standard for domination by potential groups is lower than full group agency means that we are constantly dominated, not by potential group agents, but by potential teams. Therefore, just 'by living among other people, one exposes oneself to the risk of confederacy,' rendering all of us – including 'kings, presidents, and generals' – dependent on the goodwill of

everyone else (Simpson 2017, 34–35). To illustrate this claim, Simpson offers two pairs of examples. These have been taken up by others in the debate, including Lovett and Pettit (2019), and I will therefore also rely upon them here.

Simpson’s first pair of examples offer variations of one of the motivating cases for introducing a concern for the *robust* absence of (arbitrary) interference: the master and the slave. In Simpson’s version, there is one slave and three masters. None of the masters are ‘strong enough to alone interfere with the slave’ but each of them can successfully do so with the help of one of the other masters (Simpson 2017, 32). In the case where one of the masters wants to interfere, the slave is dominated by both other masters, since either of them would then be able to bring about that interference merely by changing their mind. But we would also want to say that the slave is dominated in the case where none of the masters want to interfere, in which case that domination must be explained by the masters’ potential to act in combination.⁶⁵

The second pair of examples invokes the Indian caste system. In the first variation of the example, a Dalit (‘Untouchable’) is breaking a caste norm, taking water from a communal well that is also used by upper castes, including the Brahmins. Simpson then adds:

Suppose the Dalit is a physically strong young man, carrying a knife as self-protection, well able to defend himself against a lone attacker. While pumping water, the Dalit notices an angry Brahmin looking to incite someone so that they can together attack him (Simpson 2017, 33).

⁶⁵ In Simpson’s terminology, the masters exercise ‘polyadic’ domination over the slave: theirs is the kind of ‘relation that holds between some group of people, G, and A, when, by acting in a coordinated way, the members of G have the uncontrolled power to interfere with A’ (Simpson 2017, 36). In the case where one master wants to interfere, the slave suffers both polyadic domination at the hands of the collective and ‘dyadic’ domination at the hands of each of the masters whose change of will would suffice for bringing about interference.

The Dalit is dominated. He is subject to the will of the Brahmin and whoever would be willing to join him in the attack. Simpson then adds the following variation to the example:

Now imagine that each villager has come to repudiate the caste system as a tool of oppression, and is convinced of the dignity of each person regardless of birth. Caste norms have no social power. The Dalit now pumps water without even thinking of possible threats. His situation is akin to the slave in [the case where no master wants to interfere]. The only reason for supposing that the Dalit is not dominated is the internal change in the villagers' moral conviction. (...). The villagers (...) could repudiate their convictions and attack as easily (or with as much difficulty) as the Master could repudiate her benevolence and interfere [with the slave]. Nothing else restrains the villagers from attacking (Simpson 2017, 33–34).

According to Simpson, this point generalises. All situations are structurally like that of the Dalit and thus, by extension, the slave with three masters. We are therefore constantly dependent on the goodwill of others for our unhindered acting. Normative theory ought to recognise this fact instead of making the impossible demand that it ought not be the case (Simpson 2017, 51).

According to the critique pushed by proponents of the coalition problem, the concept of domination turns out to be radically inclusive: so long as people live together, they are structurally vulnerable to each other's arbitrary will. Therefore, an ideal of non-domination is conceptually incoherent and thus useless for grounding a normative programme of institutional reform – of border control or anything else.

5.2. Diagnosing the problem: domain restriction

As the specification of the Dalit's knife makes clear, Simpson's conception of power is one of physical force. Neither of the masters nor the Brahmin are 'strong enough' to individually interfere, but they would be by aggregating their individual strength. There

are possible worlds in which they do combine their strength and interfere, and this suffices for the slave's and the Dalit's domination. But there are also possible worlds in which the slave and the Dalit combine their strength with other agents and interfere with the masters and the Brahmin. This, so the objection goes, suffices for the domination of the masters and the Brahmin. As Simpson writes, 'it does not matter how improbable it is that they will do so; the possibility that they may' suffices for domination (Simpson 2017, 34). This exposes the core of the coalition problem: it arises when non-domination's robustness requirement is interpreted according to a 'strict possibility' standard on which all possible worlds count as directly relevant for assessments of domination (Dowding 2011, 310; Simpson 2017, 34; see also Goodin and Jackson 2007).

But why should we think that the robustness requirement should be interpreted according to such a standard? Conceptually, there is nothing that demands that it does (List and Valentini 2016, 1048; Pettit 2008, 218–219). Thus, if we could specify a bounded domain of possible worlds that is to count as directly relevant for diagnosing domination in a way that excludes the most improbable 'team formations', the coalition problem would be dissolved. The objection, then, must be that there is no principled way of doing this that delivers plausible results about which coalitions of individuals hold power by way of their capacity for forming a team (see List 2004, 77). One possible strategy would be to argue that the relevant domain can be restricted by reference to substantive moral argument, so that only those potential teams whose power would lack justification qualify as relevant for assessments of domination. Indeed, Dowding's argument is precisely that the coalition problem reveals that the ideal of non-domination requires moralisation in order to deliver its intended results in central cases (Dowding 2011, 305–308). However, whilst this strategy is possible, it will not work for the

purposes of my overall argument. I have invoked the concept of domination because – so I argue – it has a unique critical capacity for diagnosing relations of power that constrain abilities to act in ways that are corrosive of equality of status. However, if the concept of domination requires further moralisation in order to avoid the coalition problem, then it loses that critical capacity: whether a state of affairs does undermine equality of status in this way will end up turning on whatever makes power justifiable *beyond* its contribution to the ideal of non-domination.⁶⁶ Thus, it is important for my purposes that the solution to the coalition problem is not moralised.

In this context, it will be instructive to consider Lovett and Pettit’s recent solution to the coalition problem. Both Lovett and Pettit hold that non-domination constitutes the best interpretation of social freedom and they are both sceptical of moralised conceptions of freedom.⁶⁷ Hence, they are also keen to show that the coalition problem can be dissolved without appealing to moral value. As I will argue, however, whilst their solution does not require moralisation, it does limit domination’s critical potential in a different way.

As is required to dissolve the coalition problem, Lovett and Pettit object to the claim that mere possibility of team formation is sufficient for dominating power. In

⁶⁶ To give an example from the literature on migration, Victoria Costa (2016) argues that border controls dominate whoever have ‘significant objective interests’ in immigrating to a certain state. This argument appears plausible by way of its capacity to account for the intuition that borders affect different individuals – say, a refugee or a wealthy student looking to do an exchange abroad – differently. However, by making the diagnosis of domination fully dependent on what constitutes a ‘significant objective interest’, it evacuates any capacity from the concept of domination for explaining what might be objectionable with the power states claim over potential immigrants, since that will now be fully explained by the account of significant objective interest.

⁶⁷ For an in-depth discussion of why social freedom should not be moralised, as well as a critique of Pettit’s version of non-moralised non-domination, see List and Valentini (2016, 1058–1066).

addition to the possibility that their individual wills converge, Lovett and Pettit argue, potential team members must satisfy an *awareness* condition: each must know that their wills have converged. In addition, potential team members must satisfy a *strategy* condition: as a matter of common awareness, there must be a salient way for the team to jointly interfere (Lovett and Pettit 2019, 376). ‘Under normal circumstances’ these conditions will not be satisfied (Lovett and Pettit 2019, 377). Therefore, we cannot generally expect that individuals will be willing to risk engaging in an interference with the hope that others will join them. The existence of possible worlds in which spontaneous teams successfully interfere in some agent’s acting does constitute domination of that person. This dissolves the coalition problem, since now only a subset of coalitions – including the people under some favourable circumstances (Lovett and Pettit 2019, 382) – hold power as a potential team. The relevant domain of possible worlds is thus demarcated by knowledge possessed by individuals in the actual world.

The introduction of the awareness and strategy conditions rebuts the coalition problem. However, it does so at high cost for the concept of domination’s critical capacity. This becomes apparent already in Lovett and Pettit’s own discussion. Here, they are led to argue that Simpson is *wrong* to treat the domination of slaves as axiomatic:

(...) for all that Simpson’s descriptions of the scenario imply, the awareness and strategy conditions might not be satisfied. If they are not, the masters will not have the capacity to interfere, and thus not constitute a capable team holding sway over the slave. Thus, it is false to claim, as he does, that necessarily the [masters in his examples] dominate the slave (Lovett and Pettit 2019, 378).

Lovett and Pettit are quick to stress that, in line with the broader concerns of republican political theory, there are still good reasons for treating the slave as if he is dominated. In particular, the fact that it is probable that the awareness and strategy conditions will be

satisfied likely entails that the slave will fail the eyeball test outlined in the previous chapter: the slave will have reason to fear looking his masters in the eye for what they might do to bring about the satisfaction of awareness and strategy. This, Lovett and Pettit argue, is ‘probability of a kind that is naturally of concern to republicans’ and suffices for diagnosing the slave’s domination (2019, 379).

This is a striking concession. The fact that the slave is a slave – that he is subject to a system of law in which he is treated as an object of ownership – is now only derivatively relevant for diagnosing his domination. This opens for the unappealing result that a highly regulated regime of slavery that prohibited masters from owning slaves individually could be compatible with non-domination, so long as the masters’ interference was improbable. But this is precisely the kind of probability calculation proponents of non-domination take issue with. As Lovett and Pettit write elsewhere, willingness to consider probabilities or preferences as relevant for the status of a slave ‘does not square with our strong sense that slavery, whether one’s master is good, bad, or indifferent, is the quintessential state of unfreedom’ (Lovett and Pettit 2009, 14).⁶⁸ The introduction of more masters does little to change this sense.

Lovett and Pettit’s strategy gives rise to further problems for domination’s critical capacity. First, their presupposition that subjects will fail the eyeball test because they know that they know that they might be subject to ‘actual’ domination poses a question about those who are simply unaware of their potential dominators. If a colonial subject’s

⁶⁸ Note, however, that Lovett’s purely procedural account of domination would be compatible with a tightly regulated apartheid regime so long as second-class citizens ‘would know in advance that they are not allowed to f, and the law prohibiting their f-ing could be enforced with absolute impartiality and procedural fairness’ (Lovett 2010a, 117).

rulers do not fulfil awareness and/or strategy, and that subject is unaware that those rulers count him as a subject, does that make him free from domination? The same can be said for the person who moves into the new neighbourhood: does unawareness that his neighbours are racist mean that he is not dominated? To respond that these agents have reason to fail the eyeball test, and that they therefore count as dominated, seems both to add a further moralised element to the definition of domination and to go against the eyeball test's focus on subjective experience (Pettit 2012, 84–87). Second, the explicit reference to knowledge on the part of the dominators reinforces an existing concern about social practices that are sustained at the unintentional level. As Sharon Krause (2013) argues, insofar as domination is cashed out in terms of international capacity for interference, it cannot diagnose obstacles to agency that stem from widespread prejudice. Widespread prejudice has the effect of making individuals in positions of authority think that they exercise their powers in fair and accurate ways when they, in fact, systematically disfavour certain groups. Needless to say, this problem is pervasive across bureaucratic settings – including the administration of border control (Sager 2017) – and it seems odd, given the motivating concerns of republicanism, if the concept of domination cannot capture it.

To be clear, my argument is not that Lovett and Pettit are blind to these concerns. To the contrary, one would be hard-pressed to find theorists working squarely in the analytical tradition who have done more than either of them to theorise, and to emphasise the importance of, informal social institutions (esp. Pettit 1997, chap. 8; Lovett 2010b). My argument is, rather, that the domain restriction involved in their response to the coalition problem entails that they can no longer integrate many of their insights into their respective accounts of domination. Thus, they limit domination's critical potential in a

way that renders its converse ideal of non-domination vulnerable to a critique of insufficiency (cf. Markell 2008). This insufficiency is pressing for republicans since they claim that the ideal of non-domination is sufficiently robust to ground a complete normative and institutional programme (Lovett and Pettit 2009). The coalition problem might therefore appear to have exposed how the ideal of non-domination is *either* impossible *or* insufficient. Thankfully, I am able to show in the next section that both results can be avoided. However, I will also argue that dissolving the coalition problem requires opting for a systemic, as opposed to agent-relative, conception of power. Thus, republicans who are unwilling to make this move will not find comfort in my argument.

5.3. *Agent-relative and systemic power*

Recall that Simpson's conception of power is one of physical force. The Dalit has a knife, but the Brahmin could still overpower him if only he managed to enlist one of the bystanders to join him. Lovett and Pettit accept this basic premise, but then add two epistemic criteria pertaining to the Brahmin and the bystanders. This is, as Cécile Laborde calls it, an agent-relative conception of social power: the power individuals are capable of exercising in the social world is explained by their individual resources – their superior 'strength, intelligence, cunning, ambition' and so on (Laborde 2010, 57). These resources can be aggregated to create more power, giving rise to the concerns underlying the coalition problem.

Consider now a different way of explaining social power. As Laborde argues, in the social world, agent-relative resources are often less relevant for explaining what people can do than the institutional environment in which they act (Laborde 2008, 152–155; 2010, 56–58). Hence, on a *systemic* conception, an agent's power is explained by

reference to their superior location in social structures assigning roles, rights, and credibility.⁶⁹ This systemic power is significant for analyses of domination because, when an agent is vulnerable to such power, it is not only the case that they are subject to the arbitrary will of some other agent who enjoys superior power by virtue of their location in a common social structure. Given the dominated agent's inferior location in that structure, they are robustly vulnerable to the arbitrary will of others. Systemic features of society both enable and constrain action (Young 2011, 56–57). Thus, dominators are enabled to act in certain ways, whereas the dominated are disabled from acting in others. On a systemic conception, domination depends on a set of beliefs, norms, and practices that are upheld by a sufficiently large proportion of the relevant society.

To see the difference between the agent-relative and systemic conceptions, let us return to Simpson's masters and slave. Simpson explains the slave's domination by reference to the masters' capacity for aggregating their individual resources. On a systemic conception, by contrast, the slave's domination is explained by 'systemic features of slavery as a deeply entrenched, institutionalized set of rules and conventions'; it is the 'institution of slavery that [provides] the resources and background structure for the domination of slaves by their masters' (Laborde 2010, 57). In other words, that there is an institution of slavery is more relevant for our diagnosis of the slave's domination than is the observation that his masters can form a team to interfere with his acting. On a systemic conception of power, analyses of domination ought to be centrally concerned

⁶⁹ Again, it is important to emphasise that Lovett and Pettit do not deny this. To the contrary, they stress that in 'most circumstances [domination] undoubtedly reflect the advantages some individuals or groups enjoy under background social structures' (Lovett and Pettit 2019, 363). My argument is, rather, that they do not take this insight far enough.

with the social structures – created and sustained by us – that enable people to exercise power over others and at the same time disable those others to exercise symmetrical power along the same axis.⁷⁰

The point that domination is systemic is important because it highlights a fact that is easily distorted by the coalition problem: people depend for their power on social conditions that are sustained by other people. The masters' domination of the slave cannot be explained without reference to the fact that there exists an institution of slavery, that is, a system of property that recognises human beings as appropriate objects of ownership. For that system to exist, people must recognise it and act in accordance with its demands. The system must structure their agency. As Iris Marion Young explains,

when people act, they are trying to do two things at once: (1) They are trying to bring about a state of affairs that they intend, and (2) they are reproducing the structural properties, the positional relations of rules and resources on which they draw for these actions (Young 2011, 60).

Consequently, the creation of methods for how to achieve specific social effects generates its own kind of normativity: it makes the used method appear the most efficient way of achieving the intended effect and thereby also makes it the most efficient way of doing so. Social structures are 'produced only in action without being reduced to action in their description' and 'people act in relation to their knowledge of structures' (Young 2011, 60). Thus, one does not have to actively take part in an institution to reproduce it. For example, I do not have to be married to reproduce the institution of marriage. That I respect the demands of the institution – to treat couples and individuals who are married in ways that I could not treat other couples and individuals – is also part of its

⁷⁰ I follow Sally Haslanger in conceiving of systems as particular instantiations of (abstract) structures (Haslanger 2016, 118).

reproduction. The more deeply entrenched a social institution is, the more difficult it will be to act contrary to it, simply because others will fail to treat the action as a permissible way of achieving the desired end. In the case of social institutions that, like slavery, have also become legal institutions, such violating actions will face legal sanction. This, unsurprisingly, matters for social power.

Take the case at hand. The source of the masters' power is that they can assert rights of ownership over the slave with help of their social surroundings. If we imagined Simpson's example taking place in a setting with no recognisable system of property beyond what the masters enforced through their combined (agent-relative) power, it is uncontroversial that the concept of domination would also apply to the masters. This is because the absence of formal institutions prescribing rules against interference would render the masters vulnerable to potential teams along the lines highlighted by proponents of the coalition problem. Indeed, this is precisely the reason republicans (and Kantians) insist that the rule of law is necessary for freedom and equality: since no individual holding of agent-relative power ('strength') can ever be sufficient for guaranteeing robust non-interference at the hands of others, freedom from such interference requires the introduction of institutional constraints on power. But when these institutional constraints are structured unequally, then this enables one set of agents to act in certain ways and disables other agents from acting similarly. This is the source of the masters' power over the slave, not their individual strength.

It might be unclear where this argument diverges from Lovett and Pettit's. Do not social institutions enable domination precisely when and because they ensure that the awareness and strategy conditions are satisfied? It is true that social institutions can work to ensure that awareness and strategy are satisfied (cf. Lovett and Pettit 2019, 380).

However, they can enable domination more broadly, too. To see this, it will be instructive to note the relation between social institutions, power, and feasibility.

The claim that feasibility is a constraint on social power is plausible for the simple reason that we typically do not think that people have the power to do things they can only bring about accidentally. This does not mean that only easy actions are feasible. For example, I may find it exceedingly difficult to speak in front of a particular crowd of people. Yet, this does not show that I am unable to do it; it only shows that it is improbable that I do it (Estlund 2020, 85). Sufficiently incentivised – someone may convince me that it is urgent that I do so – I will do it. Following Zofia Stemplowska (2016a), I thus understand feasibility to track whether an agent could bring about an action if properly motivated. This means that feasibility is also a modal concept: it is feasible for an agent to act when the realisation of that action by that agent is robust ‘to variation (within a salient range) of the initial micro-conditions of the relevant circumstances’ (Southwood and Wiens 2016, 3048). On this model, changes in individual behaviour represent the micro-conditions, and the relevant circumstances are the (currently existing) systemic features of society. Thus, to put the definition in terms of feasibility, to be dominated is to be in a position where some external agent could receive an incentive to interfere with me without being subject to a sufficient countervailing incentive not to do so.⁷¹

One immediate problem with this account is that it seems to be open to the possibility of truly benevolent slave masters, whose normative commitments will simply

⁷¹ The sanction clause represents the rule of law requirement and is a feasibility-restricting feature itself. The existence of a legal order attaches burdens to certain actions to ensure that individuals will not be motivated to undertake those actions, regardless of incentive.

make them unresponsive to incentives, thereby making interference unfeasible for them.⁷² There are three things to say about this. First, as Stemplowska argues, being unresponsive to incentives because of one's normative commitments does not entail genuine motivational inability precisely because (not) acting from normative convictions 'expresses our agency rather than limits it' (Stemplowska 2016a, 280n21). Second, and relatedly, it is important to remember that the threshold for interference here is not set at drastic actions like torture or murder. It suffices for the slave's unfreedom that there exists an incentive that will make his master willing to restrict their action in any way. Third, and most importantly, what we are motivationally capable of doing to other people is highly dependent on social institutions themselves. As Franz Fanon ([1961] 2001) powerfully argued, legal structures that grant a privileged class vast powers over others have deep psychological effects on both the oppressors and the oppressed. This, by itself, gives us strong reason to doubt that the existence of truly benevolent masters is psychologically realistic. It should be an uncontroversial historical statement that slave societies are bound up with ideas of moral and epistemic superiority, which straightforwardly explains why violent interference has typically not been outside the scope of slave masters' motivational abilities. Lastly, and as argued above, the slave is not only dependent on his master but also on the larger social context in which they are embedded. Thus, he may not cease to be a slave after his master's death: as with other objects of ownership, he may pass on to someone else (with another motivational disposition).

⁷² I am grateful to Tom Simpson for pressing this objection to me.

This conception of feasibility can be deployed to rebut the coalition problem. A condition on feasible action is reasonable certainty of how to bring the action about. This is obvious in the case of individual action. It is not feasible for me to play a piano concert because I don't know how to (cf. Pettit 1996, 580). This would remain the case even if I – somehow – managed to play a concert because my successfully doing so would not be robust across a range of possible worlds. Similarly, in the case of collective action, what a coalition of individuals can feasibly do together depends on the existence of a method for 'deciding, communicating, and coordinating together' (Stemplowska 2016a, 283). For illegal actions, the rule of law is supposed to function so as to block the possibility of establishing such a method: attempts to instigate attacks on individuals or groups will be prosecuted. Thus, although each may be motivated to carry out the attack, they may not be motivated to run the risk of trying to instigate it. This, of course, is what Lovett and Petti's awareness and strategy conditions are meant to bring out. However, I argued that appealing to knowledge on the part of potential group members is too strict as a criterion for constraining the relevant domain of possible worlds. Therefore, the next section will aim to demonstrate that the account outlined above can explain why neither awareness nor strategy are individually necessary for holding (dominating) power as a potential team. There, I will argue that social institutions ought to be placed at the centre of analyses of domination.

5.4. Dissolving the coalition problem: the systemic solution

In the republican literature, there are frequent references to the institutions of slavery, apartheid, and coverture. What these have in common is that they are social institutions underpinned by law. Thus, republicans can ground objections to legal orders that deny

equal citizenship to everyone subjected to their laws.⁷³ However, most proponents of the ideal of non-domination want their theories to have wider application, so that they can diagnose domination between people who enjoy status as equal citizens. Racial and patriarchal oppression persists in societies despite official recognition of formal equality before the law. These forms of oppression manifest in the ability of some to interfere in the acting of others, but they are not granted by unequal law. Instead, they are grounded in widespread social norms. However, some object that republicans are incapable of diagnosing further domination under conditions of equal citizenship. Given the claim that only law can guard against domination, the objection goes, social norms are too weak to play any role in securing relations of non-domination. As I will now argue, this kind of argument fails once we adopt a systemic conception of domination. Adopting the systemic conception will also, and further, allow us to construct a response to the coalition problem that retains domination's critical capacity. In turn, this counts in favour of adopting a systemic conception of the power that is relevant for domination and its converse ideal.

Unsurprisingly, the argument that republicans are bound to treat social norms as irrelevant for assessments of domination appears in both Dowding and Simpson's discussions of the coalition problem. According to Dowding, the concept of domination is incapable of distinguishing between two societies that

(...) had the same constitutions, regulatory institutions, and enforcement practices (...) even if in the first one class of people (say women) had continually to resort to the law if they wanted their liberties respected, whereas in the other they rarely had to. After all, in both societies, the men

⁷³ Though note, again, Lovett's purely procedural account of domination, which holds that at least apartheid states are in principle compatible with the ideal of non-domination (see note 8 above).

have the same capacity to act, they have the same physical powers, and the legal constraints are identical. The only difference in the two societies is the dispositional nature and habitual behaviour of men (Dowding 2011, 312).

Such dispositional and habitual behaviour cannot make a difference in terms of domination, Dowding argues, because dependence on them is precisely what the ideal of non-domination demands protection from. This claim is analogous to that Simpson draws from his Dalit examples. The only thing that saves the Dalit from interference at the hands of the Brahmin and (one of) the bystanders is the newly adopted social norm against such interference. For norms to be effective, however, we depend on others to impose sanctions on violators and, ‘when there is gain to be had’, people cannot be trusted to do this: they will instead be willing to act in favour of that gain themselves (Simpson 2017, 46).⁷⁴ Therefore, the concept of domination cannot distinguish between the second and the first variation of the Dalit example.

