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REPUBLICAN LEGAL SYSTEMS

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This paper discusses the basic attributes of republican legal systems. I will suggest that republican principles provide the only sound basis for a just legal order, and conclude that all laws in all jurisdictions deserve public deference only to the extent that they reflect republican structures of government and legislation.

1 Republicanism

By "republican legal systems" I mean legal systems in the republican legal tradition, systems that embrace the basic tenets of republicanism, as best described and elaborated by Marcus Tullius Cicero, Polybius, Titus Livy and their various heirs and followers in Italy, England, France, and the United States of America (Sellers 1998). The fundamental test of republican doctrine is service to the *res publica* or "common good of the people" (Sellers 1997). Cicero defined republics as states belonging to "peoples", by which he meant large numbers of persons brought together to create a common sense of justice and a shared public good (Cicero, *De re publica*, I.xxv.39).¹ This remains the basis of republican thought today. Republican legal systems are systems that set out to serve justice and the common good of the people.

Most legal systems claim to do so. The essential nature of law implies assertions of justice (Sellers 1992). But republicanism takes these assertions seriously, and proposes a political technique for realizing justice and the common good, through popular sovereignty, the rule of law, and political checks and balances among elected officials. These three desiderata of republican government defend "liberty" as it was understood by the republican authors who introduced the Roman term *libertas* into modern legal thought (Sellers 1996). Republican liberty requires the dominion of *equal laws*, made by *common consent* for the *general*

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interest or *public good* of all (Adams 1787, I. 123). The first two provisions guarantee the third, and are only "republican" to the extent that they do so.

2 Liberalism

Contemporary legal scholars sometimes oppose "republican thought" to "liberalism", associating the first with democracy, and the second with human rights (see, e.g., Horwitz 1987; Symposium: the Republican Civic Tradition 1988; Habermas 1996). This creates unnecessary confusion, and obscures the context in which both liberty and democracy entered modern legal discourse. Liberty (*libertas*) and popular sovereignty (*imperium populi*) persisted together in the republican legacy of Rome and blossomed in the republican triumphs of France and the United States.²

They diverged when the unchecked unicameral French legislature collapsed into tyranny and terror. Liberalism first represented a shocked bourgeois reaction to excesses of the French revolution.

Republican liberty requires that no person be constrained by any other person's will or passion. Laws, government decrees, or other coercive action are unjust unless justified by pursuit of the common good (Sidney 1698, ch. 1, sec. 5). This creates the republican distinction between liberty and license. "License" is the unconstrained ability to do what one pleases, even to the detriment of others. "Liberty" implies constraint, in service of the common good. But early liberals, such as Benjamin Constant, drew a false distinction between the liberty of the moderns and the liberty of the ancients (Constant 1819). Constant rejected popular sovereignty and democracy and turned exclusively to rights. Liberalism redefined liberty as the ability to do what one wants, and sought to maximize self-gratification through the grant of *individual* rights, as in the old English constitution, without *political* rights, as in America or Rome.

3 The Common Good

Republicanism requires democracy and liberalism does not. But they differ less in this ("liberal democracies" exist), than in liberalism's implicit rejection of the common good. All republican doctrine follows from pursuit of the common good, while liberalism assumes that there is no "true" public justice or common good to be found — only "reasonable" accommodations between rival private interests (see, e.g., Rawls 1993). This is a subtle distinction. Republicans do not deny the existence of the private sphere, since recognizing the *res publica* implies a *res privata*. But republican doctrine depends on creating a common public interest. The chief end of law and society should be to make the interests of each individual and of the whole body politic the same (Cicero, *De officiis*, III.vi.26).³ Citizens who set out to find a common interest in their shared human

nature will be more likely to live in peace and justice than citizens who do not (ibid. III.v.23).

Let me review the republican argument for pursuit of the common good. This does not deny the pluralism of individual lives and lifestyles, or the importance of toleration and diversity. Individual interests exist, and sometimes conflict. But many important aspects of human flourishing may only be realized collectively, in large social groups. Humans will inevitably interact, and develop rules to govern their interactions. Some systems are better than others and should be sought (if not, there can be no harm in seeking them). Human nature provides the basis from which such systems must be built. But people disagree about truth and justice. Long deliberations fail to produce consensus. Individuals need: first, a technique for testing their beliefs about justice and the good life; second, a technique for protecting themselves against others in pursuing justice and the good life; and finally, a technique for obtaining the cooperation of others in building justice and good lives. These goods are all common. Without agreements about justice, and partnerships for the public good, individual lives will be confused, unsafe, and mired in isolation.

4 Popular Sovereignty

Republican legal systems since Rome have always rested on popular sovereignty as the first and fundamental basis of liberty and the public good. By popular sovereignty I mean free votes for legislators or the laws, in which all citizens can have a voice. Popular sovereignty solves the basic republican problems of uncertainty, unsafety, and non-cooperation. Free votes of the people constitute the best technique for (1) finding the truth; (2) getting others to accept the truth; and (3) arranging whatever cooperation may be necessary to take right action. Popular sovereignty offers all three by assuming every person capable of perceiving moral truths. This allows citizens to defer to majorities without admitting error, even when not convinced. National deliberation may yield truths that I do not approve, but it holds out the prospect of correcting public mistakes, and respects the reason of the citizens it overrules (Sellers 1991).

Republicans speak of popular sovereignty or the Roman *imperium populi* rather than democracy because democracy savors of Athens and Greek self-indulgence (Adams 1787, III. 160-162; Publius 1787-1788, number XIV; Sidney 1698, II.20; 30). The republican revolutions in America and France introduced democracy into modern legal discourse, but avoided the term "democracy" for twenty years, to maintain the distinction between government for the public good, and government serving private interests and passions. Republicans embraced popular sovereignty as the best shield of liberty and test of the common good. But democracy implied voting one's interests, for what one wants, not

what would be right to do. Republicanism on the Roman model entails voting for all magistrates and laws, but voting structured to attain the common good, and not the narrow interests of favored sections of society.

5 The Separation of Powers

How then to keep democracies honest? The separation of powers offers an obvious solution. Governments should protect liberty and the common good, but will not do so when their power is unchecked. Dividing governmental power, and balancing the strength of its different divisions, can prevent any one group from abusing its authority. The structure of the old Roman *res publica*, mimicked by subsequent republican governments, required approval of all laws by the people, but also a senate to propose the laws, and elected magistrates to administer them. Inadequate balance led to despotism — to Caesar in Rome, Cromwell in England, Bonaparte in France, and Jackson in the United States.⁴ Republicans always aim to perfect the balance of government in defense of liberty and pursuit the common good.

Modern republics rely on representation in the popular assembly, large election districts, and infrequent elections to purify the public voice and counteract political self-interest. The people never rule directly, but always through elected officials. They do not wield power themselves, except on election day. This prevents the main threat to republican government — corruption, which is to say any exercise of public power to serve a purpose other than the common good and justice. Staggered elections control the popular emotions. The separation of powers sets the authorities to watch each other, so that ambition will counteract ambition in defense of the public good (Publius 1787-1788, number LI; Adams 1787, III. 505; Montesquieu 1748, II.11.4.).

6 The Rule of Law.

The third traditional desideratum of republican government requires the rule of law — the “empire of laws and not of men”, which protects justice and the common good against private interests by constraining official discretion in advance. Livy endorsed this *imperium legum* for Rome, and was followed by Harrington, Sidney, Adams, Madison, and even Rousseau in concluding that “*tout gouvernement légitime est républicain*”. Republican legal systems rest on the rule of law, with the understanding that nothing can be law without approval by the people, in pursuit of the common good (Rousseau 1762, II.6; Livius, *Ab urbe condita*, 2.1.1.; Harrington 1977, 161; Sidney 1698, I.1 n.2; Adams 1787, I. 124-6; Publius 1787-1788, number XXXVII).

Republican legal systems require the rule of law because, human nature being what it is, any government official charged with making decisions will tend to

make them in his own private interest. If decisions are provided for by law and made collectively before specific situations arise, they will more likely serve the public good than if made on the spot, by possibly self-interested participants. Not every question can or should be guided in this way. Discretion will remain. But Republican governments try to limit official discretion and remove temptation by enforcing what legislation they have, and using popular sovereignty to define the scope of governmental power. The first step towards republican government is the battle for independent judges, serving during good behavior, "*quam diu se bene gesserint*", rather than at the discretion of the executive or people.⁵

7 Nationalism

Republican legal systems seek to create justice and the common good among citizens. But what of non-citizens? Like democracy and liberalism, modern nationalism began with the republican revolutions of the late eighteenth century. As the common good developed into the public interest, republics became nations by constructing local cultures to serve their social needs. The private liberty of citizens implied the public liberty of nations, limited only by the common interest of all nations in peace and justice between themselves. Christian Wolff suggested a world republic (Wolff 1934, 2.xli-xli). But Immanuel Kant first articulated the modern view, which sought world peace through numerous independent republics, separately developing their own national identities, without outside interference (Kant 1977).

A great many issues of justice and the common good are best addressed in smaller cultural units, which can develop institutions suited to their history and geographical circumstances. Nationalism reflects this reality, as does Cicero's idea of the *res publica* as a group of people united to create their own sense of justice and community. Republics will become nations, in the sense of developing a common culture. Nations should become republics, in the sense of trying to bring the interests of individuals into harmony with the interests of the community. Creating a common good may require cultural community. But cultural community can lead to xenophobia, or local intolerance and persecution in the interest of locally dominant elites. The idea of a common good promotes small communities and creeping homogeneity while justice may require numerous participants, and cultural diversity.

8 Federalism

Federalism solves this problem posed by republican nationalism. The conventional wisdom since the fall of Rome has insisted that republics must be small, to avoid Rome's descent into tyranny and oppression.⁶ But small republics quarrel, and cannot always defend their independence. By federating, republics protect

themselves against aggression, but also against internal subversion or corruption. This was the intention of the United States Constitution, which guarantees every state in the Union a "republican form of government" (USC 1787, Article IV, Section 4). The federated republic of the United States provides a republican model for solving the republican dilemma of republican intolerance. Federation leaves local culture and development to the self-determination of self-governing republics or nations, while putting certain individual rights under the protection of an over-arching union of republics, to prevent the tyranny of local majorities.

So a modern theory of republican community would locate rights-protecting institutions at the international level, while leaving culture-promoting activities to be locally determined. