

# A Further Defence of the Right Not to Vote

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**Abstract** Opponents of compulsory voting often allege that it violates a ‘right not to vote’. This paper seeks to clarify and defend such a right against its critics (Lardy in *Oxf J Leg Stud* 24:303–321, 2004; Hill in *Aust J Polit Sci* 50:61–72, 2015a; in *Crit Rev Int Soc Polit Philos* 18:652–660, 2015b). First, I propose that this right must be understood as a Hohfeldian claim against being compelled to vote, rather than as a mere privilege to abstain. So construed, the right not to vote is compatible with a duty to vote, so arguments for a duty to vote do not refute the existence of such a right. The right against compulsion is most easily defended within a liberal framework, hence its critics often appeal instead to a republican conception of freedom. In the latter part of the paper, I argue that even these republican arguments are inconclusive. Even non-dominating interference still conditions freedom, which may require justification. Further, citizens can live up to republican ideals, so long as they are vigilant; they need not actually vote. Thus, republican arguments fail to refute a right not to vote.

**Keywords** Voting · Turnout · Compulsion · Lisa Hill · Republicanism · Rights · Abstention

## Introduction

According to an influential tradition, individuals have rights that limit what can be done to them, without their consent, to promote social ends (Nozick 1974; Dworkin 1977). Thus, if a better democratic system could be had only at the cost of enslaving some portion of the population, this would be unjust. Similarly, if individuals have

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rights *not* to vote, it would be unjust to force them to do so, *even if* it improved democracy. Of course, I do not mean to suggest that compulsory voting is on a par with slavery. Nonetheless, if there is such a right, this would be an important—perhaps decisive—objection to compulsory voting. Unsurprisingly, advocates of compulsory voting have rejected this right (Hill 2002, 2015a; Lardy 2004). These efforts are hampered, however, by the fact that this putative right—though invoked in public discourse—has received little philosophical analysis or defence. My aim in this paper is to clarify and defend a right *not* to vote against these critics. I aim to show that, when properly analysed, this right is more plausible than critics have supposed and that certain objections to it miss their intended target.

The next two sections explain the motivation for this paper within current debates around compulsory voting, by presenting existing debates over compulsory voting in general and, in particular, addressing whether compulsory voting violates the right not to vote. Though some advocates of compulsory voting have claimed that legal compulsion is consistent with a right not to vote, I argue that this is unconvincing. Therefore, whether there is a right not to vote is of crucial importance.

In ‘Clarifying Rights’, I introduce Wesley Hohfeld’s typology of jural relations to clarify what a right not to vote might mean. One possibility is that it refers to a privilege not to vote (i.e. a denial of a duty to vote), but this would not be an objection to compulsory voting. Hence, I argue that the right not to vote—if it is to do what those who invoke it want it to do—should be understood as a claim not to be forced to vote. The arguments of this section partially repeat ones that I have made elsewhere (Saunders 2017), so that this paper stands alone, but the present paper goes further than previous work in showing how this understanding of the right defeats certain objections, as well as in the later arguments defending this right.

Having clarified the right not to vote, the final section seeks to defend the right not to vote. I do not seek to establish for certain that we have this right, since this may require a complete account of all rights. However, I aim to rebut certain recent criticisms of this right, showing that many misunderstand this right. I pay particular attention to arguments based on a republican conception of freedom (Lardy 2004; Hill 2015b), which seek to show that the compulsion involved in compulsory voting need not infringe people’s freedom. While many objections to compulsion—including my own (Saunders 2017)—assume a liberal or ‘negative’ conception of freedom, I argue that a republican conception of freedom as non-domination does not necessarily support compulsory voting either. The right not to vote, when properly interpreted, is more plausible than critics suggest. If advocates of compulsion wish to reject such a right, they need to focus on it as understood here (a claim not to be forced to vote), rather than simply denying the privilege to abstain (which merely amounts to defending a duty to vote).

## Background

Arguments over compulsory voting frequently focus on its supposed benefits. For instance, advocates of compulsory voting argue that it leads to more accurate representation of all social groups and greater public engagement with politics

(Lijphart 1997; Hill 2002; Birch 2009), while critics dispute whether higher turnout is necessarily better than lower turnout (Lever 2010; Saunders 2012). However, those who assert a right not to vote seek to sidestep these debates. If compulsory voting violates citizens' rights, then it is unjust, even if it improves democracy. Whether there is indeed a right not to vote, and what exactly this amounts to, is therefore of crucial importance in debates over compulsory voting. Yet, while the right to vote is generally seen as central to any democratic society, the idea of a right *not* to vote has received less attention.<sup>1</sup>

The notion of a 'right not to vote' can be traced back to at least 1871 (Conant 1871a, b). However, Conant's understanding of this right was very different from that proposed here. He assumed that all those possessing a right to vote were duty-bound to exercise it (Conant 1871a, p. 72; b, p. 216). Thus, one either has both a right and a duty to vote, or neither. Hence, his 'right not to vote' requires disenfranchisement. Conant's argument was that women should not be enfranchised, to spare them this duty. However, one can have a right without having a duty to exercise it. Perhaps some citizens have a duty not to vote, as argued by Sheehy (2002) and Brennan (2009), but the right not to vote that I defend does not require this. In fact, as explained below, it is also consistent with a duty—though not an enforced one—to vote. Thus, unlike Conant, I am not arguing for disenfranchising certain citizens, as for instance Brennan (2011) does. The right not to vote that I defend merely gives citizens certain discretion over whether they vote.

In contemporary debates, the 'right not to vote'—or a right to abstain (Lever 2010, p. 911)—is usually invoked to defend abstention and to criticise compulsory voting laws. Faced with such attacks, advocates of compulsory voting have at least two responses. The first, more conciliatory, response is to argue that while there may be such a right, compulsory voting regimes do not—or at least need not—violate it.<sup>2</sup> The second response is to deny the existence of a right not to vote. My main focus, in this paper, is to rebut this second response but, in order to motivate this, it is necessary to make a few brief remarks about the first. This is the topic of the next section.

## Does Compulsory Voting Violate the (Putative) Right Not to Vote?

It is often suggested that 'compulsory voting' is something of a misnomer, for, where the secret ballot is respected, the most that can be enforced is compulsory *turnout* (Hill 2002, pp. 82–83). Citizens may be required to attend the polls but, once there, they are free to abstain or to spoil their ballot, so they are not literally forced to vote. Thus, if the putative right not to vote is understood as a right not to

<sup>1</sup> One exception is Lever (2009, pp. 66–69), though it is not entirely clear what the non-trivial right not to vote that she defends amounts to—that is, whether it is simply a Hohfeldian privilege (i.e. the absence of a duty to vote) or a claim against being forced to vote.

<sup>2</sup> For instance, Lijphart (1997, p. 11) appears to concede a right not to vote, but argues that it remains intact so long as there is a 'none of the above' option.

cast a *valid* vote, it is arguably respected.<sup>3</sup> This response faces certain difficulties though.

First, some compulsory turnout laws, including Australian law, do require citizens to cast valid votes (Pringle 2012). Though this law may not be enforced, or even enforceable where there is a secret ballot,<sup>4</sup> such laws still have a symbolic effect (Gusfield 1967, pp. 176–178). A law prohibiting a certain religion would be an objectionable violation of religious freedom, even if not enforced. Similarly, a law that requires citizens to vote can hardly be said to respect their right not to, simply because it is not enforced. To be sure, the advocate of compulsion need not defend compulsory voting laws as actually implemented in Australia.<sup>5</sup> They might concede that such laws are problematic, because they violate a right to abstain, but still hold that it would be permissible for the law to require attendance at the polls (Engelen 2009). This, however, runs into a second problem.

While voting may be beneficial to democracy, it is harder to show how merely attending the polls (and not voting) produces democratic benefits (Saunders 2010, p. 75). Perhaps this challenge can be met. For instance, it could be argued that compulsory turnout *does* serve democratic values, because it makes clear that people's abstention is not simply due to laziness or apathy.<sup>6</sup> However, it could be replied that this does not greatly improve democratic communication; there are still a variety of reasons why someone may refuse a ballot and we will be unable to tell which were operative in any given case. And, further, that compulsion is not needed for this, since the addition of a 'none of the above' box on ballot papers could enable those who are dissatisfied with the options available to them to register their dissatisfaction. Space precludes a fuller examination of these arguments here, but I hope to have shown that compulsory turnout is not necessarily easier to justify than compulsory voting. Though compulsory turnout demands less of citizens, the benefits of this are less obvious (and probably smaller), so it is still far from clear that the benefit is sufficient to justify the demand. Consequently, there appears to be a dilemma. Either compulsory turnout increases voting, in which case it is effective but potentially abridges the right not to vote, or it does not, in which case it is harder to justify.

If there is a right not to vote, then compulsory voting is at least *prima facie* objectionable. Thus, my focus in what remains is on countering objections to the existence of such a right (Lardy 2004; Hill 2015a). However, I do not pretend to establish the existence of a right not to vote beyond any reasonable doubt. I am

<sup>3</sup> Though Lever (2008, p. 64) likens this to saying that an obligation to attend church does not violate freedom of religion provided that one is not forced to pray. Cf. Lever (2009, pp. 68–69).

<sup>4</sup> If advocates of compulsory voting rely on the existence of the secret ballot, then they make themselves hostages to fortune; some have argued for unveiling the vote (Brennan and Pettit 1990; Engelen and Nys 2013). Unfortunately most advocates of compulsory voting are not clear about what they would say were voting made public.

<sup>5</sup> Hill (2015b, p. 655) notes that she would not defend all compulsory voting regimes, but her concern seems to be the use of compulsory voting to manufacture (the appearance of) consent in non-democratic regimes. Since she elsewhere suggests that the Australian system is a 'best practice' model (Hill 2002, p. 82), I assume she is untroubled by the requirement to cast a valid vote, at least when it cannot be enforced, even if others are.

<sup>6</sup> I thank Patti Lenard for pressing me on this point.

sympathetic to the thought that the justification of rights must be holistic so that, to justify any particular right, one would have to show how it coheres with all other rights possessed by everyone.<sup>7</sup> Since a complete account of rights is too large a task to attempt here, I confine myself to the more modest task of showing that a right not to vote is more plausible than commonly supposed and, in particular, defending it against criticisms.

## Clarifying Rights

### Hohfeldian Relations

Before we can address whether or not there *is* a right not to vote, we need a more precise definition of what this would mean. Following Hill (2015a, p. 62), I turn to the work of Wesley Hohfeld (1913) for illumination. Hohfeld observed that the term ‘right’ is applied to a number of distinct jural relations.<sup>8</sup>

First, Alpha’s right against Beta may refer to a *claim* that Alpha has against Beta, which is the correlative or flipside of a duty that Beta owes to Alpha. If Alpha lends money to Beta, then Alpha’s right to be repaid is a claim. The other relations that Hohfeld identifies can all be defined in terms of their correlatives and opposites. For Beta to have a *privilege*, with respect to Alpha, to  $\phi$  is simply for Alpha to have no claim against Beta’s  $\phi$ -ing (or, equivalently, for Beta not having any duty to Alpha to refrain from  $\phi$ -ing).<sup>9</sup> Thus, if Beta has this privilege, then Alpha has no claim against Beta.

Note that Hohfeldian relations always hold between two agents (Jones 1994, pp. 12–13; Kramer 1998, p. 9). Beta might have a privilege to  $\phi$  with respect to Alpha, who has no claim otherwise, and yet lack such a privilege with respect to some other agent, Gamma. For instance, if  $\phi$  is playing loud music, then Beta might have a privilege with respect to her flatmate Alpha, who consents to Beta’s playing loud music, but still owe a duty to her neighbour Gamma not to play loud music. This is consistent with the fact that we often have privilege-rights against all other agents; it is simply that these have to be understood as a number of analytically distinct rights. Thus, if we say simply that Beta has a privilege-right to scratch her nose, without specifying some other agent, we ordinarily mean that she has such a right with respect to Alpha, Gamma, Delta, and all other agents.

Aside from claims and privileges, the other basic Hohfeldian relations are powers and immunities. These are second-order relations (Kramer 1998, p. 20; Cruft 2006, p. 176), since they concern agents’ first-order relations (claims and privileges). A *power* refers to someone’s normative ability to alter either claims or privileges. Agents typically have powers over some of their own first-order relations. For

<sup>7</sup> This thought is inspired by remarks by Onora O’Neill.

<sup>8</sup> Hohfeld was concerned with legal relations, though nothing in his typology of relations depends on this, so his schema has frequently been carried over to the moral domain, e.g. Thomson (1990).

<sup>9</sup> I follow common practice in using the term ‘privilege’ for what Hohfeld calls a ‘liberty’, though both terms have potentially misleading connotations.

instance, if Alpha promises Beta that he will  $\phi$ , then he places himself under a duty, which gives her a claim and extinguishes any privilege not to  $\phi$  that he may have had. However, agents do not have powers over all of their first-order relations. Having made the promise, Alpha cannot release himself from his duty; only Beta can do this. An *immunity* is the converse of a power. If Alpha has no power over Beta's claim, then we can express this by saying that Beta has an immunity against Alpha altering her claim.

According to Hohfeld (1913, pp. 30–32), only claims are rights *in the strictest sense*, but the term 'right' is also frequently applied to other distinct relations, such as privileges, powers, and immunities (Hohfeld 1913, p. 30). While some commentators prefer to follow Hohfeld and confine 'rights' to claims (Kramer 1998, p. 9), others are prepared to accept the wider use of the term as entirely proper and thus distinguish claim-rights, privilege-rights, etc. (Jones 1994, pp. 12–13). For purposes of this paper, I will adopt the latter terminology and talk of privileges, etc., as rights. This is consistent not only with ordinary usage but also with the terms of the debate that I am joining. Nothing crucial hangs on this choice though; first, because the right that I am primarily concerned with is a claim anyway and, second, because those who prefer to restrict the term 'right' to claims can substitute their own preferred terms as required (e.g. when I refer to privilege-rights, they can read this as simply referring to a Hohfeldian privilege—nothing hangs on whether it's called a 'right' or not).