It is implausible that the widespread disobedience of laws in favour of gender justice do not have detrimental effects on women in terms of their domination, given the broader commitments of the republican tradition. So is the claim that the Dalit’s situation is unchanged in social conditions where ‘caste norms have no social power’ (Simpson 2017, 33). Indeed, these claims directly conflict with the republican insistence that

⁷⁴ The centrality of this claim in Simpson’s overall argument is made especially clear in his recent rejoinder to Lovett and Pettit (Simpson 2019). There, he makes essentially the same point as Dowding, arguing that ‘[c]ore theoretical commitments prevent the republican’ from distinguishing between a racist society in which ethnic minorities are ‘vulnerable to teams which may attack them and otherwise treat them unjustly’ and a non-racist society in which they are not vulnerable in this way (Simpson 2019, 422). The reason for this is that norms ‘constitutively depend (and in turn shape) the moral judgements and sympathies that prevail in that population’ and that such considerations must be excluded from a republican analysis of domination (Simpson 2019, 422).

institutions must be supported by an active citizenry.⁷⁵ So, why should we think that the concept of domination is required to deliver these results? Here is one suggestion. A person's ability to do what they are physically capable of depends on their motivation. Individuals can be motivated to do most things, given the right incentive. Therefore, non-domination requires external constraints on action in the form of the rule of law: the existence of coercive state powers works on individual wills, posing a motivational block on what individuals may be physically capable of doing. Social norms, by contrast, are not enforced by coercion. They are enforced by mechanisms of social disapproval. These are psychologically powerful but will ultimately fail to render individuals unresponsive to incentives. Further, unlike laws, norms have their source in dispositional and habitual behaviour. Thus, they are not external to the agent. Although individuals may unthinkingly be reproducing social norms, they have a choice about whether or not to do so.

This methodologically individualist understanding of social norms grounds both Dowding and Simpson's arguments. Although it is perhaps elegant by way of its simplicity, it is ultimately unconvincing, for two principal reasons. First, on inspection, it offers an inadequate account of the functioning of social norms. Second, it misrepresents the relationship between social norms and the rule of law.

To see this, consider first what kind of protection the rule of law grants citizens who enjoy the same legal status. Andreas Schmidt has offered a useful taxonomy of the various ways in which agents can hold the control required for posing an external constraint on the wills of others. An agent holds *preventive* control if they can prevent

⁷⁵ As Pettit writes, '[w]hat are such [republican] laws going to require by way of supplementation if freedom as non-domination really is going to be advanced? The answer is, in a word, norms' (Pettit 1997, 241).

others from interfering; holds *abortive* control if they can remove a constraint on their action after it is already in place; and holds *responsive* control if they have means to respond to an interference after it has happened (Schmidt 2018, 180). To recall from earlier chapters, the state has *kompetenz-kompetenz*, which means that it has a monopoly on the use and regulation of coercive force. Thus, preventive and abortive control largely falls within the scope of the state's competences.⁷⁶ The main resource the rule of law grants individual citizens is response control. If and when someone suffers illegal interferences, they can call on the state to have the interfeeree punished. This responsive control can survive the individual – cases of murder are still investigated on behalf of the deceased.

To see how this complicates the claim that norms cannot impact an individual's domination, consider now how we should understand the Dalit's situation in the second variation of that example. According to Simpson, the Dalit is dominated by the existence of the potential team composed of the angry Brahmin and the bystanders. We know from the description of the case that the involved parties are in a remote place and can therefore assume that no representatives of the state are present to exercise preventive or abortive control over what, we must also assume, is an illegal attack. We should also assume that the consequences for those who engaged in the attack would be serious, were they to be found guilty in a court of law.⁷⁷ Further, since caste norms hold no social power, there exists no reason why individuals would single out the Dalit as a salient subject for an

⁷⁶ Note, however, that there may be relevant differences between states that allow citizens to carry weapons and those that do not (see Schmidt 2018).

⁷⁷ To be absolutely clear, these assumptions are warranted because Simpson wants to show that, like the Dalit, we are all constantly dominated by potential teams despite the protection granted us by the law.

attack. Acts in favour of the subordination of Dalits are not reproduced in action. This has significant consequences for the plausibility of Simpson's claim that the Dalit is, in fact, dominated on this description of the case.

Being bound by a social norm makes our preferences conditional on the acting of others. But, as Cristina Bicchieri explains, that preference is not simply conditional on how we believe others will react to our acting. It is also a function of how we believe others will act in relation to the content of the norm itself (Bicchieri 2006, 30–31). Thus, when people are subject to a common norm, they have normative expectations that others will sanction norm transgressions and empirical expectations that others will follow the norm themselves. These empirical expectations provide a crucial link between social norms and laws in circumstances – like the second variation of the Dalit case – where there exists a general expectation that people uphold the law and that all individuals enjoy equal social status. This link provides an explanation for why the convergence of individual motivation is insufficient for the feasibility of collective action that runs counter to the law.

When norms are directly tied to the law, there are material as well as 'immaterial' consequences to norm transgression. Given that individuals live under the rule of law, in conditions where each party is seen as an equal before the law (caste norms have no social power), part of obeying the norm of following the law is to support the law's application. Each party will expect that the others will not only refrain from joining the attack, but that they will be of assistance in the process of the state exercising responsive control on behalf of the Dalit. Specifically, each party can reasonably expect that the others will offer testimony to the state's officers. But this means that, even when each party is motivated to act, they will plausibly be in what Bicchieri calls a state of *pluralistic*

ignorance (Bicchieri 2017, 42–43). Such a state obtains when (i) individuals engage in social comparison with their peers that is based on inferences from their acting, since the ‘true distribution of their beliefs and preferences’ is hidden; (ii) others’ behaviour (or the results of that behaviour) are observable; (iii) no transparent communication is possible; and (iv) we assume that, unlike us, others act in accordance with their beliefs.

Bicchieri’s analysis of pluralistic ignorance is directly relevant to the situation around the well. Conditions (i) and (iv) are general facts about social life. Condition (ii) obtains because people are not reproducing the norms underpinning the caste system, which would justify the attack. Lastly, condition (iii) obtains because, if any of the bystanders were to voice their true preference, they would face legal sanction: it is illegal to instigate attacks and all bystanders are under norms to assist the state in exercising responsive control. This shows why it is implausible to claim, as Simpson does, that the Dalit is dominated in the section variation of that case. In conjunction with the laws that are in place to secure the social institution of equal citizenship, norms can act as an external constraint on individual wills by reinforcing the rule of law. The claim that norms are insufficient for freedom from domination does not entail that norms are not necessary.

To bolster this conclusion, see how the present account provides the resources for arguing that the Dalit would be dominated in the absence of the norms in favour of supporting the rule of law – and, similarly, for arguing that Dowding is wrong to infer that women are not dominated in a society with anti-patriarchal law and patriarchal social norms. I have shown why people would be unwilling to engage in random attacks if they were confident that their actions would be punished. What is lacking, then, from a convincing explanation of the Dalit’s domination is an account of what could make it the case that the bystanders would not be punished for their attack. But, as I will now show,

such an account necessarily entails that the Dalit was already dominated. The rule of law can only secure freedom from domination in the absence of systemic conditions that distort the law's equal application. When such conditions obtain, members of systematically disadvantaged groups lack the effective ability to draw on the state to exercise responsive control. They suffer *systemic domination*.

Diagnosing lingering systemic conditions of domination after the 'official' rejection of dominating practices is a key concern of the epistemic injustice literature. The innovation of Miranda Fricker – who first coined the term – was to provide a language for theorising how transmissions of knowledge happen according to patterns that systematically disadvantage certain groups. When individuals seek out information about an event, they need to rely upon the testimony of those who were present and, in so doing, they engage in implicit credibility judgements of the speakers. In this process, 'testimonial' epistemic injustice happens when a speaker is given less credibility than what she is owed, due to prejudice about her identity group on the part of the hearer (Fricker 2007, 18). In this case, her testimony's value is deflated solely on the basis of her perceived group membership.

As noted by Fricker (2013), as well as by Bohman (2012, 101–102), the concept of epistemic injustice has crucial implications for analyses of domination. Consider a final analysis of the Dalit example. Since the well is in a remote place, the Dalit's protection under the law directly depends on his ability to exercise responsive control. But his ability to do this depends on his epistemic standing. His testimony must be believed, and it must be believed over countervailing testimony offered by the Brahmin and the bystanders. The presence of epistemic injustice thus revokes the Dalit's ability to safely rely on the state's protection. This provides a plausible explanation of why the Brahmin in Simpson's

example has already decided to ‘test the water’ (cf. Lovett and Pettit 2019, 377). He can be reasonably certain that, even in the case where he is unsuccessful in his attempt to enlist others, the status imbalance between him and the Dalit will distort the latter’s ability to exercise responsive control.

The presence of social norms that ground epistemic injustice prohibit the ability of systematically disadvantaged groups from exercising responsive control.⁷⁸ This makes them vulnerable to arbitrary interference despite the existence of protective law and thus, on the view defended here, dominated. This remains the case even when those who are reproducing the norms are unaware that they are doing so. What matters is the existence of social norms that render some unable to safely rely on the law to exercise responsive control, since this makes them vulnerable to those who can exploit their advantage before the law. This analysis shows how domination by potential groups can persist in cases where neither the awareness nor strategy conditions are fulfilled. The function of the social norms grounding epistemic injustice is to remove the cost of acting to satisfy awareness and strategy. It is these norms, and not the individual knowledge of the others’ mental states that they can bring about, that are relevant for assessments of domination: they provide the circumstances against which assessments of feasible individual and collective action are to be assessed. In a racist society, a member of a racialised minority group is vulnerable to members of the majority group because the latter can get away with an illegal interference in their acting. This, on my view, is the main fact of relevance

⁷⁸ Fricker also theorises hermeneutical injustice, which occurs when a speaker lacks the concepts for voicing their experience due to systematic exclusion from the practices through which social meaning is generated (Fricker 2007, 152). This form of epistemic injustice can also ground domination by determining which legal protections will be available in the first place.

for assessments of domination. The domain of possible worlds that is relevant for assessments of domination should, therefore, be grounded in contextual analyses of operative social norms. As I have demonstrated, such an account dissolves the coalition problem. The presence of pluralistic ignorance explains why the convergence of individual wills is insufficient for feasible collective action. Moreover, this explanation holds more diagnostic power than Lovett and Pettit's alternative: a slave with three masters is dominated because the legal and social norms of that institution supply the room for voicing desires to interfere and for experimenting about how to carry out their interference in the absence of a clear path. This remains the case even if the slave were somehow oblivious of his circumstances and, as a result, would not fail the eyeball test.

I thus conclude that a systemic conception of domination can dissolve the coalition problem and thereby vindicate the conceptual coherence of the ideal of non-domination. Moreover, it can do so in a way that retains the radical critical potential of the republican project. In making this case for a systemic conception of domination, I align myself with critical republicans like Laborde (2008), Bohman (2012) and, more recently, Dorothea Gädeke (2020a; 2020b), who all argue that republicans ought to abandon a narrow focus on agent-relative resources in favour of a macro perspective on the social processes that enable and constrain people's capacity for acting in the social world. This move will be resisted by many republicans, especially those whose main concern is to show that the ideal of non-domination outperforms the liberal concept of freedom as non-interference for *all* analytical purposes. Note, however, that although my analysis does entail that freedom as non-domination might not be the best account for explaining which individual *actions* count as free, it is still completely coherent – and, indeed, plausible – as an account of *freedom of the person* (Gädeke 2020b, 216–217). A

non-dominated agent is one who stands in relations with others that are not characterised by her structural disempowerment in relation to those others and, conversely, their structural empowerment in relation to her.

One might object to my line of thought on the grounds that it is problematic to claim, as I do, that a foundational concept for political analysis and evaluation is grounded in macro-level analyses of social structures that is engendered by individual action. Does this not commit me to a suspicious methodology that treats aggregate phenomena as prior to the individual actions of which they are composed? In response to this concern, however, note that such a methodologically ‘holist’ approach to social phenomena only runs into difficulties if we seek to make ontological claims. By contrast, if the main task of our theory is to make explanatory claims, then it is unproblematic to accept that all social facts supervene on individuals and their actions while at the same time insisting on treating social structures as such facts (List and Spiekermann 2013; see also Pettit 1993). Thus, the question turns on what we want a normative ideal to do: I see no problem in holding that the concept of domination explains who stands in social relations we have fundamental reason to object to and, conversely, that the ideal of non-domination can ground efforts to reform those relations so that they would no longer be objectionable.

