Republican Liberty and its Constitutional Significance

PHILIP PETTIT*

In this paper I give some illustrations of the constitutional significance of the republican conception of liberty. I look at the implications of the ideal for the rule of law, the separation of powers, and democratic design. In doing this, I draw freely on material already published, especially in sections 2 and 3; the paper is an attempt to draw together constitutional threads that remain apart in that other writing.[1] While I am greatly indebted to work done jointly with John Braithwaite, I should say that I do not explicitly draw on that work here.[2]

It is worth looking at the constitutional significance of republican liberty for three reasons. One is that many constitutional instruments have their origin, historically, in a tradition that republican thought deeply influenced. A second is that the republican conception of liberty reveals a unifying rationale for these different instruments, where other justifications tend to provide different arguments for different devices. And a third is that this rationale, once identified, offers important suggestions as to how the constitutional instruments should be best understood and developed to meet changing circumstances.

There is a well-known ambiguity in the way scientists talk of laws and it is worth noting that our talk of constitutions is subject to a similar malaise. Scientists, when they speak of laws, may mean laws in the sense of the regularities that obtain in nature: regularities of which they will never claim to have more than fallible knowledge. Or they may mean laws in the sense of the generalisations defended in a preferred theory: laws in the sense in which we are happy to speak of Newton's laws, taking them to be attempts to formulate natural regularities. In the first sense, laws constitute an objective dispensation that rules in the world; in the second, they are theoretical formulae that attempt to capture that dispensation.

There is a similar ambiguity in the word 'constitution'. When thinkers in the 17th and 18th centuries spoke in celebration, as they often did, of the British constitution, they had in mind an unwritten dispensation that obtained, as they saw

* Professor of Political Philosophy, Research School of Social Sciences, The Australian National University.

1 Philip Pettit, *Republicanism: A Theory of Freedom and Government.* (Oxford: Oxford University Press, 1997); Philip Pettit, 'Republican Liberty, Contestatory Democracy', in C Hacker-Cordon and I Shapiro (eds), *Democracy's Value* (Cambridge: Cambridge University Press, 1999). Philip Pettit, 'Democracy, Electoral and Contestatory' (2000) *Nomos.*

2 John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1990).

it, in the objective world of British law and politics. They wrote about the constitution of Britain in the way in which Polybius had written of the *ethe* or customs of a society as distinct from the *nomoi* or laws, or Machiavelli had written of the deep-running *ordini* as distinct from the more pedestrian *leggi*. They had in mind the sort of thing to which John Rawls directs us when he speaks of the basic structure of a society.[3] But when contemporary writers speak of a constitution, what they are usually thinking of is not an objective structure or dispensation in the affairs of a people, but rather a document which formulates and attempts to regulate that structure or dispensation. They mean 'constitution' in the sense in which we speak of the American or Australian constitution, not in the sense in which older writers spoke of the British.

In looking at the constitutional significance of the republican ideal of liberty, I should say that I have in mind its significance for the constitution of a society in the vaguer, objective sense of the term 'constitution'. The constitution of a society in that sense is given by certain objective patterns which prevail in legal and political life, and that are treated as normative by participants. They are the normative regularities that determine three broad matters in particular: how positions of authority in the society—legislative, executive, and judicial—are to be filled; what constraints are to govern the exercise of those different forms of authority; and how changes can be made, if indeed they can be made, in regard to those two matters.

And so to business. In the next section I set out my understanding of the republican ideal of liberty, and its relation to the more standard ideal. In the three sections following I look in turn at the significance of that ideal for the rule of law, the separation of powers and the design of democracy. And then in a fifth and final section I comment on the difference between the implications of the republican ideal and the implications of the more standard one.

The Republican Ideal of Freedom

The core idea

The republican tradition, as I understand it, stretches far and wide.[4] The tradition is associated with Cicero at the time of the Roman republic; with a number of writers, pre-eminently Machiavelli—'the divine Machiavel' of the *Discourses*—in the Renaissance Italian republics; with James Harrington, Algernon Sydney and a host of lesser figures in and after the period of the English civil war and commonwealth; and with the many theorists of republic or commonwealth in 18th-century England and America and France. These theorists—the commonwealthmen, as they were called—were greatly influenced by John Locke and, later, the Baron de Montesquieu; indeed they claimed Locke and Montesquieu, with good reason, as their own. They are well represented in documents like *Cato's*

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3 John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971).

4 JGA Pocock, *The Machiavellian Moment: Florentine Political Theory and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975).

Letters[5] and, on the American side of the Atlantic, the *Federalist Papers*.[6]

I have argued at length elsewhere, developing the work of Quentin Skinner[7] and other historians, that the long republican tradition is associated fairly consistently with a particular conception of liberty.[8] Under this conception a person is free just to the extent that no one has the position of a *dominus* in their life: not any private lord, and not any public authority. No one is able to interfere in what they do except so far as they are forced in doing so to respect the perceived interests of the person in question; no one, in the received phrase, has an arbitrary power of interference in their affairs.

A socially demanding ideal

This conception of freedom is socially demanding, so far as it means that dependency on the goodwill of another—having to live at the mercy of another—is in itself inimical to freedom. Even if the other in question—the *dominus*—is perfectly happy to let the person do what they like, the very fact of dependence and vulnerability, the very fact of the accessibility of arbitrary interference to that *dominus*, means that the person is not free. Anything they do, they do by the implicit leave of the *dominus*. They live within a sphere of domination that, like a field of gravity, warps the character of everything they attempt.

Traditional republicans often made this idea vivid by associating the subjection to a master, even a kindly and gentle one, with servility. The subject must always take account of the wishes of the master and, if needs be, censor what he or she does in order to guard against the possibility of annoying that master, waking the despot that must always be presumed to sleep within. Perhaps the best hope of non-interference lies with living under the shade of a gentle master and censoring those choices—perhaps those few choices—that would trigger interference. But that does not mean that the mode of life in question is a free one. For the republican tradition that we find in writers as different as Cicero, Machiavelli, Harrington, Montesquieu and Madison, such self-censorship is the very epitome of unfreedom. The free person, the person capable of acting freely, cannot have to live under such a regime. He or she must be capable of boldness and fortrightness and not have to look with deference or fear on any other; they must be able to look every other in the eye.

I say that this is a socially demanding conception of freedom, because it

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5 John Trenchard and Thomas Gordon, *Cato's Letters* (6th ed (1755) New York: Da Capo, 1971).

6 James Madison, Alexander Hamilton and John Jay, *The Federalist Papers*. I Kramnik (ed), (Harmondsworth: Penguin, 1987).

7 Quentin Skinner, 'The Idea of Negative Liberty', in R Rorty, JB Schneewind and Q Skinner (eds), *Philosophy in History* (Cambridge: Cambridge University Press, 1984); Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1997). But see P. Pettit, 'Keeping Republican Freedom Simple: A Difference with Skinner' (2001) 11 *Philosophical Issues* (supp. to Nous) forthcoming.

8 Pettit, above n 1.

means that women and servants, as they were positioned in all pre-modern societies, had to be seen as unfree. Let the husband or master be the kindest in the world, still the woman or servant lives in their power: *in potestate domini.* And that is enough, on its own, to put them outside the sphere of freedom.

Of course the social radicalism of their idea did not cause traditional republicans any particular discomfort, since it was generally assumed throughout the period of their hegemony that the constituency of citizens was restricted to mainstream, propertied males. Thus one of the most outspoken of republicans, Algernon Sidney, could write in the late-17th century in quite complacent terms about the position of a servant. 'He must serve me in my own way, or be gone if I think fit, tho he serve me never so well; and I do him no wrong in putting him away, if either I intend to keep no servant, or find that another will please me better'.[9] And in the same period Mary Astell could write with acid accuracy—if not out of standard feminist motives[10]— about the position of women under republican principles. 'If all Men are born Free, how is it that all Women are born Slaves? As they must be, if the being subjected to the inconstant, uncertain, unknown, arbitrary Will of Men, be the perfect condition of Slavery? And, if the Essence of Freedom consists, as our Masters say it does, in having a standing Rule to live by?'.[11]

A constitutionally discriminating ideal

Not only is the republican conception of liberty as non-dependency or non-domination socially demanding, it is also constitutionally discriminating. The state and the law is inevitably coercive: it must tax citizens for its resources; it must threaten those who violate the law with penalties; and it must impose penalties on those convicted of violation. Will such interference deprive citizens of their freedom? Not necessarily, according to the republican ideal. Provided the interfering state is forced to respect the perceived interests of the citizens in the way it interferes, it will not dominate them. They may be restrained by the actions of the state, just as they are restrained by natural limitations. But those actions, like natural limitations, will not represent a form of domination in their lives; they may reduce the range of choices in which freedom as non-domination can be enjoyed but they will not themselves place people under the power of a *dominus.*

Traditional republicans were more interested in the constitutional, than in the social, implications of their conception of liberty. What they argued on this front is that there are common perceived interests shared by all citizens—again, I must stress that they had a restricted conception of the citizenry—such that the state that is forced to track those interests will not be arbitrary and dominating and will not offend against the liberty of citizens in the sense of dominating them. Provided the state is oriented to the common good or common weal, as it used to be said—

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9 A Sidney, in TG West (ed), *Discourses Concerning Government* (Indianapolis: Liberty Classics, 1990).

10 P Springborg, (1995) 89 'Mary Astell (1666-1731) Critic of Locke' *American Political Science Review* 621-633.

11 B Hill, *The Frist English Feminist: Reflections upon Marriage and other Writings by Mary Astell* (Aldershot: Gower, 1986).

provided it is forced to take its guidance from the *res publica*—it will not represent a power in people's lives that renders them unfree. The republican ideal was constitutionally discriminating, in the sense that it gave clear directions as to when a constitution was satisfactory, when unsatisfactory. Any constitution or dispensation that allows those in government to have a degree of arbitrary power over its people—power that is not forced to serve the people's common perceived interests—will be to that extent objectionable.

This theme in republican thought received romantic overstatements in the work of writers like Rousseau and Hegel—statements to the effect that the law could force people to be free—and it is important that we understand it properly. The idea is that that state and the law, if it tracks people's common perceived interests faithfully—a big 'if', of course—will not offend against their liberty in the first and most basic sense of dominating them; if you like, it will not compromise people's liberty. But the state and the law will necessarily offend against people's liberty in another, secondary sense: without dominating them, its coercive impositions will restrict the range of choice in which they can enjoy the non-domination; without compromising their liberty, those impositions will still condition it: they will have the same restrictive or conditioning effect that natural obstacles and limitations have. This being the case, the republican conception of liberty teaches a double lesson for constitutional thought. First, constitutions should be designed so that domination by the state is minimised. And second, that as between two non-dominating constitutions that do equally well in stopping domination by others, that which imposes the fewer restrictions will be the better. It will enable people to enjoy their non-domination across a broader range of choices.

The antonym of republican liberty

Before elaborating on the constitutional implications of the republican conception of liberty, I should first say something about the conception of liberty that took over from it, and that generally prevails today. Under this conception, freedom is constituted by non-interference rather than by non-domination. A person is deprived of their freedom so far as there is actual interference and only so far as there is actual interference; domination is neither here nor there.

The so-far part of this formula means that all law takes away freedom, since all law is coercive: and all law takes away freedom, whether or not it is forced to track the common good; whether or not it is arbitrary in the republican sense. Hence the new conception is constitutionally less discriminating than the older one; it does not, in itself, require a non-arbitrary mode of law and government: if that is to be required, it will be on the basis of other values. The only-so-far part of the formula, on the other hand, means that the mere fact of being dependent on the goodwill of another, the mere fact of having a *dominus*, does not take away one's freedom; provided the master in question does not actually interfere, one's freedom as non-interference remains intact. And so the new conception is also socially less discriminating than the older one.

