

# Neo-Roman Socialism: Assessing Liberty as Non-Domination in Hayek's Political Philosophy

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**Abstract:** One of the most powerful arguments against socialism consists in the claim that it is incompatible with liberty. In the works of F.A. Hayek, this argument is developed in a sophisticated and systematic manner. Hayek's attempt to prove the incompatibility of socialism and freedom relies on a concept of liberty that derives from the tradition of classical republicanism, and bears significant resemblance to the one used by current neo-republicans. To be free means not to be ruled in an arbitrary manner, not to be ruled by people, but by laws. Socialism however, Hayek claims, implies the direct and discretionary rule of bureaucrats over the whole economy, and thereby violates liberty.

The paper will examine this argument in detail, illuminate its connection to republicanism, and refute it. Such a refutation will not be directed against the concept of liberty employed by Hayek; instead, it will be shown that socialism properly implemented can conform to the demands of Hayek's liberty.

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Leftists typically oppose neoliberalism or even capitalism as such, advocating for a more equitable economy. At the same time, many remain committed to the idea of democracy. In fact, capitalism is viewed as hierarchical and undemocratic, and socialism as a means to secure freedom. It is no wonder, then, that the democratisation of economic relations remains a staple goal of the political left. In academic discourse, this project has inspired theoretical models such as participatory economics as developed by Michael Albert and Robin Hahnel.

But while the left attacks capitalism for the sake of liberty, others defend it on the same grounds. Liberals and libertarians often argue that capitalism guarantees our liberties, which are endangered not by the market, but by the state. Socialism, not private ownership, presents the greatest threat to a free society. In its most simplistic form, this argument

points to the myriad of violations against political rights committed by Stalinist dictatorships such as the Soviet Union, the GDR/DDR, China, and North Korea. There are, however, more sophisticated lines of reasoning which strive to prove an inherent incompatibility between socialism and political freedom. In this paper, I will assess one of the most developed examples: Friedrich Hayek's neo-republican case for capitalism.

The first section will shortly deal with the concept of negative liberty/negative freedom and its application by economic liberals. This will provide us with the backdrop against which Hayek's neo-Roman conception of liberty, which will be explained in the second and third sections, can be contrasted. Section four will then trace the way Hayek applies this concept to economics, showing why he believes in the incompatibility of socialism and freedom. Section five will address a common counterargument popular among the neo-Roman left (see Gourevich 2015, , which argues that capitalism fosters domination among the agents of civil society. This argument alone, however, cannot disprove Hayek's line of thought, for if he is right in his claim that any attempt to fight the domination of private interest must engender an even greater source of arbitrary governmental power, we have no choice but to accept capitalism as the lesser evil. The sixth section will finally try to argue that socialism can be made compatible with Hayek's neo-Roman perspective on liberty.

## NEGATIVE FREEDOM

The liberal party of Germany (FDP) argues that we need "freedom instead of restriction" (FDP n.d.). According to the US Libertarian Party, "Libertarians strongly oppose any government interference in your personal, family, and business decisions" (Libertarian Party n.d.). On both cases, a free economy is identified with an economy that is free from government intervention.

Whether they know it or not, both German liberals and American libertarians employ a concept of liberty which was fully developed in Isaiah Berlin's 1958 essay *Two Concepts of Liberty*: negative liberty. It claims that we are "free to the degree to which no man or body of men interferes" with our activities (Berlin 2001, 3). Liberty is non-interference, where interference refers to the active intervention by others, be they individual people or whole groups. It is only "the deliberate interference of other human beings within the area in which I could otherwise act" which can restrict freedom (3). Poverty, illness and similar phenomena may restrict our ability to act, but they do not count as constraints of freedom, at least

not if they cannot be traced back to deliberate human action. Those who are “too poor to afford something on which there is no legal ban” (3) are limited in their practical freedom of action, but they are not deprived of negative liberty.

Once we apply this concept of liberty to politics, governmental rules and regulations count as restrictions of liberty. Apart from a small minority of certain anarchists, people do not commonly believe that human societies can function without such rules and restrictions. Negative liberty can therefore never be fully implemented. It is impossible to enjoy full liberty. The aforementioned German liberals, for example, support many regulations such as customer protections, environmental rules, and strict regulations for so-called ‘Gatekeepers’ of digital infrastructure. Even the Libertarian Party accepts that “force and fraud must be banished from human relationships“ through state power.

While it is impossible to have zero restrictions, liberals believe that we should have as few as possible. This, of course, requires us to balance our freedom against other goods such as distributive justice, healthcare, the environment. Negative liberty, therefore, always implies a tradeoff, and liberalism an attitude which tends to assign a high value to liberty vis-a-vis other goods. Consequently, its adherents seek to minimise—not abolish—governmental interventions in the economy.

Economic liberals view socialism as the most severe form of interventionism, and therefore as antithetical to liberty. The economy, they argue, must be as free as it can be, it must be interfered with as little as possible. Free market capitalism is the freest economy that is conceivable, socialism presents us with the highest degree of unfreedom.

While this perspective is widely popular, it is limited by the shallowness of the Berlinian negative liberty view, and open to attack by leftists who argue in favour of different forms of ‘positive liberty’ or ‘effective liberty’. In the writings of Friedrich Hayek, we find a different approach. Indeed, Hayek does not argue that all interventions compromise freedom. By rejecting negative liberty in favour of neo-Roman or republican ideas, he proposes a more sophisticated perspective on the problems that socialism (and economic interventionism) pose with regard to freedom. In the next section, we will take a look at Hayek’s conception of the rule of law. This will allow us to understand his concept of liberty. This analysis will in turn supply us with the tools necessary to grasp the relationship between liberty and socialism.

## HAYEK AND THE RULE OF LAW

Just like the Libertarian Party, Hayek agrees that government is necessary to protect individuals from “coercion and violence from others”(Hayek 1982, III, 128). But in order to do this, it must secure “the monopoly of coercion and violence” (128), and become “the chief threat to individual freedom” (128). In view of this fundamental problem of the state, Hayek asserts that limitations on its power are necessary. Limitations, however, are different from reductions. The negative liberty view seeks to *minimise* unfreedom, that is to quantitatively reduce it, but Hayek seeks to achieve more; he is occupied with the erection of strict *barriers* to state power. Erecting such barriers does not imply weakening state power across the board. In fact, Hayek, continuing the ordoliberal tradition, argues that the state must create conditions in which economic competition may take place (Hayek 1982, III, 74). It does, however, mean that certain types of government actions are not only reduced, but outright prevented.

At the center of this project is the rule of law. Believing that we are unfree in any society that requires people to obey “specific and particular commands”, Hayek demands a system where order is enforced only through “these abstract rules we call ‘laws’” (Hayek 1978, 149). Those who adhere to a general law are “not subject to another man’s will and are therefore free” (153). The rule of law as commonly understood implies the primacy of laws over actions, especially the primacy of laws over governmental actions. The government must not infringe on laws. There must be a set of “legal codes” (208) which are binding to all and which must be publicly disclosed, for the general public can only be expected to follow rules they know. This also implies that the laws, whatever they may be, need to be determined in advance—one cannot disclose rules which do not exist. So far, the rule of law seems to be a straightforward idea: everyone must abide by the rules, which means that even the government shall not perform acts which are illegal according to the law.

But for Hayek, the rule of law is more than just the primacy of laws over actions, more than “the requirement of mere legality in all government action” (Hayek 1978, 205). Order can be created through general and abstract laws, which apply equally to all. It can also be enforced by the “power of the administrative machine” (Hayek 1978, 195), which can in turn appear either as ‘administrative law’, or as ‘administrative discretion’. The former consists of “rules regulating the activities of the various governmental agencies” (Hayek 1982, 137). In his later work *Law, Legislation and Liberty*, Hayek argues that this law, which always constitutes the

majority of statute, is the older form of written law, emerging when lords and kings had to lay down rules to regulate the behaviour of their bureaucrats and soldiers. Insofar as administrative law only pertains to the internal workings of the state apparatus, it is unproblematic and even necessary. However, when administrative law describes “administrative powers over persons and property”(Hayek 1982, 138), that is, once it gives rise to administrative discretion over civil society, it becomes incompatible with the rule of law.

Administrative discretion refers to the delegation of decision-making powers to specific people or agencies. As it “is evident that not all acts of government can be bound by fixed rules” (Hayek 1978, 213), different parts of the government must be allowed to decide matters on an ad hoc basis. Hayek thinks that this is not problematic “so long as the government administers its own resources” (213):

Nobody disputes the fact that, in order to make efficient use of the means at its disposal, the government must exercise a great deal of discretion. But, to repeat, under the rule of the law the private citizen and his property are not an object of administration by the government, not a means to be used for its purposes. It is only when the administration interferes with the private sphere of the citizen that the problem of discretion becomes relevant to us; and the principle of the rule of law, in effect, means that the administrative authorities should have no discretionary powers in this respect. (Hayek 1978, 213)

According to Hayek, “in all instances where administrative action interferes with the private sphere of the individual“ (213) we should have the right to contest such an action through an appeal to court. It is normally held that when such an appeal has been made, the judges shall simply determine whether the action of the administration is compatible with the law. But Hayek wants to go further, claiming that “the courts must have the power to decide not only whether a particular action was *infra vires* or *ultra vires* but whether the substance of the administrative decision was such as the law demanded” (214).

This limitation on the power of the state is the first essential condition of liberty, and it is a much more substantive requirement than the criterion of mere legality. In any case where the law neither necessitates nor disallows the use of coercion by government agencies, coercion may not be used. Under mere legality, the government may coerce members of civil society however it likes, as long as this does not violate a law. Under Hayek’s rule of law, however, the inverse is the case. The government may

only interfere if the law *forces* it to do so. Ordinary people may only be interfered with if they commit a crime or in any other case where a law clearly stipulates that the government must step in. The decision whether to interfere with citizens shall not be delegated to the executive branch with its ministries and/or to government agencies. This strict limitation of the way in which government may interfere leaves little room for administrative discretion and arbitrariness.