This chapter has showed how the ideal of non-domination is not vulnerable to the charge of incoherence as claimed by proponents of the coalition problem. It has also argued that a systemic conception of domination holds superior explanatory and diagnostic power to those that conceive of domination in agent-relative terms. My discussion has been conducted at a fairly high level of abstraction, however. This was justified, first, because the coalition problem is a general charge against the ideal of non-domination and, second, because the existing literature has discussed a particular set of

examples and adopting these examples was helpful for clarifying the distinctiveness of my account. But my discussion so far has been quite far away from the regulation of global migration. To clarify the implications of my argument, therefore, the next section applies the account of domination I have developed above to the contemporary practice of border control.

5.5. Applying the argument: systemic domination in contemporary practice

My argument in the last chapter was that the contemporary practice of border control is characterised by domination because it gives a set of states the capacity to arbitrarily interfere with a set of vulnerable individuals. This domination is enabled, on the one hand, by strong norms of territorial sovereignty and, on the other, by the lack of any supranational institutions for holding states responsible for their externalised border regimes. Moreover, the core participants to contemporary practice can externalise their regimes in this way because of their ability to exercise power in other domains in the international arena, thereby compelling contracting states to host refugees and asylum seekers and to carry out border controlling tasks on their behalf. I argued that a subset of potential migrants are dominated under contemporary practice, namely, those who are targeted by the various remote control techniques that comprise contemporary practice and who are already vulnerable to domination in their state of residence. This restriction of the diagnosis of domination – to particular sets of dominating, and of dominated, agents – is what made my argument appear vulnerable to the coalition problem: if the concept of domination includes a concern for robustness, then why does it not matter that some states currently single out some potential migrants?

The systemic conception of domination outlined above explains why the concern for robustness does not entail the radical conclusion that everyone is dominated at the hands of potential coalitions of states acting together to constrain our ability to cross borders. There are possible worlds in which citizens of Northern European states are forced to take dangerous paths through Spanish deserts and over the Mediterranean Sea to reach North Africa. However, the existence of these possible worlds is irrelevant for assessments of domination because the global order is currently structured in ways that make it unfeasible for states to act together to put in place the various obstacles that would force Northern European citizens to take such routes. First, the global order is characterised by vast material inequalities, which mean that not all states hold the resources to construct the advanced border controlling mechanisms that characterise contemporary practice, let alone convince other states to carry out border controlling tasks on their behalf. Second, the global order is also structured according to norms over which some states have more influence than others, as is illustrated perhaps most clearly by the system of permanent membership in the UN Security Council. As global democrats have consistently argued, members of weaker states fail to have voice in processes that result in norms that (nevertheless) dramatically affect their interests (Young 2000, chap. 8). Thus, the above analysis of social norms is directly relevant to politics beyond the state. As Andrew Hurrell emphasises,

Norms and rules help explain how actors are constituted: who can act and in what kinds of social and political activities. (...). In addition, norms do not only constrain action and constitute actors but they also *enable and empower action*. Norms are therefore central to understanding the power to mobilize, to justify and to legitimate (Hurrell 2007, 18, emphasis mine).

The contemporary practice of border control is grounded precisely in a set of norms that enables one set of states to mobilise and at the same time disables another set of states

from acting in symmetrical ways. Third, as Miriam Ronzoni has argued, these facts entail that the global order is characterised by what Rawls calls ‘background injustice’: it is structured in ways that reliably prohibits states from satisfying their obligations of domestic justice (Ronzoni 2009). Similarly, Cristina Lafont argues that the pressures of a globalised economy work to create a race to the bottom for states to lower regulatory standards and thus ‘directly threaten their capacity to protect the human rights of their populations’ (Lafont 2018, 317). Citizens of states that partake in contemporary practice, unlike the individuals who are targeted by contemporary practice, live in states that have the capacity to secure domestic relations of non-domination.⁷⁹ Given this, citizens of states that partake in contemporary practice do not similarly depend on the international community and, especially, on the ability to seek asylum as a safeguard against abuse domestically.

By themselves, these three points suffice for showing that motivation on the part of, say, a coalition of North African states to prohibit Northern European citizens from entering Africa is insufficient for their capacity to do so and, hence, for them to dominate as a collective. However, in addition, and as mentioned in the previous chapter, citizenship in either of the states that partake in contemporary practice robustly protects against arbitrary interference at the hands of other states’ border regimes in the following sense. Being able to rely on effective institutions of diplomacy provides citizens of these states a form of responsive control: they can call of their state of citizenship’s representatives in the relevant country to assist their case and to represent them in potential conflicts (Benton 2014). This is further reflected in the fact that cooperation on

⁷⁹ This does not, of course, mean that these states *do* secure domestic relations of non-domination – hence, the need for an active and vigilant citizenry demanding that they do.

migration, including visa facilitation schemes, has itself become a central part of general foreign policy. Powerful states are thus capable of negotiating opportunities for their citizens to study, live, and work in states with whom they share good foreign relations. Thus, although the case of the Dalit suffering epistemic injustice and the Sudanese asylum seeker can seem wildly different, they are analogous along the relevant axis for the present analysis. Both are embedded in structural relations in which they are disempowered, and others are empowered, rendering those others able to exercise power over them as a group without being reliably held accountable for that power. The migration case is, of course, more complex in that states are more complex than individual agents and, consequently, teams composed of states are more complex than teams composed of individual agents. However, the principled point remains the same. The Dalit's unhindered taking water from the well and the Sudanese asylum seeker successfully launching an asylum claim are explained by the goodwill (or, more likely, indifference) of others, rather than by institutional means that force those others to recognise their status as equals.

Therefore, and to restate my central argument, the contemporary practice of border control gives (1) a set of states (2) the capacity to arbitrarily interfere with (3) a set of vulnerable individual agents, where that capacity is explained by the structural empowerment of those states and the symmetrical *disempowerment* of those individual agents. As I argued at length in chapter 3, states keen to constrain migration flows towards their territories, whilst at the same time avoiding the costs associated with compliance with the principle of non-refoulement, can externalise their border regimes by invoking remote control techniques in other states. The potential migrants these techniques target, by contrast, cannot safely rely on their states of origin for protection of their basic human

rights, let alone for representation in their dealing with other states. Nor can they rely on the refugee regime for transferring them to a state which can guarantee their basic human rights should it become necessary for them to leave. Instead, they are exposed to the perverse incentive to undertake increasingly dangerous migration routes so that they can apply for asylum once territorially present in a state with the requisite institutional capacity. These dynamics are all explained by systemic features of the global order and, in particular, its combination of strong norms of territorial sovereignty coupled with the lack of suitable accountability mechanisms for states' acting abroad.

I thus conclude that my diagnosis of domination in the contemporary practice of border control is both coherent and plausible: it identifies relations of power that render a set of people vulnerable to another set of people in ways that are incompatible with their equality of status. Potential migrants targeted by the tools that comprise contemporary practice are at the mercy of the states that take part in that practice. The power involved in contemporary practice is thus of the kind republicans and, I have argued, those sympathetic to the power conception of legitimacy have reason to worry about. However, as I have also explained, establishing domination is not sufficient for establishing institutional illegitimacy on neither the republican view nor on the power conception of legitimacy. Before we can arrive at such a conclusive argument, we first must evaluate whether attempts to alleviate the domination involved in contemporary practice will, on balance, create *more* domination. This is what I will do in the next and final chapter. There, I will argue for the last central claim of this thesis, namely, that the relations of domination engendered by the contemporary practice of border control (4) suffice for institutional illegitimacy and therefore give rise to a demand for reform of the regulation of global migration.

CHAPTER 6

NON-DOMINATION AND SELF-DETERMINATION

The last two chapters outlined and defended the claim that the contemporary practice of border control is characterised by domination, as republicans understand that term. Under current conditions, a set of wealthy states wield arbitrary power over a set of vulnerable individuals. These states can choose or decline to introduce constraints on the actions of those individuals whilst ignoring their interests. This power is systemic. It is explained by structural features of the current global order, especially the combination of strong norms of territorial sovereignty and the lack of accountability mechanisms for states' acting beyond their borders. I appealed to the concept of domination to supplement what I have called the power conception of legitimacy. According to that conception, the stringency of the legitimacy standard an institution is required to meet is determined by the extent of the power it exercises. The power conception left a question, namely, when does an institution accumulate enough power to trigger a demand for a more stringent legitimacy standard? I have argued that an institution is subject to a more stringent standard of legitimacy when it starts dominating those it subjects to its power. The concept of domination as arbitrary power is also useful for the normative task of identifying the relevant institutional reforms required by legitimacy because the republican tradition from which it is drawn is concerned precisely with clarifying how institutions could satisfy the ideal of *non-domination*.

Thus, I have argued that the states that partake in the contemporary practice of border control exercise dominating power over potential migrants, and that this power is a function of systemic features of the global order. But, although it is tempting, it is still

too quick to conclude that these border regimes are illegitimate and, hence, that states fail to generate reasons for compliance and non-interference in their claim to regulate migration. The reason is the meta-coordination function of legitimacy. Since legitimacy assessments are inherently practical – they tell us which institutions we have reason to support for regulating specific domains – establishing illegitimacy requires the further step of showing that there are institutional alternatives which would fare better in terms of the risks and benefits they engender. This practical function coheres with, and is further explained by, the republican framework I have outlined and defended in the last two chapters. Since we need institutions to secure relations of non-domination, establishing institutional (il)legitimacy requires evaluating how that institution compares in terms of domination with institutional alternatives for regulating the same domain. Therefore, the task I set myself in this final chapter is to evaluate the prospects of alternative institutional arrangements for regulating global migration in ways that would eliminate, or at least drastically reduce, the domination migrants are currently exposed to. If such institutional arrangements turn out to inevitably lead to more domination, then we have, on balance, moral reason to let states retain the privilege of reforming their border regimes in accordance with their own interpretations of applicable standards of justice.

In undertaking this task, I will thus be concerned with evaluating the prospects of stronger international institutions for regulating global migration. More specifically, since the perverse incentive structure many prospective migrants are currently exposed to turns on the inefficiency of the refugee regime, I will consider how the possibility of more powerful supra-state institutions for managing the world's population of vulnerable migrants compares to the current system of sovereign statehood in terms of domination. Throughout my discussion, I will draw on recent arguments in favour of supranational

institutions for regulating migration (Brock 2020; Hidalgo 2016; Shachar 2020), highlighting how these might contribute to a lessening of the domination currently involved in contemporary practice. I will then consider the main objection such proposals are likely to face, namely, that they conflict with the value of self-determination. Given that self-determination – the ability of a political community to make its own rules, on its own terms – is a core republican concern, it might seem that the ideal of non-domination prohibits support for ceding sovereign competences to supranational institutions. Thus, my discussion also aims to take part in a broader conversation about the relationship, and possible tensions, between stronger forms of global governance and the legitimacy of individual states (Buchanan 2011).

One response to the self-determination objection is to grant that a supranational institution with competences to regulate global migration would conflict with self-determination and thus pose a dominating threat to states, but to argue that this domination is, on balance, less severe than the one migrants are currently exposed to. Whilst this response is certainly possible, I will develop a different response in this chapter. Perhaps surprisingly, I will argue that stronger supranational regulation of migration would not detract from self-determination but would, on an attractive republican interpretation of that value, add to it. To do this, I draw on Iris Marion Young's relational account of self-determination, which she explicitly developed by reference to the republican objection to domination (Young 2000; 2007). The central insight of this account is that institutional arrangements cannot be ruled out on self-determination grounds simply because some states would have their current institutional capacity constrained. Instead, the relevant question is whether the institutional capacity of *all* states would be constrained or enhanced by erecting a global institution for regulating

migration. As I will argue, there are good reasons for thinking that many states would, in fact, see their institutional capacities enhanced under such alternative arrangements.⁸⁰

The chapter is structured as follows. In section 1, I draw on the resources of republicanism to outline what kind of supranational institution would be required to rectify the domination potential migrants suffer under contemporary practice. I discuss the prospects of the recent Global Compact for Safe, Orderly and Regular Migration for delivering in this regard. In section 2, I outline the self-determination objection to such an institution, casting it in general terms and in the language of republicanism. Section 3 begins my argument by questioning the central premise of the self-determination objection, namely, that supranational regulation of migration would stand in fundamental tension with a commitment to self-determination. Section 4 outlines and defends Young's conception of self-determination and argues that, from a republican point of view, it is superior. Once we have adopted this understanding of self-determination, I argue, the self-determination charge loses its original force. Section 5 restates the overall argument and clarifies the mechanisms through which the supranational regulation of migration would add to, rather than detract from, a commitment to self-determination and hence to non-domination.

⁸⁰ Young listed 'citizenship and migration' as one of the issues her theory of global governance was meant to capture (Young 2000, 267). However, she never gave any specifics of i) what issues arise in this domain, nor ii) what solutions her theory would support. Thus, this chapter can also be read as trying to contribute to a limited part of the Youngian project.

6.1. Rectifying domination: the case for the supranational regulation of vulnerable migration

As I have defined it, domination is a status-related notion. A dominated agent is one whose interests can, without cost, be ignored by those with whom she relates socially. The domination agents suffer under the contemporary practice of border control exemplifies how domination is status-based. These agents have citizenship in states in which they are vulnerable to the arbitrary will of their fellow citizens, as well as the will of agents acting across borders. Moreover, should they attempt to leave their state, they will be subject to various forms of remote control for which there are insufficient accountability mechanisms. The lack of accountability of the power to which these would-be migrants are exposed is exacerbated by the weakness of their passports, since they cannot rely on their states to represent their interests vis-à-vis other states. Thus, should they find themselves in situations where it is no longer tenable for them to remain in their state of citizenship, they will face a perverse incentive: wait to receive protection from an ineffective refugee regime or set out on exceedingly dangerous journeys to states where they can apply for asylum once territorially present. On these journeys, which are necessarily conducted in lawless conditions, migrations will be especially vulnerable to domination at the hands of smugglers and other migrants.⁸¹ Thus, the domination involved in contemporary practice consists in the unaccountable power a set of states are capable of wielding over the individuals that are targeted by their border regimes, resulting in social conditions of instability and insecurity. These conditions persist even

⁸¹ For a powerful journalistic account of the intense environments in which these migrants find themselves, oftentimes for prolonged periods of time, see Trilling (2019).

if the individuals never attempt to leave. What matters is that they would inevitably be faced with the perverse incentive should they do so.

The antidote to domination, according to republicans, is voice. As Pettit describes it, a person who enjoys non-domination

is to be a voice that cannot properly be ignored, a voice which speaks to issues raised in common with others and which speaks with a certain authority: enough authority, certainly, for discord with that voice to give others reason to pause and think. To be treated properly as a person, then, is to be treated as a voice that cannot be dismissed without independent reason: to be taken as someone worth listening to (Pettit 1997, 91).

It is clear that potential migrants lack even the most minimal interpretation of such voice. The states that take part in contemporary practice can push their own agendas of restrictive border regimes without incurring clear responsibilities for those who are subject to the power that uphold their regimes.⁸² Because of this ability, these states can ignore the interests of those who are, nonetheless, subject to their power.

What, then, can rectify the lack of voice on the part of this specific set of potential migrants? The traditional republican answer is, in short, institutions. Recall that the various bad effects associated with the contemporary practice of border control are not, according to international law, permissible. All states are in principle liable for any wrongful action undertaken by an agent acting on their authority (Gammeltoft-Hansen 2015). Thus, when migrants suffer maltreatment at the hands of outsourced immigration

⁸² It is perhaps also worth noting again that these regimes are not exclusively restrictive but, instead, differentiated. Whilst the states that take part in contemporary practice are seeking to limit access to their territories for asylum seekers, they are actively recruiting immigrants in accordance with their labour market needs (Shachar and Hirschl 2014). There is thus a fairly uncontroversial sense in which these states benefit from global conditions that create emigration, since it allows them to easily recruit immigrants according to their labour market needs (see Brock and Blake 2015).

officers, or in camps created with the funding of one state on the territory of another, the initiating state is in principle legally responsible for that maltreatment. However, the problem arises when this principle of international law meets strict norms of territorial sovereignty: since all states are *de facto* responsible for whatever happens on their territories, states that rely on externalised border control can contest their *de jure* responsibility for maltreatment of migrants conducted in their name, claiming that they have not authorised that maltreatment. Because of their outsized influence over the international norms of conduct, as well as the lack of voice on behalf of the migrants who suffer abuse, these states are generally successful in such contestation. Thus, these states are capable of systematically avoiding liability for abuse of migrants – despite the fact that this abuse is oftentimes an entirely predictable effect of externalising border controlling functions to states with limited capacities (or willingness) for protecting human rights. Therefore, the dominating power of these states does not reside in what they are ‘officially’ entitled to do. Rather, it lies in the informal power they hold, given the structure of, and their position within, the contemporary global order. The republican emphasis on institutions is grounded precisely in objections to informal and unaccountable power (Ronzoni 2017, 185–186). It does not matter that the factory owner is told not to demand that his workers take double-shifts if there is no one who can reliably hold him to account when he does, which is why the republican state must regulate labour relations.

Thus, symmetrically, a republican who is convinced by the argument I have developed over the course of the previous chapters can argue that it does not matter that states are in principle responsible for abuse they have authorised when there is no mechanism for reliably holding them to account for such abuse. What we need is an

institutional agent with requisite power to bring the informal power participants to contemporary practice wield over potential migrants under rule-governed control. Such rule-governed control should, in order to rectify the domination currently engendered by contemporary practice, provide voice to those who are currently vulnerable to forces beyond their control and who, as a result, inhabit a position of structural insecurity and instability. The obvious candidate for an institution that could bring the global regulation of migration under such rule-governed control is a cosmopolitan political community in the form of a world state (Bohman 2004).⁸³ However, the case for such a radical institutional proposal is under-determined by the arguments supplied in this thesis: clearly, the full transition to a cosmopolitan political community raises a host of questions that could not be answered by an account of the risks and benefits engendered by current patterns of global migration. Therefore, it is worth considering whether less drastic transformations to the global order could alleviate the domination currently suffered by potential migrants.

There has, in fact, recently been taken significant steps to reform the regulation of global migration in ways that alleviates the vulnerability of migrants. As I mentioned in the introductory chapter, the UN General Assembly formally endorsed, and 164 states adopted, a Global Compact for Safe, Orderly and Regular Migration in December 2018. The Global Compact is essentially a cooperative framework which aims to establish a holistic approach to the regulation of global migration. According to the document, the compact ‘offers a 360-degree vision of international migration and recognizes that a

⁸³ Recall from chapter 2 that Michael Blake’s institutional conservative account of the right to exclude presupposed that a world state was the only alternative to the current system of sovereign statehood (Blake 2020, 228n30).

comprehensive approach is needed to optimize the overall benefits of migration, while addressing risks and challenges for individuals and communities in countries of origin, transit and destination' (UN 2018, rec. 11). The Global Compact thus has the ambition of addressing global migration as a transnational issue with potential benefits for both migrants, sending countries and host countries. Its guiding principles emphasise international cooperation, human rights, and the rule of law and due process (UN 2018, rec. 15). They also emphasise national sovereignty: the compact is not a treaty and is thus fully voluntary and not legally binding.

The states that have formally adopted the Global Compact have agreed to further 23 objectives (UN 2018, rec. 16). These include commitments to 'Collect and utilize accurate and disaggregated data as a basis for evidence-based policies' (Objective 1), to 'Minimize the adverse drivers and structural factors that compel people to leave their country of origin' (Objective 2), to 'Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work' (Objective 6), to 'Address and reduce vulnerabilities in migration' (Objective 7) and to 'Enhance consular protection, assistance and cooperation throughout the migration cycle' (Objective 14). As noted by Gillian Brock, the Global Compact demonstrates a recognition that the problems and tensions currently associated with the politics of migration must be addressed in a comprehensive manner (2020, 197). Moreover, the compact continually emphasises that all relevant stakeholders should be consulted and included in policymaking. Especially Objective 7 is noteworthy in the context of the arguments I have advanced so far in this thesis. In its entirety, the objective reads:

We commit to respond to the needs of migrants who face situations of vulnerability, which may arise from the circumstances in which they travel or the conditions they face in countries of origin, transit and destination, by assisting them and protecting their human rights, in accordance with our

obligations under international law. We further commit to uphold the best interests of the child at all times, as a primary consideration in situations where children are concerned, and to apply a gender-responsive approach in addressing vulnerabilities, including in responses to mixed movements (UN 2018, rec. 23).

The states that have adopted the compact will aim to realise this commitment by a series of actions, including ‘(a) Review relevant policies and practices to ensure that they do not create, exacerbate or unintentionally increase vulnerabilities of migrants, including by applying a human rights-based, gender- and disability-responsive, as well as age- and child-sensitive approach’ and ‘(g) Ensure that migrants have access to public or affordable independent legal assistance and representation in legal proceedings that affect them, including during any related judicial or administrative hearing, in order to safeguard that all migrants, everywhere, are recognized as persons before the law and that the delivery of justice is impartial and non-discriminatory’ (ibid.).

If fulfilled, these actions would significantly improve the situation of the individuals I have singled out as subjects of concern. In substantive terms, they would entail the abolishment of hosting asylum seekers in states with questionable human rights records and leaving migrants vulnerable to the decisions of private contractors administering immigration applications without means of recourse. But would these measures be sufficient for rectifying the domination potential migrants are exposed to? Recall that, from the republican point of view, diagnoses of domination do not turn on what agents are motivated to do but, instead, on what they have the capacity to do. And this capacity has not been changed with the introduction and adoption of the Global Compact. That states’ capacities to act remain unchanged is, of course, a function of the compact’s explicit commitment to a principle of national sovereignty which makes it fully voluntary and leaves states to interpret and enforce its commitments and actions as they

see fit. Whilst these commitments are most certainly welcome – indeed, they are almost certainly necessary steps on the path to a legitimate regulation of global migration – they are therefore insufficient from a republican point of view: they do not bind states in a way that forces them to consider the interests of the (potential) migrants that are subject to their policies. The perhaps most immediate piece of evidence for this claim is the fact that, whilst all 193 members of the UN agreed to the terms of the Global Compact, only 164 of them formally adopted it. Notably, the US, Hungary, Israel, the Czech Republic, and Poland voted against the final version of the Global Compact and several more – including Australia, Italy, Libya, and Algeria – abstained from voting at the final meeting at the UN General Assembly. Clearly, given the character of the compact, these states are not even ‘self-bound’ by the contents of the Global Compact and are, as a result, not constrained by its contents. The Global Compact thus offers substantive policies that are highly attractive, but it is, by itself, institutionally insufficient for rectifying the domination this thesis has identified.

Rectifying the domination involved in the contemporary regulation of migration would therefore require the establishment of more stringent supranational regulation of migration than what is afforded by the Global Compact. Giving potential migrants the voice necessary to alleviate their position of domination – to provide them sufficient power ‘to make others stop and think’ (Pettit 1997, 91) – is a matter of supplying institutional means that can robustly shield them from the perverse incentive to which they are currently vulnerable. This incentive, to recall, arises because of the dramatic inefficiency of the refugee regime and the huge payoff conferred on those who successfully cross a territorial border and launch an asylum claim. There are several potential institutional responses one might try to prohibit exposure to this incentive,

including requiring the acceptance of asylum claims in embassies or consulates (Noll 2005). Ayelet Shachar develops this basic idea by arguing that

[w]here a country intentionally delinks migration-control activities from its geographical borders, a correlated expansion of rights and protections for the individual must follow. Two complimentary methods would achieve this result: (1) expanding the extraterritorial reach of human rights, on the one hand, and (2) relaxing the fixation on territorial access as a precondition for securing refugee protection, on the other (Shachar 2020, 74–75).

Shachar proposes to achieve the first of these aims by having courts ‘adopt more flexible interpretations of jurisdiction, effective control, and the exercise of authority’ (Shachar 2020, 76). This will force states to take responsibility for the rights of the individuals whose actions they nonetheless constrain. However, Shachar is also clear that the externalisation and outsourcing of border controlling tasks make such inventive approaches to human rights law limited: ‘the more layers of discretion that are introduced, and the greater the number and variation of the actors involved (public and private, at home and abroad, the official and the semi-official), the more difficult it becomes to attribute legal responsibility, even under the more expansive interpretation of effective control’ (Shachar 2020, 81–82). As we noted in the previous chapters, this challenge is not only conceptual – turning on the difficulties of delineating proper responsibility attributions – but also one of substantive power differentials. Some have the resources to rely on contesting legal responsibility as a strategy for advancing their aims. Shachar’s second proposal of relaxing the fixation on territorial access as a precondition for securing protection is therefore also a necessary step for breaking the dynamics that expose vulnerable individuals to the perverse incentive. Specifically, Shachar suggests that states should adopt practices that let the institution of asylum track their expanded borders, so

that screenings of asylum claims can happen wherever the state exercises ‘functional jurisdiction’ (Shachar 2020, 85).

If followed through, Shachar’s proposals would empower potential migrants in ways that would alleviate their current vulnerability: they would ensure that individuals with legitimate claims for asylum could avoid dangerous transnational journeys, and they would provide resources for holding states accountable for human rights breaches that are licensed by their border regimes. However, the voluntaristic nature of these proposals makes them insufficient for rectifying the domination involved in contemporary practice. In order to revoke the dominating power states wield over potential migrants, those states would have to cede their privileges to interpret their obligations towards refugees and asylum seekers. Again, this is not a matter of moral motivation but, rather, of the decision-making capacity to choose or reject what their obligations involve.

To see this, consider the following epistemic argument for the supranational regulation of migration made by Brock and by Javier Hidalgo. Both Brock and Hidalgo start from the observation that many citizens in democratic states are ill-informed about the actual likely results of increased immigration. For example, Brock reviews empirical literature that suggests that many citizens in Western democracies hold beliefs that immigration is bad for citizens’ economic prospects; that immigrants have a negative effect on public finances; and that immigrants increase crime (Brock 2020, 204). These beliefs are, at best, contingent on the policy choices of the states themselves, and in many cases they are straightforwardly false (Brock 2020, 205). But in combination with the structural bias that governments have towards their own citizens under the current state system, these beliefs create immigration regimes that lack sufficient epistemic justification: there is political pressures on governments to adopt strict immigration

policies based on shaky or false premises (Brock 2020, 202–209; Hidalgo 2016, 144–152). From this, Brock and Hidalgo argue that more robust international governance institutions for migration would, amongst other things, provide better information about the effects of immigration and therefore also fairer conditions for migrants. As Hidalgo argues, ‘if an agent has biases that impair this agent’s capacity to make morally risky decisions in reliable ways, this agent has moral reason to transfer decision-making authority to a more reliable party’ (Hidalgo 2016, 152).

The general problem of structural bias in the setting of immigration policy impacts the likelihood of states adopting non-skill selective policies that could help alleviate levels of global poverty (Oberman 2015). But it also has implications in the specific case of protections for vulnerable migrants beyond the fact that citizens may be less inclined to support refugee settlement based on their beliefs about the negative effects of immigration. Even if there is relatively stable support for the view that states ought, in accordance with the Refugee Convention and its Associated Protocol, to assist refugees and asylum seekers, there is far less agreement on how stringent these obligations are and how they are to be distributed between states. A particularly salient issue seems to be whether states have obligations to ‘take up the slack’ as a result of the non-compliance of others (Stemplowska 2016b). Indeed, the robust presence of a fear of discharging obligations towards migrants when others are unwilling to do the same would explain the inefficiency of the current refugee regime. Take a recent example. When fires broke out in the overcrowded refugee camp in Moria, Greece, in September 2020, governments across Europe were put under increasing pressure by activists to evacuate the inhabitants – and especially the children – of the camp (BBC 2020). Norway was among one of the

countries that eventually agreed to host some of the refugees.⁸⁴ However, the Norwegian government blankly refused to take any refugees unless at least eight other countries agreed to do the same and to start the eventual evacuation until those other states started their evacuations (Olsen 2020). For the Norwegian government, the desire not to end up with a disproportionate share of the responsibilities for refugees relative to other European states clearly outweighed the concern for the refugees themselves. Thus, not only beliefs about the bad effects of immigration, but also beliefs about other states' unwillingness to live up to their commitments to assist vulnerable migrants, contribute to the production of border regimes that are – clearly – detrimental to those vulnerable migrants.

This point can be put in the language of republicanism. Without sufficient institutional constraints, the power wielded by states in the domain of migration is dominating power because it allows those agents to choose or reject which obligations they follow, and on what grounds, without proper regard for the triggering conditions of those obligations. The republican concern for domination thus pulls in the direction of placing this power under the rule-governed control of an institutional agent with the requisite power to overturn domestic decisions about *vulnerable migrants*. Such an institution would revoke the concern demonstrated by the Norwegian example, namely, that many states are worried about discharging their obligations when other states fail to do their part. If a functioning supranational institution with the requisite powers to, first, accept and adjudicate claims for protection and, second, to distribute those vulnerable migrants between states was put in place, then these migrants would no longer be exposed

⁸⁴ Specifically, 50 of the roughly 13,000 refugees left without shelter were eventually offered asylum in Norway, prompting the campaign '50 ER IKKE NOK' ('50 IS NOT ENOUGH').

to a perverse incentive. They could be certain that they would receive protection from severe vulnerability, even if they remained in place and would, as a result, not have reason to set out to apply for asylum once territorially present.

The creation of such an institution would, obviously, be a radical break from the current regulation of migration. Thus, it raises several technical issues of institutional design that I do not pretend to have answers to. What I am offering here is a principled case for the desirability of such an institution and, hence, for the view that individual agents' have moral reason to work towards its creation. A conceivable alternative institutional arrangement would be to empower the UNHCR – the UN High Commissioner for Refugees, the UN Refugee Agency – to regulate the global refugee population, administering the applications for protective status and distributing refugees between states according to their institutional capacity for protecting their rights. Since the mandate of the UNHCR is restricted to refugees, forcibly displaced communities, and stateless persons, empowering it in the way suggested by the above argument would still leave states with the power to set the rest of their immigration policies. However, the change would, of course, be drastic. Thus, the principled case for the supranational regulation of vulnerable migrants will most certainly face the objection that it effectively denies the value of political self-determination. As I will explain in the next section, this objection is especially pressing from a republican point of view because many republicans have thought that it is precisely the value of political self-determination that ought to be the central turning point in assessments of domination beyond the state.

6.2. The self-determination objection

To see the force of the self-determination objection to the case for the supranational regulation of vulnerable migration, it will be helpful to note a general difficulty faced by republicans when it comes to institutional design. As Miriam Ronzoni usefully shows, the republican emphasis on non-domination translates into three general desiderata when it comes to institutional design. First, the ideal of non-domination demands the avoidance of excessive concentrations of power: if some agent's power becomes excessive, then – by definition – that power is not counterbalanced (Ronzoni 2017, 195). Hence, that agent will be able to choose or reject to introduce constraints on the acting of others without regard for their interests. Second, the ideal of non-domination demands bringing informal power under rule-governed control. In domains where there is no institutional agent with the requisite power to enforce rules, agents are vulnerable to the arbitrary will of one another, given that there will be no formal constraints on what they can do to each other (Ronzoni 2017, 196). Lastly, republicans put key emphasis on the importance of an active citizenry. As we saw in chapter 5, the republican project depends on individual citizens remaining vigilant and ready to mobilise in response to oppressive forces. It is a central republican theme that power has a natural tendency to degenerate and become abusive: the fight for non-domination is ongoing and requires sustaining the ties necessary to respond to new dominating forces (Ronzoni 2017, 198).

As Ronzoni argues, there is an inherent tension between these desiderata and any republican project of institutional reform must therefore engage in a careful balancing between the three. In the international arena, where the state takes the double-role of a guarantor of domestic relations of non-domination and a potential dominator to individuals outside its borders, these tensions are exasperated. My argument in favour of

the supranational regulation of vulnerable migration above emphasised the second of these desiderata. Without an institutional agent with the requisite power to bring the regulation of vulnerable migration under rule-governed control, I argued, the domination inherent to contemporary practice will persist. The apparent problem with this argument, however, is that it seems to conflict with the two other desiderata: the objection to excessive concentrations of power, on the one hand, and the emphasis on an active citizenry, on the other. Empowering an institution like the UNHCR to overrule the immigration decisions of all states would make it supremely powerful and, further, might be corrosive of the ideal of an active citizenry, given that apathy is a psychologically realistic response when we are faced with powers that are simply too large to control. These concerns come together in the complaint that supranational institutions like the one I have been advocating conflict with a commitment to the value of political self-determination. According to this objection, such self-determination is necessary to avoid excessive concentration of power in the hands of institutions with no real anchoring in the kinds of political communities that can keep its power in check.

The concern for self-determination is, of course, essential to the debate on immigration. Indeed, as we saw in chapter 2, all the main general theories of the state's right to exclude ground their normative arguments in the value of self-determination (Blake 2020; Miller 2016; Pevnick 2011; Song 2019; Wellman 2008).⁸⁵ As Yong put it, lacking full control over borders stands in tension with allowing each state to pursue its

⁸⁵ Strictly, Blake grounds his defence of the right to exclude in the right to avoid unwanted obligations, which he presents as a general moral right in itself (Blake 2020, 74). However, the grounds for this right are clearly related to self-determination: to our capacity to act without being constrained by the costly rights of others.

chosen policy aims (Yong 2018, 469). Conceivably, if states could be required to take responsibility for more vulnerable migrants, then resources that could have gone into other projects would have to be directed towards programmes for those migrants. One might try to avoid the self-determination objection by following Brock in arguing that, so long as no one forces states to cede powers to a higher regulatory institution, there is no conflict between that institution and a concern for self-determination. As she writes, '[s]elf-binding and self-determination are compatible' (Brock 2020, 217). This response might be valid for Brock's purpose, which is to argue that states ought to actively bind themselves to the terms of the Global Compact. However, since Brock wants to leave the privilege to bind their policies with individual states, and I have argued that this is insufficient for rectifying the domination involved in the contemporary practice of border control, that response will not work for the institutional shift I have argued in favour of. Although self-binding would be an expression of self-determination at the 'constitutional moment' of binding, the demands of the political community would conceivably conflict with those of the supranational institution, thus reintroducing the original concern at a later point (Simmons 1999).

The self-determination objection looks especially troubling from the point of view of republican theory. Indeed, the republicans on which I have relied most heavily in this thesis have all argued that the central concern for republicanism beyond borders should be to ensure that peoples remain self-determining (Gädeke 2016; Laborde 2010; Laborde and Ronzoni 2016; Pettit 2010). Peoples will have this capacity, so the argument goes, when their state enjoys external non-domination: when there is no external agent that can interfere with their actions without being forced to consider their interests. Yet, this is precisely the danger that looms with the introduction of the supranational regulation of

migration, even if it is only for vulnerable migrants. Political communities may have good reason for controlling how and when they want to discharge their obligations towards vulnerable migrants, but without the privilege to interpret the content of those demands and to sequence required reforms of their current policies, those reasons are effectively ignored. Therefore, the introduction of supranational regulatory institutions with the authority to overturn domestic decisions poses a dominating threat to political communities. This threat could not conceivably be overcome, even if the relevant institutions are organised after democratic principles republicans might endorse (e.g., Pettit 2012, chaps. 4 and 5). The lack of a cohesive community to which that institution corresponds would inevitably lead to alienation, since it lacks even the basic ingredients for the kind of civic vigilance that is required to keep such an institution actively in check. My institutional proposal would thus inevitably lead to domination and is therefore unacceptable from a republican standpoint.

In short, the self-determination objection holds that my argument in favour of the supranational regulation of vulnerable migration puts far too much emphasis on the second of Ronzoni's desiderata. By so doing, it fails to give due weight to either of the other desiderata, thus failing as an attempted exercise in a principled case for republican institution-building.

6.3. Questioning the premise

The central premise of the self-determination objection is that supranational regulation of migration stands in tension with a commitment to self-determination and, therefore, also with a commitment to non-domination. The most obvious response to this objection is to grant this premise but to argue that, on balance, the domination currently faced by

potential migrants is more severe than the domination states would be exposed to by the erecting supranational regulatory institutions for migration. Doing this would require a careful consideration of how the intensity of the domination currently suffered by migrants compares to that which states would be subject to under an alternative regime – a difficult task because the two modes of domination are different in kind. Rather than adopting this strategy of balancing the concerns of political communities and vulnerable migrants, however, I want to target the self-determination objection’s central premise. As I will argue, on inspection, it is not altogether clear that the self-determination of states and the supranational regulation of migration stand in tension – at least not under current conditions.