The historical story as to how freedom as non-interference took over from freedom as non-domination is closely connected with this difference in the social

and constitutional significance of the two ideals. As I tell that story elsewhere,[12] the ideal of freedom as non-interference first gained popular currency—it had earlier been mooted by the great 17th-century opponent of republicanism, Thomas Hobbes—in the late-18th century.

At that time the republican ideal was constitutionally troublesome, because it suggested that colonial rule in Britain's American colonies made the colonists into slaves; they were subject to a government that, however benign in general, was not forced to track their perceived interests and that had the position of a *dominus*. This led Richard Lind and others in the pay of Lord North's government to argue that freedom should be understood only as non-interference; that all government reduced the freedom of its citizens or subjects in that sense of freedom; and so that the Americans had no greater complaint that those in Britain itself.[13] The question, so it was suggested, was not whether Britain's government of the American colonies was arbitrary and dominating but rather whether it was overall for the good: whether, for example, it prevented more interference by others in people's lives that it itself perpetrated upon them.

But at the end of the 18th century the republican conception of liberty was also a socially troublesome ideal. About this period it became impossible to neglect women and servants as completely as earlier fashion had done; for a variety of reasons, they too came to be counted as part of the constituency of state concern. But if the state was supposed to advance the liberty of its subjects, as all agreed, and if liberty was understood as requiring non-domination, then this extension of the state's concern to include women and servants looked impossibly radical; it would have required the overthrow of existing family and master-servant law, since that ensured the domination of women and servants. In this context, so I surmise, reformers were attracted to the alternative ideal of freedom as non-interference. It would have allowed women and servants to count as free, so long as their masters did not actually throw their weight about: so long as their husbands were kindly Christian gentlemen, and their employers economically rational agents who saw no return in asserting themselves for assertion's sake.

In 1785 William Paley published *The Principles of Moral and Political Philosophy*,[14] one of the most frequently reprinted books throughout the 19th century. It is significant that while he recognised that most people thought that freedom required non-domination—to simplify a little—he himself opted for the alternative ideal, deeming that conception too radical. It was one of those ways of thinking, he said, that 'inflame expectations that can never be gratified, and disturb the public content with complaints, which no wisdom or benevolence of government can remove'.[15]

Where did the new conception of freedom as non-interference come from? Not from Hobbes, who continued to languish in ill-repute. Rather from 'the very

12 Pettit, above n 1 (1997) ch 1.

13 J Lind, *Three Letter to Dr Price* (London: T Payne, 1776).

14 W Paley, *The Principles of Moral and Political Philosophy,* Vol 4, Collected Works (London: C and J Rivington, 1825).

15 Ibid 168.

worthy and ingenious friend' from whom Richard Lind (1776),[16] says that he 'received the original idea'.[17] That friend, a figure whom Paley also saw as his mentor, was the young Jeremy Bentham. He had written to Lind a short time before the publication of his pamphlet, claiming the new conception as his own and describing it as 'the cornerstone of my system'.

> It may have been half a year or a year or more, I do not precisely recollect the time, since I communicated to you a kind of discovery I had made, that the idea of liberty, imported nothing in it that was positive: that it was merely a negative one: and that accordingly I defined it 'the absence of restraint'.[18]

Bentham proved to be one of the most important influences on modern constitutional thought and it is not surprising that the notion of freedom as non-interference assumed a central place in that tradition from very early days. In arguing for the attraction of the republican ideal of liberty, then, and in particular for its attraction as a constitutional ideal, I am inevitably swimming against the current of modern thinking. But, happily of course, I am not on my own. American jurisprudential thinkers like Sunstein,[19] Michelman[20] and Tushnet[21] have already begun to demonstrate the constitutional riches of the republican tradition and what I have to say should be seen in the context of their arguments; I adopt a distinctive line, especially in taking freedom as the core republican idea, but my claims are largely in tune with theirs.

Th Rule of Law

If we want the republican state to avoid assuming an arbitrary, dominating form, as republican liberty requires, then the instruments used by the state should presumably be, as far as possible, non-manipulable. Designed to further certain public ends, they should be maximally resistant to being deployed on an arbitrary, perhaps sectional basis. No one individual or group should have discretion in how the instruments are used. No one should be able to take them into their own hands: not someone who is entirely beneficent and public-spirited, and certainly not someone who is liable to interfere for their own sectional ends in the lives of their

16 Lind, above n 13, 54.

17 Ibid 18.

18 DC Long, *Bentham on Liberty* (Toronto: University of Toronto Press, 1977).

19 CR Sunstein, 'Beyond the Republican Revival' (1988) 97 *The Yale Law Journal,* 1539-1590; CR Sunstein, *The Partial Constitution* (Cambridge Mass: Harvard University Press, 1993a); CR Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1993b); CR Sunstein, 'The Enduring Legacy of Republicanism', in SE Elkin and KE Soltan (eds), *A New Constitutionalism: Designing Political Institutions for a Good Society* (Chicago: University of Chicago Press, 1993c).

20 F Michelman, 'The Supreme Court 1985 Term' (1986) 100 *Harvard Law Review,* 4-77.

21 M Tushnet, *Taking the Constitution Away from the Courts* (Princeton, NJ: Princeton University Press, 1999).

fellow citizens. The institutions and initiatives involved should not allow of manipulation at anyone's individual whim.

How to make republican instrumentalities maximally non-manipulable? Here it is essential to take account of empirical realities and it is impossible to devise a compete blueprint on a purely philosophical basis. But under any plausible scenario one of the conditions is, in James Harrington's phrase, that the system should constitute an 'empire of laws and not of men'.[22]

There are two aspects to the empire-of-law or rule-of-law condition. The first prescribes that laws should assume a certain sort of shape: roughly, that they should conform to the constraints described by contemporary rule-of-law theorists.[23] They should be general and apply to everyone, including the legislators themselves; they should be promulgated and made known in advance to those to whom they apply; they should be intelligible, consistent and not subject to constant change; and so on.

It should be clear why republicans will want laws to conform to constraints of these kinds. If the laws do not satisfy such constraints then those who make, execute or apply the law may easily be given arbitrary power over others. The legislators who can make laws without being subject to them, for example—say, the British Parliament in relation to the American colonies—will have arbitrary power. Again the legislators who can make retrospective laws or laws that apply, like the bill of attainder, to particular individuals or families will be able to interfere more or less arbitrarily in people's lives. And similarly the administrators or judges who can choose at will to apply unpromulgated laws, or who can exploit the obscurity or inconsistency of the law for their own purposes, will represent an arbitrary regime. If the rule-of-law constraints are breached, then the law becomes a playground for the arbitrary will of the authorities.

The second aspect of the empire-of-law condition presupposes that the first is satisfied and that any laws that are introduced will have a satisfactory shape. It prescribes that where government has a choice between acting on a legal basis—that is, legislating about the case on hand—and acting in more particularistic way it should always prefer the first, principled approach. There is no suggestion that government action, provided that it is legal, is bound to be for the good. The idea is that, assuming that government action is indeed needed, that action should operate as far as possible via law-like decisions, in particular via decisions that honour the rule-of-law constraints: via decisions, for example, that are not *ad hoc* or *ex post*.

The republican rationale for this idea is that where the particularistic decision can be shaped on an arbitrary basis by the will of the decision-makers, the principled piece of legislation is not so readily manipulable. The legislation will be of concern to people generally, including potentially the decision-makers

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22 J Harrington, in JGA Pocock (ed), *The Commonwealth of Oceana and a System of Politics* (Cambridge: Cambridge University Press, 1992) 81.

23 LL Fuller, *The Morality of Law* (New Haven, Conn: Yale University Press, 1971); CL Ten 'Constitutionalism and the Rule of Law' in RE Goodin and P Pettit (eds), *A Companion to Contemporary Political Philosophy* (1993).

themselves, and it is not going to be easy for them—though, unfortunately, it may still be possible—to guide it on an arbitrary basis.

The republican rationale supports extending the rule of law as far as possible, preferring principled to particularistic decision-making. This has far-reaching ramifications for how government is conducted. It means that parliament must always seek to legislate, under the usual rule-of-law constraints, about any issue that comes before it. But it also means that other agencies of government should be forced to act always in a principled, law-like way. They should be permitted to act only under the authority of law and only in a way that accords with the requirements of law. Those agencies will have to conform to established protocols and procedures, for example, in the arrest, accusation and adjudication of those believed to have committed a crime; or in the identification of those in need of welfare and in the provision of welfare to them; or in the determination of where certain government agencies are to be based and of where associated benefits are to flow; and so on. An empire of law requires fidelity to due process on a wide range of political fronts.

There are a number of features that should be noted about this derivation of the rule-of-law ideal from the republican conception of freedom as non-domination. A first is that it is the sort of justification for the rule of law that appealed historically to seminal figures like Harrington and indeed to republican forbears in ancient Rome. 'Nothing can be more absurd', wrote Algernon Sydney for example, 'than to say, that one man has an absolute power above law to govern according to his will, for the people's good, and the preservation of their liberty: For no liberty can subsist where there is such a power'.[24] The condition was recognised as essential to ensuring that government action was not just a front behind which an individual or a group could exercise arbitrary power. It meant that the law was 'a standing Rule to live by', in the phrase imputed by Mary Astell to 'our Masters', and it helped to ensure that government would not represent 'inconstant, uncertain, unknown, arbitrary Will'.[25]

The second feature to notice about the republican case for the rule of law is that it has a general, substantive reach. It applies, not just to legislation, but also to administration. As we noticed, it supports ideals of natural justice and due process in just the way that it supports a more narrowly conceived notion of the rule of law. But though the justification is more general in this sense, it does not reduce the rule-of-law ideal to something purely formal or content-independent. It provides grounds, not just for arguing against forms of rule that technically violate the standard constraints, but also against laws and decisions that offend only against the spirit of those constraints. We will find technically satisfactory laws offensive when the categories in which they are formulated are picked in such a way that the normal protections against arbitrariness that the rule-of-law provides are not extended to certain individuals or groups.

Finally, the third feature to notice about the republican case for the

24 Sidney, above n 9, 440; cf 465.

25 Hill, above n 11, 76.

rule-of-law is that it does not sacralise or fetishise such a rule: it does not make it into an absolute constraint. Let us suppose that if we emphasise rule-of-law protections against arbitrariness in certain cases then we will do more republican harm than good; we will excessively fetter the capacity of government to fit its action to the needs of particular cases and to be guided by common perceived interests. Given the justification provided for the rule-of-law ideal, we can easily see reason why in such cases a limited discretion may reasonably be given to government agents. If people's freedom as non-domination is better served under a regime that allows certain forms of discretion, then that regime should be put in place.

One reason why republicans may be well disposed to discretion of this sort, and may oppose any privileging of rule by the book,[26] is that other devices apart from the rule-of-law are available to guard against arbitrariness. Agents who are given limited discretion may be required to give reasons for their decisions, for example, may be subject to a complaints and appeals procedure, and may be disciplined by a procedure of routine monitoring. Thus the breach of strict rule-of-law constraints involved in giving government agents a degree of discretion may be compensated for by the imposition of other devices that further the goal of those constraints: that is, the protection of people against arbitrary, dominating forms of interference on the part of government.

The Separation of Powers

A second condition associated with the desirability of having a non-manipulable, constitutionalist system of government requires that the powers which officials have under any regime of law should be separated or dispersed. Where the empire-of-law condition bears on the place and content of law, this condition bears on the way in which the law operates.

Where there is law there are, of necessity, different roles to be fulfilled. In the taxonomy that finally got established only in the 18th century—most famously in the work of[27]— there is the function of making law, of executing or administering law, and of adjudicating those controversial cases where the law has to be applied. The dispersion of power requires that these functions be pretty well separate. And the reason, at least from a republican point of view, is more or less obvious. A consolidation of functions in the hands of one person or group would be likely to allow that party to wield more or less arbitrary power over others; it would mean that they could play around with the law in a relatively unfettered way. As Madison wrote 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition

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26 TD Campbell, *The Legal Theory of Ethical Positivism* (Brooksfield, VT: Dartmouth, 1996); F Schauer, *Playing by the Rules* (Oxford: Oxford University Press, 1991).

27 C de S Montesquieu, in a.t.AM Cohler, BC Miller and HS Stone (eds), *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989).

of tyranny'.[28]

If legislators are to be allowed to legislate only in a way that is consistent with certain existing laws or principles, therefore, then it is important that those who judge on whether the legislation does conform to those constraints are not the legislators themselves. Again if those who execute the law are to be required to conform to existing laws in their mode of execution, then it is important that they are not their own judges; it is important that the relevant judicial power lies in other hands.[29] The powers of legislation, execution and adjudication must be distributed among different parties and bodies.

Although the full taxonomy of powers was only set out in the 18th century, when the so-called separation of powers became perhaps the outstanding theme in the republican tradition, republicans had insisted on the dispersion of power from much earlier.[30] Marchamont Nedham did not strike a particularly novel note, for example, when in 1657 he described the confusion of legislative and executive powers—executive powers would have included judicial—as a great error of government: 'in all Kingdoms and States whatsoever, where they have had any thing of Freedom among them, the Legislative and Executive Powers have been managed in distinct hands: That is to say, the law-makers have set down Laws, as Rules of Government; and then put Power into the hands of others (not their own) to govern by those Rules'.[31]

We have concentrated, so far, on the separation of law-related functions. But, under its republican version, the dispersion-of-power condition has significance in other areas too. The republican rationale for dispersing power is, other things being equal, to increase the non-manipulability of the law and to guard against government exercising arbitrary sway over others. The assumption is that to the extent that power is localised, in the sense of accumulating in this or that person, power is potentially dominating. Given this rationale, the dispersion of power for which we should look may well support other measures besides the separation of legislative, executive and judicial power.[32]

One measure it may well support is the bicameral arrangement under which there are two houses of parliament, each with a distinctive base; indeed such bicameralism, as we shall see, is likely to appeal to republicans on a number of counts. And another, equally familiar, measure is the decentralisation of power that is achieved by having a federal system under which a number of constitutent states share power with the central government; it is no accident that republicans have

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28 J Madison, A Hamilton and J Jay, in I Kramnik (ed), *The Federalist Papers* (Harmondsworth: Penguin, 1987) 303.

29 Montesquieu, above n 27, 157.

30 MLC Vile, *Constitutionalism and the Separation of Powers* (Oxford: Oxford University Press, 1967).

31 WB Gwyn, *The Meaning of the Separation of Powers* (The Hague: Nijhoff, 1965) 131.

32 For a very original exploration of this theme see J Braithwaite, 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers' (1977) 47 *University of Toronto Law Journal* 305-61.

been traditionally partial to federations. Yet another measure, this time a novel one, is the dispersion of power that can be realised in the contemporary world so far as governments agree to be bound by certain international covenants or conventions; this has the effect of giving over power to the international bodies that interpret those covenants. Such a policy is likely to be welcomed by someone who wants official power to be so dispersed that people's freedom as non-domination is safe in its presence.

When I say that the dispersion of power may require more than the separation of legislative, executive and judicial functions, I remain faithful to the older republican tradition. Within that tradition, the functional division was part of a larger project of dispersing power. This project was encapsulated in the ancient ideal of a mixed government in which different sectors are represented and power is given in part to this representative body—perhaps this house of representatives—and in part to that.[33] The project supported a hostility, not just to compromising the division of functions, but also to anyone's being judge in their own case, for example, and to anyone's being both judge and jury.

The republican rationale for dispersing power, in particular the rationale for dividing functions, should be contrasted with other possible grounds for supporting it. Suppose you are a populist, who believes that the people should be the only makers of law; suppose you are of a parliamentarian mentality, for example, and think that the people's representatives are the one and only legal sovereign.[34] In that case you will want to insist that law-making power should never drift elsewhere, in particular never drift into the hands of an unelected judiciary. On the letter of what the separation of power requires, you will be very exacting, at least in regard to law-making power. But your commitment to those requirements will come of a very different spirit from that which animated and animates the republican attitude. Indeed it will come of a spirit that is directly anathema to republicanism, being complacent about the possibility of a majority imposing its will on others.

The contrast between the republican and the populist rationales for separating legislative, executive and judicial functions comes out in a difference of view about how exact that separation should be. Republicans are likely to think that no exact division is really feasible: it is surely inevitable, for example, that in interpreting law the courts will effectively wield a degree of law-making power. Republicans may even believe that no exact division is likely to be desirable; the required regimentation of functions would be liable to compromise the ability of government to advance its republican aims. But that need not concern them, provided that power still remains effectively dispersed. Thus it did not concern the authors of the *Federalist Papers* who defended the United States Constitution against the anti-federalist objection that it allowed an unwonted degree of leakage across functional boundaries.[35]

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33 Ibid.

34 Campbell, above n 26; AV Dicey, in ECS Wade (ed), *An Introduction to the Law of the Constitution* (10th ed, London: Macmillan, 1960).