It is worth emphasising how these different relations are connected to each other, not only because some may be unfamiliar with Hohfeld's work, but also because the purpose of Hohfeld's typology is to clarify the different things that may be meant by any assertion of 'a right to X', so any mistakes or misunderstandings of this terminology will undermine this aim. Indeed, I think that Lisa Hill is guilty of misrepresenting Hohfeldian relations in a way that confuses the nature of the right not to vote.

### Hill on Hohfeld

Hill (2015a) also appeals to Hohfeld to clarify the right not to vote. However, she misrepresents Hohfeldian powers when she gives the example of someone's right to drive after receiving a licence (Hill 2015a, p. 62). This example suggests that any ability, such as the ability to drive, is a power, but this is not so. As we saw, powers are abilities to do something very specific, viz. to alter other normative relations (Hohfeld 1913, pp. 44–50). Someone's right to drive is, in Hohfeldian terms, a privilege. Prior to acquiring one's licence, one is under a duty not to drive. Being granted a licence releases one from this duty, bestowing upon one a privilege. Thus, the Hohfeldian power is exercised by the state official who issues the licence, thereby altering the individual licence-holder's first-order normative position. Note that even if an individual had the authority to issue a licence to herself, there would still be a distinction between her right to issue the licence (which is a power) and her subsequent right to drive (which would be a privilege).

Hill's terminology is again in danger of confusing when she characterises the vote as a 'duty-right'. As noted above, various Hohfeldian relations may be

considered rights, thus we may distinguish claim-rights, privilege-rights, etc. However, given this established usage, Hill's coinage of the term 'duty-rights' suggests that she thinks that some Hohfeldian duties *are* rights, in the same way that claims or privileges may be rights. But, while privileges, powers, and immunities are commonly considered to be rights (*pace* Hohfeld), duties are not. It is an interesting question *why* duties are not generally considered rights, even when they satisfy the other conditions of rights, such as serving their holder's interests (Cruft 2006). Whatever the reason, to consider a Hohfeldian duty to be a right would be a departure from ordinary usage. Of course, one may have both a duty to  $\phi$  and a right (some other claim, privilege, etc.) to  $\phi$ , but this is not to say that the duty itself is a right. Perhaps it would be useful to have some phrase to refer to such protected duties and, in fact, this is how Hill (2015a, p. 69) defines what she calls duty-rights, as duties protected by claims. However, 'duty-right' is not a felicitous term to describe such a case, since it is likely to be understood, by analogy to privilege-right, as referring to a duty that is itself a right. Though Hill clearly defines what she means by the term, and I do not wish to suggest that she is guilty of any conceptual confusion here, this term is best avoided lest it mislead.

### The Right to Vote

Though my purpose here is to defend a right *not* to vote, it will be helpful to precede this with some brief remarks on the right to vote. This is important because, as we will see later, some suggest that the right not to vote follows in some way from the right to vote.

Hill (2015a, p. 63) asserts that her opponents construe voting simply as a privilege. However, this mischaracterises the position of her opponents.<sup>10</sup> As we have seen, to say that Alpha has a privilege to  $\phi$  means that Alpha violates no duty in  $\phi$ -ing (Hohfeld 1913, p. 32; cf. Jones 1994, pp. 17–22). Thus, if voting were simply a privilege, it would mean merely that citizens violate no duty by voting. First, not everyone thinks that all citizens have a privilege to vote in the first place. For instance, Claudio López-Guerra (2005) and Jason Brennan (2009) both argue, on different grounds, that some citizens have a duty not to vote. Assuming that this duty is owed to their fellow citizens, who therefore have correlative claims, then these citizens have no privilege to vote. If they have no privilege to vote, then their right to vote cannot be simply a privilege.

Second, and more important, even those who think that there is a privilege to vote do not ordinarily think that this exhausts the right to vote. That one has a privilege to  $\phi$  does not, in itself, entail that others have any duty to enable one's  $\phi$ -ing or even not to interfere with one's  $\phi$ -ing (Hohfeld 1913, p. 35; Jones 1994, p. 19; Kramer 1998, pp. 10–15). If voting were *merely* a privilege, then the state would have no duty to facilitate citizens' voting through, e.g., holding elections and providing opportunities for voter registration and access to the polls, and there would be

<sup>10</sup> I think Hill again misunderstands Hohfeld's relations. She seems to understand a privilege to vote as meaning that voting is optional, i.e. one is under no duty to vote (Brennan and Hill 2014, p. 169), whereas a Hohfeldian privilege to vote would mean that one violates no duty by voting, i.e. that one has no duty *not* to vote (Hohfeld 1913, p. 32).

nothing wrong with the state or others interfering with those who try to vote. We ordinarily think that people have a claim to non-interference, and perhaps even to assistance, when it comes to voting. There is no reason why someone who defends a right not to vote should be any less committed to these Hohfeldian claim-rights than anyone else.

