

## BOOK REVIEW

### Liberal Ends and Republican Means

PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT*, Oxford University Press (1997) (304 pages) (\$29.95).

*Reviewed by Gerald J. Russello\**

The last three decades have seen a resurgence of interest in the tradition of political thought known as republicanism (or civic republicanism).<sup>1</sup> Works by Pocock, Bailyn, and Wood have recovered the intellectual and social milieu of seventeenth and eighteenth century Anglo-American thought for modern political theorists.<sup>2</sup> Indeed, the rise in historical and legal commentary on, and interest in, republicanism has been so dramatic as to be called a "republican revival."<sup>3</sup> This renewed interest in republican thought has coincided with a larger debate over the future of liberalism, which has been accused of ignoring important aspects of political life such as the need for community<sup>4</sup> or modern developments in psychology.<sup>5</sup>

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<sup>1</sup> See Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3, 27-28 (1995) (noting different terms used to describe republican tradition).

<sup>2</sup> See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); J.G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT* (1975); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1992). See also Richard R. Beeman, *Deference, Republicanism, and the Emergence of Popular Politics in Eighteenth Century America*, 49 WM. & MARY Q. 401 (1992); Daniel T. Rogers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992); Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334 (1982).

<sup>3</sup> See generally Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988). See also STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM* 5 (1993) (calling recent republican scholarship an "extraordinary effort of rescue").

<sup>4</sup> See generally JOHN GRAY, *ENLIGHTENMENT'S WAKE: POLITICS AND CULTURE AT THE CLOSE OF THE MODERN AGE* (1995); Pierre Schlag, *The Empty Circles of Liberal Justifica-*

Modern elaborations of the republican tradition have attempted to update its concerns for modern pluralist societies. In its concern for shared values and emphasis on civic virtue, modern republicanism has some similarity with communitarianism, which has arisen in the last several years as an intellectual alternative to liberalism.<sup>6</sup> Some thinkers, however, such as Cass Sunstein, see republicanism within a larger theory that also embraces liberalism.<sup>7</sup> Others, such as Mark Tushnet, acknowledge that certain principles of republicanism, such as "the common good," remain ill-defined.<sup>8</sup> Still other critics contend that the values of republicanism are ill-suited to modern sensibilities.<sup>9</sup>

The fundamental problem in finding contemporary relevance for republicanism is the overly restrictive nature of republican principles as they have been traditionally expressed. As Philip Pettit notes, almost from its inception republicanism was "an ideal for an elite of propertied, mainstream males."<sup>10</sup> Similarly, the republican preference for small, close-knit communities is at odds with the new republicans' approval of geographically large and extremely diverse

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tion, 96 MICH. L. REV. 1 (1997); MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996).

<sup>5</sup> See generally John Lawrence Hill, *Mill, Freud, and Skinner: The Concept of the Self and the Moral Psychology of Liberty*, 26 SETON HALL L. REV. 92 (1995).

<sup>6</sup> See generally ROBERT BOOTH FOWLER, *THE DANCE WITH COMMUNITY* (1991) (reviewing range of communitarian thought). The literature on communitarianism and its dispute with liberalism is extensive. For a bibliographic overview, see Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1766-68 & n.9 (1994) (book review).

<sup>7</sup> See Sunstein, *supra* note 3, at 1541 (arguing dichotomy between liberalism and republicanism is false); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1496 (1988) (stating classical republican thought contains resources useful to modern liberal constitutionalism).

<sup>8</sup> See MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 6 (1988).

<sup>9</sup> See Richard H. Fallon, Jr., *What Is Republicanism, And Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1698-99 (1989); Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L.J. 1651, 1662 (1988) (arguing that republican emphasis on rational dialogue may hinder other goals such as equality and political participation); cf. Martin S. Flaherty, *History "Lite" in American Constitutionalism*, 95 COLUM. L. REV. 523, 528 (1995) (disputing legal accounts of history of republican thought).

<sup>10</sup> PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 6 (1997); see also Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1669 (arguing republicanism hindered women and minorities from equal participation in political life). But see Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 36-37 (1986) (advocating a revised version of republicanism); Suzanna Sherry, *Civic Virtue and Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986) (finding some republican concerns applicable to feminism).

societies.<sup>11</sup> The task for the new republican theorists, therefore, is to "reappropriate [the republican] ideal and reintroduce it as a universal ideal for the members of a contemporary society."<sup>12</sup> Pettit's new book on republicanism is an impressive effort in this process of reintroduction. *Republicanism* is part philosophical treatise and part policy guideline. Not only does Pettit develop a modern republicanism and suggest its application to social policy, but he also includes a "Propositional Summary" that tracks the argument contained in the text, in outline form. This summary is helpful because the book introduces a number of specialized terms.

The political tradition Pettit draws upon has a rich history. Republican imagery and language, largely drawn from classical models, were pervasive in the seventeenth and eighteenth century Anglo-American world.<sup>13</sup> Although republican writers used a constellation of images and concepts to further their arguments, two have particular prominence. First was the belief that virtue, understood as the sacrifice of individual interests to the polity as a whole, was the essential support for society.<sup>14</sup> The purpose of the state, in early formulations of republicanism, was to inculcate virtue into its citizens. Virtuous citizens would place the national interest before their own, and the public good existed separately from the aggregate interests of individual citizens.<sup>15</sup> This idea of the citizen had obvious connec-

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<sup>11</sup> See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 46-47 (1985). To accommodate these opposing viewpoints, some new republicans have adopted the position of Madison, who thought that the goals of republicanism (reduction of corruption, preservation of community values) could be preserved in a large republic in which faction checked faction. See *id.* (arguing Madison and other Federalists achieved a synthesis of republicanism with other values such as pluralism).

<sup>12</sup> PETTIT, *supra* note 10, at 6; see also Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 749-53 (1992) (claiming modern republicans have refashioned republicanism to make it more attractive); Sunstein, *supra* note 11, at 30-31.

<sup>13</sup> See generally M.N.S. SELLERS, *AMERICAN REPUBLICANISM* (1994) (analyzing iconography and imagery reflecting American interpretations of classical republicanism).

<sup>14</sup> See William Michael Treanor, *Fame, The Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 736 (1997) (discussing the Framers' concern with virtue); see also Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 280-81 (1991).

<sup>15</sup> See Sunstein, *supra* note 3, at 1548 (1988); see also Daniel Walker Howe, *Introduction: Anti-Federalist/Federalist Dialogue and Its Implications for Constitutional Understanding*, 84 NW. U. L. REV. 1, 2 (1989). For a nonliberal critique of the modern understanding of classical republicanism, see Bruce Frohnen, *The Bases of Professional Responsibility: Pluralism and Community in Early America*, 63 GEO. WASH. L. REV. 931, 948 (1995) (arguing that virtue emerges from plurality of communities and

tions to classical political theory, in which political life and the pursuit of civic virtue, rather than protecting individual rights, were considered the highest callings.<sup>16</sup> A free citizen was one intimately involved in political life. The republican ideal, therefore, was extremely "public"—the fortunes and identity of the citizens were closely tied to those of the republic itself.

Deliberation is a second central republican concept. A republican polity reached political decisions through a reasoned dialogue among all its citizens, a process that should produce a solution that represents the common good.<sup>17</sup> As corollaries to these principles, the ideal republic in classical theory was comparatively compact in territory and population, and citizens enjoyed relative equality of condition.<sup>18</sup> A small and homogenous polity made deliberation among the citizenry easier and the possibility of arriving at a reasonable and just decision more feasible.

The core republican ideal Pettit draws from his review of the republican tradition is the idea of freedom as "non-domination;" that is, freedom consists in the absence of mastery by others.<sup>19</sup> Pettit argues, however, that this conception of freedom has been overshadowed by a series of thinkers who, for different reasons, mistook the ideal of non-domination for the ideal of non-interference, which Pettit claims is distinct from and inferior to the republican vision of freedom.

This review is divided into three parts. Part I summarizes Pettit's analysis of the historical and theoretical underpinnings of republicanism, and Part II examines Pettit's application of republicanism to the modern state. Part III concludes with some final comments on Pettit's proposals.

## I

While republicanism does have a "distinctive historical provenance," Pettit contends that to remain viable as a political choice,

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that the "people" modern republicans envision is a fiction).

<sup>16</sup> See Isaac Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 WM. & MARY Q. 3, 4-5 (1988). But see John O. McGinnis, *The Partial Republican*, 35 WM. & MARY L. REV. 1751, 1758-59 (1994) (arguing founders believed republicanism compatible with natural rights).

<sup>17</sup> See Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 471-72 (1989); see also Sunstein, *supra* note 11, at 32.

<sup>18</sup> See Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 72 (1987).

<sup>19</sup> See PETTIT, *supra* note 10, at 22.

republican thought must be reconstructed.<sup>20</sup> He is not therefore concerned with presenting a precise history of republican ideas. Nevertheless, some historical background is necessary to demonstrate that the republican ideal is rooted in Anglo-American political thought.

A. *Historical Antecedents*

Before concluding that the republican understanding of freedom is one of non-domination, and before proceeding to the philosophical and political consequences of that conclusion, Pettit devotes a chapter to an historical survey of the republican tradition. Republican thought began in ancient Rome, particularly in the work of Cicero, and continued through the Renaissance in the writings of Macchiavelli and in the political development of the Italian city-states.<sup>21</sup> Its early modern exponents include James Harrington and, more popularly, political writings like *Cato's Letters* or *The Federalist*.<sup>22</sup>

Although Pettit names James Madison as a republican proponent, it was the Anti-Federalists, the opponents of the new Constitution, who generally adopted republican reasoning.<sup>23</sup> Based upon their localist orientation, they perceived a national constitution as a threat to the autonomy of the states and therefore to the rights of citizens.<sup>24</sup> The Anti-Federalists saw an intimate connection between the extent of a republic and the moral rectitude of its citizens; the extended commercial republic proposed in the Constitution threatened that vision.<sup>25</sup> For a republic to function properly, they argued,

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<sup>20</sup> See *id.* at 10. But see Barry Friedman, *The Turn to History*, 72 N.Y.U. L. REV. 928, 948-53 (1997) (disputing republicans' reliance upon history to support their claims).

<sup>21</sup> See *id.* at 17-50.

<sup>22</sup> See *id.* at 20-21; see also Stephen A. Siegal, *The Marshall Court and Republicanism*, 67 TEX. L. REV. 903 (1989) (book review) (recounting history of republicanism).

<sup>23</sup> See generally STEPHEN R. BOYD, *THE POLITICS OF OPPOSITION: ANTI-FEDERALISTS AND THE ACCEPTANCE OF THE CONSTITUTION* (1979); Gary L. McDowell, *Federalism and Civic Virtue: The Anti-Federalists and the Constitution*, in *HOW FEDERAL IS THE CONSTITUTION?* 123 (Robert A. Goldwin & William A. Schambra eds., 1987).

<sup>24</sup> See Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229, 1236-37; Jennifer Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 HARV. L. REV. 340, 345 (1982) (reviewing *THE COMPLETE ANTI-FEDERALIST* (Herbert J. Storing ed., 1981)).

<sup>25</sup> See *Essays of Brutus, I*, in *THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION* 108 (Herbert Storing ed., 1985) [hereinafter *THE ANTI-FEDERALIST*]. Some Anti-Federalists argued that large republics would prevent representatives from knowing or representing the sentiments of the people. When that is the case, "the people do not govern, but the sovereignty is in a few." *Id.*; see also

its members must share the same "manners, sentiments and interests."<sup>26</sup>

Madison thought these ideals were commendable but "impracticable."<sup>27</sup> Madison is probably better characterized as a liberal or "pluralist," who sought to substitute the notion of faction for republican virtue; his contention in *The Federalist* No. 10, for example, about the natural inequality of possession of property, would not have found many sympathetic republican listeners.<sup>28</sup> *The Federalist* does echo some republican themes, such as the need for virtue, but in strikingly different ways.<sup>29</sup> Madison himself defined republican governments as those that derived their powers from the consent of the governed, and whose officers served for limited terms or during good behavior.<sup>30</sup>

The writings of Thomas Hobbes mark a decisive shift in the republican understanding of freedom. Hobbes deflected the emphasis in the republican tradition from non-domination to non-interference. In *Leviathan* and elsewhere, Hobbes took issue with the republican belief that the rule of law was consistent with freedom.<sup>31</sup> Republicans had argued that the rule of law is a condition of freedom and that to protect liberty a civil society required a system of law. Pettit calls this the "law-and-liberty" theme of republicanism.<sup>32</sup> Of course, laws interfere with freedom, but, when carefully constructed, they can do so in a non-arbitrary manner. The subjects of the interference have the ability to control the law, and republican legal systems will have structural safeguards to protect against arbitrariness. Hobbes argued instead that freedom consisted in freedom from coercion (i.e., interference) of any sort. As law, even republican law, was a form of coercion, by necessity it was a coercive restraint upon freedom.<sup>33</sup> Hobbes needed to break down the concep-

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*Letters of Agrippa, IV*, in *THE ANTI-FEDERALIST*, *supra*, at 235.

<sup>26</sup> *Essays of Brutus, I*, in *THE ANTI-FEDERALIST*, *supra* note 25, at 114.

<sup>27</sup> See *THE FEDERALIST* NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961). Of course, the Federalists were just as influenced by the republican tradition as the Anti-Federalists. See generally JOSEPH P. VITERITTI AND GERALD J. RUSSELLO, *Community and American Federalism: Images Romantic and Real*, 4 VA. J. SOC. POL'Y & L. 683 (1997).

<sup>28</sup> See *THE FEDERALIST* NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961); Sunstein, *supra* note 11, at 46-48.

<sup>29</sup> See Sunstein, *supra* note 11, at 42.

<sup>30</sup> See *THE FEDERALIST* NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

<sup>31</sup> See THOMAS HOBBS, *LEVIATHAN* 262 (C.B. MacPherson ed., 1968).

<sup>32</sup> See PETTIT, *supra* note 10, at 35.

<sup>33</sup> See *id.* at 37-39.

tual barrier between "free" and "unfree" legal systems in order to support his general argument for authoritarian government.<sup>34</sup>

Although opposed to the main tradition of republicanism, freedom as non-interference came to be associated with republicanism through a series of writers who opposed the American Revolution. Like Hobbes, the pro-British partisans had to advocate that there was no difference, in terms of liberty, between the colonial governments and republics. If all law was coercive, and the only true freedom an absence of law, the colonists would be no better off under their own legislatures than they were under parliamentary rule.<sup>35</sup>

Although Jeremy Bentham did much to make this view of freedom respectable, Pettit places the blame upon Isaiah Berlin and his followers for importing the unrepublican conception of freedom as non-interference into this century.<sup>36</sup> Berlin described two conceptions of liberty: negative liberty existed in the absence of interference or the threat of interference. Positive liberty required the "agent to take an active part in gaining control or mastery over themselves."<sup>37</sup> Berlin associated the former type of liberty with the great English and French figures in philosophy: Bentham, Hobbes, and Mill; Montesquieu, Tocqueville, and Constant; and Americans such as Thomas Paine. The positive form of liberty Berlin painted in darker colors as being susceptible to fanaticism.<sup>38</sup>

Pettit finds that "the negative-positive distinction has served us ill in political thought" because it posits only two ways of understanding liberty and ignores at least one further possibility.<sup>39</sup> Freedom as non-domination shares elements of both negative (the notion of absence) and positive (the notion of master) liberty, but highlights the difference between dominance (or mastery) and interference that Pettit believes is crucial to republicanism and that Berlin's taxonomy obscures.<sup>40</sup>

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<sup>34</sup> See *id.* at 38.

<sup>35</sup> See *id.* at 44-45.

<sup>36</sup> See *id.* at 17.

<sup>37</sup> *Id.* at 17; see also ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 130-31 (1969) (defining negative liberty as "the extent to which no [one] interferes with my activity" and positive liberty as "the wish on the part of the individual to be his own master").

<sup>38</sup> See PETTIT, *supra* note 10, at 18.

<sup>39</sup> *Id.*

<sup>40</sup> See *id.* at 22.

*B. Philosophical Premises*

Domination and interference are not identical concepts, although they can overlap. One can be dominated without being interfered with, or interfered with without being dominated. Employing a second republican theme of "liberty versus slavery," Pettit illustrates the distinction with the classic republican imagery of master and servant.<sup>41</sup> A servant is subject to the will of the master, but the master may not interfere with the servant's actual choices. The master may be kind, for example, or the servant clever enough to be able to get away with whatever the servant wants. Conversely, one may not be a servant of another but another party—Pettit uses the example of a government agency—may have the ability to interfere with the person's choices.<sup>42</sup> If that interference is in accordance with the person's own desires, or if the performance of that party is policed by another, or if the person has equal power to challenge the interference, then there is no domination. In other words, the difference between interference and domination is that under the latter conception, the dominator has an arbitrary ability to interfere, while under the former the potential dominator is restricted, either by the subject's ability to contest the interference or in some other manner. Pettit summarizes the difference this way:

Domination can occur without interference, because it requires only that someone have the capacity to interfere arbitrarily in your affairs; no one need actually interfere. Interference can occur without domination, because interference need not involve the exercise of a capacity for arbitrary interference, only the exercise of a much more constrained ability.<sup>43</sup>

Freedom as non-domination is not a positive conception, like Berlin's positive liberty, because it stresses removing mastery by others, not furthering self-mastery.<sup>44</sup> The central republican thinkers, Pettit argues, had this sense of arbitrary interference in mind when arguing for liberty. Drawing on the works of Paine, Harrington, and others, Pettit concludes that "the writers who identify with the broad republican tradition of thinking take liberty to be defined by a status in which the evils associated with interference are avoided rather than by access to the instruments of democratic control."<sup>45</sup> Therefore, any form of government, in theory, would be suitable to further

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<sup>41</sup> See *id.* at 31.

<sup>42</sup> See *id.* at 23.

<sup>43</sup> *Id.*

<sup>44</sup> See PETTIT, *supra* note 10, at 31.

<sup>45</sup> *Id.* at 30.



and protect republican principles.<sup>46</sup> Although a more positive emphasis on direct or representative democracy, derived from Rousseau, became a characteristic feature of later republican thought, Pettit warns against a facile equation of republicanism with populism.<sup>47</sup> This position places Pettit at odds with some new republicans, such as Michelman, who see self-government as the crucial feature of the republican tradition, as well as with the older republicans, who conceived citizen identity as closely tied with the larger public life of the polity.<sup>48</sup>

Non-domination is preferable to non-interference because of the former's institutional and political implications. Non-interference values choice, but is not concerned with whether that choice may be dominated by another. So long as there is no actual or threatened coercion, the principle of non-interference is satisfied. Thus, freedom as non-interference does not take into account political or economic structures that constrict individual choice if those choices are not actually being interfered with. Freedom as non-domination, however, has more to say to these concerns, and will be more active in reducing impediments to non-dominated choices.<sup>49</sup>

To complete his conception of non-domination, and to answer some challenges he anticipates to his view, Pettit supplements the account of freedom as non-domination with some definitions. Arbitrariness is a critical term in Pettit's vocabulary. An act is arbitrary when "it is subject just to the *arbitrium*, the decision or judgment, of the agent; the agent was in a position to choose it or not choose it, at their pleasure."<sup>50</sup> He notes that domination may be more or less intense, in the level of dominance one enjoys over another, and may be more or less extensive, in the range of choices that are subject to domination.<sup>51</sup> The emphasis, therefore, is on the controls, or lack

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<sup>46</sup> See *id.* Although monarchy may seem to be the antithesis of republicanism, anti-monarchism never became a dominant feature of the tradition, in part because the republican writers considered representative or democratic government to be only one possible method of protecting liberty, but not liberty itself. See *id.* Montesquieu thought that the British constitutional monarchy provided the best protections for liberty. See *id.* at 41.

<sup>47</sup> See *id.* at 30 ("To think of the republican tradition as populist, as of course many have done, would be to sustain the very dichotomy that has rendered the republican ideal invisible."); see also Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709, 718 (1994) (arguing against "radical simplicities" that reduce understanding of republicanism to direct democracy).

<sup>48</sup> See Michelman, *supra* note 10, at 40. See generally Kahn, *supra* note 17.

<sup>49</sup> See PETTIT, *supra* note 10, at 25.

<sup>50</sup> *Id.* at 55.

<sup>51</sup> See *id.* at 57-58.

thereof, that govern the potential dominator's actions, not on the substantive results achieved by the domination.<sup>52</sup>

An act is non-arbitrary, therefore, to the extent that it tracks the interests of those subject to it. Pettit terms the restraint upon arbitrary action available to those affected by the action "contestability."<sup>53</sup> Pettit argues that no one can consent to be dominated, and so the existence of consent is irrelevant to whether one party is dominating another.<sup>54</sup> Thus, Pettit notes, populism and freedom of contract are illegitimate offshoots from the republican tradition, because they rely on the false assumption that a person or group of persons can consent to be dominated by another person or group either through electoral victory or by entering into a contract that places one at the mercy of another.<sup>55</sup> Pettit prefers, therefore, to speak of contestability rather than consent. An act will not be arbitrary so far as those subject to the act are able to contest it, although they need not actually do so. A republican state requires certain preconditions of contestability to ensure that the decisionmaking process tracks the interests of those affected by the decision. Potential for contestation must exist, as well as channels to guide that contestation. Finally, a forum in which to voice the arguments contesting the action or decision must exist.<sup>56</sup>

Pettit closes his philosophical analysis by tying the republican ideal to contemporary political theory. The author argues that the republican ideal of non-domination, although originally restricted to a small class of propertied males, can be expanded to a modern pluralistic state. Like some versions of modern liberalism, such as that espoused by Ronald Dworkin, non-domination represents a "neutral" ideal that different groups, with varying conceptions of the good, will find satisfactory.<sup>57</sup> Non-domination is an egalitarian idea separate from particular conceptions of the good and that nevertheless establishes the principle that each will be treated as one, and none as more than one.<sup>58</sup> In response to the traditional republican idea (carried forward by some modern communitarians) that neutral val-

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<sup>52</sup> See *id.*

<sup>53</sup> *Id.* at 61.

<sup>54</sup> See *id.* at 62.

<sup>55</sup> See PETTIT, *supra* note 10, at 62.

<sup>56</sup> See *id.* at 183-85.

<sup>57</sup> See *id.* at 96; see also RONALD DWORKIN, A MATTER OF PRINCIPLE 191 (1985) (stating liberalism posits a neutral ideal of equality that is "independent of any particular conception of the good life"). But see SANDEL, *supra* note 4, at 8-19 (criticizing such an approach).

<sup>58</sup> See PETTIT, *supra* note 10, at 110.

ues cannot claim the allegiance of disparate groups, Pettit claims that such arguments offer a counsel of "despair" and "ignorance" that essentially surrenders the idea of a functioning pluralist society.<sup>59</sup>

However, Pettit is not ready to concede that republicanism is incompatible with every form of communitarianism. Non-domination is a common good in that it can be enjoyed only in relation to other individuals and cannot be enjoyed alone.<sup>60</sup> Legal and social arrangements must be in place to preserve and further non-domination. These arrangements—which are of interest to the entire community—if not completely random, will work on the basis of what Pettit calls "markers" that classify individuals according to a set of characteristics. Thus, furthering non-domination for one individual will further non-domination for the communities of individuals who share those characteristics.<sup>61</sup>

## II

Having recovered republicanism for contemporary debate and defined its key features, Pettit turns to describing what a contemporary republican society might look like. Although Pettit does not use the terms, his republican constitution would function as both a framework for protecting non-domination and as a constraint upon those institutions, public or private, that could dominate.<sup>62</sup> The republicanism Pettit describes retains some of its historical features, particularly its recognition that the institutions meant to preserve freedom may, if given enough power, function as dominating forces themselves. To counter that threat, Pettit devotes a chapter to "Checking the Republic," in which he sets forth an elaborate system of "sanctions"<sup>63</sup> and "screens"<sup>64</sup> to prevent arrangements meant to further non-domination from themselves dominating. The republican position approaches the design of institutions with the assumption that persons in power are corruptible although not in fact invariably corrupt. Republican institutions must be designed to take

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<sup>59</sup> See *id.* at 96-97.

<sup>60</sup> See *id.* at 122.

<sup>61</sup> See *id.* at 123.

<sup>62</sup> See generally Larry Kramer, *Fidelity to History—and Through It*, 65 *FORDHAM L. REV.* 1627, 1631 (1997).

<sup>63</sup> PETTIT, *supra* note 10, at 212-13 (describing "sanctions" as measures that make some options more or less attractive than if the sanctions had not been in place).

<sup>64</sup> *Id.* at 214 (describing "screens" as measures that aid in recruiting to certain tasks persons inclined to act in socially valuable ways).

both possibilities of corruption and non-corruption into account.<sup>65</sup> The goal that should guide the republican policymaker should by now be obvious: to further non-domination in whatever form.

#### A. *General Principles*

Pettit concludes that the principle of non-domination permits republicans to be politically optimistic and socially radical. Republicans will have less skepticism about the role of the state because "[republicans] do not view state action, provided it is properly constrained, as an inherent affront to liberty: as itself a form of domination."<sup>66</sup> Their greater radicalism arises from their intolerance at any form of domination, even benign forms. The republican ideal does have its limits however. Because non-dominating government can, if too large, itself become dominating, the range of independent powers trusted to such a government must remain limited. Non-domination is not the "sort of monstrous ideal" that requires continual government growth to exist.<sup>67</sup> Pettit proceeds to consider non-domination in relation to five general areas of state policy: external defense, internal protection, personal independence, economic prosperity, and public life. While generally not concrete proposals, Pettit provides a sketch of the course a republican state may take.<sup>68</sup>

Whichever the area, a republican society will keep government power as close to the people affected by that power as possible. A number of structures can accomplish this goal, such as establishing a federal system or bicameral legislature.<sup>69</sup> The argument here is abbreviated, and Pettit could have elaborated further upon the connections he discerns between the historical suspicion of government power in the republican tradition (and hence the eagerness of republicans for small governments closely bound to the people) and his contention that republicans are not necessarily hostile to state power.

The republican emphasis on non-domination, when applied to the criminal law, would emphasize correcting the arbitrary interference caused by the criminal actor upon the victim. Thus, a republican criminal law would concentrate on compensating the victim and society for the decrease in non-domination caused by the offense and on limiting the potential of law enforcement officers from be-

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<sup>65</sup> See *id.* at 211.

<sup>66</sup> *Id.* at 148.

<sup>67</sup> See *id.* at 150.

<sup>68</sup> See *id.* at 147-70.

<sup>69</sup> See PETTIT, *supra* note 10, at 178-79.

coming agents of domination—such as in minority communities, perhaps.<sup>70</sup> Typical republican sanctions might include restitution or reparations, and a reassurance that the offender will no longer be a threat.<sup>71</sup>

More controversially, perhaps, Pettit argues that the principle of non-domination may require granting basic entitlements as a matter of right to those citizens who lack the resources or faculties to enjoy non-domination unaided. These entitlements, Pettit argues, should be independent of the political process and of the arbitrary or capricious decisions of administrators.<sup>72</sup> Pettit correctly notes that the republican tradition, generally, had little difficulty with schemes of taxation to reduce luxury or the power of the wealthy to corrupt the political process.<sup>73</sup> Montesquieu, for example, argued that republican government required “mediocrity” of fortunes.<sup>74</sup> Modern republicans also have argued that republican principles are compatible with schemes of wealth redistribution, drawing on the writings of the Anti-Federalists.<sup>75</sup> Pettit does not go as far as some of the modern republicans, however, and contends that non-domination requires only structural equality, not material equality.<sup>76</sup>

Pettit’s proposal, however, contravenes some of his operating premises. The republican concern was to reduce the power of wealthy elite who could corrupt the state, not necessarily to raise those thought dependent (for example, due to a lack of property) to independent status. Pettit approaches the problem of corruption from the opposite direction, by increasing non-domination for those who have little. While there may not be a conceptual difficulty with treating the problem of corruption this way, Pettit does not present a

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<sup>70</sup> See *id.* at 154-57.

<sup>71</sup> See *id.* at 156-57. See generally Shirley Woodward, *Debt to Society: A Communitarian Approach to Criminal Antiprofit Laws*, 85 GEO. L.J. 455 (1997).

<sup>72</sup> See PETTIT, *supra* note 10, at 162-63.

<sup>73</sup> See McGinnis, *supra* note 16, at 1769 (discussing Madison’s conception of taxation of the wealthy).

<sup>74</sup> See Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 358-59 & n.162 (1996) (expounding on the republican need for equality in wealth).

<sup>75</sup> See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 138 (1993) (arguing republicans believed that basic needs should be provided to all citizens through taxation); Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax*, 70 IND. L.J. 119, 135 (1994) (arguing that wealth promotes participation in society). See generally Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37 (1990). See also *Letters of Centinel, I*, in *THE ANTI-FEDERALIST*, *supra* note 25, at 16 (stating “republican, or free form of government, can only exist where the body of the people are virtuous and where property is pretty evenly divided”).

<sup>76</sup> See PETTIT, *supra* note 10, at 117.

full argument as to why a system of absolute entitlements could not also corrupt the political process. Those required to support such a system through contributions of wealth may feel themselves subject to arbitrary controls. Granting entitlements may not be in accord with their interests and may not be contestable (in Pettit's sense) if such a system is conceived as a constitutional guarantee. Thus, those affected may not be able to give effective voice to their concerns. Strangely, Pettit recognizes this concern as motivating the partisans for American independence, who saw the colonists as subject to taxation by a government over which they had no control, but does not make the connection with an entitlements guarantee.<sup>77</sup>

Republicans resorted to methods like social pressures to support charities, or the common implementation of luxury or sumptuary taxes to reduce the corrupting privileges of wealth.<sup>78</sup> These were political measures, however, reflecting the republican belief that property was not an absolute right or constitutional guarantee.<sup>79</sup> Property was an instrumental good that enabled its holders to cultivate virtue and tied persons to their communities.<sup>80</sup> Understood in this way, we can satisfy Pettit's concern that those who are vulnerable to domination be given the means to escape it, and we can be more faithful to republican principles by placing non-arbitrary restrictions on how that property is used.<sup>81</sup>

Further, granting entitlements a protected status outside of normal political processes undercuts the reliance Pettit places upon deliberative processes to debate matters of common good in order to find a just solution, the outlines of which may change over time. Placing certain subjects beyond discussion by means of constitutional guarantee grants those benefiting from those subjects a freedom not granted to others not so protected. Indeed, it allows those who benefit from such a system to escape its constraints.<sup>82</sup>

Non-domination, therefore, may not be the best way to support Pettit's argument for minimum entitlements. An alternative argu-

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<sup>77</sup> See *id.* at 33.

<sup>78</sup> See Rose, *supra* note 74, at 361.

<sup>79</sup> See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 783 (1995) (discussing the dominance of republican property beliefs as the pertinent history for the Takings Clause).

<sup>80</sup> See Suzanna Sherry, "Without Virtue There Can Be No Liberty," 78 MINN. L. REV. 61, 71 (1993) (discussing the connection between property and sense of community).

<sup>81</sup> See *id.* at 75-77.

<sup>82</sup> See PETTIT, *supra* note 10, at 200.

ment found in the republican tradition, based upon the notion of "natural rights," is perhaps a better foundation. Such an argument would base entitlements on rights inherent in every individual, and the government's responsibility to aid in the enjoyment of those rights. Pettit, however, rejects that possibility and claims the republican language of rights was of "rhetorical significance" only.<sup>83</sup> However, at least some republicans upon whom Pettit relies, such as Madison or James Wilson, had a belief in the existence of natural rights.<sup>84</sup> Indeed, it is Pettit's villain, Jeremy Bentham, who called the belief in natural rights "nonsense upon stilts."<sup>85</sup>

### B. *Deliberation and Virtue*

In the closing chapters, Pettit reintegrates his two guiding terms of republican discourse, deliberation and the notions of civic virtue, into a reformulated republicanism. He returns to the notion of contestability as a basis for non-domination in the republican "deliberative" republic.<sup>86</sup> The deliberative republic contains within itself the methods through which the interests of all parties, especially those of minority communities, can be given voice. Pettit adopts the model developed by Sunstein and Quentin Skinner, within which "citizens have equal claims and powers, public matters are decided by deliberation on the basis of considerations that have common appeal . . . and agreement serves as a regulative ideal as to how things should be decided . . . ."<sup>87</sup> Implicit in this view is the belief that representatives will deliberate not on the basis of narrow motives, nor even on the interests of their constituents, but rather in light of the common good.

In outlining his vision of the deliberative republic, Pettit returns to the place of group rights. His model would require inclusionary electoral representation, based upon group characteristics, to further the non-domination of minority and other disadvantaged groups, such as indigenous peoples. A republican polity, he argues, cannot

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<sup>83</sup> See *id.* at 101.

<sup>84</sup> See Stephen A. Conrad, *The Rhetorical Constitution of "Civil Society" at the Founding: One Lawyer's Anxious Vision*, 72 IND. L.J. 335, 335-38 (1997) (outlining James Wilson's belief in natural rights).

<sup>85</sup> 2 THE WORKS OF JEREMY BENTHAM 501 (John Bowring ed., 1962); see also McGinnis, *supra* note 16, at 1774-75 (arguing republicans believed in natural rights and that such a belief was in accord with pluralism).

<sup>86</sup> See PETTIT, *supra* note 10, at 187.

<sup>87</sup> *Id.* at 189. See generally SUNSTEIN, *supra* note 75. See also QUENTIN SKINNER, REASON AND RHETORIC IN THE PHILOSOPHY OF HOBBS 15-16 (1996). But see McGinnis, *supra* note 16, at 1778-81 (criticizing the Sunstein model).

be fully deliberative unless all groups are heard and able to participate. Otherwise, some groups are at risk of subjection to the arbitrary decisions of other groups, especially the majority. Republican institutions, therefore, must be representative of the various groups within the society.<sup>88</sup>

This model, Pettit argues, differs from the "interest-group pluralism" criticized by Sunstein as an alternative to republicanism. Simply put, the interest-group model is the "invisible-hand" applied to politics; each group seeking its own private interests will result in a general public good.<sup>89</sup> These groups are not seeking to find a separate "public good;" instead, the model stresses compromise and bargaining over an agreeable mix of private goods.<sup>90</sup> Republicanism rejects that mode, even if the pluralists are correct that persons know, and can act in furtherance of, their private interests. Pettit writes, "To make naked preference into the motor of social life is to expose all weakly placed individuals to the naked preferences of the stronger," or to expose them to the arbitrary will of majorities.<sup>91</sup> The invisible hand model, which may work for market transactions involving large numbers of buyers and sellers constantly entering and leaving the market, is not the proper model, from the republican view, for other parts of political life.

Pettit recasts the republican concern for virtue as the need for "civility." Although the law cannot inspire civility, republican regimes require a basis in widespread civility, which will encompass both generally-accepted norms of behavior, as well as specific norms for those within certain groups or roles.<sup>92</sup> These norms will support the laws insofar as the laws themselves support republican principles; if the two are in congruence, the citizens will be more inclined to obey the laws and to enjoy a higher degree of non-domination. Internalizing these republican principles will enable individuals to identify with others and with the good of society as a whole.<sup>93</sup>

The state cannot command, however, an increase in civility when a society has lost it; the supply of "social capital" must derive

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<sup>88</sup> See PETTIT, *supra* note 10, at 191; see also Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1530 (1992) ("Representatives of all interests potentially affected by a government action must have meaningful opportunities to engage in discussion about the action").

<sup>89</sup> See PETTIT, *supra* note 10, at 204-05.

<sup>90</sup> See Sunstein, *supra* note 11, at 32.

<sup>91</sup> See PETTIT, *supra* note 10, at 205.

<sup>92</sup> See *id.* at 246-51.

<sup>93</sup> See *id.* at 260.



from nonrepublican institutions.<sup>94</sup> Yet, because of Pettit's claim that non-domination must be a neutral good that can claim the allegiance of those with more particularized concepts of the good, he refrains from describing these nonrepublican (or pre-republican) institutions in detail. A look at the republican tradition, however, will reveal two significant pillars of republican virtue: religion and the family.<sup>95</sup> Indeed, in reviewing the history of republican thought, Pettit ignores that in the ancient and some modern republics, social, political, and religious functions were closely tied together and collectively formed the republic's identity.<sup>96</sup>

Pettit's muting of "virtue" into "civility," therefore, is of more than semantic importance. Republican virtue was based upon an "unquestioned hierarchy of values" that governed individual and social behavior.<sup>97</sup> A reluctance to particularize the requirements of republican virtue beyond the neutral ideal of non-domination eliminates the ability of a republican state to discriminate between virtuous and nonvirtuous behavior.<sup>98</sup> Republican emphasis, however, upon deliberation in the pursuit of virtue would seem to require not only that republican citizens seek virtue, but also that a republican state should actively dissuade vice.<sup>99</sup> In Pettit's language, a state that could determine the best interests of citizens, even if the citizens themselves could not, should be able to dominate their choices. The language of shame and dishonor, for example, is omitted from Pettit's account. Also missing from Pettit's republicanism is a theory of human nature that would explain why we should value non-domination over and above the other elements that made up the classical republican conception of human nature and political society. In effect, Pettit is attempting to attain liberal ends (individual

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<sup>94</sup> See *id.* at 254.

<sup>95</sup> See Frohnen, *supra* note 15, at 946-47 (arguing that the founding generation considered republican principles derived from religious faith and family); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 385-87 (1996) (concluding republican thinkers regarded religious belief essential to a virtuous republic and that it ought to be publicly supported).

<sup>96</sup> See Carl J. Friedrich, *The Concept of Community in the History of Political and Legal Philosophy*, in 2 NOMOS 3, 5-6 (Carl J. Friedrich ed., 1959).

<sup>97</sup> See Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 138-40 (1995) (arguing that moral skepticism and egalitarianism of modern republicans is fundamentally at odds with traditional republican theory).

<sup>98</sup> See *id.* at 141.

<sup>99</sup> See Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 809 (1993) (arguing modern republicans do not fully define republican virtue and that classical republican virtue would not condone neutrality among competing conceptions of the good life).

freedom and value-neutrality) through the republican language of freedom, virtue, and deliberation.

### III

Traditional republicanism was about limits. Republicans believed there were limits to human goodness, to government's ability to protect freedom, in the abilities of people to resist temptation, and even limits to the physical territory of a republic.<sup>100</sup> Pettit offers a vigorous and thoughtful reconception of the republican tradition and demonstrates that the republican tradition can be just as much about opportunities as about limits. Pettit makes a convincing case that furthering non-domination as a "dynamic" ideal not tied to particular institutional arrangements will allow flexibility and will protect a comfortable amount of personal and social liberty.<sup>101</sup> Pettit's proposals contrast favorably with certain trends in modern liberalism, such as its obsession with fixing legal rights and thus freezing political and legal development in light of more flexible principles.<sup>102</sup> Likewise, Pettit's argument that the republican ideal of non-domination is both individual and communitarian is a needed corrective to the oftentimes sterile debate between liberals and communitarians.

As further support, Pettit might have discussed the institutional embodiments of republicanism. For example, recent scholarly work has demonstrated the republican principles supporting institutions such as the colonial and state militias.<sup>103</sup> Moreover, aside from passing references to the need to make juries more representative of the population, there is no analysis of the role the common-law jury

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<sup>100</sup> See Paul Finkelman, *Antifederalists: The Loyal Opposition and the American Constitution*, 70 CORNELL L. REV. 182, 202 (1984) (discussing the need for limits on federal government); Nedelsky, *supra* note 24, at 345. For example, at least some republicans held up the example of the Roman Empire as a cautionary example of expanding a republic too widely. See *Letters of Brutus, I*, in THE ANTI-FEDERALIST, *supra* note 25, at 113.

<sup>101</sup> See PETTIT, *supra* note 10, at 146.

<sup>102</sup> See John Gray, *Autonomy Is Not the Only Good*, TIMES LIT. SUPP., at 30 (June 13, 1997) (book review).

<sup>103</sup> See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1170-71 (1992) (describing militia as local institution serving popular values); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 35 (1996) (recounting republican influences in debates over the Second Amendment); Thomas B. McAfee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?* 75 N.C. L. REV. 781, 813 (1997) (arguing classical republican rhetoric accords significant role for citizen militias).

played in developing republican principles.<sup>104</sup> The jury was a critical element in revolutionary-era republican theory and language. It embodied the deliberative process of true citizenship and the cultivation of civic virtue.<sup>105</sup> The jury was thought valuable to republican government for enshrining these principles, despite occasional aberrant or irrational decisions in particular cases.<sup>106</sup>

Of course, efforts to compress any complex tradition of thought risks the dangers of reductionism and flattening important nuances.<sup>107</sup> Indeed, some scholars have argued that "republicanism" itself is largely a modern construct.<sup>108</sup> While hostility to arbitrary control is important, it must be considered along with the other elements of the tradition.

The place of group rights, for example, has an awkward place in the republican tradition.<sup>109</sup> Pettit's measured approval of extreme autonomy, or even secession for cultural or other minority groups, sidesteps the examples the republicans had before them in emphasizing the importance of a unified civic culture.<sup>110</sup> While some republicans certainly were proponents of localism, out of a desire to protect localities from the power of central authorities, this conception does not translate well into Pettit's multicultural republican vision, at least without further discussion of the structural safeguards that would protect against domination. The localism contained in the republican tradition is a remnant of the "ancient constitutionalism," which was described by Carol Rose and was based on granting sub-

<sup>104</sup> See PETTIT, *supra* note 10, at 192-93; see also Nedelsky, *supra* note 24, at 345 (demonstrating Anti-Federalist belief in value of jury system); Note, *The Value of the Civil Jury*, 110 HARV. L. REV. 1421, 1436-37 (1997) (exploring republican roots of importance of juries to democratic government).

<sup>105</sup> See *Value of the Civil Jury*, *supra* note 104, at 1440; see also Cass R. Sunstein, *The Idea of a Useable Past*, 96 COLUM. L. REV. 601, 607 (1995) (listing the right to a jury trial as a precondition for political liberty in republican thought).

<sup>106</sup> See *Value of the Civil Jury*, *supra* note 104, at 1437.

<sup>107</sup> See generally William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061 n.4 (1994).

<sup>108</sup> See generally THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* (1988); Frohnen, *supra* note 15, at 938 (claiming modern republicanism is based on a misunderstanding of founding principles).

<sup>109</sup> See, e.g., Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994); Cynthia V. Ward, *The Limits of "Liberal Republicanism": Why Group-Based Remedies and Republican Citizenship Don't Mix*, 91 COLUM. L. REV. 581 (1991). But see Sunstein, *supra* note 3, at 1589 (arguing for group representation to correct material and social inequality).

<sup>110</sup> See PETTIT, *supra* note 10, at 199-200. The author writes, "At the limit, the ideal of non-domination may require in relevant cases that [a minority group is] allowed to secede from the state, establishing a separate territory or at least a separate jurisdiction; that possibility has to be kept firmly on the horizon." *Id.* at 199.

stantive rights or privileges, based in immemorial custom or usage, to particular groups within the larger community.<sup>111</sup> This localism also protected the "voice" and "exit" options of individuals and their communities.<sup>112</sup>

This strand of the republican tradition, although admired by Pettit, does not conform completely to Pettit's principle.<sup>113</sup> Granting substantive privileges or benefits to some groups over others presents the same difficulty for Pettit as granting entitlements: it removes from the deliberative process some parts of political life that would otherwise be open to discussion. The republican ideal of the citizen devoted to the common good loses its effectiveness when citizens can exchange that common good for the good of a particular group, or even withdraw from considering the common good altogether. Indeed, Pettit's theory contains traces of the "interest-group pluralism" that he condemns, because his model implies that groups can withhold their participation in the republican civic culture until they are granted political concessions.

Suzanna Sherry has criticized the understanding of pluralism that she finds characteristic in modern republican writing.<sup>114</sup> She argues that because the new republicans do not share the conception, held by earlier republicans, of a unified cultural community seeking absolute moral norms, their liberal epistemology invariably leads them to create new rights intended to protect minority or dissenting groups. While Pettit disavows the language of rights in an effort to avoid the problem Sherry identifies, his use of non-domination as a surrogate for group rights encounters the same difficulty. As Sherry writes, "[t]hese new rights, however, are themselves in conflict with a republican political community since they are likely to lead to exclusion and balkanization."<sup>115</sup> Similarly, Cynthia Ward has stated that the "communo-pathic" features of liberalism and its attachment to a political outlook alienate citizens from the state.<sup>116</sup>

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<sup>111</sup> See Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74 (1989).

<sup>112</sup> See *id.* at 96-97.

<sup>113</sup> See PETTIT, *supra* note 10, at 199.

<sup>114</sup> See Sherry, *supra* note 97, at 138-40 (arguing that moral skepticism and egalitarianism of modern republicans is fundamentally at odds with traditional republican theory).

<sup>115</sup> *Id.* at 143; see also Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 331, 357 (1994) (arguing new republicans do not distinguish correct from incorrect value judgments).

<sup>116</sup> See Ford, *supra* note 109, at 1889 (noting that the republican state that unites

Insofar as Pettit argues for secession from a political community and forming a subunit within the larger political entity, it might be compatible with some forms of republican federalism.<sup>117</sup> The right to "exit" has long been a part of republican, and especially American, political tradition. However, insofar as he argues for complete separation from a larger political community, he undermines his republican vision. Granting rights of secession to discrete groups eviscerates the attraction of non-domination as a neutral ideal applicable to different groups. If, after participating in the deliberative process and being granted concessions to protect the group's identity such as proportional representation,<sup>118</sup> a particular group is still permitted to leave the republican polity, what incentive is there to engage in the deliberative process at all? If a group has the ability to secede from the larger polity, there is little incentive to cultivate civic virtue among members of that group and little incentive for members of other groups to accommodate the needs of the minorities.<sup>119</sup> While the initial move toward recognizing group rights was based in a desire to protect those groups from discrimination (or domination), that desire is rooted in a liberal understanding of political community. Perhaps what is needed is a stronger sense of common identity than Pettit's theory seems to allow.

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all persons in collective process to discover common good has no room for "organized disadvantaged groups as separate political entities"); Ward, *supra* note 109, at 583.

<sup>117</sup> See generally Joseph P. Viteritti, *Municipal Home Rule and the Conditions of Justifiable Secession*, 23 FORDHAM URB. L.J. 1 (1995).

<sup>118</sup> See PETTIT, *supra* note 10, at 191.

<sup>119</sup> See Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 634-35 (1991) (arguing secession creates instability for constitutional government).