Government, Hayek maintains, “must never coerce an individual except in the enforcement of a known rule” (Hayek 1978, 205). This, of course, is a much stronger requirement, meant to prevent any meddling of the administrative branch (214). At the core lies his belief that “under a reign of freedom the free sphere of the individual includes all action not explicitly restricted by a general law” (216). Coercion is only ever acceptable when it “conforms to general laws”, it is illegitimate when it is used as a “means of achieving particular objects of current policy” (214-215).

The rule of law also implies *equality before the law*. This means that only “general, abstract rules” can be “laws in the substantive sense” (Hayek 1978, 208). Such rules must contain “no references to particular persons, places, or objects” (208). A law that states that the speed limit applies to everyone but the president’s son, or that the inhabitants of San Francisco shall pay double taxes, is incompatible with the rule of law because it violates this equality requirement. This provision addresses one of the criticisms levied against Hayek by Ronald Hamowy, namely that the Hayekian rule of law allows for unequal treatment when it comes to military conscription (Hamowy 1961, 50).

While he states that the principle of equality before the law cannot be exhaustively defined, that “no entirely satisfactory criterion has been found that would always tell us what kind of classification is compatible with equality for the law” (Hayek 1978, 209), Hayek nevertheless regards it as an important foundation of liberty. We will discuss the equality requirement at a later point, as it plays an important role in his attacks against socialism. Here, it suffices to say that legitimate coercion must “serve general and timeless purposes, not specific ends”, and that it “must not make any distinctions between different people” (226).

### **HAYEK AS A NEO-ROMAN PHILOSOPHER**

According to the negative liberty perspective, freedom is to be identified with the absence of interference. But for Hayek, freedom exists in the rule of law, that is in the rule of rules. Some forms of intervention, therefore—

those which are based on proper law—are conducive to freedom. In *The Constitution of Liberty*, Hayek expresses the view that the “alteration of those rules or the passing of a new rule by the legislature” does not threaten liberty, provided that the rule is applied “equally to all people for an indefinite period of time” (Hayek 1978, 211). It is only discretionary or otherwise *arbitrary* power that threatens our freedom. Freedom is compromised by “the exercise of coercive power of government which was not regular enforcement of the general law and which was designed to achieve a specific purpose” (211). According to Hayek, the “habitual appeal to the principle of non-interference in the fight against all ill-considered or harmful measures” (Hayek 1978, 221) only serves to blur “the fundamental distinction between the kinds of measures which are and those which are not compatible with a free system” (221). Opposing the “old formulae of laissez faire or non-intervention” (Hayek 1978, 231), he insists that the deciding factor shall not be whether intervention takes place or not, but whether it is based on general rules or arbitrary will.

Hayek’s perspective on liberty has been criticised by libertarian philosophers such as Roland Hamowy for allowing the violation of certain ‘basic freedoms’ and allows ‘coercive acts’ such as “conscription, interference with the economy [...] and alteration by fiat of the social structure” (Hamowy 1961, 50–51). Such a complaint, however, betrays a fundamental misunderstanding of the theoretical presuppositions embraced by Hayek. Hamowy’s criticism is valid only insofar as we accept the concept of negative liberty. Hayek, as Sean Irving (2020) has pointed out, is informed by a very different perspective, the ‘neo-Roman’ concept of liberty. Only by taking a closer look at neo-Roman liberty can we properly assess Hayek’s claims and the underlying logic they are based on.

Currently, the most prominent proponents of neo-Roman liberty are the neo-republicans Philipp Pettit (1997a) and Quentin Skinner (1998). Drawing inspiration from classical republicanism, they argue that liberty should be conceptualised as *non-domination*. Pettit speaks about the ‘republican’ concept of liberty, while Skinner uses the term ‘neo-Roman’. We will use the latter term in order not to confuse non-domination with classical republicanism as a world-view, which goes far beyond the rejection of relations of domination. In classical republicanism, non-domination is embedded in a more expansive concept of political health, virtue, and corruption. “The confrontation of ‘Virtue’ with ‘corruption’” (Pocock 1975, ix) is indeed central to the ‘Machiavellian vocabulary’ from which the classical republicanism of early modern constitutional thought derives. This

vocabulary can still be observed in the writings of the British Commonwealthmen (see Robbins 1968), American revolutionaries (see Wood 1972, Huyler 1995) and in Rousseau's writings, having vanished only in the early 19th century. This broader context is often neglected in the works of Skinner and especially Pettit, who shares neither the language of virtue and corruption, nor the other aspects of classical republican thought such as opposition to professional armies (Pocock 1975, 124–200; Robbins 1968, 30) and luxury (Robbins 1968, 30).