This discussion helpfully illuminates the fact that the rights commonly spoken of often involve a number of distinct Hohfeldian relations. For example, my property right over my car includes a claim that others not drive it without my permission, a privilege to drive it myself (subject to the laws of the road), a power to permit others to drive it or to transfer ownership by selling it, and immunities against many others unilaterally altering these relations. Thus, we cannot assume that a ‘right to  $\phi$ ’ necessarily corresponds to any single Hohfeldian relation concerning  $\phi$ -ing. It may be that ‘the right to  $\phi$ ’ is actually elliptical for a bundle of distinct rights.

The right to vote, it seems, takes such a form (Beckman 2014, p. 399). As noted above, it is not *simply* a privilege, though it is commonly supposed that most citizens have a privilege to vote. Citizens ordinarily have certain claims connected with voting, such as a claim that their government gives them reasonable opportunities to vote and claims that others not interfere with their exercise of the vote. Further, through the vote citizens can exercise Hohfeldian powers (Beckman 2014, p. 398), while these rights are immune to various forms of interference (e.g. my employer cannot strip me of my right to vote). Thus, the right to vote comprises several Hohfeldian relations.

## The Right Not to Vote

Let us turn now to the right not to vote. Hohfeld’s typology allows us to distinguish two obvious ways to understand the right not to vote. First, it may refer to a privilege-right; thus, one violates no duty by not voting. Second, it may refer to a claim-right, because others have some duty, such as a duty not to force one to vote. One might think that citizens have a right not to vote in both of these senses, but neither entails the other. First, one may think that citizens have a privilege-right not to vote but not think that this privilege is protected by any claims against interference. Alternatively, one may think that citizens have a duty to vote (and so no privilege not to) but, even so, that they have a claim not to be interfered with if they do not—that is, they have a ‘right to do wrong’ (Waldron 1981; Herstein 2012).<sup>11</sup>

It is perhaps the privilege-right that has received more attention, since arguments as to whether or not there is a duty to vote carry immediate implications for the existence of a privilege not to vote. If one has a duty to vote, then one has no privilege (with respect to the agents to whom one owes the duty) not to vote. Conversely, if one does not owe someone a duty to vote, then one has a privilege not to vote. However, it is not clear that it is a privilege-right that is being invoked by

<sup>11</sup> This point is acknowledged by Lardy (2004, p. 305, n.5). As she points out, it is also possible that one may lack a claim against being forced to  $\phi$ , even though one has no duty to  $\phi$  (i.e. one has a privilege to not  $\phi$ ).



opponents of compulsion. As noted above, you can have a privilege to  $\phi$  without having any claim against others that they not prevent you from  $\phi$ -ing (Hohfeld 1913, p. 35). Thus, I am not sure what it would be to *violate* a privilege. Indeed, Thomson (1990, p. 47) explicitly affirms that there is no such thing as infringing a privilege-right. Hence, a privilege-right not to vote does not seem able to ground an objection to compulsory voting.

Perhaps, it may be suggested, having a privilege to  $\phi$  means being under no duty not to  $\phi$  and so having a duty to  $\phi$  imposed upon one violates one's privilege. However, it is not clear that one's privilege is violated, rather than simply revoked. If one is liable to such interference, because someone else has this power, then this may be entirely permissible. To suggest otherwise would conflate privileges with another Hohfeldian relation, namely immunities (Hohfeld 1913, p. 55; Jones 1994, pp. 24–25). While one may have both a privilege and an immunity, the immunity is not itself part of the privilege, for it is possible to have a privilege without an immunity, in which case it may simply be revoked without being violated. Thus, while I am certainly inclined to think that most people have a privilege-right not to vote, it is not clear whether compulsory voting laws violate this. So, for the sake of argument, I will concede that there *is* a duty to vote. This duty is compatible with there being a right not to vote in another sense.

The second sense in which a right not to vote can be invoked is as a claim-right against interference with one's act of not voting. This right, if it exists, is clearly violated by compulsory voting laws (at least, when they are enforced). Thus, it seems that whether or not those who object to compulsory voting laws actually invoke a claim-right not to be forced to vote, it would be more dialectically effective to invoke such a right, rather than a mere privilege not to vote. Hill (2015a) does not, so far as I can see, consider whether there may be a right not to vote in this latter sense. At least, the arguments that she offers against the right not to vote seem to target the idea of a privilege or to support a duty to vote, but do not show that there is no claim against being forced to vote. Even if we grant that there is a duty to vote, all that follows is that non-voters are acting wrongly. It does not follow that coercion becomes permissible to make them comply, for they may still be owed a duty of non-interference, correlating to their claim not to (be made to) vote.

## Is There a Right Not to Vote?

Having given a clearer account of what I mean by a right not to vote, it still has to be determined whether or not such a right exists. How might this claim be established? I will consider two possibilities. The first sub-section considers conceptual arguments. It is sometimes suggested that a right not to  $\phi$  is always part of, or entailed by, the right to  $\phi$ . Let us call these conceptual arguments. Such arguments are criticised by Lardy (2004) and Hill (2015a). While I do not agree with every detail of their critiques, I agree that such arguments should be rejected.

