

# Critical Exchange | The Privatized State: Neo-republicanism and Ideal Theory

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In her book *The Privatized State. Why Government Outsourcing of Public Powers is Making Us Less Free* (Princeton University Press, 2020) Chiara Cordelli addresses the largely unexplored issue of state privatization, namely “whether and when it is permissible for a government to delegate certain responsibilities to private actors” (5). According to Cordelli, these questions pose a problem of legitimacy. Private actors not only provide goods and services to citizens on behalf of the government, but also make decisions that affect individual liberty while performing such public functions. These decisions are deemed illegitimate.

Although these few pages cannot fully convey the scope and value of the book, I will briefly summarize Cordelli’s rich and elaborate argument in order to better understand her thesis, before raising some critical points that I think are worth discussing.

To begin with, it is important to note that freedom here is understood as independence from the will or authority of others, and “independence requires rights”, i.e., “a sphere of action that one is entitled to control and others are obliged not to interfere with” (49). Furthermore, in a Kantian vein, Cordelli argues that such rights are only provisional in the state of nature, where everyone has “an equal right to stand by his or her own judgment and not to defer to others with regard to reasonable disagreements about the shape and boundaries of their reciprocal rights and obligations” (63).<sup>1</sup> By contrast, reciprocal rights and obligations be-

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<sup>1</sup> Cordelli draws on both Locke and Kant with respect to the definition of freedom and its connection with rights; then, though, she distances herself from the

come effective when they are the result of a process in which everyone has participated and in which everyone has been granted equal normative authority. Namely, when they are defined and enforced within a democracy that does not privilege anyone and that represents the shared or “omnilateral” will of all (62). Only when rights are shaped by a democratic process will no one be dependent on the unilateral will of others, and thus everyone will be free.

The question now is what happens when a democratic government delegates certain responsibilities to private actors. Cordelli’s answer is that a new form of dependency emerges, for two reasons (Part One). On the one hand, by performing such public functions, private actors shape the rights and duties of citizens, namely, they have a legislative or quasi-legislative power, rather than a merely executive power (92). On the other hand, this power is illegitimate because private actors *qua* private actors cannot fulfil the above-mentioned requirements for defining such rights and duties without endangering citizens’ freedom as independence.

Let me use one of Cordelli’s telling examples, that of US health-care system, to illustrate this point.

Under the US health-care system, recipients of publicly funded health-care services typically enroll in “managed care organizations” (MCOs). The government pays MCOs a set amount for their services. Since, given resource scarcity, it is impossible to cover all requests for treatment, an MCO must make decisions about what treatments to cover. Suppose two patients, A and B, both enrolled in the same MCO, claim access to different kinds of treatments,  $T_1$  and  $T_2$ . Both patients advance reasonable claims and are *prima facie* owed the treatment, but because of resource scarcity only one treatment can be covered. The MCO must then decide how to balance these patients’ claims (90).

In other words, the private actor delegated by the democratic government to carry out a specific public function, i.e., health care, seems to enjoy a certain discretion in deciding who is entitled and who is not to the good it must provide to citizens, i.e., medical treatment. Accordingly,

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former by following the Kantian idea that “rights are merely provisional in the state of nature, [and] so is justice” (50).

MCOs enjoy not only executive power but also legislative power since they ultimately determine what A's and B's entitlements to health care are.

At first glance, this could be legitimate if the government not only outsources a specific task to private actors, but also delegates its legislative power – after all, this is precisely what individual citizens do with respect to public administration, i.e., they delegate their normative authority, why should this not be the same for private actors? Cordelli, however, strongly rejects this possibility (Part Two). Unlike public administration, she argues, private actors cannot meet the three conditions for delegation, namely authorization, representation, and domain (119-120). First, they cannot be validly authorized. When many public functions are outsourced, “the government loses both ‘epistemic’ and ‘practical’ control over what is done to citizens”, “‘civil vigilance’ is often weakened (142-150)”, and this undermines legitimate democratic self-rule (Herzog 2023). Second, even if private actors could be validly authorized, they cannot act in the name of citizens, anyway, because *qua* private actors they follow reasons of profit and efficiency that differ from the public and shared reasons of citizens. Third, even if they could act on behalf of citizens, private actors still cannot do what they would be delegated to do: the provision of public goods is not only a matter of outcomes, but also of collective processes directed toward collective ends and “private actors [...] fail to be part of these ‘jointly intentional’ activities (209)” (Herzog 2023). As a result, a democratic government cannot legitimately delegate much of its normative authority to private actors, and when many private actors exercise normative authority (i.e., make decisions that shape citizens’ rights and duties), as is often the case in contemporary Western democracies, citizens’ freedom is ultimately compromised because citizens are inevitably dependent on the unilateral will of such private actors.