To begin this argument, note a parallel between the self-determination objection above and a different self-determination argument. In 2005, the UN General Assembly adopted the so-called Responsibility to Protect (R2P) doctrine. The R2P doctrine conceives of sovereignty as a responsibility to protect human rights, rather than an absolute claim against external interference. Thus, if a state fails to uphold its human rights obligations to its citizenry, it renders itself liable to outside interference. As a result, some commentators worried that the R2P doctrine would inevitably undermine self-determination, given that weaker states would be continually exposed to outside interference. Thus, and further, some of these proclaimed proponents of self-determination argued that human rights standards ought to be *lowered* so as to ensure that weaker states would retain institutional autonomy.⁸⁶ The worry is that, unless human rights standards are lowered, strong states will abuse the R2P norms to exercise control

⁸⁶ For an overview of the debate, see Lafont (2016, 429–431).

over weak states: to dominate them, in republican terms. In response to these views, Cristina Lafont offers a simple but effective challenge, which is to point out that

(...) in order to assess how much potential for abuse the ‘triggering function’ of human rights norms actually harbours, we need to analyze the consequences *in both directions*, so that we can reach an ‘all things considered judgement’ as to which conception of sovereignty merits our endorsement under current circumstances. Looking in the opposite direction, we need to examine whether traditional norms of sovereignty may be even more prone to abuse by powerful states precisely because the current international order no longer fits the Westphalian conditions that these norms presuppose (Lafont 2016, 432, emphasis in original).

Lafont then argues that, under current conditions, upholding high human rights standards adds to the institutional capacity of weak states more than it detracts from it. The reason is that internationally recognised human rights standards give weak states protections from transnational economic pressures that would otherwise force them to adopt economic policy that is damaging to their populations, for example, by deregulating labour markets (Lafont 2016, 434–435; see also Laborde and Ronzoni 2016). Therefore, rather than rendering weak states vulnerable to domination at the hands of powerful states because of the raised triggering conditions for the R2P doctrine, the strengthening of human rights standards thus plausibly *add* to self-determination, rather than detract from it under conditions where some states have outsized influence over global norms of conduct set by institutions like the WTO.

Taking my cue from Lafont’s challenge to the proponents of lowering human rights standards in the name of self-determination, I want to raise a symmetrical challenge to theorists who want to oppose the supranational regulation of migration on self-determination grounds. This challenge is based on an obvious empirical premise, namely, that ‘85 percent of the global population of refugees and displaced persons are hosted by already struggling, resource-strapped countries in close proximity to active conflict

zones' (Shachar 2020, 88). Would also these states see a decrease in their capacity to exercise self-determination after the introduction of more stringent supranational regulation of migration, or would they, rather, see an increase in their institutional capacities? As Lafont's argument demonstrates, the introduction of a new norm of regulation cannot be faulted on self-determination grounds without considering how our *current* norms impact self-determination.

Consider the case of Lebanon. According to numbers collected by the UNHCR, Lebanon has an estimated refugee population of close to 1,7 million (UNHCR 2021). This is an exceedingly high number taking into consideration that Lebanon's entire population amounts to roughly 7 million. By comparison, a recent note from the European Commission states that 'the share of refugees in the EU is 0,6% compared to its total population' (European Commission 2019). Lebanese political institutions and its economy has been under increasing strain since the outbreak of the Syrian Civil War in 2011, and the country does not have control over its refugee population. Having asked the UNHCR to suspend new registrations in Lebanon in 2015, there are, as of September 2020, 'only' 880,000 of the estimated 1,7 million refugees in the country who are registered (UNHCR 2021). With strained political institutions and a huge pressure of migrants fleeing countries in the region, and especially Syria, Lebanon is not able to control access to its territory *despite its expressed interest* in reducing the number of refugees for which it is responsible. Thus, although Lebanon has an expressed wish to exercise control over its borders, its right to do so is merely formal: it does not have the institutional capacity to control its borders.

The Lebanese case is not unique. Common to most of the largest global recipients of refugees – for example, Jordan, Sudan, Uganda, Liberia (Christophersen 2020) – is

that they are states with limited institutional capacities, which would thus struggle to control access to their territories even if they wanted. Indeed, as I argued in chapter 3, the weak institutional capacities of states with large populations of vulnerable migrants are an essential part of the contemporary practice of border control. Had these states had larger capacities for exercising control over their institutions, it is not certain that they would agree to form migration compacts, and thus to host vulnerable migrants on behalf of others in exchange for financial contributions and the like. The contemporary practice of border control depends on states being willing to exchange responsibility-taking for migrants for such contributions. Note also that these general dynamics are reproduced within the European Union. The Dublin Regulation, which received its third renewal in 2013, is a piece of EU law which regulates responsibilities for asylum applications within the union. Dublin III, as it is also known, states that this responsibility is determined by reference to where an asylum claim was first launched (EU 2013). Given their geographical location within the Union, Dublin III has resulted in Greece and Italy shouldering vastly disproportionate shares of the responsibilities for vulnerable migrants seeking asylum in Europe. This has, in turn, spurred political controversy within the EU, critics arguing that Dublin III reflects larger power differentials between the Northern and Southern Member States (see Servent 2018).

Thus, it is far from clear that all states would see their institutional capacities reduced by the creation of stronger forms of supranational regulation of migration. There is a set of states that shoulder vastly disproportionate shares of the responsibilities for the world's vulnerable migrants. For these states, their formal right to control their borders does not matter much when faced with a political reality where people are compelled to cross borders to alleviate the vulnerability they face in their country of origin.

6.4. Relational self-determination and non-domination

The above argument points to an essential feature of the self-determination objection, namely, that it relies on a particular conception of self-determination. This is a straightforward interpretation of self-determination, understood as non-interference. On this view, a state's self-determination is a function of its liability to external interference. From this perspective, the supranational regulation of migration – indeed, any supranational form of regulation – poses a threat to self-determination. If the state lacks formal authority to regulate a given domain, then it lacks self-determination in that domain. However, as the reader will recall from chapter 4, a one-sided focus on non-interference sits poorly with the overall concerns of the republican tradition. From the republican point of view, and especially from the systemic conception of domination I defended in the last chapter, self-determination should not be understood as simply the absence of formal constraints on action. Instead, it should be understood as the 'positive' capacity to act within a shared institutional system.⁸⁷

The incompatibility between the ideal of non-domination and a narrow conception of self-determination as non-interference was noted by Iris Marion Young in her theory of global governance. As Young puts it, on a 'non-interference model of self-determination, a people or government has the authority to exercise ultimate control over what goes on inside its jurisdiction, and no outside agent has the right to make claims upon or interfere with what the self-determining agent does' (Young 2000, 257). What this model lacks, Young argues, is proper concern for the fact that individual capacities

⁸⁷ For a distinction between negative and positive sovereignty, see Ronzoni (2012).

to act are not merely a function of what agents are ‘left alone to do’. Instead, it is a matter of what they can do from within the relations in which they are embedded (Young 2000, 258). This point was also central to my arguments in favour of a systemic conception of domination in the last chapter. What agents have the power to do is not mainly a function of their individual resources but, instead, of their ability to influence common norms of conduct (e.g., Hurrell 2007, 17). Thus, Young argues, whilst self-determination does entail a presumption in favour of non-interference, it is primarily a matter of whether agents are embedded in social relations that are mutually supportive of their individual capacities to act (Young 2000, 258).

The relational model of self-determination is congenial to republicanism, *and more so than the non-interference model*, precisely because one of the core insights of the republican project is that interference does not necessarily stand in tension with individual freedom (Young 2000, 259).⁸⁸ What matters, according to the republican model is whether that interference is arbitrary, whether it is chosen or rejected without concern for the interests of those it affects. By definition, the introduction of supranational institutions will limit the capacity of states to act unconstrainedly within the domain that institution regulates. From the point of view of non-domination, however, what matters is whether that institution does so in an arbitrary manner. Thus, to return to the case at hand, it is clear that the introduction of a supranational institution for the regulation of vulnerable migration would reduce the capacity of the main participants to the

⁸⁸ To recall, although I am invoking the republican ideal of non-domination, for the purposes of my argument in this thesis I remain agnostic about whether it represents the best interpretation of social freedom. This agnosticism is permissible because, as critics of freedom as non-domination often stress, republican institutions will contribute to the promotion of freedom as non-interference by making freedom, so conceived, more probable (Goodin 2003).

contemporary practice of border control – the EU, Australia, the US – to do as they please. However, it is far from clear that this reduction would be universal across all states. To the contrary, given the systemic features that characterise the current global order, stronger supranational regulation of vulnerable migration would plausibly *strengthen* the capacity of many states to act according to their own will. Thus, the objection to the proposal must be that the power held by such an institution would necessarily be arbitrary: it would give the institution powers that would render states powerless to have their preferences heard on equal terms with other states. But this is a far more questionable claim than the original appeal to self-determination, especially once we consider how our current set of norms structures global relations of power. Far from mutually supporting states' individual scope of action, our current norms demonstrably allow one set of actors to dictate the terms of common interaction without concern for the interests of other states.

Therefore, any claim that a supranational institution for the regulation of vulnerable migration would necessarily wield dominating power must show why this is the case by way of detailed argument. This is not to say that the arbitrariness concern is not real. To the contrary, designing global regulatory institutions in ways that allows each state the proper channels to voice their concerns is a core task for the international republican project (see Lovett 2018, sec. 4.4; Ronzoni 2017). My point is, rather, that the case for such regulatory institutions cannot be rejected on self-determination grounds without also demonstrating that our current norms are preferable in terms of their *mutual* support of states' capacities to act.

By way of conclusion, it is important to reemphasise the dialectic of my overall argument in this chapter. I am not arguing that we should shift to alternative institutional

arrangements for the regulation of migration *because* it will, on balance, increase the value of self-determination. My argument is that objecting to such institutional arrangements on self-determination grounds is ineffective because many states would plausibly see an increase in their institutional capacities because they would no longer be forced to shoulder a disproportionate share of the global responsibilities for vulnerable migrants. But this is not the main argument in favour of shifting to that institution. The main argument in favour of that institution is to alleviate vulnerable migrants from the domination they suffer at the hands of the set of states that can engage in the contemporary practice of border control. Therefore, I conclude that the republican balancing act weighs heavily in favour of empowering such an institution. Not only would it alleviate the domination suffered by individuals, but it would also plausibly work to add to the institutional capacity of individual states.

6.5. Self-determination and supranational regulation

Recall that the point of the present argument has not been to offer a detailed proposal of institutional design. Instead, it has been to argue that we have reason to support the empowerment of a supranational institution for the regulation of vulnerable migration. My argument has been that we have such reason because, unlike what is standardly assumed, the empowerment of such an institution would not conflict with a commitment to self-determination. To the contrary, I have argued that empowering such an institution would likely add to states' capacities for exercising self-determination. Thus, what is standardly presented as the most powerful objection to projects of supranational institution-building turns out to *support* such a project in the domain of global migration. This argument matters because, on the conception of legitimacy I have defended,

establishing the illegitimacy of an institution X requires showing that some other institution Y could perform the regulatory tasks of X in a way that engenders a preferable distribution of risks and benefits to freedom. Thus, the above defence of a principled case for a supranational regulatory institution works to demonstrate the conclusion my arguments in this thesis have been building towards. Given uncontroversial facts about the current global order and the way that order impacts vulnerable migrants, as well as vulnerable states, shifting to a new set of institutions would generate a preferable distribution of risks and benefits to freedom. Such a new set of institutions would yield such a preferable distribution of risks and benefits to freedom because it would revoke the domination migrants are currently exposed to, at the same time as it would contribute to states' capacities for exercising self-determination. The contemporary regulation of global migration is, therefore, scarred by illegitimate exercises of power. I will elaborate on the upshots of this conclusion, as well as offer a run-through of the overall argument of this thesis, in the concluding remarks that follow this chapter.