The second sub-section considers substantive arguments for the right not to vote. These, I suggest, are more promising. While perhaps they cannot be conclusive, without a complete account of all rights possessed by all persons, I think it plausible

that there is a *prima facie* right against being coerced and that the arguments offered against the right not to vote do not clearly succeed in defeating this.

### Conceptual Arguments

It is sometimes suggested that, for any  $\phi$ , a right to  $\phi$  must include or entail a right not to  $\phi$ . Given the frequency with which this assertion is made, it must be conceded that it has some *prima facie* plausibility. Further, this proposition can be supported by the supposition that the purpose or function of rights is to protect people's choices.<sup>12</sup> If the purpose of one's right to  $\phi$  is to empower the bearer to decide *whether* to  $\phi$ , then it is natural to suppose that the bearer must also have a right not to  $\phi$ .

However, if this were so, then there would be no difference between a right to  $\phi$  and a right to its opposite; what we know as the 'right to life' might equally be labelled a 'right to death'. Unsurprisingly, there is something wrong with this argument. It is true that many, if not all, rights can be waived by their possessors. For instance, if I lend you money, I can waive my right to be repaid, thus releasing you from your duty. But the resultant situation, in which I no longer have a right to repayment, would not ordinarily be described by saying I have a right not to be repaid; it is simply one in which I have no right to be repaid. It seems that this conceptual argument involves a slippage from no-right-to- $\phi$  to a-right-not-to- $\phi$ . As Hill notes, 'it would be awkward to argue that, because I have a right to be free from physical assault, I also have a right *not* to be free from physical assault' (Hill 2015a, p. 66). A right not to be free from physical assault, presumably, amounts to a claim-right to be assaulted. But such a right would not result simply from one waiving one's claim-right against being assaulted—this would only give someone a privilege to assault you, not a duty to do so.

The cause of confusion seems to lie, in part, in failing to distinguish different things that people may do with their rights, such as not exercising them, waiving them, and inverting them. That one does not exercise one's right does not mean that one relinquishes that right. I may attend a meeting and not say anything, without any implication that I have waived my speech right, even temporarily; I simply chose not to exercise it. Similarly, those who do not wish to vote on a given occasion need not wish to surrender their right to vote. Perhaps some would not object to being stripped of the right, but others might sincerely value the right even though they do not wish to exercise it on a given occasion. Thus, non-voters are not necessarily seeking to waive or alienate—even temporarily—their right to vote. Sometimes, however, people do seek to relinquish certain rights, either temporarily or permanently. For instance, the case where I release you from the obligation to repay me is different from the case where I simply do not demand immediate repayment. In the latter case, I retain the right to be repaid at a later date, whereas releasing you from your duty extinguishes my right. However, even this does not

<sup>12</sup> This is often associated with the choice or will theory of rights though, as Preda (2015) observes, it is a mistake to conflate an account of what rights are with their justification.

create an inverse right. As noted above, it results in me having no right to be repaid, not a right not to be repaid (whatever that would be).

None of this is to deny that at least some rights *do* plausibly include their inversions. For instance, the right to free speech may include a right not to speak (Taruschio 2000, p. 1001; Blocher 2012, pp. 4–5), or the right to freedom of association may include the right not to associate with particular persons (White 1997; Wellman 2008). However, these ‘rights’ are actually clusters of distinct rights (cf. Thomson 1990, pp. 54–56), which happen to include, for instance, both claims not to be prevented from associating with those ones wishes to and claims not to be forced to associate with those one does not wish to. The reason for including both of these claims within a ‘right to freedom of association’ is that they serve much the same ends. Thus, the right *not* to associate with particular persons does not follow from a right *to* associate on the grounds that all rights include their negation, but rather it is grounded in the same substantive considerations. Perhaps this is often the case, for many rights, though not for all rights, for instance the right to a fair trial or a secret ballot.<sup>13</sup> So, in order to uncover whether we have a right not to  $\phi$ , as well as a right to  $\phi$ , we need to consider the substantive values that justify the right in the first place. This leads us to examine the substantive arguments that might ground the right (not) to vote.

### Substantive Arguments

I have argued that the right not to vote cannot be established on conceptual grounds, but it remains to be seen whether there are good substantive arguments to ground such a right. This sub-section considers substantive values that might ground this right. I have previously argued that the compulsion involved in compulsory voting might violate a right against interference, thereby appealing to a negative notion of freedom (Saunders 2017). However, both Lardy (2004) and Hill (2015a, b) appeal to a rival, republican understanding of freedom, so I begin by considering whether this undermines any objection to compulsion. After arguing that it does not, and that republicans may in fact reject compulsory voting, I then turn to consider some of the other substantive values commonly invoked by those who object to the right not to vote, such as the value of fairness.