Despite this, understanding the neo-Roman concept of liberty as conceptualised by Skinner and Pettit will allow us to better understand what Hayek means when he talks about arbitrary power and the rule of law. It will also illuminate his debt to the classical republican ideas developed by early modern philosophers such as Machiavelli (2007) and Harrington (1771).

What does the neo-Roman concept of liberty entail? Domination, in the words of Pettit, “is exemplified by the relationship of master to slave or master to servant” (Petit 1997a, 31). It implies “that the dominating party can interfere on an arbitrary basis with the choices of the dominated” (31). Ancient Roman literature stresses the importance of the distinction between *liber* (free person) and *servus* (slave), which was based on the belief that to be free means not to be a slave, and not in a situation that is structurally similar to slavery. Liberty is “the status of someone who, unlike the slave, is not subject to the arbitrary power of another” (31). Domination therefore does not require interference; a slave that is not actually interfered with because they are subject to a benevolent master is nevertheless unfree (22–23).

Being dominated is antithetical to freedom because it will always create dependence. Even if the master does not actually interfere with the slave, the mere possibility of interference will engender submissive behaviour, a kind of anticipatory obedience to the supposed wishes of the dominator. Those who are dominated know that they are “at the mercy of the powerful and not on equal terms” (61). Under an authoritarian regime, for example, journalists will not dare to criticise the government, even if actual interference is sparse. They know what is expected from them and behave accordingly.

Dependence on the whim of some person, group, or institution constitutes an evil in itself, irrespective of whether actual intervention is frequent or not. Hayek expresses precisely this opposition to arbitrary power when he claims that liberty is “the state in which man is not subject to

coercion by the arbitrary will of another or others” (Hayek 1978, 11). He is deeply concerned about the “arbitrary power of the executive” (196), and believes that only a strict adherence to abstract laws can prevent it from becoming “a self-willed and uncontrollable apparatus before which the individual is helpless” (262). The belief that coercion does not require intervention actually taking place, that arbitrary power alone is enough to compromise freedom is an important element of the Hayekian perspective (Irving 2020, 557). This extends to Hayek’s belief that the Fall of Rome was caused by the reintroduction of arbitrary power through the emperors (see Irving 2021, 68).

Hayek, Skinner and Pettit all agree that liberty as non-domination was the original European idea of liberty, only to be later displaced by liberty as non-interference. Furthermore, Hayek agrees with the claim that liberty is precisely that which the slave does not possess:

It so happens that the meaning of freedom that we have adopted seems to be the original meaning of the word. Man, or at least European man, enters history divided into free and unfree; and this distinction had a very definite meaning. The freedom of the free may have differed widely, but only in the degree of an independence which the slave did not possess at all. It meant always the possibility of a person's acting according to his own decisions and plans, in contrast to the position of one who was irrevocably subject to the will of another, who by arbitrary decision could coerce him to act or not to act in specific ways. The time-honored phrase by which this freedom has often been described is therefore ‘independence of the arbitrary will of another’. (Hayek 1978, 12)

Administrative discretion unchecked by the law, the evil which Hayek opposes so ardently, is clearly a form of arbitrary power (Irving 2021, 111). This is recognised by neo-Romans. According to Skinner, the tradition claims that “if you live under any form of government that allows for the exercise of prerogative or discretionary powers outside of the law, you will already be living as a slave” (Skinner 1998, 70). Under such conditions, a benevolent government might “choose not to exercise these powers” (70) or to use them to the public benefit. Still, “the very fact [...] that those rulers possess such arbitrary powers means that the continued enjoyment of your civil liberty remains at all times dependent on their goodwill” (70).

In the sense that domination can exist without interference, the neo-Roman concept of liberty is more demanding than negative liberty. At the same time, however, it is also more permissive. Just as there can be non-

interfering dominators (Pettit 1997a, 24), there can also be non-dominating interferers. Those non-dominating interferers wield non-arbitrary power. The best example here are interferences which result from the application of a proper law.

Laws are only meaningful when they are enforced (even the deterrent effect depends on frequent enforcement) and thereby necessitate intervention against those who break them. It follows that viewed from the perspective of the negative liberty tradition, laws always compromise liberty. They can be justified with regard to other goods, which have to be balanced with liberty. Neo-Romans, however, disagree here. They claim that laws can create and increase freedom as long as they “respect people's common interests and ideas and conform to the image of an ideal law” (Pettit 1997a, 36). The laws shall not be “the instruments of any one individual's, or any one group's, arbitrary will” (36). This position perfectly mirrors Hayek's position, who, as we have seen, does not oppose interference as such, but only interference which is based on administrative discretion (Hayek 1978, 221-231). The sum of abstract laws or the *nomos*, epitome of non-arbitrary power, can require significant interventions without compromising freedom. Hayek insists that “we are not subject to another man's will and are therefore free”(153) when we obey proper laws. He regards “coercion according to known rules” (21) as not oppressive, because it can be “an instrument assisting individuals in the pursuit of their own ends and not a means to be used for the ends of others” (21).