Let me conclude the present chapter, however, by clarifying precisely why the supranational regulation of vulnerable migration would likely add to, rather than detract from, a commitment to self-determination. This reason is, in fact, well-articulated by the very theorists who would be sceptical of ceding sovereign privileges to a supranational authority. As Yong argues,

(...) the rate of immigration and the skill composition of the entering pool of immigrants tends to affect outcomes in the domestic labor market, the rate of labor productivity, levels of expenditure on social services and the welfare state, levels of government revenue, the size of aggregate economic output, and other outcomes of concern to domestic economic and fiscal policy. Hence, there is a tight functional connection between, on the one hand, a state's capacity to pursue its chosen domestic policy goals and implement its preferred policies and, on the other hand, its

capacity to regulate immigration to its territory. A state that lacks an effective capacity to unilaterally regulate immigration will have its ability to shape relevant economic and social outcomes within its territory according to its members' choice impaired to a significant degree (Yong 2018, 468).

As the debate in analytical political theory tends to proceed, the imagined recipient country that would have their institutional capacities impacted in the way described by increased rates of immigration is wealthy and stable democracies in the Global North. For these states, it might well be true that increased immigration would reduce the extent of their institutional capacities compared to the capacity they currently enjoy. However, as I have argued above, a full assessment of the impact a new norm of regulation has on self-determination must also consider how our current norms of regulation impact self-determination. And once we adjust the imagined recipient of immigration to states like Lebanon, Libya, or Turkey, the picture changes. *According to the same standard* invoked by proponents of strict sovereignty over borders, these states currently have their institutional capacities drastically impacted by the large immigrant populations they shoulder. Note also that insofar as many of these immigrants are refugees coming directly from active war zones, they may not yet be able to take part in the state's labour markets and thus become net contributors. This is a contrast to the wealthy states political theorists typically take as the relevant subject of analysis, since these states largely adopt skills-selective policies that function to ensure that immigrants become net contributors as rapidly as possible.

Empowering a supranational authority for regulating migration would, thus, add to the self-determination of *most* states by ensuring that states' institutional capacities were more equally impacted by responsibilities for protecting vulnerable migrants and integrating them into their political communities. In a word, the institutional capacity lost

by Norway from empowering such an institution is far less than that Lebanon loses under the current system. The supranational authority would be able to ensure such equality of impact by being able to distribute vulnerable migrants between the UN's membership. Note that this does *not* preclude the possibility that some states, for example those closer to conflict zones, could choose to shelter a larger share of immigrants. However, what the institution would also offer is a forum for states to voice their *preferences* in this regard. This point is important because, as I showed in chapter 3, the contemporary practice of border control is characterised by the politics of conditionality: weaker states are impelled to host migrants on behalf of strong states in exchange for financial transfers and political benefits. Thus, contemporary practice, by its very nature, contains a possible tension with Yong's demand that a self-determining state have '*effective* capacity to unilaterally regulate immigration' (2018, 468, emphasis mine). The fact that some states can rely on conditionality to externalise their border regimes raises the question: would weak states agree to host vulnerable migrants on their territories were they not in a position of disempowerment in the contemporary global order?

This question is relevant for republican thinking about international relations because, as I mentioned in chapter 4 there is reason to believe that the contemporary practice of border control involves inter-*state* domination. I have not made the claim that states are dominated under contemporary practice. However, given the fact that many of the states that agree to form 'migration compacts' are in dire need of the financial transfers they receive as a result of their forming these compacts, there is reason to think that the relationship of dependence that is created between the contracting parties gives one party arbitrary power over the other. As should be clear, bringing the regulation of global migration under rule-governed control which would ensure that an equal

distribution of responsibility for vulnerable persons is the *default*, would go a long way in alleviating vulnerability to such inter-state domination. Thus, the supranational regulation of migration would not only alleviate the domination suffered by vulnerable individuals who may be forced to rely on migration for the protection of their basic rights but would potentially also alleviate the domination of states.

Crucially, a supranational institution of the kind I am arguing in favour of would have to be structured in ways that ensured that it did not simply reproduce the power relations – and hence domination – that structure the contemporary global order. To do this, it would have to include strong democratic elements that allow for effective state representation (Young 2000, chap. 8). Such a democratic structure would, in line with the republican justification (Pettit 2012, 218), ensure that each state could take an *authorial* role in designing the rules that structure their common relations. At the same time, such a democratic structure would provide each state an *editorial* role, offering the possibility of keeping the institution itself in check. Politically, this will be no easy task. However, my argument does not hinge on providing a clear blueprint for how we are to move towards such an institution. All that I have had to show – and thus what I am hoping that I have been successful in convincing the reader – is that a project of supranational institution-building is compatible with commitments to the self-determination and thus the non-domination of states. Indeed, I have argued that commitments to self-determination and to non-domination provide positive reason for supporting that project.

CONCLUSIONS: NORMATIVE, THEORETICAL, PRACTICAL

This thesis has sought to provide an answer to the question: is the power involved in the contemporary regulation of global migration legitimate? In response, I have argued that the contemporary regulation of global migration is characterised by a practice that exposes vulnerable individuals to unaccountable power. This power qualifies as dominating power and is, therefore, illegitimate. To summarise, I arrived at this conclusion via the following steps.

I began by drawing a distinction between the function of theories of justice, which is to evaluate institutional rules, and the function of theories of legitimacy, which is to determine which institutions have the standing to enforce rules according to their own interpretations of justice. I deployed this distinction to systematise the debate on migration, arguing that participants have overwhelmingly focussed on the justice of immigration policy. I then offered a hypothesis as to why the question of justice in migration has taken such priority over the question of the legitimacy of border control, namely, that participants to the debate have presumed that the legitimacy of border control follows from state legitimacy more generally. I outlined two general strategies for vindicating this presumption. These strategies aimed to show that states have the so-called right to exclude, one by invoking thick *moralised* accounts of the state and one by invoking thin *descriptive* accounts of the state. I argued against the moralised strategy on the grounds that it struggles to explain why actual states in the real world have the same privileges as the idealised states that these theories appeal to. I argued against the descriptive, or ‘institutionally conservative’, strategy on the grounds that it is bound to conflate justice and legitimacy. By devising principles *for* states as they currently exist, these theories overreach insofar as they claim to vindicate the competences states

currently have. I then considered a response on behalf of institutional conservatism, which worked by offering a rational reconstruction of the state *system*, as distinct from individual states. I argued, however, that this response cannot vindicate the institutional conservative's preferred conclusions. It is far from obvious that a rational reconstruction of the state system could justify strict norms of territorial sovereignty, including full control over borders.

On the basis of these initial arguments, I concluded that border control stands in need of an independent legitimacy assessment. Thus, I next turned to the question of what could confer legitimacy onto states' claim to authority over their borders. I outlined and defended a general account of how to approach this question, which worked by tying legitimacy standards to social power. Drawing on this account, I offered an objection to the standard view in the literature, namely, that border control is rightly held to a minimal non-violation of human rights standard. Since the appropriateness of the minimal standard is normally assumed, rather than positively defended, I reconstructed a strong case in favour of holding border control to the minimal standard. I then showed that this case is bound to rely on an inaccurate picture of border control. In particular, I argued that the case in favour of the minimal standard fails to vindicate the *extraterritorial* and *coordinated* nature of contemporary border regimes. Under the contemporary practice of border control, states exercise unaccountable power that is not captured by the minimal standard. Therefore, I argued, the power involved in the global regulation of migration is subject to a higher standard of legitimacy – one which it currently fails to meet.

This argument posed an obvious question: what is the relevant legitimacy standard for border control? Drawing on republican political theory, I argued that the republican concept of domination offers the theoretical resources for determining when an institution

has accumulated enough power to trigger a demand for a more stringent standard of legitimacy. Conversely, I argued that the ideal of non-domination offers guidance for working out how institutions can satisfy applicable legitimacy standards. Invoking the republican framework required offering a convincing diagnosis of domination in the contemporary regulation of global migration. In response to this task, I showed that the contemporary practice of border control gives a set of states the capacity to arbitrarily interfere with a set of vulnerable individual agents, resulting in relations of domination. I then outlined two powerful objections to my project of using this diagnosis to establish the illegitimacy of the power involved in contemporary practice. The first objection questioned the philosophical coherence of advocating the eradication of domination and the second held that, as a practical matter, any attempt to eradicate the domination I identified would inevitably lead to more domination.

The first objection intended to establish its conclusion by showing that the republican ideal of non-domination is vulnerable to the so-called coalition problem, according to which domination is ever-present because, for any action, there is always a possible world in which its realisation is frustrated by a coalition of agents acting together. Given this, so the objection goes, the ideal of non-domination is incoherent: it simply makes impossible demands. In response to this objection, I showed that it relies on a particular agent-relative conception of social power. I then argued that there are conclusive reasons in favour of discarding this conception of social power in favour of a systemic conception. I then demonstrated how this systemic conception dissolves the coalition problem in a way that retains the concept of domination's critical potential: once we see that power is systemic, non-domination's robustness requirement can be

constrained in ways that blocks the coalition problem from arising at the same time as it can convincingly diagnose cases of domination as such.

The second objection appealed to the value of self-determination to argue that any attempts to rectify the domination I have identified would ultimately lead to more domination. This objection was crucial for my overall project because, on the meta-coordination view of legitimacy I defended, establishing illegitimacy is not only a matter of identifying objectionable concentrations of institutional power: it is also a matter of showing that alternative institutional arrangements could regulate the domain in question in a preferable way. I argued that the domination vulnerable migrants suffer under contemporary practice could only be rectified by empowering a supranational institution. The immediate objection to such a proposal is that it undermines the value of self-determination. However, I showed that this objection misfires: given the systemic constraints that characterise the contemporary global order, there is good reason for thinking that empowering a supranational institution for vulnerable migration would add to, rather than detract from, self-determination. This argument was based on the simple fact that the states that currently shelter vastly disproportionate shares of the responsibility for protecting vulnerable migrants are not in a position to refuse taking on this share. Thus, I argued that empowering a supranational institution for vulnerable migration would yield a fairer distribution of responsibility which would, in turn, lead to an increase in institutional capacity for states in general.

In conjunction, these arguments demonstrate that the power involved in the contemporary regulation of global migration is illegitimate. There are normative, theoretical, and practical implications of this conclusion.

Normatively, individual citizens in the Western world have reason to support a project of institutional reform to the regulation of global migration. In the short term, this requires ensuring that governments live up to the contents of the Global Compact for migration or, in the case of citizens of states that have not adopted the compact, putting pressure on governments to sign up to it. In the longer term, however, we should engage in creative thinking about how institutional design above the state level can be done in ways that do not simply reproduce the domination that is abundant in the contemporary global order.

Theoretically, political theorists should continue their explorations of supranational institutional design, contributing to the conversation of how such institutions can enhance the institutional capacity of all states. More generally, political theorists need to shed methodological nationalist assumptions (Sager 2016). States are currently seeking to exercise power in ways that defies theorising them as territorially bounded jurisdictions (Hirschl and Shachar 2019), and normative assessments of their legitimacy (and justice) should reflect this fact. Another upshot of this is that theorists need to think more carefully about the relationship between illegitimacy in one part of the state's legal order and its general claim to authority. Do citizens have weighty reason to comply with rules issued by a state that wields illegitimate power over outsiders? Apart from a recent contribution by Shmuel Nili (2018), political theorists have generally failed to address this question. However, under conditions of pervasive transnational integration, it is clearly pressing for normative evaluations of the state's claim to authority.

Practically, and most importantly, the illegitimacy I have identified in the contemporary regulation of global migration entails that the world's most powerful states

fail to generate reasons for compliance and non-interference with their border regimes. This conclusion is not to be underestimated. The language around unauthorised migration is often highly moralised. Many question the intent and character of the persons who engage in such migration. A worrying expression of this trend is the rise of extremist organisations across the Western world engaging in vigilantism with the aim of enforcing their state's immigration regimes (Bjørgero and Mareš 2019). Governments are also increasingly seeking to prosecute activists that violate their 'immigration priorities' by assisting vulnerable migrants seeking to cross their borders (King 2019). The arguments in this thesis show that we have fundamental reason to object to these developments. Given the illegitimacy of the power currently involved in the enforcement of states' border regimes, neither vulnerable migrants nor those sympathetic to their claims have moral reason to respect the content of these regimes.

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