What should be done? Cordelli asks after this rather negative diagnosis (Part Three). Her answer is twofold. On the one hand, we should *ideally* get out of the privatized state. Governments should stop systematically delegating public functions to private actions, and this could be done by setting constitutional limits on privatization and by redesigning the system of public administration. On the other hand, however, such an exit process might take time, as well as being currently unavailable in the real world, hence, *non-ideally*, we should promote some improvements within the privatized state itself, e.g., imposing moral duties on

private actors while exercising their legislative or quasi-legislative power. To be sure, privatization would still be illegitimate, and the main goal would still be to get rid of it. Nevertheless, Cordelli seems to be aware of the practical difficulties associated with this goal, and thus she envisages further proposals, although her core aim in the book remains to show the illegitimacy of the privatized state.

This leading purpose is, I think, one of the main interests of the book itself. This is so in two ways. First, Cordelli undeniably addresses a real problem that is often overlooked in political philosophy. Addressing such a problem from the perspective of political philosophy allows her to provide a precise theoretical analysis of it, as well as to show why it is morally problematic in general and what the available solutions are, normatively speaking.

Second, the author frames it in terms of legitimacy, rather than in terms of desirability or efficiency, the two criteria generally used to address the issue of privatization. This has the advantage of emphasizing the urgency of the issue. For legitimacy enjoys a certain priority (12) over other values, such as justice. As I see it, citizens may, for instance, be treated justly by their queen, but if they have no control over her decisions, they will always be subject to her discretion, i.e., they will always be dependent on her unilateral will. Of course, they would be better off if their queen treated them justly, but this would not mean that they would be less dependent on her good will.

Such an image clearly recalls Philip Pettit's well-known example of "the slave of a kindly master" (Pettit 1997, 35). Even if the enslaver is "benign and permissive" (Pettit 1997, 32) and does not interfere with the enslaved person's life, the enslaved person remains dependent on the will of the enslaver. According to Pettit, this is a classic case of domination without interference. On the other hand, there is interference without domination. The main example pertains to laws that citizens can control: such laws interfere with citizens' lives but do not dominate them (Pettit 1997, 35-41 and 63-64). What matters, then, seems to be that people have control over the process that leads to the decisions they have to abide by, rather than the content of those decisions themselves. If the goodness of the latter depends on the "unilateral" – as Cordelli calls it – or "uncontrolled" – as Pettit (2012) does – will of some, it would be a mere concession of the kind that a kindly master or a benevolent queen

might make, which could change at any time according to their capricious will. In fact, as Cordelli also mentions in a footnote (308), Pettit himself argues for the priority of legitimacy over justice (Pettit 2012).<sup>2</sup>

This similarity underscores another element of interest in this work, which is the ongoing dialogue with the recent contemporary revival of the republican tradition. Cordelli herself makes explicit her aim to contribute to the neo-republican literature (14). In my view, however, the deep relationship between *The Privatized State* and neo-republicanism lies not so much in the specific contributions identified by the author as in the very idea of freedom that they both defend. As the author herself acknowledges, they are both concerned with the same problem, whether one labels it dependence or domination. Despite the differences between Cordelli's thought and neo-republicanism, thus, *The Privatized State* makes an important addition to the neo-republican literature.

As a corollary to this initial praise, let me mention that this book represents a remarkably strong and well-written piece of political and analytical philosophy. The author brilliantly guides the reader through her argument, step by step to its conclusion. Not only does she make her point clear, but she also offers accurate analysis and charitable criticism of alternative positions. Despite being a very rich and dense work, it proves to be an enjoyable reading even for readers who are new to the topic – as I suspect many will be, given the novelty of the subject.

Now, although I am sympathetic to Cordelli's argument against privatization in general, there remain some issues that I think are worth discussing. I find two of them particularly relevant. The first is the relationship between Cordelli's work and neo-republicanism; while the second concerns the balance between ideal and non-ideal theory. In what follows I will explore them one by one.

Despite the above-mentioned similarities with the neo-republican framework, as well as Cordelli's explicit aim to contribute to the neo-republican literature, the author of *The Privatized State* surprisingly does not endorse a neo-republican perspective. I wonder why. On the one hand,

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<sup>2</sup> In her reading of Pettit's thought, Pamela Pansardi speaks of "normative priority of legitimacy over justice" since "in the absence of legitimacy [...] justice may be a contingent feature of a society dependent upon the discretionary will of the ruler" (Pansardi 2015, 52).

her work might fit more neatly into such a contemporary outlook, given their shared rationales and concerns. On the other hand, her argument itself might benefit from the debate about freedom as non-domination.

Cordelli, instead, endorses a Kantian understanding of freedom, and she does so, it seems to me, in the name of a stronger connection between freedom and democracy. As she writes:

while for Pettit democratic political institutions are *instrumentally* related to nondomination (they are meant to minimize instances of domination), a Kantian view of democracy stresses the freedom-*constituting* role of democratic institutions (323, footnote 50, emphasis added).

Although this observation appears in a footnote, such a distinction seems crucial to Cordelli's analysis of privatization as a matter of legitimacy. The illegitimacy of private organizations acting on behalf of the state is so compelling precisely because democratic legitimacy constitutes freedom.

However, even if one agrees that Pettit considers democracy primarily as instrumental rather than constitutive, this interpretation overlooks the centrality that political legitimacy also holds for Pettit's idea of freedom as non-domination. Furthermore, the departure from neo-republicanism appears to be happening too quickly: even though Pettit's definition certainly stands as an undiscussed milestone, it is only one of several available definitions of non-domination within the neo-republican panorama.

Other neo-republican notions of non-domination seem to put more emphasis on the link with democracy. Consider, for instance, the work of Dorothea Gädeke, who even uses language similar to Cordelli's, since she also refers to the idea of 'normative authority'. According to Gädeke, in order to be free from domination, people should indeed be granted an equal status as "normative authorities" (Gädeke 2020, 29). Moreover, they are granted such an equal status when the norms they have to comply with meet the criteria of generality and reciprocity, that is, they are justified by procedures in which all "enjoy equal chances to take part" and no one can impose his or her preferences, as well as "they [norms] apply to all and not particular persons" and "they accord the same claims and obligations to everyone" (Gädeke 2020, 40).

This is not to highlight a lacuna in Cordelli's book – especially since the two works are nearly contemporaneous. It is merely to suggest that her position appears to align more closely with the neo-republican discourse than what she is willing to concede. Furthermore, the debate on non-domination could enhance Cordelli's argument by offering a solution to the impasse of demandingness pointed out by Liza Herzog.

In her review of *The Privatized State*, Herzog wonders “how incredibly difficult” it would be to solve the problem of privatization following Cordelli's approach. To achieve this, not only should private actors cease to be delegated, but public actors should also meet exceptionally high standards of legitimacy:

civil servants need to steadfastly hold onto their mandate, unerringly following the course of the omnilateral democratic will, even while also exercising their unavoidable discretion wisely and in ways that are responsive to citizens' needs and concerns. There might be civil servants capable of such virtuous behaviour, but they seem rare exceptions (Herzog 2023, 662).

As Herzog argues, Cordelli focuses on ‘who’ exercises legislative power and, drawing on Hegel, on their motives and reasons. This is in line with her decision to avoid concentrating on the ‘what’, i.e., what are the results of such a power, when she criticizes the delegation of power to private actors. Remember that when private actors perform public functions, they act illegitimately not because of their actions themselves, but rather because the way they act leads to a form of dependency – and *qua* private actors, they cannot act otherwise. However, I agree with Herzog that the standards set forth by Cordelli for how public actors should behave in order to prevent this kind of dependency appear to be quite demanding.

This is where I think non-domination *à la* Gädeke could be useful, as legitimacy does not rely on those who wield legislative power or their behavior (who), but instead, on the process by which the power is exercised (how). In fact, the non-dominating character of norms does not hinge upon the “individual set of internal commitments, intentions or dispositions” (104) of lawmakers, or their high “level of moral motivation” (289). The legislative process itself, meeting the criteria of generality and reciprocity, prevents domination. The prevention is not due to

the legislator's orientation or "bureaucratic ethos", as Cordelli puts it. Normative authority would thus be granted to everyone through normative-procedure dependent laws.

Such a move would not contradict Cordelli's view of privatization as illegitimate because private actors, *qua* private actors, inevitably adhere to other criteria, such as those of profit and efficiency. Similarly to what Cordelli argues, besides, I believe that they would lose their essence as private actors if they abandoned these criteria in favour of those necessary for legitimacy, i.e., generality and reciprocity. On the other hand, a shift from focusing on the 'who' to the 'how' could obviate the objection of demandingness, since public officials would not be expected to be exceptional, nor would their motives or reasons.

Of course, Cordelli might reply – as she does in response to the "realist skeptic" of the epilogue – that the public actors she is referring to are *ideal* public actors, part of the *ideal* normative solution she puts forward at the end of the book, which is, after all, "primarily a work of philosophy and, as such, a work of hope" discussing "what sort of political reforms [it is] reasonable to hope for" (302).

This brings us to my second point, which concerns the balance between ideal and non-ideal theory. Roughly speaking, the debate between ideal and non-ideal theory is a methodological debate within political philosophy: while some argue that the proper task of political philosophy is to put forward a picture of the *ideal* just society, others claim that political philosophy should be concerned with actually improving the *non-ideal* unjust world to make it more just.<sup>3</sup> As I see it, Cordelli's work lies between these two positions. *Ideally*, she argues that the privatized state should come to an end because it cannot be legitimate. Therefore, we should envision a more legitimate political regime based on constitutional limits on privatization and governed by civil servants. *Non-ideally*,

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<sup>3</sup> For an overview of the ideal vs. non-ideal theory debate see Valentini 2012. Note that, in what follows I do not intend to enter such a complex debate, nor to defend ideal theory from the well-known objection by Amartya Sen (2006) that "transcendental" theories, as he calls them, are neither necessary nor sufficient for justice – other scholars (e.g., Ingrid Robeyns 2012) have undoubtedly dealt with these issues better than what the scope of this review would allow me to do.



instead, she promotes duties for private donors and providers to enhance the current state of affairs, even though she emphasizes that this would not render privatization more legitimate.

Two types of problems arise from this non-ideal solution. One is practical. Improving the status quo could slow down, if not undermine, the process of exiting the privatized state. The author herself recognizes this matter:

Assuming conditions of resource scarcity, we may well have reasons to invest these resources in efforts to limit state privatization and to bring about a more legitimate political order. Further, effectively implementing the above duties might end up being *counterproductive* [...]. This is because realizing those duties may end up legitimizing the role of private agents as appropriate political organs (282, emphasis added).

Nevertheless, she argues, these practical problems do not undermine her argument. I do not see, however, how the promotion of reforms that improve the privatized state would not weaken the claim that this state is wrong (i.e., illegitimate) and cannot be otherwise. It is one thing to acknowledge that the privatized state is unlikely to cease to exist in the near future, and that we need to adapt accordingly. But it is quite another to propose enhancing the legitimacy of privatization, even if only provisionally, in the non-ideal scenario. How can private associations act “as if they were legitimate” (281) if they cannot be legitimate by definition? Saying that seems to contradict the main argument. In this regard, I think that Cordelli’s non-ideal solution leads to a theoretical problem as well. Therefore, I wonder why Cordelli does not bite the bullet and go for the ideal solution *tout court*. This looks more consistent with her own argument, namely that privatization is illegitimate and cannot be legitimized.

Moreover, this would not prevent her from considering empirical constraints, as she says she does in defending her view against the “radical skeptic”, to whom she replies that her “political imagination may be limited, but intentionally so” (302). With this, she clearly seeks to balance the desire to develop a “work of hope” with the need to take practical limitations into account. However, this appears to be an issue of the feasibility of ideal theory rather than a matter of non-ideal theory. Furthermore,

this intention would not be denied by endorsing only the ideal solution. Such a solution may indeed take into account empirical constraints. For example, if one admits that “the presence of a complex administrative apparatus” is inevitable, one could, like Cordelli, imagine an ideal political world that reflects this feature. In a Rousseauian vein, political philosophy would “inquire if, in the civil order, there can be any sure and legitimate rule of administration, men being taken as they *are* and laws as they *might be*” (Rousseau 2014, 3, emphasis added) – where what has to be taken as it is would not only be human nature, but also some features of human society. This is also in line with Cordelli’s answer to the “realist skeptic”, which emphasizes that what she is looking for are “political reforms” for which it is “*reasonable to hope*” (302, emphasis added).

Note that my final remark is driven by the conviction that the privatized state is a problem, and political philosophy ought to find ways to eliminate it. However, because I agree with Cordelli’s main argument, I believe that her ideal normative proposal of a more legitimate system of public administration (283) would have deserved more space in the book’s length. This does not diminish the validity of her prior take on the illegitimacy of privatization, which I think is still sound, consistent, and compelling.

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