### **HAYEK'S CASE AGAINST SOCIALISM**

As we have seen, the notion of liberty that Hayek embraces does not imply that all governmental interventions reduce liberty. This, of course, also applies to the economy. In contrast to more mainstream economic liberal and libertarian positions, intervention in the economy as such is not a problem for Hayek, at least not when it comes to questions of liberty:

Freedom of economic activity had meant freedom under the law, not the absence of all government action. The ‘interference’ or ‘intervention’ of government which [Adam Smith and John Stuart Mill] opposed as a matter of principle therefore meant only the infringement of that private sphere which the general rules of law were intended to protect. They did not mean that government should never concern itself with any economic matters. But they did mean that there were certain kinds of governmental measure which should be precluded on

principle and which could not be justified on any grounds of expediency. (Hayek 1978, 220–221)

As we can see, the regulation of the economy itself is not a problem (of liberty, at least) if implemented in a manner respecting the rule of law. Through general rules alone, the government can establish an environment within which individuals and corporations may act undisturbed by ad-hoc administrative decision-making. We cannot but notice the parallels to the ordoliberalism of Walter Eucken (1959) and Franz Böhm (1937), which likewise seeks to restrict state activity to the creation of a general legal framework while leaving concrete decisions to market participants.

Far from supporting the “old formulae of laissez faire or non-intervention” (Hayek 1978, 231), Hayek affirms the neo-Roman idea that arbitrariness, not interference, is objectionable. In *The Constitution of Liberty*, he allows different government activities that adherents of negative liberty would see as problematic: “provision of a reliable and efficient monetary system” (Hayek later changed his mind about this), “setting standards of weights and measures”, and “providing of information” (223). Insofar as they are based on clear rules, those activities serve to “provide a favourable framework for individual decisions“. Hayek even tasks the government with “health services”, “the construction and maintenance of roads”, and “the amenities provided by municipalities for the inhabitants of cities” (223). It shall also “take the initiative, in such areas as social insurance and education” (258). In all of those cases, there exists a specific reason why the market cannot provide the services needed by society. In addition, there can be legislation pertaining that enforces safety measures and other general requirements that economic agents must satisfy:

Furthermore, a free system does not exclude on principle all those general regulations of economic activity which can be laid down in the form of general rules specifying conditions which everybody who engages in a certain activity must satisfy. They include, in particular, all regulations governing the techniques of production. (Hayek 1978, 224)

General rules must, of course, be applied to the specific case at hand. One might argue that this creates a space for administrative discretion. However, while “the manner in which the authorities may have to act cannot be foreseen”, it is nevertheless clear that the correct action “once a certain situation has arisen, can be made predictable to a high degree”

(225). The law cannot enumerate all possible cases with complete precision, but where problems arise, the correct decision follows rather clearly from the specifics of the case and the spirit of the rule, and should, in any case, not be entrusted to the executive branch of government, but to independent courts:

The destroying of a farmer's cattle in order to stop the spreading of a contagious disease, the tearing-down of houses to prevent the spreading of a fire, the prohibition of an infected well, the requirement of protective measures in the transmission of high-tension electricity, and the enforcement of safety regulations in buildings undoubtedly demand that the authorities be given some discretion in applying general rules. But this need not be a discretion unlimited by general rules or of the kind which need to be exempt from judicial review. (Hayek 1978, 225)

We can summarise that far from being an expression of laissez faire liberalism, Hayek's views on liberty are shaped by republican concerns. He believes that socialism must necessarily dispense with the rule of law, that it implies our total subordination to the arbitrary will of government. This is the case firstly because of the aims of socialism—an equitable distribution of wealth—and secondly because of the means it employs—full public control over the economy.

First and foremost, Hayek criticises socialism on the grounds that it strives to implement a society where some specific ends are being met. Abstract rules such as those that the rule of law requires are, for Hayek, always “end-independent”, meaning that they do not serve any known particular goals (Hayek 1982, II, 5-31). The prohibition of censorship, for example, does aim to prevent the censoring of any specific opinion. Whether it will serve the left or the right, the liberals or the conservatives cannot be known in advance. It is precisely the fact that abstract rules “serve unknown ends” (15) which makes them universally agreeable and keeps them from being tyrannical. Hayek seeks to implement something akin to John Rawls' veil of ignorance. It is precisely our lack of knowledge with regard to the factual consequences of the rules we implement which makes them unsuitable as means of arbitrary power. This is what differentiates a *nomocratic*, that is rule-based society from teleocracy, where the state implements specific goals and serves to special interests.

Hayek's opposition to a state which serves special interest is firmly rooted in neo-Roman ideas and has its precursors in classical republicanism. Here, it is important that we resist the temptation of projecting back

20th century notions onto the authors of the early modern period by dividing them into ‘commercial’ and ‘left-wing’ positions. Instead, there was an accepted canon of republican ideas which do not map onto contemporary debates between libertarians, liberals, and socialists. In fact it is Rousseau perhaps more than anyone else who shares the Hayekian conception of the rule of law. Hayek, who generally opposed Rousseau as a “rationalist constructivist” and proto-socialist, begrudgingly admits this (Hayek 1982, III, 102).

One of the most complete accounts of Rousseau’s concept of the rule of law can be found in Philip J. Kain (1990). Far from being the tyrannical instrument it is usually presented as, the *general will* must be “applicable to all” (Rousseau 2002, 174) in the same manner, upholding the “equality of rights” (174) by not being directed toward “some individual and specific object” (174). The sovereign may only deal with “abstract and universal questions” (Kain 1990, 318). Clearly, this is a formulation of the idea of equality before the law that is, as we have seen, espoused by Hayek. Furthermore, the questions that the sovereign deals with must be formulated in a way which aims not at the disclosure of their particular goals, but at their opinion about what would be beneficial for society as a whole:

The citizens, in being asked to cast a vote, are not being asked to express their particular interests; they are being asked to engage in a reflective, intellectual inquiry. [...] In other words, the question must be put so as to ask the citizen to reflect on an intellectual matter—the citizen must give an opinion on what is right. (Kain 1990, 318)

While some might claim that such a focus on the good of society alone is illiberal due to its exclusion of individual interests, Hayek interestingly expresses precisely the same sentiment:

Legislation proper [...] should not be governed by interests but by opinion, i.e. by views about what kind of action is right or wrong—not as an instrument for the achievement of particular ends but as a permanent rule and irrespective of the effect on particular individuals or groups. (Hayek 1982, II, 112)

Just like Hayek, Rousseau does not want to exclude particular interest from the state. Particular goals might still be pursued privately; they can just not be enforced through governmental coercion. No one has the right to use the powers of the state in order to force others to comply with their particular goals. The conception of the general will is therefore not,

as has often been claimed, a totalitarian device by which Rousseau seeks to justify tyranny. On the contrary, Rousseau formulates a criterion that severely limits the use of state power. For Rousseau as for Hayek, the state shall not be an instrument of special interests. Instead, it can only lay down abstract rules aiming at the general interest of society.

Now socialism, according to Hayek, does not strive to implement a set of neutral rules. It aims to directly realise a number of concrete goals. Indeed, this is true for all political currents which advocate for some form of distributive justice. To demand that everyone should get the same, or that everyone should get what they deserve, or that the distribution of wealth should be more equitable, means to aim at a specific outcome (Hayek 1982, II, 64). Instead of arguing for a set of abstract rules and accepting the outcomes dynamically generated by those rules, they desire a determinate end state. Those who strive for distributive justice will inevitably feel compelled to “determine the material position of particular people” (Hayek 1978, 231). It is “the very nature of their aim” (232) to “favour discriminatory and discretionary action”(232). The demands that the rule of law places upon government—equality before the law and the absence of administrative discretion—are thereby incompatible with the socialist aim to achieve full equality (or any other ‘just’ distribution of income, for that matter). Such a programme is incompatible with the ‘no-mocratic’ approach which is for Hayek fundamental for the rule of law, and therefore an indispensable ingredient of a free society in the neo-Roman sense.

Under socialism, the private sector is abolished, and thereby also the market. To “approach even remotely the ordering function of the market”, the government has to “co-ordinate the whole economy” (Hayek 1978, 282). It has to create a “centrally planned and administered system“ where all power emanates “from a single central authority” (282). It is clear that the administration of the economy can not proceed by simply applying abstract rules. Decisions have to be taken about a myriad of different things, from the allocation of resources to the layout of factories. Under capitalism, many of those things are regulated by the impersonal forces of the market. Those decisions which have to be taken by humans are decentralised. It is not the government which decides, but the managers of different, competing forms. Under socialism, Hayek argues, neither the market nor independent companies exist, so that all relevant decisions must be taken by the state. This, evidently, is the ultimate form of

arbitrary power. The governmental planning board would have full administrative discretion with regard to every detail of economic life.

### IS CAPITALISM FREE FROM DOMINATION?

While Hayek uses a neo-Roman approach to defend capitalism, the same set of ideas can be used to attack the capitalist economy. Historically, republican or neo-Roman concepts have been central to the political outlook of the left. Rousseau, for example, talks about the corruption of the citizens of Rome and Sparta, whose votes were bought by the rich (Rousseau 2002, 239). Even more dangerous was excessive wealth, which combined with the introduction of a professional army would allow the powerful to “enslave their country” (220–221). Similar concerns moved the Country faction during the Court-Country controversy in England, and the Jeffersonians when they opposed Hamilton’s plans. Wage workers, Jefferson argued, would be dependent upon their masters and therefore be unable to act as independent citizens (Jenkinson 2004, 26–27). This way the republic would be corrupted. Under the classical republican framework from which the neo-Roman concept of liberty is derived, one cannot separate domination by the state and domination within civil society, as both are opposed precisely because it is believed that they cause corruption:

To become the dependent of another was as great a crime as to reduce another to dependence on oneself. The dereliction of one citizen, therefore, reduced the others’ chances of attaining and maintaining virtue, since virtue was now politicised; it consisted in a partnership of ruling and being ruled by others who must be as morally autonomous as oneself. In embracing the civic ideal, therefore, the humanist staked his future as a moral person on the political health of his city. (Pocock 1975, 75)

From the French Revolution to the writings of Karl Marx, critics of economic liberalism have been preoccupied not so much with questions of social or distributive justice, but with republican liberty. Capitalists were portrayed as dominators, and the working class described as living under conditions of slavery. When it comes to state power, leftists such as Anarchists and Marxists were extremely critical of centralisation, unchecked power, and bureaucratic discretion—at least before the rise of Stalinism and economic interventionism.