35 B Manin 'Checks, Balances and Boundaries: The Separation of Powers in the Constitutional Debate of 1787' in B Fontana (ed), *The Invention of the Modern*

Populists, however, are bound to take a different view. They must think that any leakage of law-making power, whether in the direction of the judiciary or the executive, has to represent an inherent evil; it means that the law is made by someone other than the people or their representatives. Thus they have to insist on a separation of powers—or at least on an isolation of law-making power—that is as exact as possible; they have to look for a watertight compartmentalisation. It may have been this populist attitude that inspired the anti-federalist objections to the United States Constitution. If it was, then we can see the anti-federalists as figures whose enthusiasm for democracy led them to betray the essential republican concern: the concern to ensure against arbitrariness in power, even against arbitrariness in the power of the people.

We said in connection with the republican rationale for the rule-of-law ideal that it connects with a traditional justification of the ideal, that it gives a general resonance to the ideal and yet that it does not sacralise or absolutise it. Three parallel comments apply, we can now see, to the republican derivation of the separation-of-powers ideal.

That derivation, as we stressed, is the one that figures in the institutional and intellectual history that gave rise to the idea of separating or dispersing state power; and in this respect it is distinct, for example, from the more populist account of why that separation is important. Second, that derivation argues for a dispersion of power, not just in the narrow functional sense of separating legislative, executive and judical authority, but also in the broader sense illustrated by bicameralism, federalism and more recent initiatives whereby nation states put themselves under various international instruments. Third, and finally, the derivation does not make a fetish of separating powers. In particular, it allows that provided power is in different hands, there may be leakages across those boundaries; it does not make the separation of powers into an absolute, purist constraint.

D mocratic Design

The assumption in the preceding sections has been that to the extent that the interference of government in people's lives is forced to track their common perceived interests, to that extent it will be non-arbitrary. But what interests should it track in particular? Those interests, so the tradition goes, that can be served in common by government: those interests whose satisfaction makes government desirable in the first place.

The issue of how to define the common interests—the common perceived interests—that a republican state should be constitutionally forced to track is a tricky one and I don't propose to do any more here than offer my favoured definition. Where the members of a population have common interests, it must be that they will all benefit from jointly seeking to cooperate with one another in the ordering of their relations: this, rather than not cooperating at all or rather than cooperating in sub-populations. Their common interests, then, will be those goods

Republic (1994).

such that the considerations avowable in the course of such a cooperative enterprise—considerations, of necessity, that take everyone's welfare into account—argue for providing them collectively.

The primary constitutionalist challenge for republicanism can be rephrased with the help of this notion of common interests. It is to identify institutions that will force the state to track the common interests of the citizenry, and only those common interests. There are two dangers, then, that the required institutions will have to guard against. One is the danger of the false negative: failing to identify and empower certain common, recognisable interests. And the other is the danger of the false positive: allowing factors other than common, recognisable interests to be authorised as influences on government.

This observation suggests that we should seek out republican institutions that will work in two dimensions. First, they will guard against false negatives by providing a supply of candidates for matters of common, recognisable interest—for policies that will guide government—that is likely to err on the side of generosity. And second, they will guard against false positives by providing a check on the candidates finally empowered, and on the other factors shaping government decisions, to see that only common interests have influence. In the first dimension the institutions will work to ensure that all common, recognisable interests are articulated and authorised as guides for government. In the second they will work to ensure that only common, recognisable interests are so articulated and authorised.

The obvious way to achieve the first effect will be to open up all possible channels for the public to make proposals on matters allegedly to do with common, recognisable interest. And here the salient sort of institution to introduce is that of the democratic election in which any citizen is free to stand and every citizen has the same voting power. Electoral competition in such an environment should provide for any potential matter of common, recognisable interest to be aired and given a hearing, as rival candidates look for a platform that can command majority support. This should be so, in particular, provided that electoral campaigning is funded or facilitated in a way that gives all corners of opinion a chance to have a say.

But the electoral institutions that should ensure that all potential matters of common, recognisable interest get a hearing—and that should guard in that way against false negatives—will tend to fail on the side of false positives. Since elections have to be majoritarian in character, they may put up as matters of common, recognisable interest things that answer only to the interests of a majority. And since they only allow for a very loose control of the policies eventually pursued by government, they may fail to stop those elected to power from nurturing policies that fail to answer to popular interests or from pursuing policies in a way that doesn't answer to popular interests. In phrases that had a wide resonance within the republican tradition, the electorally democratic state may be an elective despotism; it may represent a tyranny of the majority or indeed a tyranny of this or that elite or in-group.

How to guard against such false positives prevailing in the corridors of power? How to ensure that the personnel and the policies that gain an electoral mandate are checked and balanced in such a way that opportunities for false positives are significantly reduced? How to increase the chances that only matters of common, recognisable interest are allowed to dictate the ends and the means adopted in government action?

Electoral standing gives the collective people the power of an indirect author in relation to governmental laws and decisions. They may not be the authors of what those in government say and do but they determine who the authors shall be or at least who the overseers of the authors shall be. The problems just identified with electoral democracy stem from two sources: on the one hand, the fact that this authorial control is exercised collectively, so that minority voices may be ignored; and on the other, the fact that it is exercised indirectly, so that other factors may dictate what happens: in particular, factors that it is not in the common interest to empower.

The metaphor of authorship suggests that the way to guard against the problems in question—ultimately, the way to guard against false positives—may be to try and ensure that ordinary people, individually and in groups, have a power of editorship as well as a power of authorship in relation to government. They should have a power over what is done by government, of a kind with the power that editors have over what gets published in their journal or newspaper.

People cannot have a power of individual veto, since that would probably make government impossible. Many policies that advance common, recognisable interests will disadvantage some over others—the communally desirable hospital or refuge or prison has to be built near someone's back yard—and were people to have a power of veto then those disadvantaged under any proposal might seek to block it in the hope of pushing the relative costs onto others. But not every editor has a power of veto. Some are only able to contest submissions to which they object by appealing to an editorial board for judgment. And one way of giving ordinary people editorial power in relation to government would be by establishing parallel possibilities of contestation.

The editorship metaphor picks up the idea behind the contestatory democratisation for which I argue in chapter six of my book. But it has two advantages, both of which I have exploited in more recent work.[36] First, it sets contestatory democracy in a context where electoral democracy is clearly the required complement; in the book I derive electoral democracy from the contestatory ideal rather than giving it independent footing in this way.[37] And second, it suggests a useful basis for thinking about what a contestatory democracy would require.

In order to appreciate this second point, consider the steps that might be taken by an editorial board in order to give suitable contestatory power to the editor in our imagined newspaper or journal. Contestation that takes the form of an appeal

36 Pettit, above n 1 (1999); Pettit, above n 1 (2000).

37 Pettit, above n 1 (1997) 191.

to the board is likely to be very demanding—it would consume a lot of time and energy—and not very efficient: suitable grounds for contestation would have to emerge case-by-case. But there are two steps that we can readily imagine the journal or newspaper taking.

The first would be for the editors and editorial board to agree on the conclusiveness of certain grounds for challenge, on the need for submissions to be prepared for consideration according to certain guidelines, on the expectation that contributors not be in the pay of certain interests, and perhaps even on specific constraints that any published piece ought to meet. They would embody these points of agreement in procedures that writers can then be guided by.

The second step would be to allow room for *ex ante* as well as *ex post* contestation. Instead of permitting only the contestation whereby the editor challenges a finished submission before the editorial board they might allow the editor to have a say at an earlier stage by inviting authors to seek editorial input and advice. They might introduce consultative as well as procedural devices to increase the power of the editor and supplement *ex post*, appellate contestation.

Returning now to republican institutions for reducing the influence of false positives on government, we can see means whereby people might enjoy editorial power of a parallel kind through receiving parallel resources of a procedural, consultative and appelate nature. We can see means whereby the public contestability of the things done by government might be enhanced, and the chance of false positives reduced.

Procedural resources that would parallel those designed to empower the editor are exemplified by measures of the kind that we have been considering in previous sections; the electoral-cum-contestatory conception of democracy serves to put such measures in nice perspective. The resources envisaged are measures of the kind that curb and channel the things that government can do and that thereby empower ordinary people. They will include not just rule of law constraints and the separation of powers, but also the need to back public decisions with reasons, the involvement of statutory authorities in certain decisions, the accountability of government to an independent auditor, and the provision for freedom of information.

But not only can the contestability of government doings be enhanced by procedural provisions of these kinds. Governments in many countries have taken steps in recent years to enable ordinary people to be consulted and to have an influence between elections on what government is doing. Not only can parliament be petitioned by members of the public, parliamentary representatives accessed by their constituents, and parliamentary inquiries and committees activated by public pressure. Provision is often made in addition for advisory, community-based bodies that administrative agencies have to consult; for public hearings and inquiries relevant to this or that proposed venture of government; for the publication of proposals—say, in 'green' or 'white' papers—and the eliciting of responses from members of the public; and for focus-group research, or research of a related kind, into public opinion on issues where the government intends to take action.

I now see these procedural and consultative measures—and I say nothing here on how they might be developed or improved—as two of the three sides to a contestatory democracy.[38] The third side, of course, is the *ex post* appellate one on which I concentrate in the book. This, as I emphasise there, can take many forms, public and parliamentary, as well as judicial. And the judicial form itself covers a multitude. For the actual institutions in many societies show that not only can government decisions be judicially reviewed for their legality; they may also be reviewed by administrative tribunals for their merits, or investigated by ombudsman figures to see if certain more general complaints should be upheld.[39]

The upshot is that if we focus on the republican need to have institutions that will identify and empower all and only the common, recognisable interests of citizens, then we are naturally directed to a two-dimensional ideal of democracy, which encompasses ideals like those already described. Under this ideal the people have powers of two kinds, one authorial, the other editorial. And under this ideal, due place is made on the one hand for institutions of electoral democracy and, on the other, for procedural, consultative, and appellate resources of a piece with measures that traditional republicans have always emphasised.

The primary lesson of republicanism, then, is that the polity should seek for institutions that embody this ideal of a democracy that is at once electoral and contestatory. Such institutions would guard against the danger of the state becoming a *dominus* by making it difficult for public policy not to be driven by common, recognisable interests. And they should also facilitate the emergence of the sort of policy designed to increase people's freedom as non-domination.

Not, I should add, that there is a guarantee on either front. A policy may get through the finest institutional procedures and not be genuinely a matter of common, recognisable interest. There are no institutions that could ever justify complacency, then, on the part of someone attached to republican values. Otherwise put, republican freedom is not a pure procedural ideal;[40] however important institutional procedures are, they only ever provide imperfect reason for thinking that the ideal is satisfied.

This rather brisk account of the significance of the republican ideal of liberty for our conception of democracy fits rather well, I think, with the republican tradition, broadly conceived. That tradition was essentially Roman in origin and inspiration,[41] so that while it gave great importance to democratic election, it equally emphasised the importance of the sorts of checks and balances on democratic power that the Roman constitution at least theoretically exemplified: this, for example, in the fact that there were four assemblies in Rome, each with its own power; there was a commitment to the rule of law; there was limitation of tenure on office as well as rotation in office; there were provisions for challenging

38 Pettit, above n 1 (2000).

39 P Cane, *An Introduction to Administrative Law* (3rd ed, Oxford: Oxford University Press, 1996).

40 Rawls, above n 3,, 81.

41 MNS Sellers, *American Republicanism: Roman Ideology in the United States Constitution* (New York: New York University Press, 1995).

power, as in the right of the tribunes of the plebs to veto various decisions; and so on. The tradition saw such devices as a means whereby people were individually empowered, just as they saw electoral institutions as a means whereby they were collectively empowered.

They followed Polybius in rejecting the notion of unconstrained democracy that he suggested, not entirely accurately, was personified in Athens; he described this as 'ochlocracy'—from *'ochlos'* meaning 'mob'—and contrasted it with democracy proper.[42] Thus the Levellers in 17th century England, who represented a radically democratic republicanism, could argue that the purpose of government was the 'severall weales, safeties and freedomes' of people—the word 'severall' is important—and that their protection required checking the power of the people in their collective, parliamentary incarnation.[43]

I argued earlier that my republican derivation of the familiar rule-of-law and the separation-of-powers ideals was historically earlier and more important than current derivations. The case of democracy is somewhat different, for we have been so influenced by a more recent, populist rationale for democracy—a rationale under which the important thing is to give power to the *vox populi*—that we don't any longer think of contestatory measures as democratic in inspiration; rather we often see them as examples of trimming the democratic sails. In this case, then, reverting to the republican derivation of democracy is even more important. It reminds us that democracy flies on two wings, one electoral, the other contestatory—it reminds us, indeed, that we would not describe a country as democratic if it lacked the contestatory protections—and it restores us to a more rounded, persuasive image of the democratic ideal. Under this image it is the common good of the people—in its original, non-ominous usage, the *salus populi*—that matters. This common good will certainly require us to empower the electoral voice, the *vox populi*, but equally it will require us not to give that voice complete, untrammelled sway in the lives of individuals.

The Contrasting Implications of Freedom as Non-Interference

This last discussion of the democratic ideal should make clear that the sort of republicanism that I favour, and that is deeply rooted in the neo-Roman tradition which shaped modern western institutions, is distinct from what is more properly called 'communitarianism', though this approach sometimes invokes the tag of 'republicanism'.[44] That communitarian doctrine often claims descent from the Athenian ideal of political participation that is hailed, with greater or lesser accuracy, by contemporary writers like Hannah Arendt.[45] It has little or nothing to

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42 Ibid.

43 ES Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: Norton, 1988) 71.

44 Pettit, above n 1 (1998); M Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, Mass: Harvard University Press, 1996).

45 H Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958).

do with what the actual historical tradition of republicanism but springs rather from the enthusiasm for all things Greek that so influenced 19th-century romantic thought.

But while my republicanism may clearly be distinct from communitarianism in any such sense, others may say that it is not so clearly distinct from the tradition of thinking about constitutional matters that gives pride of place to freedom as non-interference, rather than freedom as non-domination. This tradition probably deserves, in that loosest of loose tags, to be described as liberal. I would like to conclude with some comments on the charge that the republican way of conceiving and supporting constitutional ideals of the kind described is indistinguishable from the liberal.

Those who press the charge will argue, quite rightly, that though the modern constitutional tradition conceives of liberty as non-interference, still it also hails—with differences of detail, of course—the ideals of the rule of law, the separation of powers and constitutional, constrained democracy. As against that argument, the main point that I would make is that in defending such ideals, the tradition does not clearly derive them from a concern for liberty as non-interference. Rather it tends to muster a rag-tag of different considerations in support of each of the ideals, leaving them look like a contingently related set of desiderata. And here there is a deep and striking contrast with the republican view. For under that view, as I have tried to show, the ideals in question constitute a tightly connected vision of how political life should be organised, being derived in common from a foundational concern for freedom as non-domination.

But still, the ideal of freedom as non-interference is served in some measure, it will be said, by devices like the rule of law, the separation of powers, democratic election and contestatory access. Those devices are bound to reduce the likelihood of interference of a certain, damaging kind in people's lives. So what more does the republican ideal do in their defence?

In order to answer this query, think by way of parallel of the utility of taking out insurance against a certain danger; I am grateful to Geoffrey Brennan for suggesting this analogue. Such insurance has a double utility in the normal case. It has the use-value of reducing the likelihood of ruin in the event of the danger looming or materialising. And it has the security-value of allowing the insured person not to worry about the danger, a value which means that even if the feared eventuality never comes about, still the insurance will have been worth purchasing.

Under the ideal of non-interference, the protections afforded by our constitutional devices will have one form of utility only: that involved in their reducing the likelihood of certain forms of interference. But it is worth noticing that if we calculate about the devices in such terms, we may well conclude that they come at too great a cost. They involve interference themselves, of course, and that interference has to be put in the balance with the interference against which they protect. And not only do they involve interference: they often fetter government in a way that has substantial costs, making it difficult for government to do things that might increase the choices available to ordinary people.

Under the ideal of non-domination, however, the protections afforded by our constitutional devices will be attractive, not just for making certain forms of interference relatively unlikely, but also for having a value akin to the security-value of insurance. They have the value of enabling people to know that they do not live at the mercy of public officials, and that they can walk tall among their peers. Good republican policies will ideally ensure that people are not at the mercy of private wealth and power—*dominium*—and a good republican constitution will ensure that neither are they at the mercy of public power: *imperium*. Those devices will have the use-value of guarding against abuses of public power but, short of any such abuses occurring, they will also have the status-value, as we might call it, of enabling people to walk tall, without any need to defer to those in government. John Milton marked this theme when he said of the 'free commonwealth': 'They who are greatest walk the streets as other men, may be spoken to freely, familiarly, without adoration'.[46]

I trust that what I have said is sufficient to show that the republican tradition, in particular the republican ideal of freedom, gives us a compelling insight into how certain constitutional ideals should be conceived and into why they are important. I do not think for a moment, of course, that societies can live by constitutional ideals alone. Constitutional devices are not enough for promoting people's freedom as non-domination; the policies pursued under them must also be squarely shaped by that ideal And in any case, constitutional instruments will survive as stalwart protections only if they are supported by substantive civic norms and widespread civic virtue.[47] But still, manifestly, constitutional design is important. And if I am right, it is important that it be recalled to the republican ideals that have shaped it in the past. William Paley moved out of the orbit of those ideals, as we saw, on the ground that in a mass society they would be too demanding and, ultimately, too subversive. But our societies have moved a long way since his time and we do not now have the same excuse for resiling from the republican vision.

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46 B Worden, 'English Republicanism', in JH Burns and M Goldie (eds), *The Cambridge History of Political Thought* (1991).

47 Pettit, above n 1 (1997) ch 6.