

Law and Republicanism: Mapping the Issues

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Positive laws in constitutional government are designed to erect boundaries and establish channels of communication between men whose community is continually endangered by the new men born into it.¹

I. Introduction

Since the last decade of the twentieth century, debates in political theory have been increasingly dominated, at least in Anglo-American circles, by the opposition between liberalism and republicanism. Today, it is safe to describe republicanism as the major alternative to liberal political theory. This is true in the European context given the long republican traditions in Italy, France, or the United Kingdom, and the more recent but remarkable awakening of republicanism in Spain, but also beyond Europe as exemplified by the development of republican scholarship in the United States and Latin America.

Republicanism is a well-known political and democratic theory. In the sense used in this volume, it has nothing to do with the contemporary opposition to monarchy—at least to the extent that it is part of a constitutional and democratic set of political institutions—or with the current American political party. It refers, instead, to a long tradition in political philosophy that goes back to Ancient Greece. Scholars versed in the history of political thought have long started providing detailed accounts of the main authors and works that have contributed to this tradition for more than twenty-five centuries, from Aristotle to Montesquieu, Rousseau, or Arendt, and from Cicero or Machiavelli to Harrington, Paine, or Jefferson.² In the last few years, a number of philosophers

¹ Arendt, H., *Between Past and Future: Six Exercises in Political Thought*, 2nd edn. (New York: Viking Press, 1968), 465.

² e.g. Baron, H., *The Crisis of the Early Italian Renaissance*, 2nd edn. (Princeton: Princeton University Press, 1966); Bailyn, B., *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1967); Wood, G. S., *The Creation of the American Republic 1776–1787* (Chapel Hill, NC: University of North Carolina Press, 1969); Pocock, J. G. A., *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*

and political theorists have begun to develop a contemporary political doctrine founded on that republican tradition, and have produced a myriad of books and papers intending to criticize and improve the state of current constitutional democracies and to differentiate themselves from political liberalism.³

In spite of this burgeoning literature, a lot of work remains to be done and on several fronts. First, the history of ideas continues to play a significant role in shaping republican doctrine,⁴ and the numerous and detailed historical studies published on republicanism have left some issues open and others

(Princeton: Princeton University Press, 1975); Skinner, Q., *The Foundations of Modern Political Thought: Volume I The Renaissance* (Cambridge: Cambridge University Press, 1978); Van Gelderen, M. and Skinner, Q. (eds.), *Republicanism: A Shared European Heritage* (Cambridge: Cambridge University Press, 2002); Skinner, Q., *Liberty before Liberalism* (Cambridge: Cambridge University Press, 1998); Bock, G., Skinner, Q., and Viroli, M. (eds.), *Machiavelli and Republicanism* (Cambridge: Cambridge University Press, 1990); Viroli, M., *For Love of Country* (Oxford: Oxford University Press, 1995); Vertel, R. and Bryner, G., *In Search of the Republic: Public Virtue and the Roots of American Government* (Totowa, NJ: Rowman & Littlefield, 1987); Pangle, T. L., *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (Chicago: The University of Chicago Press, 1988); Rahe, P., *Republics, Ancient and Modern: Classical Republicanism and the American Revolution* (Chapel Hill, NC: University of North Carolina Press, 1992); Nicolet, C., *L'idée républicaine en France (1789–1924)* (Paris: Gallimard, 1982); Spitz, J.-F., *La Liberté politique* (Paris: Presses Universitaires Françaises, 1995); Spitz, J.-F., *Le moment républicain en France* (Paris: Gallimard, 2005); and Sellers, M., *American Republicanism: Roman Ideology in the United States Constitution* (Basingstoke: Macmillan, 1994); Sellers, M., *The Sacred Fire of Liberty: Republicanism, Liberalism and the Law* (Basingstoke: Macmillan, 1998).

³ e.g. Sandel, M., *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press, 1996); Sandel, M., 'The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues', *Fordham Law Review*, 66/1 (1997), 1; Taylor, C., 'What's Wrong with Negative Liberty', in Ryan, A. (ed.), *The Idea of Freedom* (Oxford: Oxford University Press, 1979); Taylor, C., 'Cross-Purposes: The Liberal-Communitarian Debate', in Rosenblum, N. (ed.), *Liberalism and the Moral Life* (Cambridge, MA: Harvard University Press, 1989); Michelman, F., 'The Supreme Court 1985 Term—Foreword: Traces of Self-Government', *Harvard Law Review*, 100 (1986), 4; Michelman, F., 'Law's Republic', *Yale Law Journal*, 97 (1988), 1493; Sunstein, C., 'Beyond the Republican Revival', *Yale Law Journal*, 97 (1988), 1539; Sunstein, C., *The Partial Constitution* (Cambridge, MA: Harvard University Press, 1993); Pettit, P., *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997); Pettit, P., *A Theory of Freedom: From the Psychology to the Politics of Agency* (Oxford: Oxford University Press, 2001); Habermas, J., 'Human Rights and Popular Sovereignty: The Liberal and Republican Versions', *Ratio Juris*, 7/1 (1994), 1; Habermas, J., *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. W. Rehg (Cambridge, MA: MIT Press, 1996); Habermas, J., 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?', *Political Theory*, 29/6 (2001), 766; Viroli, M., *Republicanism*, trans. A. Shugar (New York: Hill & Wang, 2002); Dagger, R., *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford: Oxford University Press, 1997); Kymlicka, W., *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford: Oxford University Press, 2001); Honohan, I., *Civic Republicanism* (New York: Routledge, 2002); Winstock, D. and Nadeau, C. (eds.), *Republicanism: History, Theory and Practice* (London: Frank Cass Publishers, 2004); Honohan, I. and Jennings, J. (eds.), *Republicanism in Theory and Practice* (New York: Routledge, 2006); Lovett, F., 'Republicanism', *Stanford Encyclopedia of Philosophy* (<<http://plato.stanford.edu/entries/republicanism/>>); Bellamy, R., *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007); and Laborde, C. and Maynor, J. W. (eds.), *Republicanism and Political Theory* (Oxford: Blackwell, 2007).

⁴ On the importance of historical studies in understanding this political tradition, see Honohan, *Civic Republicanism* (above, n. 3), 2–4.

underexplored.⁵ Second, while everyone accepts that republicanism is a heterogeneous tradition that has historically grown around distinct lines of thought and involving very different accounts of politics and democracy, there is no agreement on how many republican streams or schools there are and what they are. Civic republicanism, Aristotelian republicanism, neo-Roman republicanism, neo-Athenian republicanism, social-liberal republicanism, communitarian republicanism, and even liberal republicanism are often distinguished. But there is no consensus on how to define each of these groups of thoughts and how to distinguish republicanism from other competing political doctrines, such as liberalism, communitarianism, or socialism.

Third, as a result of the latter, the very core of republican thought is still in question. Many authors have emphasized the importance of freedom as the core value for republicanism,⁶ but others prefer to prioritize the role of civic virtues⁷ and the community.⁸ There is certainly not more disagreement among republicans than among liberals, concerning their respective basic values. However, what is distinctive of republican thinkers is that they do not only disagree about what these central values mean, but also about which of them should take priority over the others. That fact and the heterogeneity of both traditions add a particular complexity to the confrontation between liberalism and republicanism.⁹

A fourth concern for current republican theories is institutional design. Certain proponents of contemporary republicanism have been concerned about practical and institutional issues, or at least have endorsed a view of republicanism that is non-utopian.¹⁰

⁵ Three chapters in this volume are intended to contribute to this inclusive historical effort and to cast some light onto the French (Spitz, chapter 12; and Lacroix and Magnette, chapter 13) and Scottish republican traditions (Tomkins, chapter 14).

⁶ See Skinner, Q., 'The Idea of Negative Liberty: Philosophical and Historical Perspectives', in Rorty, R., Schneewind, J. B., and Skinner, Q. (eds.), *Philosophy in History: Essays on the Historiography of Philosophy* (Cambridge: Cambridge University Press, 1984); Skinner, Q., 'The Republican Ideal of Political Liberty', in Bock, G., Skinner, Q., and Viroli, M. (eds.), *Machiavelli and Republicanism* (Cambridge: Cambridge University Press, 1990); Skinner, Q., 'On Justice, the Common Good, and the Priority of Liberty', in Mouffe, C. (ed.), *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* (London: Verso, 1992), 211; Skinner, *Liberty before Liberalism* (above, n. 2); Taylor, 'What's Wrong with Negative Liberty' (above, n. 3); Taylor, 'Cross-Purposes' (above, n. 3); Pettit, *Republicanism* (above, n. 3); Pettit, *A Theory of Freedom* (above, n. 3); Habermas, 'Human Rights and Popular Sovereignty' (above, n. 3); Habermas, 'Constitutional Democracy' (above, n. 3).

⁷ See Arendt, H., *The Human Condition* (Chicago: Chicago University Press, 1958); Arendt, H., *On Revolution* (New York: Penguin, 1977); Dagger, *Civic Virtues* (above, n. 3); Viroli, *Republicanism* (above, n. 3).

⁸ See Sandel, M., 'The Procedural Republic and the Unencumbered Self', *Political Theory*, 12 (1984), 81; Sandel, *Democracy's Discontent* (above, n. 3); Sandel, 'The Constitution of the Procedural Republic' (above, n. 3).

⁹ The aim of this introduction is not to offer panoramic account and comparison, but the present volume should reflect part of the pluralism one can find within the republican tradition.

¹⁰ Pettit, *Republicanism* (above, n. 3); Pettit, P., *Examen a Zapatero*, trans. J. L. Martí (Madrid: Temas de Hoy, 2007) (much of the material in this book will be incorporated into a book under preparation by J. L. Martí and P. Pettit on civil republicanism in Zapatero's government); Sunstein,

Recently, some authors have started addressing legal issues more closely, applying republican theory to certain political and legal institutions. What is still missing, however, is a more holistic approach to the political and legal organization of a republic. This is what the concept of legal republicanism aims at capturing, for institutional design in political doctrines is usually channelled through legal institutions. Besides a few studies that focus on constitutional republicanism¹¹ and international law,¹² it is Braithwaite and Pettit's seminal work about criminal justice that has been most crucial for the development of a republican theory of law.¹³ Notwithstanding, legal republicanism remains largely unexplored *qua* legal doctrine and deserves more attention by philosophers and legal scholars. Besides pointing out some concrete institutions or identifying the content of republican laws, it is important to identify the impact of republican

C., *Republic.com* (Princeton: Princeton University Press, 2001); Bellamy, *Political Constitutionalism* (above, n. 3); Laborde, C. and Maynor, J. W., 'The Republican Contribution to Contemporary Political Theory', in Laborde and Maynor (eds.), *Republicanism and Political Theory* (above, n. 3), and most of the essays in that volume. As an example of a concrete policy, see the debate on civic education through Gutmann, A., *Democratic Education* (Princeton: Princeton University Press, 1987); and Kymlicka, *Politics in the Vernacular* (above, n. 3), ch. 16.

¹¹ Pettit, *Republicanism* (above, n. 3); Part II; Bellamy, *Political Constitutionalism* (above, n. 3); Bellamy, 'Republicanism and Constitutionalism', in Laborde and Maynor (eds.), *Republicanism and Political Theory* (above, n. 3); Honohan, *Civic Republicanism* (above, n. 3); Part II; Sellers, M., *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State* (New York: Palgrave Macmillan, 2003); Sellers, *American Republicanism* (above, n. 2); Sellers, *The Sacred Fire of Liberty* (above, n. 2); Tomkins, A., *Our Republican Constitution* (Oxford: Hart Publishing, 2005).

¹² Onuf, N. G., *The Republican Legacy in International Thought* (Cambridge: Cambridge University Press, 1998); Habermas, J., 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?', in Habermas, J., *Dergespaltene Westen. Kleine politische Schriften X* (Frankfurt: Suhrkamp, 2004), 113 (translated as 'Does the Constitutionalization of International Law Still Have a Chance?', in *The Divided West*, ed. and trans. C. Cronin (Cambridge: Polity Press, 2006), 115); Habermas, J., 'Eine politische Verfassung für die pluralistische Weltgesellschaft?', in Habermas, J., *Zwischen Naturalismus und Religion* (Frankfurt: Suhrkamp, 2005), 324; and Habermas, J., 'Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik', in Niesen, P. and Herboth, B. (eds.), *Anarchie des kommunikativen Freiheit* (Frankfurt: Suhrkamp, 2007), 406; Sellers, M., *Republican Principles in International Law: The Fundamental Requirements of a Just World Order* (London: Palgrave Macmillan, 2006); Bohman, J., *Democracy Across Borders: From Demos to Democracy* (Cambridge, MA: MIT Press, 2007); Bohman, J., 'Non-Domination and Transnational Democracy', in Laborde and Maynor (eds.), *Republicanism and Political Theory* (above, n. 3); Besson, S., 'Deliberative Democracy: Towards the Deterritorialization of Democracy', in Besson, S. and Martí, J. L. (eds.), *Deliberative Democracy and Its Discontents* (Aldershot: Ashgate, 2006) 181 Besson, S., 'Institutionalizing Global Democracy', in Meyer, L. et al. (eds.), *International Law, Justice and Legitimacy* (Cambridge: Cambridge University Press, forthcoming); and Besson, S., 'Theorizing the Sources of International Law', in Besson, S. and Tsoulas, J. (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, forthcoming).

¹³ Braithwaite, J. and Pettit, P., *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1990). See also Pettit, P., 'Republican Theory and Criminal Punishment', *Utilitas*, 9 (1997); Braithwaite, J. S., *Regulation, Crime, Freedom* (London: Ashgate, 2000); Dagher, 'Republican Punishment, Consequentialist or Retributive?', in Laborde and Maynor (eds.), *Republicanism and Political Theory* (above, n. 3); Duff, R. A., *Punishment, Communication and Community* (New York: Oxford University Press, 2001); Duff, R. A., *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007); and Lacey, N., *State Punishment: Political Principles and Community Values* (London: Routledge, 1994).

values both on the content and on the form and structure of law in general, or even on the theoretical understanding of law itself.¹⁴

In any case, legal republicanism is not only a matter of designing concrete legal institutions for republicanism in a real world. The intersection between law and republicanism also concerns important—particularly normative—issues of legal theory, on the one hand. On the other, exploring those legal theoretical issues and clarifying what should be the content of republican law are also necessary to develop a complete and deep understanding of the political, abstract principles of republicanism in general. Defining the principles of legal republicanism is, at least in part, a task of mutually accommodating political and legal principles and values. Thus, when arguing whether judicial review is compatible with republican political principles of freedom and self-government, we are improving our understanding of republican political principles themselves.

One of the major difficulties hampering the development of a republican theory of law has been that philosophers are usually unable to deal with a concrete and detailed analysis of actual institutions and that legal scholars often ground their institutional analysis on insufficient theoretical and normative foundations. In our view, then, one of the priorities should be to create a common legal language for legal republican endeavours so as to foster co-operative reflection about common themes, and hence to consolidate ties among political philosophers and legal scholars who are working on republican theory. The renaissance of the republican tradition in political theory cannot be complete before its legal dimension is sufficiently explored and clarified. This collection of essays aims at exploring this legal dimension and hence provides the necessary complement to the current revival of republican political theory.¹⁵ The chapters in this volume amount to more than a mere exercise in deduction—whether in application of abstract principles to concrete realities or in deduction of legal principles from political ones—and their efforts involve an act of philosophical, political and legal reflection.

In the remainder of the present introduction, we will map some of the fundamental theoretical principles underlying republicanism in general and legal republicanism in particular. The idea is to set a research agenda for the years to come through a survey of the main issues raised by legal republicanism. Whereas several of the questions identified in the introduction are addressed in some of the chapters of the book, others are still open and in need of further studies. Another caveat is in order. Although many of these general topics were discussed during the workshop at which the chapters in this book were first presented, the views expressed in this introductory chapter do not necessarily reflect those of all authors in the book. On the contrary, as will become clear in the course of the

¹⁴ See Pettit, chapter 1 in this volume.

¹⁵ See the most recent examples of that revival in Laborde and Maynor (eds.), *Republicanism and Political Theory* (above, n. 3).

book, many of the central issues identified in this introduction constitute the focal point of most disagreements internal to the republican tradition.

II. Republicanism

A serious discussion of the legal aspects of republicanism requires a prior assessment of the central values and tenets of republican political theory. Before we start our preliminary study of legal republicanism, it is useful to provide a broad overview of what we regard as the key features of republicanism *tout court*.

1. Republicanism(s) and other political theories

Republicans disagree about what constitutes the primary or core value(s) in contemporary republicanism. As mentioned before, some of them emphasize freedom or liberty,¹⁶ while others stress the role of civic virtues and active citizenry as a distinctive feature of that tradition,¹⁷ and still others ground the doctrine in the idea of a community and the common good,¹⁸ or more specifically in a deliberative defence of democracy.¹⁹ Disagreement about the core values of republicanism is often interpreted as a sign of the co-existence of many republicanism(s): some views of republicanism are closer to the liberal tradition in their vindication of liberty as a consequence of the Roman origins of their ideas; others are situated closer to the Aristotelian tradition with their emphasis on virtues and a citizenry that finds self-realization in political participation; finally, others come closer to communitarianism in their valuation of the community, or to socialism in their defence of the central value of political equality.²⁰

This brings us to the important question of how republicanism relates to other competing political doctrines. Again, authors disagree about what differentiates

¹⁶ Skinner, 'The Republican Ideal of Political Liberty' (above, n. 6); Skinner, Q., 'The Paradoxes of Political Liberty', in Miller, D. (ed.), *Liberty* (Oxford: Oxford University Press, 1991); Skinner, *Liberty before Liberalism* (above, n. 2); Skinner, Q., 'A Third Concept of Liberty', *Proceedings of the British Academy*, 117 (2002), 237; Taylor, 'What's Wrong with Negative Liberty' (above, n. 3); and Taylor, 'Cross-Purposes' (above, n. 3); Pettit, *Republicanism* (above, n. 3); Pettit, *A Theory of Freedom* (above, n. 3); Habermas, 'Human Rights and Popular Sovereignty' (above, n. 3); Habermas, 'Three Normative Models of Democracy' (above, n. 6); Habermas, *Between Facts and Norms* (above, n. 3); and Habermas, 'Constitutional Democracy' (above, n. 3).

¹⁷ Arendt, *The Human Condition* (above, n. 7); Arendt, *On Revolution* (above, n. 7); Dagger, *Civic Virtues* (above, n. 3); Viroli, *Republicanism* (above, n. 3).

¹⁸ Sandel, 'The Procedural Republic and the Unencumbered Self' (above, n. 8); Sandel, *Democracy's Discontent* (above, n. 3); Sandel, 'The Constitution of the Procedural Republic' (above, n. 3).

¹⁹ Sunstein, 'Beyond the Republican Revival' (above, n. 3), 1539; Sunstein, *The Partial Constitution* (above, n. 3).

²⁰ Laborde and Maynor, 'The Republican Contribution to Contemporary Political Theory' (above, n. 10).

republicanism not only from liberalism, but also from communitarianism and socialism.

Mainstream literature insists on the opposition between republican and liberal theories.²¹ This is especially true of authors who consider liberty and/or civic virtues as central values of republicanism, and try to differentiate the republican from the liberal notion of freedom, or to specify how liberals traditionally have been unable to recognize the relevance of virtues in the political system. At the same time, many neo-republican authors are admittedly deeply influenced by the thought of first modern republicans, such as Rousseau, Montesquieu, Paine, or Jefferson. The latter sharply distanced themselves from the liberal orthodoxy of their time, as represented by Locke, Paley, or Bentham; those differences pertained especially to their disagreements with Roman and Italian thinkers like Cicero and Machiavelli.²² In any case, it is undeniable that republicanism represents a political tradition much more ancient than liberalism. And when contemporary republicans go back to the origins of republican thought to find inspiration for current proposals, they are trying to distinguish themselves from the newer liberal tradition.

The relationship between republicanism and liberalism obviously depends on how we define both concepts. And this is not an easy task given the plurality of views and perspectives grouped under both headings. While it is possible to contrast republicans and liberals who endorse a clearly negative conception of liberty, like libertarians, it is more difficult to distinguish republicans from egalitarian liberals who might argue for an interventionist account of the State.²³ At the same time, it is obvious that modern republicanism endorses some principles traditionally attributed to the liberal tradition, such as the separation between public and private spheres, the separation of powers, or the broader principle of state neutrality. Partly because of this, some authors have suggested that republicanism and liberalism are not foes but allies and that there is nothing wrong in defending a liberal brand of republicanism.²⁴

²¹ See Taylor, 'What's Wrong with Negative Liberty' (above, n. 3); Taylor, 'Cross-Purposes' (above, n. 3); Spitz, J.-F., 'The Concept of Liberty in "A Theory of Justice" and Its Republican Version', *Ratio Juris*, 7 (1994), 331; Spitz, *La Liberté politique* (above, n. 2); Pettit, *Republicanism* (above, n. 3), ch. 1 and 4; Skinner, 'On Justice, the Common Good, and the Priority of Liberty' (above, n. 6); Skinner, *Liberty before Liberalism* (above, n. 2); Sandel, *Democracy's Discontent* (above, n. 3), 25–8; Viroli, *Republicanism* (above, n. 3), ch. 4; Lovett, 'Republicanism' (above, n. 3). See, also, most of the chapters in this volume.

²² For the exact contrast between Bentham's liberalism and republicanism, see Pettit, chapter 1 in this volume.

²³ Pettit, *Republicanism* (above, n. 3), 8–10; also Sunstein, 'Beyond the Republican Revival' (above, n. 3); and Kymlicka, *Politics in the Vernacular* (above, n. 3), ch. 18.

²⁴ Kymlicka, *Politics in the Vernacular* (above, n. 3), 387; Patten, A., 'The Republican Critique of Liberalism', *British Journal of Political Science*, 26 (1996), 25; Ackerman, B., *We the People, Volume 1, Foundations* (Cambridge, MA: Harvard University Press, 1991), 29–30; Sunstein, 'Beyond the Republican Revival' (above, n. 3); Macedo, S., *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Contractualism* (Oxford: Oxford University Press, 1990); Haakonssen, K., 'Republicanism', in Pettit, P. and Goodin, R. (eds.), *A Companion*

Three remarks are in order in this context. First, no matter how difficult it is to trace doctrinal divisions in political theory, they are useful in the academic debate and help improve our understanding; complete awareness of the meaning of one's arguments stems from the precise identification of one's competitors.²⁵ For contemporary republicanism to assert itself as a major political theory, it needs to be carefully distinguished from its main alternatives. And this is particularly important with respect to freedom, if it is to be one of its core values, as freedom is traditionally identified in priority with liberalism.

Second, those who reject the incompatibility between republicanism and liberalism generally do so because they consider themselves deeply influenced by paradigm liberal thinkers, like John Rawls, or because they endorse views that until now have been widely considered as main liberal assumptions. However, different contexts and backgrounds call for different answers and labels. Because republicanism had virtually disappeared during the nineteenth century and most of the twentieth century, or at least because it was not explicitly vindicated at those times, it was to be expected that authors like Rawls were not required to differentiate between liberalism and republicanism, and just assumed to be liberals, or to consider republicanism as an incompatible doctrine. And, for that reason, it is entirely irrelevant to ask whether they were republicans or liberals, in the meanings we are currently using.²⁶ As a result, although some contemporary writers may identify themselves as liberals, this is not a definitive exclusion of their republican affiliation.²⁷ These labels mean different things depending on the person who uses them, on the purpose for which they are used, and on the context to which they are applied. What matters, of course, is to distinguish the ideas underlying those labels.

The third remark has to do with the previous two. As mentioned before, a growing number of contemporary philosophers and political and legal theorists declare their allegiance to the republican tradition as a way to significantly oppose the dominant standpoint in political theory that is usually identified as a liberal one. These authors stress the importance of values such as freedom, equality, self-government, civic virtues, or active citizenship. Unsurprisingly, some of these values, and hence some of the concrete institutional proposals propounded to protect them, are also shared within the liberal tradition,²⁸ despite important

to *Contemporary Political Philosophy* (Oxford: Blackwell, 1993); Laborde and Maynor, 'The Republican Contribution to Contemporary Political Theory' (above, n. 10). For an analysis of that debate, see Lovett, 'Republicanism' (above, n. 3).