The connection between neo-Roman republicanism and the left is most apparent in the so-called *Labour Republicans* whose contemporary popularisers, among them Alex Gourevich (2015) and Tom O’Shea (2020),

explicitly count themselves as members of the neo-Roman tradition. They argue that capitalism creates power imbalances which allow employers and landlords to dominate workers and tenants, and thereby gain arbitrary power over them. Generally, even more moderate republicans such as Pettit and Skinner can be seen as left-leaning.

Blandine Kriegel (1995) differentiates between two forms of domination, which she calls *imperium* and *dominium*. Imperium here refers to the domination caused by the state and denotes the arbitrary power held by government officials and agencies over individuals and groups. To be subject to imperium means to be subject to the arbitrary will of the state and its functionaries. Dominium, on the other hand, refers to the domination exercised by members of civil society over other members of civil society (see Irving 2020, 564). According to Pettit, dominium can exist between employer and employee, husband and wife, or landlord and tenant (Pettit 1997a, 138-143). In all of those cases, a dominator (employer, husband, landlord) can exercise considerable and arbitrary power over their respective counterpart (employee, wife, tenant). The idea of dominium fits the neo-Roman idea that the slave is the perfect example of unfreedom. Slaves, more often than not, were dominated not by the government, but by their masters.

Leftist arguments which point to the dominium created by capitalism, however, cannot make Hayek's points go away. If Hayek is right in his claim that socialism must necessarily create an all-powerful state which is forced to abolish the rule of law and therefore implement absolute imperium, any sane neo-Roman would prefer to live under the yoke of capitalists and landlords than under tyrannical bureaucrats. While the former can at least be exchanged for their competitors because they provide "only one opportunity among many" (Hayek 1978, 136), the armed forces of a tyrannical government are harder to escape.

### **CAN SOCIALISM BE NEO-ROMAN?**

In order to make socialism and neo-Roman liberty compatible, it does not suffice to point to the forms of arbitrary power which capitalism creates. We must also be able to show that socialism does not always lead to the forms of absolute state power that Hayek envisions.

Hayek's first argument for the incompatibility of socialism and freedom presupposes that unequal outcomes are naturally produced under every possible system of rules, so that equal outcomes can only ever be achieved through constant arbitrary intervention and the unequal

treatment of persons. In order to make his neo-Roman case against equitable distributive patterns, Hayek must presuppose that it is impossible to achieve this goal by a set of abstract and non-discriminatory rules alone. It is unclear, however, why this should be the case.

A rule-based, nomocratic system which can implement relative distributive equality could rely, for example, on an abstract law that determines a certain 'general wage'. Such a law could, in its crudest form, stipulate that everyone is to be paid the same fixed amount of money. This is not to say that this would be beneficial from an economic standpoint. What is relevant to the argument is only that such an arrangement would guarantee equality of outcome while preserving equality before the law.

Now we can proceed to the second argument. The public sector is for Hayek always a source of *imperium*, because it allows the government to directly and arbitrarily interfere with the life of its citizens. The more of the economy is controlled by the public sector, the more pervasive the power of administration over civil society. The full abolition of private enterprise as advocated by socialists is the most radical assault on liberty. It implies full governmental control over *all* economic activity. Under such conditions, civil society would cease to exist. If we accept that administrative discretion is dangerous, then this can only appear as a grave threat to liberty.

Hayek's argument, however, suffers from similar problems as his purely economic critique of socialism. In both cases, he can only conceive of a socialist economy as a command economy in the strictest sense, a system of direct control where every decision results from the will of a planning body with infinite power. Such an agency would micromanage economic processes at its own discretion and in accordance with the will of the executive branch. All non private institutions would become pawns of some government ministry and therefore part of the state apparatus. Under such conditions, the head of the executive branch—the prime minister or president—could direct the whole economy as they see fit. The dangers inherent in such an arrangement are obvious, and grave indeed. It would be preferable to have capitalism, which at least allows for a certain degree of independence in civil society and the economy.

However, a closer look reveals that Hayek presents us with a false dichotomy, that he makes a caricature out of socialism. Socialists do indeed demand that the means of production shall be publicly held, but this does not imply that they must be controlled by *the executive branch*. The property of not being private property does not entail, by any logic, the

property of belonging to the state apparatus or the administrative state. Logically, there is no reason why public (non-private) enterprises could not be independent of all political influence. Likewise, empirical reasons for the same incompatibility claim have not been put forward; Hayek simply assumes that independence is unthinkable in the absence of private property.

But non-private, non-governmental institutions do exist. We find them not in voluntary associations such as worker-owned companies (worker's cooperatives) or NGOs, which are still strictly speaking private organisations, but in the so-called statutory corporations.<sup>1</sup> One of the best examples would be the BBC in the United Kingdom. The British understood that the task of informing the public is too important to leave it to business interests. It follows that the BBC does not have private owners. At the same time, the government could not be trusted with this crucial task, as it would surely feel tempted to spread propaganda in its favour. The BBC is established under a royal charter, its mission defined by abstract and general laws. It is not subordinated to any ministry, it is independent from direct governmental influence, and thereby not subject to administrative discretion. The executive branch has no means to decide which programs the BBC shall broadcast. Laws, and only laws, define the framework in which the BBC must operate. Administrative decisions are up to its own staff, which is selected in accordance to its own rules. Similar structures exist in Germany, for example, where the public service television broadcasters ARD and ZDF are non-private, and at the same time independent from government intervention ('öffentlich-rechtlich').

Another example for non-private institutions which are protected against executive branch meddling are, of course, the courts. They exist, they are independent of the particular will of the executive, and they are certainly not private enterprises.

Hayek's legal philosophy presents a clear case against state enterprises. But as we have seen, not all public enterprises must at the same time be controlled by the state. Far from serving as a rebuttal of socialism, Hayek's neo-Roman ideas provide socialists with important insights on how to build the institutions of a future society. They showcase why we should prefer independent statutory corporations to those which are

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<sup>1</sup> An economy based on such corporations would solve one of the major problems that socialists talk about: the exploitation of the working class and the profit making of those who already have access to capital. It remains to debate in what sense such an approach would get rid of or reestablish the 'anarchy of the market'.

directly controlled by the government, and therefore threaten to dominate civil society.

Hayek's opposition to the centralisation of administrative powers in the economy can even be used as an argument *for* socialism. At least in some sectors, market economies necessarily give rise to monopolies which have the ability to set prices at will. Thereby, society is dominated by a cartel, which from a neo-Roman perspective fatally compromises its liberty. The problem of monopolies and the difficulties of combating them without resorting to administrative tyranny is acknowledged by Hayek:

So far as the enforcement of general rules (such as that of non-discrimination) can curb monopolistic powers, such action is all the good. But what can be done in this field must take the form of that gradual improvement of our law of corporations, patents, and taxation, on which little that is useful can be said briefly. I have become increasingly skeptical, however, about the beneficial character of any discretionary action of government against particular monopolies, and I am seriously alarmed at the arbitrary nature of all policy aimed at limiting the size of individual enterprises. (Hayek 1978, 265)

Socialists, however, can get rid of the problem. Under a socialist economy, where the responsibilities of different statutory corporations are clearly delimited by law, provisions can be made that prevent any of those corporations to simply buy off others. Such an arrangement can hardly be practical under capitalist conditions; the buying and selling of assets (means of production) is a necessary part of the economic whole. This is evidenced by the failure of antitrust legislation.

From a republican perspective, monopolies are far from harmless. They create dependencies. If an essential good is monopolised by a single company, government agencies need to create close ties with its management. Business leaders and public officials thereby become mutually dependent upon each other. In the republican language of Machiavelli (2007, 60, 78, 85), Rousseau (2002, 201, 206, 241), and Paine (1894, 50, 132, 141), this is nothing short of a recipe for corruption.

Classical republicans have warned us of the dangers posed by the centralisation of power, which always leads to the imposition of arbitrary will onto civil society. This is just as true with regard to economic power as it is with political force. The old neo-Roman concept of liberty that Hayek seeks to revive can provide good reasons to take a critical look at capitalism.

## A DIFFERENT PERSPECTIVE

The idea that socialism creates unfreedom by centralising economic decision-making powers in the hands of the government, endowing it with total control over society is one of the most potent arguments that can be levelled against those who strive to abolish capitalism. It not only portrays the left as an advocate of unchecked arbitrary power, it also suggests a systematic connection between socialist theory and 20th century totalitarian practice. Should it be true, then we can conclude that all socialists promote tyranny and oppression, whether they do it willingly or unknowingly.

No one has made a stronger case for the inherent connection between freedom and capitalism than F.A. Hayek. This paper does not aim to ignore, belittle, or reject the concerns that he voiced. On the contrary, it wholeheartedly accepts the neo-Roman criteria that he applied in his attack against socialism. However, as we have seen, the liberty-based argument against socialism that Hayek proposes only works if we assume that socialism implies the eradication of civil society, economic competition, and decentralised decision-making in favour of a centralised bureaucratic planning. It is far from certain that this is the only possible form of socialism. For those who believe in neo-Roman liberty, there is another way to build socialism, one that involves the rule of law, independent enterprises, and the absence of arbitrary political intervention. The absence of such a vision has engendered a false dichotomy.

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