### Republican Liberty

Various substantive arguments might be offered to support the putative right not to vote, but the most obvious is grounded in the value of individual liberty. If we assume a general right to be free (Hart 1955), then it seems that coercion always stands in need of justification. To be sure, sometimes we are justified in restricting individual freedom, most obviously when it is necessary to prevent harm to others. Nonetheless, a compelling justification is required in order to overcome the presumption in favour of liberty. Advocates of compulsory voting sometimes argue

<sup>13</sup> Though some rights-theorists deny that these are properly rights or, at least, they are not rights possessed by those whose interests they protect (Steiner 1994, pp. 65–73).

that the loss of liberty is small and can be justified by the benefits that compulsion is supposed to bring (Lijphart 1997, p. 11). However, *if* this compulsion violates individual rights, then the fact that it is only a small violation, or that it realises significant benefits, is irrelevant. Rights are not subject to cost-benefit calculations.

A more promising strategy for advocates of compulsory voting involves questioning the liberal, negative understanding of freedom implicitly invoked here. Both Lardy (2004) and Hill (2015a, b) suggest that we should instead adopt a republican conception of freedom, according to which it is arbitrary domination, rather than interference, that renders us unfree (Pettit 1997). If freedom consists in non-domination, then one may be unfree even when not actually interfered with, as demonstrated by the slave with the benevolent master. But conversely one need not be unfree, even when interfered with, provided that this interference is not arbitrary (or dominating) in nature. Thus, republicans hold that freedom is compatible with the rule of law. Invoking such an understanding of freedom, Lardy (2004, p. 314) argues that non-voting creates a risk of domination, while being forced to vote, because it is not arbitrary interference, does not diminish freedom.

One response to such charges would be to defend a liberal conception of freedom, arguing that the republican view is misguided (Patten 1996; Goodin 2003; Brennan and Lomasky 2006; Wendt 2011). This would be beyond the scope of the present article. I will confine myself to arguing that, *even if* we accept a republican conception of freedom, we need not reject the right not to vote. Though Pettit (2015, pp. 689–690) seems happy to endorse compulsory voting, he (and other republicans) are not necessarily committed to it.

First, let us consider the positive case for compulsory voting. Lardy (2004, p. 313) argues that those who do not vote are vulnerable to being ignored by the voting majority or having their interests overridden and, thus, to be dominated in Pettit's sense. It is perhaps true that some non-voters may be at risk of domination, but it is not clear that universal voting is required to avoid this. It is often said that the price of liberty is eternal vigilance, but vigilance need not require action.<sup>14</sup> To be sure, those who pay no attention to politics may not be living up to the republican ideal of the virtuous citizen, exposing themselves and others to the risk of domination, but it seems that one can do all that is required without ever actually participating. A virtuous citizen might keep a close eye on political developments, and be ready to act if needed, without ever actually feeling the need to act (McBride 2013, p. 504; Amna and Ekman 2014).

Indeed, Pettit himself has likened the role of democratic citizens to editors, rather than authors, of the laws (2000; 2004, pp. 61–62), which suggests that their main function lies in oversight, rather than active participation. An editor need not intervene if the author's text is satisfactory and, similarly, citizens need not actually participate in politics, provided that they are alert and ready to intervene if needed. Moreover, even if one decides that intervention *is* needed to contest some decision, it is a further question whether voting is the best means of intervention. Citizens

<sup>14</sup> Elliott (2017) has recently suggested that mandatory turnout may nudge citizens to surveil politics, rather than to vote. However, it is surely possible for virtuous citizens to do this without being made to vote. Moreover, it is unclear why those who do not do so ought to be nudged in this way.

might instead voice their displeasure by taking to the streets in protest or even by engaging in acts of civil disobedience. While Hill (2010, pp. 919–920) suggests that non-voting is part of a trend of demobilisation, others have suggested that citizens are increasingly participating in other ways (Dalton 2008). Thus, while widespread voting may be one means through which republicans might seek to avoid domination, it is not the only means. It is therefore unclear whether a republican ought to favour compulsory voting over alternatives.

Second, let us consider the costs of compulsory voting. Its opponents frequently point to the loss of liberty, but Lardy (2004, p. 314) argues that republican freedom is not diminished when one is compelled to vote. The argument here is not simply that a small *pro tanto* loss of liberty is justified by greater gains elsewhere, since liberals too may think that. Rather, on a republican understanding, freedom is threatened only by domination and not by mere interference (Pettit 2002). Thus, a non-dominating law, such as one requiring citizens to vote, does not reduce their freedom. However, this overlooks the fact that Pettit (1997, p. 26; 2002, p. 347) distinguishes between unfreedom, which results from domination, and non-freedom, which he describes as merely ‘conditioning’ freedom. Conditioning freedom may be easier to justify, but perhaps it still needs justification.

To be sure, republicanism is a diverse tradition and not all republicans share Pettit’s views. Nonetheless, I hope to have shown that compulsory voting is not obviously required or costless, even on a republican conception of liberty. Once we also take into account that such an understanding of liberty is itself controversial, it is far from clear that it can justify compulsory voting. While the alternative liberal, negative notion of freedom, invoked to justify the right not to vote, is also controversial, there is an asymmetry. The republican notion is being invoked to justify coercing citizens who may reasonably reject it, whereas a right not to vote does not subject anyone to coercion. Here, I appeal to something like what Rawls (2005, p. 137) calls the ‘liberal principle of legitimacy’. I suggest that there is a greater justificatory burden on those advocating state coercion than on those who oppose it (cf. Brennan and Hill 2014, pp. 6–7). Thus, I think it legitimate to invoke a controversial liberal conception of freedom to support a right not to vote, because no one is being coerced on grounds they cannot accept, but illegitimate to invoke an equally controversial republican notion in order to justify compulsion.

## Other Arguments

While the main arguments offered for or against the right not to vote rest on the value of individual liberty, as discussed above, this is not the only value at stake. This section considers some other objections brought against such a right.

Hill (2015a, p. 68) claims that a right not to vote cannot be universalised. It is far from clear that this is true. First, there are familiar problems in formulating maxims of action and applying the universalisation test to them. Second, even if this can be done, the test applies to maxims and not rights, so it is still unclear how it can be applied here. One might reasonably think that one should only claim rights for oneself that one would be prepared to grant to all others. However, we can universalise a right without assuming that everyone will act on it. I am happy to

grant that if I have a right not to vote, then so do all of my fellow citizens. But there is no contradiction, either in conception or will, in universalising this right. Even granting that the results would be disastrous if no one were to vote, I can reasonably predict that many people will vote even where they have the right not to (this is readily observable from countries in which voting is not compulsory). Thus, the *right* not to vote can be universalised, even if the maxim of abstaining cannot be.

This, however, brings us to another of Hill's objections to abstention. She argues that democracy requires work and our fellow citizens have a claim on us that we bear some share of this burden by voting (Hill 2015a, p. 70), invoking Hart's duty of fair play (Hart 1955, p. 185) to explain why all must bear a share of these costs. Hill (2015a, p. 70) alleges that non-voters are free-riding on the efforts of their fellow citizens.<sup>15</sup> However, it is not clear whether this establishes a general duty to vote. There are familiar objections to such fair play arguments, particularly when scaled up from small cooperative groups to something like the nation-state (Smith 1973, pp. 954–958; Nozick 1974, pp. 90–95). And, even if we grant that all citizens have a duty to do some fair share of the work necessary to sustain democracy, it is not clear that this delivers the conclusion that Hill needs. Doing one's fair share need not mean voting in every election; it might be enough if everyone votes in every other election (cf. Birch 2009, p. 26). Indeed, it might even be that one can do one's share of the work through ways other than voting, perhaps through running for office, lobbying, campaigning, organising a pressure group (Dalton 2008), or even simply observing political events and being ready to vote if necessary (Amna and Ekman 2014). So, *even if* all citizens owe it to their fellow citizens to bear some share of the burden of sustaining democracy, they may discharge this obligation in other ways, so this would not show that they have an obligation to vote in every election. The more fundamental problem with this argument, however, is that even if it is wholly successful, it only establishes a duty to vote. As we saw earlier, this duty to vote only excludes a privilege-right to abstain, but it is compatible with having a claim-right not to be made to vote. Thus, Hill's argument—even if successful—does not tell against the right not to vote that I have defended here and that serves as an objection to compulsory voting.

## Conclusion

Doubtless more could be said about whether sustaining democracy and ensuring equal representation is compelling justification for coercion, and some of Hill's arguments touch on such issues (Hill 2015a, p. 70). Further discussion of these questions is beyond the scope of this article, though I would note that such arguments—if successful—would seem to point to an obligation to vote *well*, rather than an obligation to vote *simpliciter*. For instance, Hill (2015a, p. 70) claims that women owe it to other women to vote in order to prevent the domination of men, but

<sup>15</sup> Curiously, Hill elsewhere denies that non-voters are free-riders since they do not benefit (Hill 2002, p. 88). Since it is possible that she has changed her mind over the intervening years, I set aside the issue of her consistency.

a woman who votes for patriarchal policies or candidates hardly satisfies her obligations simply because she voted. Moreover, it may not always be obvious how one should vote in order to support justice and democracy. In such cases, it may be better that one abstains rather than votes badly (Brennan 2009). For present purposes, however, my aim has merely been to show that a right not to vote, in the sense of a claim not to be forced to vote, is compatible with the existence of both an unwaivable right to vote and a duty to vote. Thus, I find arguments purporting to show that there is no right not to vote untroubling.

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