²⁵ In opposition to that idea, see Laborde and Maynor, 'The Republican Contribution to Contemporary Political Theory' (above, n. 10).

²⁶ The same can be said in relation to the endless debates about whether Immanuel Kant, Friedrich Hegel, and John Stuart Mill were republicans, liberals, or both.

²⁷ For instance, Waldron regards himself as a liberal, and Habermas situates himself halfway between liberalism and republicanism. But the republican reading of their writings is probably the most consistent one with our general presentation of political republicanism.

²⁸ Pettit, *Republicanism* (above, n. 3), 10–11.

differences in their interpretation. It is this very difference of approach and interpretation of the same values that explains why it is worth keeping liberalism and republicanism conceptually separate in contemporary debates. Different conceptions of freedom, different evaluations of the private-public sphere distinction, different notions of legal rights, different conceptions of the constitution linked to a particular view of democracy, and diverging interpretations regarding which kind of dispositions, attitudes, or virtues can be required of, or fostered among citizens are all significant elements that can be used to differentiate both traditions. In the next section, we will endeavour to explore the specifically republican interpretation of those values.

Similar problems arise in relation to the distinction between republicanism and other political theories, such as communitarianism, nationalism, or socialism. Republicans share several commitments with communitarians: first, the criticism of the sometimes excessively individualistic liberal view of society; second, a richer and more complex notion of freedom that requires citizens' engagement in the public or in the political community, connected to the rejection of a self-centred, egocentric, and privatizing conception of individual life; and third, as a consequence of the latter, a different interpretation of the public-private division and a different emphasis on each, together with a shared rejection of the liberal principle of neutrality.²⁹ In addition to those theoretical overlaps, one should mention that authors like Taylor and Sandel, who were generally deemed as advocates of communitarianism during the 1990s' opposition to liberalism, are now usually associated with republican theory.³⁰ As a matter of fact, the Aristotelian legacy is usually vindicated by both doctrines. It should not come as a surprise therefore that some authors conflate republicanism and communitarianism, or defend a communitarian reading of republicanism.³¹ In any case, despite some common views, communitarianism defends cultural traditions in a way that republicanism need not. It also values cultural social ties and moral virtues in general, whereas republicanism promotes civic bonds, public virtues, and political participation in organizing the political community. For those reasons, while communitarianism may be characterized as an eminently

²⁹ Pettit, *Republicanism* (above, n. 3), ch. 1 and 4; Skinner, 'On Justice, the Common Good, and the Priority of Liberty' (above, n. 6); Sandel, *Democracy's Discontent* (above, n. 3), 25–8; Viroli, *Republicanism* (above, n. 3), ch. 4; Haakonssen, 'Republicanism' (above, n. 24).

³⁰ Sandel, 'The Procedural Republic and the Unencumbered Self' (above, n. 8); Sandel, *Democracy's Discontent* (above, n. 3); Sandel, 'The Constitution of the Procedural Republic' (above, n. 3); Taylor, 'What's Wrong with Negative Liberty' (above, n. 3); and Taylor, 'Cross-Purposes' (above, n. 3). While distinguishing between them, Honohan claims that republicanism is a variant of communitarianism; see Honohan, *Civic Republicanism* (above, n. 3), 8–12.

³¹ This occurs with Jürgen Habermas, who sometimes opposes republicanism because he identifies it with communitarianism, considering Hannah Arendt as the representative of both traditions. See Habermas, *Between Facts and Norms* (above, n. 3), ch. 4, Parts I and II. See e.g. Habermas, J., 'The European Nation-State: Its Achievements and its Limits', in Balakrishnan, G. (ed.), *Mapping the Nation* (London: Verso, 1996); and Habermas, 'Constitutional Democracy' (above, n. 3).

conservative doctrine that looks back to past practices, republicanism is more forward-looking as it tries to identify the conditions for fully protecting liberty and complete self-government, thus enabling the political community to determine its own future.

More or less the same can be said with respect to nationalism and socialism. On the one hand, republicanism has in certain historical contexts shared nationalists' criticism of tyranny and the defence of liberty, autonomy, and self-government.³² According to some contemporary republicans, republicanism and nationalism jointly hold the claim against liberalism that a free society requires patriotism and solidarity bonds.³³ On the other hand, certain republicans have shared socialists' criticism of the thin liberal conception of freedom, the emphasis on the basic equality among citizens, or the struggle against domination, exploitation, or alienation.³⁴ It would take too long to analyse in full the concrete relationship between republicanism and these and other competing political doctrines.³⁵ It suffices to note that contemporary republicanism encompasses a sensitivity to political problems that is at least slightly different in emphasis from those expressed by the doctrines just mentioned.

2. Republican values

Most republicans endorse a similar set of values or principles, mainly including those of liberty, political equality, civic virtues, and deliberative democracy, while they disagree, as mentioned above, about which of them must be given priority in republican theory. Notwithstanding those theoretical disagreements, most republicans tend to agree on the majority of concrete implications of the whole set of principles. It might be considered, therefore, that conceptual priorities or the relative centrality of one or the other value need not make much difference in the practical conception of republican institutions, even though they are surely related to their theoretical justification.³⁶ In spite of the importance of that justificatory and philosophical debate, one may proceed while leaving it open, and explore each of those central values in turn.

³² See Tomkins, chapter 14 in this volume.

³³ Taylor, 'Cross-Purposes' (above, n. 3).

³⁴ Pettit, *Republicanism* (above, n. 3), ch. 5; Honohan, *Civic Republicanism* (above, n. 3), 118 and 191; Gargarella, chapter 7 in this volume.

³⁵ Republicanism also shares some concerns with feminism; see Pettit, *Republicanism* (above, n. 3), ch. 5; and Phillips, A., 'Feminism and Republicanism: Is This a Plausible Alliance?', *Journal of Political Philosophy*, 8 (2000), 279.

³⁶ There is one aspect of that debate which is not irrelevant and which is whether republicanism is a pluralist theory that endorses several values that cannot be ordered or balanced in a general way, or whether it assumes the possibility of reducing or at least ordering all these values in a coherent way. This has practical implications since it affects the way in which we operate with such values in legal practice.

There are at least four main elements at the core of republican political thought: (i) a particular and rich conception of liberty, that departs from a narrow, liberal one; (ii) a particular and ambitious conception of basic and political equality, that ought to be distinguished both from liberal and socialist conceptions; (iii) a strong and deliberative ideal of democracy, much more participatory than what liberal democratic theory can accommodate; and (iv) an idea of civic virtue that entails a particular conception of the public-private distinction, that would be unacceptable from the classical liberal perspective.

a. Liberty

According to the majority view, the idea of liberty is the central value in republican political tradition. Even though other political doctrines can share that value, the republican notion of liberty is taken to be different from other doctrines' and particularly from the liberal notion. The most popular formulation of republican liberty is Pettit's 'freedom as non-domination',³⁷ although it is roughly equivalent to 'neo-Roman liberty' as depicted by Skinner,³⁸ to 'political liberty' as described by Taylor,³⁹ or to 'full autonomy' with a private and a public or political dimension as propounded by Habermas.⁴⁰ All of them are slightly different formulations of the same republican intuition:⁴¹ the necessity to define liberty in a richer and more demanding way than the traditional negative liberty, to borrow Berlin's famous opposition, but without conflating it with its positive characterization.⁴² For most of those authors, republican liberty constitutes a third conception that differs from negative and positive accounts of liberty,⁴³ a sort of middle way between *la liberté des anciens* and *la liberté des modernes*, to use Constant's famous opposition.⁴⁴ While negative liberty focuses on the effective absence of interference in one's behaviour or choice, republican liberty depends on the absence of domination, defined as the control exerted by others on one's basic domains of choice and independently from interference. Domination, in short, means the possibility of arbitrary interference, be that effectively realized or not. Others can

³⁷ Pettit, *Republicanism* (above, n. 3); Pettit, *A Theory of Freedom* (above, n. 3); Pettit, 'Republican Freedom: Three Axioms, Four Theorems', in Laborde and Maynor (eds.), *Republicanism and Political Theory* (above, n. 3); and Pettit, chapter 1 in this volume.

³⁸ Skinner, *Liberty before Liberalism* (above, n. 2).

³⁹ Taylor, 'What's Wrong with Negative Liberty' (above, n. 3); and Taylor, 'Cross-Purposes' (above, n. 3).

⁴⁰ Habermas, 'Human Rights and Popular Sovereignty' (above, n. 3); Habermas, *Between Facts and Norms* (above, n. 3); and Habermas, 'Constitutional Democracy' (above, n. 3).

⁴¹ There are some minor differences among these characterizations, of course. As we will see later, some authors have identified two different strands of thought in the republican conception of liberty just outlined: the neo-Athenian and the neo-Roman.

⁴² Berlin, I., 'Two Concepts of Liberty', in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 118.

⁴³ Skinner, 'A Third Concept of Liberty' (above, n. 16).

⁴⁴ Constant, B., 'De la liberté des anciens comparée à celle des modernes', in *Œuvres politiques* (Paris: Gallimard, 1997), 589; see also Spitz, *La Liberté politique* (above, n. 2); and Pettit, *Republicanism* (above, n. 3), 36.

control one's choices and behaviour without active interference, and in doing so they are violating or invading one's republican liberty.⁴⁵

At the same time, republican liberty is not supposed to turn into a positive conception of liberty, at least as Berlin understood it, i.e. as a way of self-realization. This positive conception has traditionally been criticized for being paternalistic or even perfectionist. Most republicans, however, stress that endorsing such a positive conception of liberty would fail to respect the private liberty of individuals. It is not entirely clear what Berlin considered positive liberty to amount to concretely, but Pettit spells out the opposition by defining republican liberty as the situation in which a person holds a perfect dominion of her own choices and behaviour. According to Pettit, to be free in a republican way merely requires the absence of external domination, while to be free in a positive way would also require avoiding all the internal causes that prevent, distort, or simply affect our free choice—things like weakness of will, adaptive preferences, cognitive dissonances, and so on.⁴⁶ If the republican polity was to protect and grant the liberty of individuals in such a positive view, it would intervene in large domains of our lives in order to help us avoid those internal effects or distortions, and this would surely lead it to adopt perfectionist or at least paternalistic policies. Thus, it is extremely important to emphasize that republican liberty, just as the negative, liberal one, requires the absence and not the presence of something. But what must be absent is not interference, but domination.

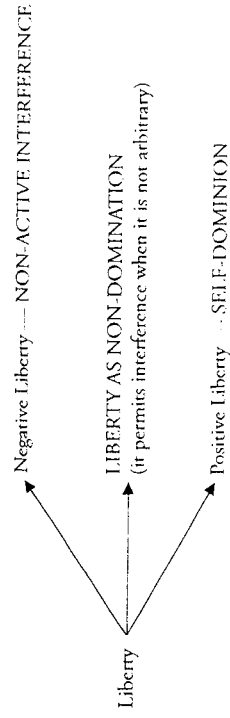


Figure 1. Conceptions of liberty

⁴⁵ Pettit, *Republicanism* (above, n. 3); Pettit, *A Theory of Freedom* (above, n. 3); Skinner, 'The Republican Ideal of Political Liberty' (above, n. 6), 301–03; Patten, 'The Republican Critique of Liberalism' (above, n. 24), 25, 28 and 29; Lovett, 'Republicanism' (above, n. 3); see also a parallel strategy in Macpherson, C. B., 'Berlin's Division of Liberty', in Macpherson, C. B. (ed.), *Democratic Theory: Essays in Retrieval* (Oxford: Clarendon Press, 1973), esp. 117–19.

⁴⁶ Pettit, *Republicanism* (above, n. 3); Pettit, *A Theory of Freedom* (above, n. 3); Pettit, 'Republican Freedom: Three Axioms, Four Theorems', in Laborde and Maynor (eds.), *Republicanism and Political Theory* (above, n. 3); and Pettit, chapter 1 in this volume.

Some republicans, however, have not entirely abandoned the positive conception of liberty. According to Bellamy, Laborde, and Maynor, for instance, the neo-Athenian interpretation of republican liberty propounded by Michael Sandel or Charles Taylor rests on ideas of self-mastery or self-realization in a community, and implies that liberty is intrinsically or 'definitionally' linked with popular participation.⁴⁷ This more demanding interpretation of republican liberty seems akin to the positive conception of liberty, at least if we understand it by reference to Constant's notion of *liberté des anciens*. It stands in stark contrast to another republican conception of liberty, defended centrally by Skinner and Pettit, which can be called neo-Roman. One difference between the two republican views of liberty would be that while the former requires active political participation for granting and exercising liberty, the latter would only require the absence of external political control, that is the absence of political domination.⁴⁸ Both perspectives value liberty and democracy. But while neo-Athenians do it 'on the intrinsic grounds that it [democracy] promotes individual self-realization through political participation', the neo-Romans do it 'on the instrumental grounds that it guards against domination and enshrines our status as equal citizens'.⁴⁹ And this might be seen as a fundamental division within contemporary republicanism concerning the way to interpret the republican value of liberty.

The distinction between neo-Athenian and neo-Roman republicanism seems very clear, as far as it relates to a sharp distinction between intrinsic and instrumental justifications, but things are slightly more complicated. Three different levels in the understanding of liberty ought to be carefully distinguished, and are not necessarily connected to each other. The first level is the negative and positive conceptions of liberty, as outlined above; the second one is the level of the private and public dimensions of liberty, understood as domains in which liberty can be exercised; and, finally, at the purely justificatory level, we find the instrumental and intrinsic reasons in favour of liberty. The problem with the distinction between neo-Athenian and neo-Roman republicanism is that it conflates these three different levels. It would be wrong, however, to equate negative liberty with the private domain of liberty, and with instrumental justifications, as well as it is a mistake to consider the public exercise of liberty as a case of positive liberty, justified only by intrinsic reasons.

⁴⁷ Laborde and Maynor, 'The Republican Contribution to Contemporary Political Theory' (above, n. 10); Bellamy, 'Republicanism and Constitutionalism' (above, n. 11), 161 et seq.; Bellamy, chapter 4 in this volume; also Honohan, chapter 3 in this volume.

⁴⁸ Laborde and Maynor, 'The Republican Contribution to Contemporary Political Theory' (above, n. 10).

⁴⁹ Bellamy, 'Republicanism and Constitutionalism' (above, n. 11), 159. Pettit, for instance, argues that it is only when political institutions admit contestability and popular control and when the citizenry is attentive, civically virtuous, and politically motivated that political domination can be avoided and liberty protected (Pettit, *Republicanism* (above, n. 3)). Skinner still clearly argues that the exercise of self-government is valuable only for instrumental reasons, i.e. to achieve the conditions of a free State (Skinner, 'On Justice, the Common Good, and the Priority of Liberty' (above, n. 6)).

First of all, with respect to the negative-positive level, it is erroneous to argue that neo-Roman republicanism is not concerned at all with the conditions of the exercise of autonomy, since what is valued by republicans, including the neo-Romans, is not the mere formal liberty, but to some extent the capacity to exercise that liberty. As a result, Pettit's distinction between negative, republican liberty and positive liberty could be misinterpreted. It is true that the republic is not required to grant all the conditions, external or internal, objective or subjective, that allow for the actual exercise of self-dominion or full autonomy, conceived as the capacity to determine all the aspects that affect one's life. It would be impossible to do so without adopting a perfectionist view of self-dominion. But the republic should, of course, remove or avoid, as much as it can, obstacles to the exercise of one's full autonomy when they stem from social and political reality (i.e. the complex set of social and political institutions) or when they compromise natural preconditions for that exercise, jeopardizing, for instance, the fulfilment of one's basic needs. This is the reason why a republican polity must take care of its citizens' basic needs. When those needs are not fulfilled, citizens cannot experience liberty at all. As a result, it is difficult to state so easily that positive liberty is the only form of liberty concerned with the conditions of exercise of liberty, while both negative and republican ones are not.

Second, it is one thing to refer to that what Pettit tries to capture as positive liberty, when he talks about self-dominion as the effective possibility of rationally governing our choices and actions, along the lines perhaps of Aristotle,⁵⁰ but it is quite another to identify the public aspect or dimension of liberty that one can obtain only when exercising one's liberty in the public domain, as requested by Taylor or Sandel. True, for the State to guarantee my positive liberty in the first sense, it needs to intervene quite incisively and paternalistically in my private life in a way that is incompatible with the basic respect for freedom that Pettit and others claims should apply. Still, this is not the same as permitting or even encouraging one to participate in political decision-making.

It is hard to see why permitting political participations through the creation, for instance, of semi-direct participatory institutions intended to complement representative bodies, is perfectionist or paternalistic. Organizing new ways of exercising liberty cannot be at odds with liberty itself.⁵¹ On the other hand, it is also difficult to understand why even public encouragement of political participation through educative civic campaigns can be considered an unacceptable paternalistic intervention. Promotional policies are not necessarily compulsory ones. One often justifies State interventions to promoting certain values, as exemplified by public encouragements to adopt a healthy life style, the promotion of

⁵⁰ Pettit, *Republicanism* (above, n. 3), 17–21; Pettit, *A Theory of Freedom* (above, n. 3), 125–9; and Pettit, chapter 1 in this volume.

⁵¹ The outcome of that exercise of liberty might lead, as a byproduct, to a violation of liberty, depending on the content of public decisions. But permitting that exercise of liberty cannot itself be a violation of liberty.

culture, and so on. Not to mention a whole range of compulsory interventions, like the obligation to use seat belts in cars or helmets when driving motorcycles, which are generally deemed justifiable even if they are paternalistic. Of course, this is a complex debate that would deserve more attention than there is scope for in the present introduction.

What has become clear at this stage is the following: it is one thing to be concerned with the public dimension of liberty, and quite another to be referring to the internal, effective, and positive conditions for the actual exercise of that liberty. Perfectionism and paternalism are related to the latter, not to the domain (private or public) in which liberty is exercised. In other words, a republican can endorse a complex conception of liberty that embodies both a private and a public dimension, and even emphasize the importance of effective political participation, as Habermas does, without defending a positive conception of liberty, as described by Pettit.⁵²

And third, to value political participation and self-government for intrinsic reasons, does not imply endorsing a perfectionist or paternalistic take either. Perfectionism and paternalism refer to the kind of State intervention defended by a doctrine, to the institutions or policies proposed, but not to the values they are supposed to honour or respect. Therefore, a republican author concerned with the intrinsic value of liberty when it is exercised in the public domain as a use of self-government, can constrain his institutional proposals by considerations based on the same value of liberty, avoiding thus both perfectionism and paternalism. On the other hand, an instrumental view of political participation might also be sufficient to lead someone to defend broad paternalistic policies. The perfectionist or paternalistic character of a doctrine is not conceptually related to the kind of reasons it uses to justify a political institution or practice.

In a nutshell, there are important differences in the way in which republicans conceive liberty, and there is no need to deny the differential influence of the Greek and Roman classical thought on several contemporary authors. All the same, the distinction between neo-Athenian and neo-Roman contemporary republicanism does not account sufficiently for all the interesting open issues relative to republican liberty. On the other hand, and despite those deep disagreements relative to the clarification of the republican idea of liberty, contemporary republicans almost unanimously accept that the defence of liberty is conceptually related to political self-government, be it in a strong sense and connected to active political participation, or be it in a weaker sense and related only

⁵² The original confusion is probably due to the mistake of considering Berlin's distinction between private and public liberty as equivalent to Constant's one between *la liberté des anciens* and *la liberté des modernes*. It is true that the two levels mentioned in the text appear conflated in Athenian thought, and it is the reason why Berlin's and Constant's accounts could seem alike. But the former rests more on the idea of self-realization, while the latter emphasizes the value of political participation.

to the absence of political domination.⁵³ More particularly, the majority of contemporary republicans claim that the current representative democratic institutions are incapable of granting adequate channels of political participation (or democratic control and contestation) for citizens, and they conceive of liberty as connected to a richer and more demanding ideal of democracy, such as the deliberative ideal.⁵⁴ Only when citizens are engaging in public or political debates, have an equal share in political decision-making, and do so in developing their civic or public virtues, only then can their liberty be secured and the threat of domination put aside. For most contemporary republicans, as a result, political equality, self-government, deliberative democracy, and civic virtues are all values connected to the primary idea of liberty.

b. Equality

Basic or political equality has received considerably less attention on the part of contemporary republicans, although it also constitutes a pre-condition of the existence of a republic. To the extent that republicans are concerned with domination, they cannot tolerate that some citizens be freer than others. The sort of equality that matters to republicans is not, or at least not mainly, economic equality in terms of distributive justice. The strong democratic commitment in republicanism is derived from its conception of the basic equality of all citizens. All citizens must be equally free, particularly from the political point of view that defines their status as citizens.⁵⁵ Citizens' equality is, in other words, equality in access to power or equality in effective political influence.⁵⁶ As soon as some citizens enjoy greater political influence than others, when influence is understood as the capacity to determine ultimate political decisions, they are more capable

⁵³ Pocock, J. G. A., 'The Machiavellian Moment Revisited: A Study in History and Ideology', *Journal of Modern History*, 53 (1981), 49 at 71; Dagger, *Civic Virtues* (above, n. 3), 105; Sunstein, 'Beyond the Republican Revival' (above, n. 3), 1539; Sunstein, *The Partial Constitution* (above, n. 3).

⁵⁴ Pettit, *Republicanism* (above, n. 3); Habermas, 'Human Rights and Popular Sovereignty' (above, n. 3); Habermas, *Between Facts and Norms* (above, n. 3); and Habermas, 'Constitutional Democracy' (above, n. 3); Sunstein, *The Partial Constitution* (above, n. 3).

⁵⁵ Pitkin, H. and Shumer, S., 'On Participation', *Democracy*, 2 (1982), 44; Michelman, 'The Supreme Court 1985 Term' (above, n. 3), 33, 40–1; Honohan, *Civic Republicanism* (above, n. 3), 188–92; and Spitz, chapter 12 in this volume.

⁵⁶ This concern has been addressed in detail by promoters of deliberative democracy: Knight, J. and Johnson, J., 'What Sort of Equality Does Deliberative Democracy Require?', in Bohman, J. and Rehg, W. (eds.), *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT Press, 1997), 279; Cohen, J. and Rogers, J., *On Democracy: Toward a Transformation of American Society* (New York: Penguin, 1983), ch. 3; Cohen, J. and Rogers, J., 'Associative Democracy', in Bardhan, P. and Roemer, J. (eds.), *Market Socialism: The Current Debate* (Oxford: Oxford University Press, 1993); Bohman, J., *Public Deliberation: Pluralism, Complexity, and Democracy* (Cambridge, MA: MIT Press, 1996), ch. 3; Bohman, J., 'Deliberative Democracy and Effective Social Freedom: Capabilities, Resources and Opportunities', in Bohman and Rehg (eds.), *Deliberative Democracy* (above, 321; and Christiano, T., 'Deliberative Equality and Democratic Order', in Shapiro, I. and Hardin, R. (eds.), *Political Order: Nomos XXXVII* (New York: New York University Press, 1996), 251.

than others of imposing their desires, beliefs, or preferences and thus more likely to dominate others. Domination can only be neutralized once we equilibrate that capacity to determine political outcomes. In other words, all citizens should be considered as equally free in their public exercise of autonomy. What matters for this public dimension of autonomy is once again not mere formal equality, but the prohibition of discrimination or inequality in the exercise of liberty. As it would be the case in the private sphere, inequalities in the exercise of liberty constitute the seeds of domination.

As a result, the republican defence of liberty presupposes the equal dignity of every citizen: that no one is regarded as better than the other and, to borrow Pettit's expression, that citizens can look into each other's eyes and see fellow-citizens, and not others vested with special privileges.⁵⁷ According to Pettit, basic equality—like the other republican values—is entailed in the very concept of republican liberty *qua* primary value of republicanism.⁵⁸ The fact that the republican conception of liberty encompasses considerations of basic equality is perceived as a feature of parsimony that makes the republican conception superior to the liberal one.⁵⁹ Other republicans, by contrast, conceive of basic equality as a separate value that complements liberty in a complex articulation of principles.⁶⁰

Notwithstanding, it is important to distinguish two separate components in the idea of republican equality that are not sufficiently considered in the literature. First, the republican polity should neutralize socio-economic inequalities that prevent an equal enjoyment of the *private* dimension of liberty. It is in virtue of this first element that the republic is expected to secure social equality of opportunities, starting with an adequate response to basic needs. Republicanism shares this first element with other egalitarian traditions like socialism or liberal egalitarianism, which claim to be empowering the disadvantaged.⁶¹ Like left-wing liberalism, republicanism also requires the provision of welfare to enable the protection against dependency.⁶² Understood along those lines, the first element of republican equality is connected to the private dimension of liberty discussed before.

The second element of republican equality, by contrast, is much more radical than any liberal alternative and it is based on the idea of effective political equality.

⁵⁷ Pettit, *Examen a Zapatero* (above, n. 10).

⁵⁸ Pettit, P., 'Freedom in the Market', *Politics, Philosophy, and Economics*, 5 (2006), 131.

⁵⁹ List, C., 'Republican Freedom and the Rule of Law', *Politics, Philosophy, and Economics*, 5 (2006), 201.

⁶⁰ Michelman, 'The Supreme Court 1985 Term' (above, n. 3), 4; Bohman, *Public Deliberation* (above, n. 56); Bohman, 'Deliberative Democracy and Effective Social Freedom' (above, n. 56); Christiano, T., 'The Significance of Public Deliberation', in Bohman and Rehg (eds.), *Deliberative Democracy* (above, n. 56), 243.

⁶¹ Sandel, *Democracy's Discontent* (above, n. 3); Pettit, *Examen a Zapatero* (above, n. 10); Spitz, chapter 12 in this volume.

⁶² Pettit, *Examen a Zapatero* (above, n. 10).

Since the republican view of liberty stresses the importance of the public dimension of autonomy and self-government, and supports a richer and demanding ideal of participatory and deliberative democracy, it also calls for a more subtle and ambitious notion of political equality that goes beyond formal equality. The kind of political equality propounded by republicanism should lead to the effective equal capacity of every citizen to influence or determine the political decisions that bind them.⁶³

This second political element of republican equality is related to the *public* dimension of liberty and has two kinds of effects. First, it requires removing, reducing, or eliminating as far as possible those socioeconomic obstacles and conditions that contribute to unequal positions in political decision-making. And, second, it requires remedying as much as possible deliberative inequalities to secure the equal capacity to exert political influence. The first prong of the political dimension of republican equality makes for a much more demanding ideal of equality; it deepens the egalitarian considerations deriving from the first element of republican equality, which is related to the private dimension of liberty. The second prong is even more ambitious as it purports to enhance personal and cultural capabilities. In short, the value of republican equality lies in the reduction or the elimination of what James Bohman refers to as 'political poverty' and that encompasses a great variety of inequalities and differences.⁶⁴ Although it is not a distributive ideal, it generates obvious distributive consequences, and they can become as ambitious as those proposed by other egalitarians. It also constitutes a central idea in republican political theory, which proves particularly strong in its political dimension when it is connected to a thick interpretation of the democratic ideal.

c. *Self-government and democracy*

According to Michael Sandel, the 'liberal begins by asking how government should treat its citizens, and seeks principles of justice that treat persons fairly as they pursue their various interests and ends. The republican begins by asking how citizens can be capable of self-government, and seeks the political forms and social conditions that promote its meaningful exercise.'⁶⁵ As mentioned before, the neo-Athenian republicans, such as Sandel or Taylor, consider self-government and democracy in general as the main core value of republicanism, and find a

⁶³ Bohman, *Public Deliberation* (above, n. 56), ch. 3; Bohman, 'Deliberative Democracy and Effective Social Freedom' (above, n. 56); Christiano, 'Deliberative Equality and Democratic Order' (above, n. 56); Knight and Johnson, 'What Sort of Equality Does Deliberative Democracy Require?'; in Bohman and Rehg (eds.), *Deliberative Democracy* (above, n. 56); Cohen and Rogers, *On Democracy* (above, n. 56).

⁶⁴ Bohman, *Public Deliberation* (above, n. 56), 123; and Bohman, 'Deliberative Democracy and Effective Social Freedom' (above, n. 56), 332.

⁶⁵ Sandel, *Democracy's Discontent* (above, n. 3), 27.

conceptual link between liberty and self-government. So do the neo-Romans, although for slightly different reasons.

As previously indicated, almost all republicans—certainly both neo-Athenians and neo-Romans—accept the connection between republicanism and the ideal of self-government. They can differ about the reasons why participation in democracy is valuable, as well as about the concrete political settings that respect that value, but most of them share a commitment to the idea of self-government, and believe that the best interpretation of that ideal is that of deliberative democracy.⁶⁶ Contemporary republicanism is deeply concerned with the public dimension of liberty, the exercise of public autonomy, as well as the necessity of justifying public, coercive decisions in order to prevent public domination.⁶⁷ Considering citizens as autonomous and free individuals implies enabling them to participate in political decision-making and offering them reasons they can reasonably accept. It means, in short, organizing minimal conditions of democratic deliberation. True, deliberative democracy may seem *prima facie* compatible with both a liberal and a republican reading. It can be argued, however, that the republican conception is more consistent with the values of autonomy and equality underlying the ideal as a whole.⁶⁸

Disagreement among republicans pertains to the scope of effective participation of citizens in political decision-making,⁶⁹ and the so-called 'politicization' of democracy.⁷⁰ Some of them defend a more participatory conception that requires as much effective participation of the people as possible in decision-making procedures,⁷¹ while others are satisfied with ensuring institutional accountability

⁶⁶ Sandel, *Democracy's Discontent* (above, n. 3); Michelman, 'The Supreme Court 1985 Term' (above, n. 3), 4; Michelman, 'Law's Republic' (above, n. 3), 1493; Cohen, J. and Rogers, J., 'Secondary Associations and Democratic Governance', *Politics & Society*, 20 (1992), 393; Sunstein, *The Partial Constitution* (above, n. 3), ch. 1 and 133–45; Pettit, *Republicanism* (above, n. 3); Honohan, *Civic Republicanism* (above, n. 3), ch. 7; Martí, J. L., *La república deliberativa* (Madrid: Marcial Pons, 2006), ch. 6. On the general idea of deliberative democracy, see Gutmann, A. and Thompson, D., *Democracy and Disagreement: Why Moral Conflict cannot be Avoided in Politics, and What should be Done About It?* (Cambridge, MA: Harvard University Press, 1996); Gutmann, A. and Thompson, D., *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004); Bohman, *Public Deliberation* (above, n. 56); Bohman, J., 'Survey Article: The Coming of Age of Deliberative Democracy', *The Journal of Political Philosophy*, 6 (1998), 400; Bohman and Rehg (eds.), *Deliberative Democracy* (above, n. 56); Elster, J. (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998); Macedo, S. (ed.), *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford: Oxford University Press, 1999); Fishkin, J. and Laslett, P. (eds.), *Debating Deliberative Democracy* (Oxford: Blackwell, 2003); and Besson and Martí (eds.), *Deliberative Democracy and Its Discontents* (above, n. 12).

⁶⁷ See Bellamy, chapter 4 in this volume.

⁶⁸ Honohan, *Civic Republicanism* (above, n. 3), 222; Martí, *La república deliberativa* (above, n. 66), ch. 6.

⁶⁹ Laborde and Maynor (eds.), *Republicanism and Political Theory* (above, n. 3).

⁷⁰ Contrast Pettit, P., 'Depoliticizing Democracy', in Besson and Martí (eds.), *Deliberative Democracy and Its Discontents* (above, n. 12); with Bellamy, chapter 4 in this volume.

⁷¹ Sandel, *Democracy's Discontent* (above, n. 3); Sandel, 'The Constitution of the Procedural Republic' (above, n. 3); Taylor, 'What's Wrong with Negative Liberty' (above, n. 3); Taylor, 'Cross-Purposes' (above, n. 3); Habermas, *Between Facts and Norms* (above, n. 3); Cohen and

and popular contestability.⁷² This difference of view could be derived from a more fundamental divergence in their interpretation of liberty and the connection between liberty and democracy, as outlined above, but is not related to the private-public liberty issue, nor to the intrinsic or instrumental justification of democratic participation. Most of them, however, argue that current democratic procedures should be strengthened or that new ones should be created to provide for greater control and participation, and especially to enhance democratic deliberation. In this sense, most republicans argue for more participatory settings and institutions, even when they disagree about the desirable horizon, and see this claim as a distinctive republican feature by opposition to liberal democratic theory.

Most republicans also share a fear about populism *qua* form of domination, even if they diverge about which preventive mechanisms should be adopted.⁷³ In fact, their difference of views about the scope of popular participation corresponds in part to this divergence. They agree, however, that popular political participation is not always valuable, but only as far as some epistemic quality is recognized to the decision-making process. Democratic deliberation, as a result, is assumed to be the best safeguard against populism due to its epistemic character.⁷⁴ In sum, deliberative democracy serves both the purpose of enabling an effective and real exercise of the public dimension of liberty or public autonomy, and the objective of enhancing the epistemic quality of democratic decision-making that avoids populism and accordingly the risk of domination.

d. *Citizenry and civic virtue*

If the protection of republican liberty requires, conceptually or instrumentally, establishing more participatory and deliberative democratic procedures, these procedures call for an active and motivated citizenry to be effective. Both republicans who defend a strong participatory democracy and those who only argue for control and contestation, emphasize the necessity of increasing civic and

Rogers, 'Secondary Associations and Democratic Governance' (above, n. 66); Honohan, *Civic Republicanism* (above, n. 3); Bellamy, *Republicanism and Constitutionalism* (above, n. 11).

⁷² Pettit, *Republicanism* (above, n. 3); Pettit, *Examen a Zapatero* (above, n. 10); Sunstein, *The Partial Constitution* (above, n. 3).

⁷³ See Pettit, *Republicanism* (above, n. 3); Honohan, *Civic Republicanism* (above, n. 3); Lovett, 'Republicanism' (above, n. 3).

⁷⁴ Estlund, D., 'Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence', *Texas Law Review*, 71 (1993), 1437; Estlund, D., 'Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority', in Bohman and Rehg (eds.), *Deliberative Democracy* (above, n. 56), 173; Habermas, 'Human Rights and Popular Sovereignty' (above, n. 3); Habermas, *Between Facts and Norms* (above, n. 3); Habermas, 'Constitutional Democracy' (above, n. 3); Lafont, C., 'Is the Ideal of a Deliberative Democracy Coherent?', in Besson and Martí (eds.), *Deliberative Democracy and Its Discontents* (above, n. 12), 3; Martí, *La república deliberativa* (above, n. 66), ch. 4 and 5; and Martí, 'The Epistemic Conception of Deliberative Democracy Defended: Reasons, Rightness and Equal Political Liberty', in Besson and Martí (eds.), *Deliberative Democracy and Its Discontents* (above, n. 12).

democratic culture and fostering certain civic or public attitudes of the citizenry. If citizens are not motivated enough to seek information about public affairs and to contest public decisions, if they are passive and conformist, public power becomes uncontrollable and perhaps dominating.⁷⁵ If such citizens are not committed to the common good or to public interest—or to some idea of impartiality—when participating in public law-making, but are strategically pursuing their personal self-interest, democratic deliberation is widely undermined.⁷⁶ And, when this happens, merely aggregative or negotiated democratic procedures—alternative to deliberative democratic ones—can also lead to a dominating tyranny of the majority. Therefore, both the absence of political participation and the presence of the wrong kind of it, can lead to political domination. In other words, civic virtues are necessary both to enable and to promote the right kind of political participation.⁷⁷ Given that deliberative democracy is a condition for the respect of republican liberty, and given that an active (participatory) and impartially or publicly motivated citizenry is a condition for deliberative democracy, the respect of republican liberty (and the struggle against domination) can be said to require civic virtue.⁷⁸

Civic virtues are generally understood as a set of attitudes or motivational dispositions oriented to public concerns, to impartiality or to the common good.⁷⁹ To mention just a few of them, citizens should feel and act with respect for and loyalty to the law, the republic's institutions, and the substantive and procedural values of republicanism; they should feel and act with respect for pluralism and for others' preferences and opinions; they should feel and believe that others are fellow-citizens that deserve exactly the same consideration and respect, and that

⁷⁵ Passivity can even be a symptom of previous alienation (a kind of domination without interference), since people can refrain from participating because of a deficient understanding of their own interests, celebrated (or even promoted) by the powerful.

⁷⁶ The relationship between deliberative democracy and self-interest is not as simple as that, and there are many kinds of self-interest motivations compatible with a range of different deliberative procedures. For a detailed analysis of this complex issue, see Mansbridge, J., Bohman, J., Chambers, S., Estlund, D., Follesdal, A., Fung, A., Lafont, C., Manin, B., and Martí, J. L., 'The Place of Self-Interest in Deliberative Democracy', *Journal of Political Philosophy*, forthcoming.

⁷⁷ This means that not all sorts of political participation are valuable and that participation is not necessarily good at any rate. This is precisely, as mentioned above, what distinguishes a participatory democratic republicanism from populism.

⁷⁸ Skinner, 'The Republican Ideal of Political Liberty' (above, n. 6), 301–03; Skinner, 'On Justice, the Common Good, and the Priority of Liberty' (above, n. 6); Viroli, *Republicanism* (above, n. 3); Dagger, *Civic Virtues* (above, n. 3); Arendt, *The Human Condition* (above, n. 7); Arendt, *On Revolution* (above, n. 7); Sunstein, 'Beyond the Republican Revival' (above, n. 3), 1539; Taylor, 'Cross-Purposes' (above, n. 3); Pettit, *Republicanism* (above, n. 3), ch. 8; Honohan, *Civic Republicanism* (above, n. 3), ch. 5; and Lovett, 'Republicanism' (above, n. 3).

⁷⁹ For general accounts of the idea of virtue, see Brennan, G. and Hamlin, A. (eds.), *Democratic Devices and Desires* (Cambridge: Cambridge University Press, 2000); Paul, E. F., Miller, F., and Paul, J. (eds.), *Virtue and Vice* (Cambridge: Cambridge University Press, 1998); Paul, E. F., Miller, F., and Paul, J., *Human Flourishing* (Cambridge: Cambridge University Press, 1999); and Chapman, J. and Galsston, W. (eds.), *Virtue: Nomos XXXIV* (New York: New York University Press, 1992).

all of them should enjoy effective basic and political equality; they should develop some interest for politics and political participation both in political decision-making and in controlling public power; and they should have the motivation to pursue the common good instead of their own particular advantage through political participation.⁸⁰

The republican conception of the common good retains, however, considerable ambiguity and should be clarified and examined in more detail.⁸¹ The first dimension of the common good to come to mind is *substantive* and is presupposed by the whole set of republican values just outlined. Republican values of liberty, equality, self-government, and civic virtue are to be considered common goods in a republic, public goods for everyone. When a political decision, no matter the extent of popular support for it, violates some of these values, it must be considered anti-republican. On the other hand, there is also a *procedural* dimension of the common good based on republican foundations, whose content remains open to the specifications set by each political community according to its exercise of self-government. Since republicanism values self-government, it also necessarily trusts the outcome of self-government. When a political decision is reached according to democratic and deliberative procedures, no matter how wrong its content could be, such decision should be considered a specification of the republican common good. These two dimensions in the notion of the common good—the substantive and the procedural—usually enter in conflict and are difficult to reconcile, but both are equally central to the republican tradition.⁸² Besides this, it remains to be established if the republican notion of the common good transcends the traditional liberal view which sees the public interest merely as the aggregation of citizens' individual interests, thus becoming something more holistic tied with a strong view of the political community, or if it simply is the sum of all the individual goods that citizens derive from being members of the same community.⁸³

And, finally, republicans also disagree about the best strategy to enhance civic virtues among citizens, that is, about the republican policy to ensure or promote this fourth central value. That is a crucial issue since liberals tend to criticize republicanism as inevitably leading to perfectionism or to unjustified paternalism, especially when it proposes an intervention into the sphere of individual virtues.

⁸⁰ This is a minimal list. Other authors have included many other virtues, such as a sense of belonging to the political community, communal solidarity, and overall patriotism. See Taylor, 'Cross-Purposes' (above, n. 3); Taylor, C., 'Why Democracy Needs Patriotism' in Cohen, J. and Nussbaum, M. (eds.), *For Love of Country: Debating the Limits of Patriotism* (Boston: Beacon Press, 1996); Vitroli, *Republicanism* (above, n. 3); and Vitroli, *For Love of Country* (above, n. 2).

⁸¹ See some efforts in Honohan, *Civic Republicanism* (above, n. 3), 148 et seq; Pettit, chapter 1 in this volume; Dagger, chapter 6 in this volume; Cheneval, chapter 10 in this volume; and Sellers, chapter 8 in this volume.

⁸² On how this double dimension can help overcome the Benthamite problem of non-dominating albeit coercive law, see Pettit, chapter 1 in this volume.

⁸³ Honohan, *Civic Republicanism* (above, n. 3), 150–8.

The traditional liberal point of view repudiates the idea of a State encouraging, promoting, or enhancing the development of citizen's virtues, even of a civic kind,⁸⁴ and also rejects any related discourse about the common good. Both things would entail a violation of the liberal principle of neutrality, an imposition of a particular conception of the good, and accordingly a perfectionist intervention. But, as noted above in the discussion of the intrinsic conception of republican liberty, this critique needs to be assessed more carefully. First, promoting civic virtues involves, it is true, a re-conceptualization of the public-private distinction.⁸⁵ Republicans tend to consider the liberal distinction between the public and the private spheres as too narrow, due to the impoverished liberal conception of the public. Once the public is understood in a richer way that pays attention to the value of self-government and its conditions, the requirement of civic virtues becomes crucial and remains attached to the public sphere only; these civic virtues are never supposed to be private ones, but only dispositions that individuals must have in their relation to other citizens, to the State or to the public itself.

Second, there are strategies for enhancing civic virtues that do not involve direct State intervention. Political practice and deliberative procedures themselves encourage this kind of dispositions, because they create certain conditions that make partiality and selfishness difficult to admit publicly.⁸⁶ Thus, simply by fulfilling the principle of self-government entailed by the third republican value, the State is indirectly fostering the fourth one. And this cannot be considered as a perfectionist or paternalistic intervention. Third, as mentioned previously, the majority of republicans prefer promotional interventions of the State, like civic education, to more direct interventions. In the end, virtue is not a disposition that can be made compulsory. The republic should endeavour to foster and encourage it, but it certainly cannot force citizens to comply with it. Finally, even in the few

⁸⁴ Interestingly, there have been some signs of departure from that traditional idea in contemporary liberalism. This is the case when John Rawls affirms the necessity of thinking of citizens as having a sense of justice and impartiality, of tolerance and mutual respect, in order to ensure the stability of democratic institutions, and this is why he argues that there is a duty of civility on the part of citizens (Rawls, J., *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971)). See also in the same vein, Macedo, *Liberal Virtues* (above, n. 24).

⁸⁵ Honohan, L., 'Dealing with Difference: The Republican Public-Private Distinction', in Baghrarian, M. and Ingram, A. (eds.), *Pluralism: The Philosophy and Politics of Diversity* (London: Routledge, 2000); Honohan, *Civic Republicanism* (above, n. 3), 158; Patten, 'The Republican Critique of Liberalism' (above, n. 24), 42.

⁸⁶ Pateman, C., *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 1970), 42; Hirschman, A., *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press, 1970); Macpherson, C. B., *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977), ch. 5; Manin, B., 'On Legitimacy and Political Deliberation', *Political Theory*, 15 (1987), 338 at 354 and 363; Mansbridge, J., 'A Deliberative Theory of Interest Representation', in Pettaccia, M. (ed.), *The Politics of Interest: Interest Groups Transformed* (Boulder, CO: Westview Press, 1992), 32; Mansbridge, J., *Beyond Adversary Democracy*, 2nd edn. (Chicago: The University of Chicago Press, 1983); and Fung, A., *Empowered Participation: Reinventing Urban Democracy* (Princeton: Princeton University Press, 2004).

cases in which republicanism supports the adoption of compulsory measures to force citizens to act in a given manner, those measures could probably be justified *qua* acceptable paternalistic interventions.

III. Legal republicanism

Based on this general presentation of republican values, it is time to turn to the relationship between republicanism and law, law being the most important political creation and instrument. As mentioned above, legal republicanism should be seen as a crucial part of political republicanism, and not merely as its concretization. Since political theories encompass a view of political organization, a larger part of which is forged by legal means, the institutional dimension of those theories ought to refer to legal institutions and provisions. Thus, when liberalism, for instance, purports to defend liberty, it does so by requiring the introduction of legal—or constitutional—rights protecting the different dimensions of liberty. As a result, any normative political theory ought to entail its own normative legal theory as part of its model of institutional design. Political republicanism entails legal republicanism, just as political liberalism implies some kind of legal liberalism.

The expression 'legal republicanism', however, is interestingly ambiguous. It concerns at least two different, although partly related, levels of doctrine. First, and primarily, legal republicanism is a normative theory about the content, the structure or the form of law. Second, it can also refer to a republican normative jurisprudence or legal philosophy. As a normative theory about the content of the law, it establishes those substantive and procedural standards which the law should attain to be considered republican. Identifying those standards amounts to determining the principles of republican law. One may therefore refer to this first sense of legal republicanism as *republican law*. If this pertains, republican law constitutes an alternative to liberal law, provided we can fairly distinguish republicanism from liberalism; just as one may ask whether French or German laws are liberal or socialist, one may also ask whether they are republican.

Legal republicanism, understood in this first sense as republican law, includes requirements derived from the protection of republican values regarding both the content of law and the structure and forms of law and procedures of law-making. While honouring republican liberty, for instance, may require the recognition and protection of some basic individual rights and liberties, perhaps at the constitutional level, honouring the value of self-government and deliberative democracy entails privileging some decision-making procedures and a particular theory of legislation. We might refer to these two different implications as *substantive legal republicanism* (or substantive republican law) and *procedural legal republicanism*

(or procedural republican law) respectively, being aware that their requirements may conflict.⁸⁷

The second meaning of the expression 'legal republicanism' refers to a more general approach, not directly connected to the specific content of law: a general legal theory or jurisprudence that analyses legal concepts and the functioning of law according to the principles of republicanism. It is what one may term *republican jurisprudence* or as *republican legal theory*. This may at first sound unorthodox to a legal positivist, given that legal positivism *qua* legal theory is supposed to be a scientific and value-free discipline. A legal theorist is supposed to do her work without being influenced by her normative commitments. In our view, however, this reasoning ought to be more nuanced.

Although there is certainly some place in legal theory for neutrality—for neutral description—it is impossible to build general conceptual theories of law in a completely value-free way. Contrary to what traditional methodological legal positivism claims,⁸⁸ there are reasons to believe that interesting theories of law are conceptual and normative at the same time. Furthermore, as some authors have argued, if positivism aims at coherence with its own original values, it necessarily must adopt the form of normative (or ethical) positivism.⁸⁹ Finally, if jurisprudence involves a normative dimension, it is reasonable for it to be influenced by normative political theory.⁹⁰ Of course, this reasoning depends on one crucial premise: that legal theory or jurisprudence necessarily entails a normative dimension. And this premise is conceptually unrelated to political or legal republicanism. This means that while a republican legal theorist—in the normative sense just outlined—is someone who conceptually endorses political and legal republicanism (and therefore republican jurisprudence entails both political and legal republicanism), the reverse need not be true; it may be possible to

⁸⁷ This tension within legal republicanism mirrors the tension identified before between the substantive and procedural notions of the common good in republican theory. See also Pettit, chapter 1 in this volume.

⁸⁸ The classic reference in Anglo-American jurisprudence is Hart, H. L. A., *The Concept of Law* (Oxford: Clarendon Press, 1961). The historic champion of continental legal positivism is Kelsen, H., *Reine Rechtslehre*, 2nd edn. (Wien: Auflage, 1960).

⁸⁹ e.g. Campbell, T., *The Legal Theory of Ethical Positivism* (Aldershot: Dartmouth, 1996); Campbell, T., *Prescriptive Legal Positivism: Law, Rights and Democracy* (London: UCL Press, 2004); Waldron, J., *Law and Disagreement* (Oxford: Oxford University Press, 1999); Waldron, J., 'Normative (or Ethical) Positivism', in Coleman, J. (ed.), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford: Oxford University Press, 2001), ch. 12; Perry, S., 'Hart's Methodological Positivism', in Coleman (ed.), *Hart's Postscript* (above); Murphy, L., 'The Political Question of the Concept of Law', in Coleman (ed.), *Hart's Postscript* (above); and Murphy, L., 'Better to See Law This Way', *NYU Law Review*, 83/4 (2008), 1088.

⁹⁰ To be more exact, this is so unless one holds a thesis as controversial as the fragmentation of practical discourse. Only if one defends the idea that there can be several, unrelated, and incommensurable realms for normative reasons—one for law, another for politics, and perhaps still another one for ethics—is it possible to keep both normative political theory and normative jurisprudence separate. But it is certainly counterintuitive to imagine a normative theory of law unrelated to political values. What would be the point of political theory otherwise?

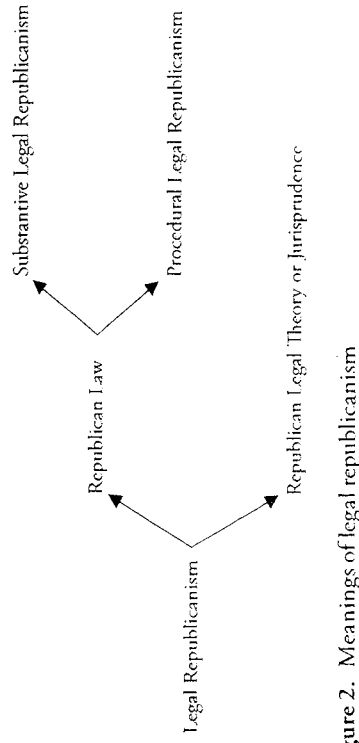


Figure 2. Meanings of legal republicanism

defend a republican approach to the content or the form of law without endorsing a normative conception of jurisprudence or, at least, to do that for different reasons. It depends on one's conception of legal theory or jurisprudence.

Republican legal theory, in this sense, is a doctrine that emphasizes certain features of democratic law: first, the idea of authority, and more concretely of legitimate authority, that integrates a theory of law-making; second, a rich and complex notion of the rule of law; and, third, as a consequence of the other two, a number of jurisprudential theses regarding the role of adjudication, legal interpretation, the very notion of norm, and so on.⁹¹

In short, therefore, legal republicanism has two dimensions. The first one is republican law, which itself is comprised of two parts, one substantive about the content of the law, the other formal or procedural about the structure and the form of the law. Republican law amounts to normative principles and standards, substantive or procedural. The second dimension is republican legal theory, which is the application of those normative standards to a general account of the law, a theoretical or jurisprudential conception of the law.

IV. Republican law

Legal systems in advanced democratic societies are eminently liberal in all their elements. We are used to living under and with liberal law. The creation of law through legislative activity, its contents, and the institutions which implement it, are (almost) all liberal in nature; they are the expression of legal liberalism, the normative legal doctrine derived from political liberalism. In this context, those who endorse political republicanism should be aware of the requirements this political theory places not only on the form and the content of law, but also on its

creation, adjudication, and application. These requirements constitute what we have called republican law.

Republican law may be found in all the areas that traditionally constitute the law. While republicans have focused in recent years on three of them mainly—namely, constitutional law, criminal law and international law—nothing prevents from developing principles of republican contract law, republican labour law, republican administrative law, and so on.⁹²

To start with, as any other modern political doctrine, political republicanism endorses a view of the basic political organization and distribution of rights and duties, both things being usually regulated by *constitutional law*. Constitutional provisions are crucial from a republican point of view, and accordingly republicans' concerns have mainly focused on constitutional issues.⁹³ Most of them converge on the need to recognize and protect basic individual rights and democracy in a constitution, and to enforce civic duties. They disagree, however, about the compatibility of republicanism with judicial review or the ideal degree of constitutional rigidity.⁹⁴ They also differ in their understanding of the traditional republican principle of a mixed constitution, and about the kind of civic duties that should be constitutionally required or enhanced.

Promoters of republican *criminal law* have focused on the definition of crimes, the role and justification of punishment, the organization of the criminal judicial process, and the democratization of the whole criminal justice system.⁹⁵ There is wide consensus that crime should be defined according to the basic republican values of freedom and equality, and that those values should also be used to determine the adequate public response in case of offence and particularly

⁹² Fraser, A. W., *Spirit of the Laws: Republicanism and the Unfinished Project of Modernity*, (Toronto: Toronto University Press, 1990); Braithwaite, J., 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers', *University of Toronto Law Journal*, 47 (1997), 305.

⁹³ See, for instance, Pettit, *Republicanism* (above, n. 3), Part II; Honohan, *Civic Republicanism* (above, n. 3), Part II; Sellers, *Republican Legal Theory* (above, n. 1); Tomkins, *Our Republican Constitution* (above, n. 1); Bellamy, *Political Constitutionalism* (above, n. 3). In this volume, see Pettit (chapter 1), Bellamy (chapter 4), Honohan (chapter 3), and Tomkins (chapter 14).

⁹⁴ In favour of a certain constitutional rigidity and judicial review: Pettit, *Republicanism* (above, n. 3); Dawood, Y., 'The Antidomination Model of the Judicial Oversight of Democracy', *Georgetown Law Journal*, 96:5 (2008), 1411; Honohan, *Civic Republicanism* (above, n. 3); Honohan, chapter 3 in this volume. Against that thesis: Waldron, *Law and Disagreement* (above, n. 89); Bellamy, *Political Constitutionalism* (above, n. 3); Bellamy, 'Republicanism and Constitutionalism' (above, n. 11); Bellamy, chapter 4 in this volume; Besson, S., *The Morality of Conflict* (Oxford: Hart Publishing, 2005); Gargarella, R., 'Full Representation, Deliberation, and Impartiality', in Elster (ed.), *Deliberative Democracy* (above, n. 66), 260; but also, with a slightly different position, Gargarella, R., 'Should Deliberative Democrats Defend the Judicial Enforcement of Social Rights?', in Besson and Martí (eds.), *Deliberative Democracy and Its Discontents* (above, n. 12), 232; Tomkins, *Our Republican Constitution* (above, n. 1).

⁹⁵ See Braithwaite and Pettit, *Not Just Deserts* (above, n. 13); Pettit, P., 'Republican Theory and Criminal Punishment', *Utilitas*, 9 (1997); Braithwaite, J. S., *Regulation, Crime, Freedom* (London: Ashgate, 2000); Dagger, 'Republican Punishment, Consequentialist or Retributive?' (above, n. 13); Duff, R. A., *Punishment, Communication and Community* (above, n. 13); Duff, R. A., *Answering for Crime* (above, n. 13); and Lacey, *State Punishment* (above, n. 13).

⁹¹ Waldron, *Law and Disagreement* (above, n. 89).

the appropriate punishment when it is to be applied. Republicans emphasize the importance of education, prevention, and promotion, and also defend the application of alternatives to a traditional, punitive judicial process, like restorative justice. Advocates of republican criminal law also converge about the importance of the role of the citizenry and the community for the whole criminal system, as well as about the necessity to democratize the criminal justice system, both in order to protect freedom and fundamental rights, and to develop civic responsibility.⁹⁶

Certain republican lawyers and philosophers have also recently started to be concerned about *international law* and relations.⁹⁷ In that context, they have focused on the articulation of a global legal system that protects basic republican values. While they disagree about the interpretation of the Kantian cosmopolitan ideal and about the desirability or even the possibility, in the long run, of instituting a global government, there is widespread agreement on the necessity of strengthening international law and politicizing a putative global public sphere in order to create a global republican polity or community. Most of them regard the traditional, modern nation-State as largely obsolete in the face of global challenges and make suggestions as to how to design international institutions that are respectful of cultural and national pluralism and compatible with local or regional democracy, but can be responsive to the requirements of global politics and international law-making. There is no unanimity among those authors, however, as to the identity of the subject(s) of republican international law and as to whether States should remain the main subjects or whether one should be developing some kind of global citizenship. Finally, there is still a lot of work to be done in determining how basic republican values can be transposed onto the international arena and in designing democratic international institutions in a way that does not undermine, but on the contrary reinforces domestic democracies.⁹⁸

Besides those substantive elements, republican law also brings about formal or procedural requirements. A republican lawyer is expected to endorse a strongly

⁹⁶ For instance, in this volume, see Martí (chapter 5), Dagger (chapter 6), and Gargarella (chapter 7).

⁹⁷ See for example Onuf, *The Republican Legacy in International Thought* (above, n. 12); Habermas, *Between Facts and Norms* (above, n. 3); Habermas, 'Constitutional Democracy' (above, n. 3); Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' (above, n. 12); Habermas, 'Eine politische Verfassung für die pluralistische Weltgesellschaft?' (above, n. 12); Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik' (above, n. 12); Sellers, *Republican Principles in International Law* (above, n. 12); Besson, 'Deliberative Democracy in the European Union' (above, n. 12); Besson, 'Institutionalizing Global Democracy' (above, n. 12); Besson, 'Theorizing the Sources of International Law' (above, n. 12); Besson, S., 'Whose Constitution(s): International Law, Constitutionalism and Democracy', in Dunoff, J. and Trachtman, J. (eds.), *Ruling the World* (Cambridge: Cambridge University Press, forthcoming); Deudney, D., *Bounding Power: Republican Security Theory from the Polis to the Global Village* (Princeton: Princeton University Press, 2007).

⁹⁸ In this volume, see Bohman (chapter 2), Sellers (chapter 8), Besson (chapter 9), Cheneval (chapter 10), and Lafont (chapter 11).

democratic theory of legal authority. The law's legitimacy stems from its adoption by democratic institutions, showing due respect to actual disagreements among citizens.⁹⁹ Furthermore, according to the republican view of the rule of law, legal and constitutional provisions ought to be adopted in a way that ensures a strict separation of powers and that prevents the judiciary from intervening too much in the law-making and law-applying processes. Political republicanism implies a number of complex requirements in terms of procedure that have not yet been sufficiently explored in spite of their great importance for the republican project. The writings of Waldron, Campbell, and Murphy constitute an essential starting point in this exploration,¹⁰⁰ but more work needs to be done.¹⁰¹

V. Republican legal theory

To date, legal republicanism has focused mostly on the content of substantive republican law. As a result, it has not paid sufficient attention to the consequences of endorsing political republicanism for the way in which we understand the law in general, and in particular to its implications for legal theory or jurisprudence. Let us draw here a sense in which jurisprudence could be said to be republican.

Jurisprudence usually identifies certain features of law in a particular geographical and historical context, and theorizes them under a general, apparently purely conceptual account of the law. If modern legal theorists account for the law, for instance, as a legal system compounded by general norms that pre-exist the facts adjudicated by such norms, it is because they are abstracting certain features of concrete legal orders that, ultimately, derive from a liberal understanding of law and the rule of law. Modern legal theorists never single out a determinate concept of law so general as to encompass all legal manifestations in the world and across history. Their account hardly embraces, for instance, the features of ancient Roman law. As a consequence, if what they are capturing is basically a liberal form of legal order, which has been dominant in modern democracies in the last centuries, it is reasonable to expect that their 'conceptual' analysis embodies some liberal features as well. This kind of influence on legal theorization, however, should not be our concern here, since it is unrelated to normative jurisprudence as discussed here.

⁹⁹ Waldron, *Law and Disagreement* (above, n. 89); Besson, *The Morality of Conflict* (above, n. 94).

¹⁰⁰ Waldron, *Law and Disagreement* (above, n. 89); Waldron, J., 'The Rule of Law as a Theater for Debate', in Burley, J. (ed.), *Dworkin and his Critics: With Replies by Dworkin* (Oxford: Blackwell, 2004), 319; Waldron, J., 'The Concept and the Rule of Law', manuscript (2007); Campbell, *The Legal Theory of Ethical Positivism* (above, n. 89); Campbell, *Prescriptive Legal Positivism* (above, n. 89); Murphy, 'The Political Question of the Concept of Law' (above, n. 89); and Murphy, 'Better to See Law this Way' (above, n. 89).

¹⁰¹ See further developments in Bellamy, chapter 4 in this volume; and Bohman, chapter 2 in this volume.

Republican jurisprudence is a doctrine that emphasizes certain features of democratic law, such as the idea of authority or the ideal of rule of law, and that assumes a normative approach to legal theory. Authors such as Scarpelli, Waldron, and Campbell have explained why someone committed to a democratic theory of legal authority ought to endorse a normative approach to legal positivism, rather than a merely conceptual one.¹⁰² They defend what has been called ethical, prescriptive, or normative positivism. This is not to say, however, that republican legal theory can be identified with normative positivism. A normative positivist need not be republican, as Jeremy Bentham or John Austin, who are usually identified as the fathers of normative positivism despite being champions of liberalism. But there seems to be a connection the other way around. First, we argued that the only way to make sense of republican jurisprudence is in interpreting jurisprudence as being necessarily normative. It would be difficult otherwise to see why a normative account of the law—republican law—could affect a purely conceptual form of jurisprudence. Second, legal republicanism ought to encompass a positivist theory of law, because it cannot rely on the existence of a natural, pre-political validity. If so, it seems that republican legal theory has a lot in common with normative positivism.

Let us now briefly present the main features of this jurisprudential position. Contemporary defences of normative positivism emerged as a criticism of methodological or 'descriptive' positivism.¹⁰³ At first glance, descriptive and normative positivisms seem to capture different things and hence to be compatible.¹⁰⁴ However, contemporary normative positivists hold at least two theses that they consider as interrelated. One of them is clearly normative, while the other is methodological and in plain contradiction with the basis of descriptive positivism:

- (1) There is a normative claim underlying the positivist tradition as to what the law should be. That claim is committed to the values of the rule of law and to a particular view of legal authority and validity.
- (2) It is not possible or interesting to reduce legal positivism to a merely descriptive theory. An adequate legal theory is inevitably value-laden and must be openly normative.¹⁰⁵

¹⁰² Scarpelli, U., *Cos'è il positivismo giuridico* (Milan: Edizioni di Comunità, 1965); Campbell, *The Legal Theory of Ethical Positivism* (above, n. 89); Campbell, *Prescriptive Legal Positivism* (above, n. 89); Waldron, *Law and Disagreement* (above, n. 89); and Waldron, 'Normative (or Ethical) Positivism' (above, n. 89). See also Perry, 'Hart's Methodological Positivism' (above, n. 89); and Murphy, 'The Political Question of the Concept of Law' (above, n. 89).

¹⁰³ Marmor, A., 'Legal Positivism: Still Descriptive and Morally Neutral', *Oxford Journal of Legal Studies*, 26 (2006), 683.

¹⁰⁴ *Ibid.*, 684 and 690–2.

¹⁰⁵ Waldron, 'Normative (or Ethical) Positivism' (above, n. 89). It is this second thesis which is not necessarily shared by all political republicans, and this is why political republicanism, or even legal republicanism as a normative doctrine of law, does not entail republican legal theory.

It is the second thesis that leads normative positivists to criticize allegedly value-free legal theories. The concept of law refers to a social and institutional practice that has a normative dimension. As a result, it has nothing to do with natural concepts that try to describe natural reality.¹⁰⁶ As part of institutional reality, the law exists if, and only if, practitioners believe it exists, and it consists in what should be in certain particular circumstances.¹⁰⁷ As a normative practice, it bears the purpose that the practitioners attribute to it, and as a result the law in a given society is inevitably linked to the political values of that society.¹⁰⁸ This is not simply to say that Kelsen's, Ross's, or Hart's legal theories 'emerge from a particular intellectual and political background', and are often motivated, more or less explicitly, 'by a moral-political vision'.¹⁰⁹ This would surely be applicable to physicians and biologists as well, although their objects of study do not belong to the institutional reality at all. The law has a normative dimension that is not present in natural reality or even in other objects in the social-institutional reality. As a social practice, it has purposes, functions, or points, and some of them are normative. To understand them, we need therefore to 'engage in moral argument'.¹¹⁰

This does not make legal positivism normative yet, as one could account for other institutional and normative practices like games or sports without 'rely[ing] on any particular views about the moral merit or worth of the functions or purposes that would make sense of the practice in question'.¹¹¹ But the law is not like games or sports in an essential way: the normative dimension of the institutional practice of law does not only stem from the fact that it is regulated by rules, but that it rests on certain assumptions about what can acceptably count as a legal authority and the role it plays in practical reasoning. The contrast between games and the law can be vividly observed in the different relevance that disagreements conflicts have for the whole practice. While disagreements about the rules in a game are contingent, and also obstacles for the adequate functioning of the game, legal disagreements are essential to the practice of law and a very condition for its change. Participants in a legal practice disagree about what the law requires, about what the rule of law requires, or about what justice requires, but all those disagreements take place despite (or by virtue of) a basic agreement on the very concept of law.¹¹² The relationship between the stability of expectations

¹⁰⁶ Dworkin, R., *Justice in Robes* (Cambridge, MA: The Belknap Press of Harvard University Press, 2006), 2–10.

¹⁰⁷ Searle, J. R., *The Construction of Social Reality* (New York: Free Press, 1995).

¹⁰⁸ Perry, 'Hart's Methodological Positivism' (above, n. 89).

¹⁰⁹ Marmor, 'Legal Positivism' (above, n. 103), 691–2, 699.

¹¹⁰ Perry, 'Hart's Methodological Positivism' (above, n. 89).

¹¹¹ Marmor, 'Legal Positivism' (above, n. 103), 697.

¹¹² Dworkin, *Justice in Robes* (above, n. 106), 9–10.

in law and change, between legal agreements and disagreements, has therefore been considered an essential feature of modern law.¹¹³

Of course, general jurisprudence ought to be able to find general features in law that are not specific to this or that legal order. But it is also true that there is a sort of trade-off in the search for generality in terms of relevance or interest. The more general the features we identify as legal theorists, the less relevant or interesting they will be for our current purposes.¹¹⁴ If we were capable of determining an all-encompassing concept of law that could be applied to all those instances in which someone has described a practice as legal around the world and across history, it would probably be a trivial, empty notion of law, completely irrelevant to most of our purposes. It would be a notion of law which would not make any reference to legal authority, legal process, norms, courts and adjudication, and perhaps even to sanctions. What both Kelsen and Hart knew was that they had to try to identify a notion of law that was connected to the legal practices of their time, hence their respective account of legal norms.

The task of general jurisprudence is to explain and reconstruct what characterizes legal practice and what can be considered as the normative point of that practice, because this is precisely what can be recognized as an essential feature of the practice by practitioners. As a result, that normative point is exactly what makes that practice exist. And this is especially important since the practice of law, by contrast to other social practices like sports or Christmas celebrations, is seen as normative. Our legal theory must account for our 'sense of why it is important whether something counts as law or not'.¹¹⁵ This, finally, makes our considerations about what the law is, depend on our considerations about what makes the law good or bad, and compromises the normative neutrality assumed by descriptive positivists. What counts as law is dependent on what we value in law, and this is a normative question. In this respect, the conceptual discussion about what the law is, is very similar to the discussion about the concept of democracy. Any attempt to define democracy in a value-free way has failed because our understanding of democracy is not totally independent of what we value in democracy.¹¹⁶

This methodological critique of descriptive positivism is shared by other normative views of the law like Dworkin's.¹¹⁷ The normative or prescriptive

¹¹³ Sunstein, *The Partial Constitution* (above, n. 3); Waldron, *Law and Disagreement* (above, n. 89); Besson, *The Morality of Conflict* (above, n. 94); and Moreso, J. J., 'Legal Positivism and Legal Disagreements', manuscript (2008).

¹¹⁴ Waldron, *Law and Disagreement* (above, n. 89), 46.

¹¹⁵ Waldron, 'Normative (or Ethical) Positivism' (above, n. 89), 420.

¹¹⁶ See, for instance, Sartori, G., *Democrazia. Cosa è?*, 2nd edn. (Milan: Rizzoli, 2007); Held, D., *Models of Democracy*, 3rd edn. (New York: Polity Press, 2006); Arblaster, A., *Democracy*, 2nd edn. (London: Open University, 2002). The same comparison may be found in Murphy, 'Better to See Law this Way' (above, n. 89).

¹¹⁷ Dworkin, R., *Law's Empire* (Cambridge, MA: Harvard University Press, 1986); and for a recent restatement, Dworkin, *Justice in Robes* (above, n. 106).

positivism defended here differs from Dworkin's theory, however, with respect to the first thesis outlined above. The main element in a normative account of the law is indeed the ideal of 'the rule of law',¹¹⁸ i.e. a political value that requires certain features from the law, mainly procedural, such as publicity, predictability, and so on. This was recently pointed out by Waldron:

The Rule of Law celebrates features of a well-functioning system of government such as publicity and transparency in public administration, the generality and prospectivity of the norms that are enforced in society, the predictability of the social environment that these norms help to shape, the procedural fairness involved in their administration, the independence and incorruptibility of the judiciary, and so on. It looks to a world where people in positions of power exercise their power within a constraining framework of public rules rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong.¹¹⁹

The rule of law is valuable because it is a necessary condition for justice, particularly for the respect of individual autonomy and democracy understood as self-government.¹²⁰ In other words, the rule of law can be seen as a requirement for the exercise of autonomy both in its private and its public dimensions and all its requirements can be understood as a function of either of those two elements.

This is also why republicans emphasize the importance of the rule of law to fulfil republican values.¹²¹ The ideal of the republic can only be achieved in a legal order inspired by the value of the rule of law. Without the rule of law, citizens would fall prey to domination, both because they could not have stable expectations and because they could not exercise self-government. The rule of law is not only a formal or procedural property of legal orders, but, as we have said, a normative, political ideal. As a result, legal republicanism must enforce that ideal as part of its normative theory. But at the same time, as contemporary normative theorists have shown, it must also be part of our concept of law.

¹¹⁸ Fuller, L., *The Morality of Law* (New Haven: Yale University Press, 1964); Waldron, *Law and Disagreement* (above, n. 89); Waldron, 'Normative (or Ethical) Positivism' (above, n. 89); Waldron, 'The Rule of Law in Contemporary Liberal Theory', *Ratio Juris*, 2 (1989), 79; Waldron, 'The Concept and the Rule of Law' (above, n. 100); Campbell, *The Legal Theory of Ethical Positivism* (above, n. 89); Campbell, *Prescriptive Legal Positivism* (above, n. 89). See, in this volume, Pettit (chapter 1), Honohan (chapter 3), Bellamy (chapter 4), Sellers (chapter 8), Bohman (chapter 2), and Besson (chapter 9).

¹¹⁹ Waldron, 'The Concept and the Rule of Law' (above, n. 100).

¹²⁰ Waldron, 'The Rule of Law in Contemporary Liberal Theory' (above, n. 118); Waldron, *Law and Disagreement* (above, n. 89); Campbell, *Prescriptive Legal Positivism* (above, n. 89).

¹²¹ Pettit, *Republicanism* (above, n. 3), 174–6; Pettit, *Examen a Zapatero* (above, n. 10); Pettit, chapter 1 in this volume; Honohan, *Civic Republicanism* (above, n. 3); Lovett, 'Republicanism' (above, n. 3); Bellamy, *Political Constitutionalism* (above, n. 3); Bellamy, 'Republicanism and Constitutionalism' (above, n. 11); and Bellamy, chapter 4 in this volume. On the importance of the international rule of law, see Waldron, J., 'The Rule of International Law', *Harvard Journal of Law and Public Policy*, 30 (2006), 15; Besson, 'Theorizing the Sources of International Law' (above, n. 12). See also Besson, chapter 9 and Bohman, chapter 2 in this volume.

As a consequence, the controversy surrounding the interpretation of the rule of law and its requirements simultaneously pertains to political theory, normative legal theory, and jurisprudence. This is why all the chapters in this volume, which all directly or indirectly revolve around the idea of the rule of law, are contributions to all three disciplines at once.