

Republicanism's Debt to Liberalism: Comments on Pettit

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Introduction

Professor Pettit's paper is an eloquent and compelling restatement of republican constitutionalism. The essay conceptualises the republican ideal, maps its implications for constitutional theory and discusses the institutional devices that help us in the achievement of that ideal. Pettit's republicanism stands in sharp contrast to the cosmetic republicanism dominating the current debate in Australia concerning the identity of the head of state. It is also far removed from the idea of popular sovereignty that is used to justify majoritarian democracy as well as nationalistic and proletarian dictatorships. Pettit's republicanism is grounded in the classical tradition that seeks to limit the power of rulers to rule in their own interests while providing the means whereby the state can identify and promote the *res publica*. The republicanism that Pettit espouses coincides at many points with classical liberalism in regard to both desired outcomes and selected constitutional devices. Indeed, many historical figures from whose work Pettit draws his republican theory such as Cicero, Polybius, Locke, Montesquieu, Trenchard, Gordon, Madison, Hamilton and Jay are also icons of the classical liberal tradition. However, Pettit distances his republicanism from liberalism in a fundamental way. He does so by claiming for republicanism the exclusive intellectual possession of certain ideas that liberals have cherished as part of their own tradition. In particular, Pettit regards the conception of liberty as freedom from domination as a peculiarly republican notion and he attributes to liberalism a conception of liberty as freedom from interference which I find to be completely at odds with at least one version of liberalism, namely that commonly described as classical liberalism. Pettit is also less than fair when he suggests that the liberal commitment to constitutional ideals such as the rule of law, separation of powers and constrained democracy is based on 'rag-tag of different considerations in support of the ideals leaving them look (*sic*) like a contingently related set of desiderata.' He contrasts this approach with the republican view under which the ideals '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'. I will argue that this charge is unsustainable against classical liberalism.

Though Pettit's republicanism echoes classical liberalism there is no specific

discussion of that branch of liberalism in the paper or for that matter in the book from which the paper is derived. There is no mention of the contributions to the causes of liberty and constitutionalism by the Scottish moral philosophers Hume, Smith and Ferguson, by the Austrian intellectuals Menger, von Mises and Hayek or by other modern 'economic liberals' such as Coase, Friedman, Buchanan, North, Kirzner, Posner, Epstein and Vanburg. On the contrary, he distinguishes republicanism from liberalism in the broadest sense in which the term is used. It is inconceivable that a writer of Pettit's erudition could have failed to consider the classical liberal position on liberty and constitutionalism in distinguishing republicanism from liberalism. The only plausible explanation is that Pettit's republicanism is an eclectic version that has embraced and internalised much of the scholarship that may be considered to be classically liberal. If this is the case, we must acknowledge the debt that republicanism owes to classical liberalism for enriching and solidifying its theoretical foundations. These comments will seek to do just that.

Classical Republicanism and Classical Liberalism

In comparing Pettit's republicanism and classical liberalism, we face initially the common semantic problem of the imprecision of terms that we are compelled to use. The meanings of the terms 'republicanism' and 'liberalism' are equally uncertain and each has been employed in the service of very different ends. The adjective 'classical' has been used in relation to each tradition to signal both their roots in classical antiquity as well as their 'pure' form. The reality though, is that as inaccurate as they are we cannot go anywhere without using labels. We cannot speak in singularities but only in categories, however uncertain. Professor Pettit gives us a sketchy but helpful initial account of the cluster of ideas and attitudes that make up his republicanism and we are progressively enlightened about it by the arguments that he develops in the course of his paper. Similarly, I will only provide a brief initial account of classical liberalism in the hope that my comments will progressively clarify the ideas that constitute the tradition. Despite its descriptive tag and its debt to classical antiquity, classical liberalism is relatively modern. Its origins are found in 17th century Whig ideology and its influence began to radiate only with the work of the 18th century evolutionist thinkers, particularly Bernard Mandeville, David Hume, Adam Smith and Adam Ferguson and the success of the American revolution under the influence of Locke and Montesquieu.¹ The adjective 'classical' though inapt, helps us distinguish this branch of liberalism from American liberalism that elsewhere is known as social democracy.

Classical liberals and classical republicans share the conviction that the primary goal of a constitution is to limit the powers of rulers to seek their own ends at the expense of the interests of the citizens. But unlike older republicanism, and

¹ For a valuable discussion of the origins of liberalism, see FA Hayek, *New Studies in Philosophy, Politics, Economics and the History of Ideas*, (London: Routledge & Kegan Paul, 1982) 119-151.

indeed unlike American liberalism and social democratic theory, classical liberalism shows little faith in the ability of a state, however organised, to identify or pursue the public interest, except in relation to a very narrow range of almost universally acknowledged public goods. Classical liberalism is based on a deep mistrust of discretionary power and has as its cornerstone the rule of law as opposed to the rule of particular individuals or groups. Its philosophical attitude is one of receptiveness to new ideas including those that directly question the suppositions that originally inspired the liberal movement in the seventeenth and eighteenth centuries.² The problem of distinguishing classical republicanism and classical liberalism is compounded by the fact that the term liberalism is a modern coinage unknown to 17th- and 18th-century initiators of the intellectual tradition. At the time that they were writing, the taxonomy of political systems did not easily accommodate their ideas. Locke, Montesquieu, Hume and Madison did not and could not describe themselves as liberals.

A Suspect Dichotomy Concerning Liberty

In the first part of his paper, Pettit distinguishes the idea of republican liberty with what he describes as the modern, liberal conception of liberty. Pettit identifies republican liberty with freedom from domination as distinguished from freedom from interference. Freedom from domination arises from the absence of the power to dominate or coerce. Under this conception a person is free to the extent that no one has the position of a *dominus* in relation to that person. Thus, subjects of a benevolent despot may be left free to do as they please but will have no republican liberty so long as the despot can violate his self-imposed restraint. Pettit contrasts republican freedom with what he calls the modern idea of liberty as freedom from interference. The test of the existence of freedom from interference, Pettit says is the actual absence of interference rather than the absence of the power to interfere. There is no question that freedom from interference is often found to exist without freedom from domination. However, the issue is not whether the two forms of freedom are observable states but whether we can give rational reasons for preferring one form to the exclusion of the other. Pettit claims republicanism is distinguished by its conception of liberty as freedom from domination. Controversially, he also maintains that those who desire freedom from interference do not subscribe to freedom from domination. He attributes to others, including liberals the latter conception of liberty.

Pettit speculates about the origin of the idea of freedom from interference and traces it to the young Jeremy Bentham who in a letter to Richard Lind defined liberty in purely negative terms to mean 'the absence of restraint'. Bentham's definition of liberty as absence of restraint, of course, is wide enough to encompass the idea of freedom from domination and hence does not give rise to a new category of liberty. The idea of negative liberty has application to single moments and events as well as to the longer term and general condition of the people. For example, my authoritarian ruler has the power to censor my writings, but he has not

² Ibid.

done so. Thus, I enjoy present freedom of expression in that I enjoy momentarily, the absence of restraint. Let us assume that my ruler has no power to censor my work. Then, I have lasting freedom of expression. But, in each case, my freedom is negative in sense of the absence of restraint. The latter is freedom in Pettit's republican sense but is also freedom in Bentham's negative sense.

If Pettit wishes to claim that liberty as freedom from domination is a uniquely republican conception, he must show that others who conceive liberty as freedom from interference are not interested in securing that freedom as a permanent condition of social life. This he has failed to do. The only proponents of such a limited conception of liberty mentioned in the paper are Richard Lindt and others in the pay of Lord North's government. He does not point to any liberal thinker, not even Bentham, who proposes this kind of liberty as a sufficient basis for social life.

At a superficial level, the conception of liberty as freedom from interference appears to be recognised in 20th-century constitutional theory concerning the omnipotent sovereignty of the British parliament. When questioned, nine out of ten British constitutional lawyers are likely to say that the British Parliament has the capacity to interfere monstrously in the lives of people, but is unlikely to do so. Accordingly, the freedoms of the British subjects are contingent upon the sovereign will and exist so long as the Queen in Parliament chooses not to interfere with them. However, Pettit rightly rejects the narrow positivist view of the idea of a constitution. He uses 'constitution' in the sense of 'certain objective patterns that prevail in legal and political life, and that are treated as normative by participants'. This is the 'real constitution' or as institutional economists will call it, the 'economic constitution' that actually constrains the exercise by parliament of its formally unlimited powers. This constitution is made up of the complex web of formal and informal constraints of which the formal constitution is but a part. Even a cursory look at history reveals that what matters for republicanism and for that matter liberalism is not the formal or paper constitution but the economic constitution. The formal constitution of Britain may seem fragile and illusory but its real constitution is robust and stable. Hence, according to the more sophisticated understandings of the British Constitution, British subjects enjoy freedom from domination.

Liberty and Classical Liberalism

Pettit's claim on behalf of republicanism, to the exclusive intellectual ownership of the idea of liberty as freedom from domination is contradicted by the history of liberalism. The idea of liberty as mere freedom from interference without lasting limits on rulers' power to interfere is fundamentally at odds with classical liberalism and modern libertarianism. Classical liberals not only demand freedom from being interfered with, they believe that the only means by which freedom from interference can be achieved is the removal from governments of the power to interfere. In other words they demand both freedom from interference and freedom from domination for they believe that one cannot exist without the other. In fact, as

explained presently, this insistence on the non-severability of these two kinds of freedom is one of the points at which classical liberalism diverges from older republicanism. The notion of liberty as freedom from actual and potential interference dominates liberal thought from the time of Locke. A principal apologist for the Glorious Revolution around whose work the Whig political theory took shape, Locke maintained that supreme power or legislative power was but a fiduciary power and that there remains in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them.³ For Locke, liberty was secured not by the good sense of the rulers but through the binding limitations placed upon their power by the social contract backed by the ultimate right of revolt.

Pettit's claim of exclusive republican ownership of liberty as freedom from domination is most strongly contradicted by the writing of the intellectual forebears of modern liberals working in the evolutionary tradition. The rejection of the older republican reliance on civic virtue in favour of constitutional arrangements designed to prevent sectional domination finds early expression in Bernard Mandeville's celebrated dogrel *The Fable of the Bees, or Private Vices and Public Benefits*⁴ and is restated in David Hume's essay 'Of the Independency of Parliament'. At the very beginning of his essay, Hume made clear his view that nothing less than the permanent elimination of the power of domination would suffice for a system of government.

Political Writers have established it as a maxim, that, in contriving any system of government, and fixing the several checks and controls of the constitution, every man ought to be supposed a *knave*, and to have no other end, in all his actions, than private interest. By this interest we must govern him, and, by means of it, make him, notwithstanding his insatiable avarice and ambition, co-operate to public good. *Without this, say they, we shall in vain boast of the advantages of any constitution, and shall find, in the end, that we have no security for our liberties or possessions, except the good-will of our rulers; that is, we shall have no security at all*.⁵

The words in emphasis leave no doubt that Hume believed that mere freedom from interference that is dependent on the momentary will of rulers does not deserve the name of liberty. Hume's thesis of non-reliance on virtue was repeated by Madison in the Federalist No 51 when he argued for 'the policy of supplying, by opposite and rival interests, the defect of better motives'.⁶

Modern liberals working within the various economic disciplines have been no less emphatic in arguing for permanent limitations on the powers of even elected

³ John Locke, *Two Treatises of Government*, (Cambridge: Cambridge University Press, 1970) 385.

⁴ Bernard Mandeville, *The Fable of the Bees, or Private Vices and Public Benefits*, Vol 1 (Oxford: Clarendon Press, 1924) 44 ff.

⁵ David Hume, *Essays Moral, Political and Literary*, (Indianapolis: Liberty Classics, 1987) 42.

⁶ A Hamilton, J Madison and J Jay, *The Federalist Papers* (New York: Bantam Books, 1982-1988) 263.

governments and legislatures. Hayek devoted two entire books, *The Constitution of Liberty* and *The Political Order of a Free People* to arguing for permanent constitutional limits on power, in other words for Pettit's freedom from domination. In the latter work, Hayek exposed the 'tragic illusion that the adoption of democratic procedures made it possible to dispense with all other limitations on governmental power'.⁷ As he argued, 'the very omnipotence conferred on democratic representative assemblies exposes them to irresistible pressure to use their power for the benefit of special interests, a pressure a majority with unlimited powers cannot resist if it is to remain a majority'.⁸ Hayek went on to propose his own model constitution that he hoped would be more effective in securing freedom not only from interference but also from domination. A survey of the literature of public choice theory (James Buchanan, Gordon Tullock, Mancur Olsen and others), institutional economics (Douglass North, Manfred Streit and others), transaction cost economics (Ronald Coase, Richard Posner and others) and property rights theory (Richard Epstein and others) leave little doubt concerning the commitment of 'economic' liberals to idea of permanent limits on power and the entrenchment of basic freedoms.

The Liberal Case for Freedom from Domination is Not a Rag-tag of Different Considerations

Pettit is conscious that liberals will claim co-ownership of the conception of liberty as freedom from domination. He concedes that those who advocate freedom from interference will also seek to place permanent limitations on the power of rulers to interfere. However, he says that this commitment to constitutional precautions is based on a 'rag-tag of different considerations' or a 'contingently related set of desiderata'. This assertion, when considered in relation to classical liberalism, is misconceived. In fact, it is my contention that classical liberalism and not classical republicanism provides the most cogent and coherent case for freedom from domination.

Eighteenth-century evolutionists such as Mandeville, Hume, Smith and Ferguson were acutely aware of the potency of governments to do evil and the weakness of governments to do good. They argued for permanent limits on the power of rulers on the conviction that the public good is achieved not by governmental action but through the striving of individuals in the pursuit of their own ends. This conviction was born of an intuitive assumption concerning human nature, an appreciation of the limits of human knowledge and an understanding of the process of social change.

The assumption concerning human nature was best expressed by Hume when he proposed that in devising systems of control, framers of constitutions should assume that people have 'no other end, in all [their] actions, than private interest'. It is this assumption that underlies Adam Smith's theory of the 'original

⁷ FA Hayek, *Law Legislation and Liberty*, Vol 3 *The Political Order of a Free People* (London: Routledge & Kegan Paul, 1975-1979) 3.

⁸ Ibid 128.

passions',⁹ the thesis in Madison's *Federalist Paper No 51* and Acton's celebrated epigram: power corrupts and absolute power corrupts absolutely. The assumption is found in modern liberal economic scholarship in the form of methodological individualism. It is not that liberals believe human beings are never virtuous but that they acknowledge that human minds are inscrutable and that reliance on virtue is unsafe. As Brennan and Buchanan put it, 'even if we had available to us a descriptively accurate model of the moral character of individuals, we should use the more pessimistic, amoral model when analysing alternative institutional frameworks with a view to institutional or constitutional reform.'¹⁰

The second limb of the classical liberal case for freedom from domination consists of the epistemological thesis that human knowledge is seriously and irremediable flawed. It is based on the awareness that in a complex system such as a large society, no single mind can possess all the knowledge required to advance the public interest through specific interventions in the affairs of people. While we can gain knowledge of rules and processes, we know very little about particular facts or circumstances relating to the millions of individuals who constitute society. Indeed, as economists of the Austrian school of economics remind us we know very little about our own circumstances as life is a process of discovery.¹¹ As Hayek pointed out the fiction that all relevant facts are known to some one mind, and that it is possible to construct from this knowledge of the particulars a desirable social order, is based on a profound synoptic delusion.¹² It follows from this thesis that even the most benevolent and wise rulers cannot be trusted with power to direct us to our own good or to regulate society in the public interest.

The third limb of the liberal case consists of the appreciation of the spontaneous or self-ordering nature of complex systems. The 18th-century evolutionists were again the first thinkers to clearly perceive the spontaneous nature of society. Mandeville's social parody concerning the emergence of public good from private vice, Adam Smith's explanation of the 'invisible hand' and Hume's theory that social order results not from reason but from the build up of experience in the form of convention drew attention to the fact that much of our culture including language, laws, morals and political institutions are not products of great minds but the cumulative and unintended consequences of individual actions directed to disparate ends. The thesis was captured by Adam Ferguson in his memorable statement: 'Every step and every movement of the multitude, even in what are termed enlightened ages, are made with equal blindness to the future; and nations stumble upon establishments, which are indeed the results of human action,

⁹ Adam Smith, *The Theory of Moral Sentiments* (Oxford: Clarendon Press, 1976) 9.

¹⁰ Geoffrey Brennan and James M Buchanan, 'Predictive power and the choice among regimes', (1983) 93 *Economic Journal*, 90-91. See also discussion in Geoffrey Brennan and Alan Hamlin, 'Survey article: constitutional political economy: the Philosophy of the *Homo Economicus*?' (1995) 3(3) *Constitutional Political Economy*, 291-295.

¹¹ Israel Kirzner, *How Markets Operate: Disequilibrium, Entrepreneurship and Discovery* (London: Institute of Economic Affairs, 1997) 33-35.

¹² Hayek, above n 7, vol 1, 14.

but not the execution of any human design.¹³

Modern liberals working within the evolutionary tradition have worked out the implications of the theory of spontaneous order for constitutionalism. In the absence of an intelligent artificer, our institutions must be taken to reflect adaptations that have enabled us to cope with our complex environment of which we have very imperfect knowledge. As Hayek states it, 'the problem of conducting himself successfully in a world only partially known to man was thus solved by adhering to rules which have served him well but which he did not and could not know to be true in the Cartesian sense.'¹⁴ Thus, the design conception of society is abandoned in favour of the evolutionary view that commends legislative restraint and the reliance on the bottom up process of law formation through the free interaction of individuals. Understanding of the spontaneous and self-ordering nature of society leads to the appreciation that the overall order of society cannot be improved by arbitrary and *ad hoc* interventions in the affairs of people but only through the incremental revision of the abstract rules upon which the order rests. It is not possible to track the consequences for the overall order of interventions directed to particular outcomes and such interventions lead to corrections that often yield undesired results. On the contrary, by securing the supremacy of abstract rules, we make the environment more predictable and leave individuals much greater scope to utilise knowledge that they alone possess and hence to adapt better to their own conditions. The utilisation of this knowledge improves the adaptiveness of the social order as a whole.

Thus the three ingredients, the sceptical view of human nature, the imperfect nature of human knowledge and the self ordering and evolutionary character of society combine to provide a powerful argument for the permanent containment of authority. In no sense can these desiderata be regarded as contingent or rag tag in nature as Pettit alleges.

The Divergence of Classical Republicanism and Classical Liberalism

We have seen that classical republican and classical liberal conceptions of liberty coincide in the form of freedom from domination. Pettit argues that republican liberty is consistent with an authority's power to interfere with people so long as the authority is forced to track the people's interests. In his book, Pettit elaborates that there will be no domination if there are suitable constraining constitutional arrangements that work effectively to ensure that the interference is non-arbitrary in the sense that the official has no discretion or only has discretion of the type exercised by judges.¹⁵ In short Pettit is arguing for official discretion to be limited in the extreme, a position that classical liberals wholeheartedly endorse.

¹³ Adam Ferguson, *An Essay on the History of Civil Society 1767* (Edinburgh: Edinburgh University Press, 1966) 122.

¹⁴ FA Hayek, above n 7, 18. Cf Douglass North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990) 25.

¹⁵ Phillip Pettit, *Republicanism* (Oxford: Clarendon Press, 1997) 212.

Pettit's republicanism parallels classical liberalism in another important respect. Pettit abandons the older republican faith in *virtu* (civic virtue) and in his book, Pettit endorses the Madisonian view that we cannot remove the causes of faction and may only control the effects of faction. Madison, of course, was echoing Hume's thesis that in designing constitutions, we should assume every person to be a knave. Pettit claims somewhat controversially that the republican tradition has always embraced the Madisonian conclusion 'however much it may have insisted on the importance of virtue'.¹⁶ So, wherein lies the difference between the two traditions? It is hard to find in Pettit's writings once we have established that classical liberalism is indistinct from classical republicanism with respect to the conception of liberty. I think that the difference lies not in the conception of liberty but in the conceptions of harm and interest.

Pettit states that 'provided the state is oriented to the common good or common weal, as it used to be said—provided it is forced to take its guidance from the *res publica*—it will not represent a power in people's hands that renders them unfree' (manuscript p 5). How does one determine the common weal or the *res publica*? Pettit's republicanism prescribes the well-recognised constitutional precautions that inhibit the rulers from pursuing factional interests and assist the identification of the 'common recognisable interests'. It does not posit a theory of non-intervention such as that embodied in Mill's harm principle. The latter principle dictates that liberty of persons ought to be restricted only to prevent harm to others but never harm to themselves. Classical liberalism, in contrast to Pettit's republicanism, is much more sceptical of the ability of authorities to determine the public interest. Indeed, liberals find problematic, the very conception of the public interest that is distinct from the interest of each individual member of society to pursue his or her own ends as determined by them. This is because of the self-ordering nature of society and the problem of dispersed knowledge discussed previously. Since all individuals have the same interest in striving to achieve their own ends, the public interest is served mainly by the establishment and enforcement of rules of just conduct that facilitates the pursuit of individual interests by demarcating areas permissible action and by making life more predictable. Beyond this, the public interest is advanced by the provision of a narrow range of goods and services that cannot be secured efficiently by private arrangement owing to costs and the free rider problem. Classical liberals, generally endorse Mill's harm principle and seek to install specific precautions against state invasion of private space in the form of basic civil liberties and property rights. They prefer endogenous social change to state engineered change. To that end they seek to deny the state the power to define the *res publica*. Herein lies the true difference between these two great traditions.

¹⁶ Ibid 65.

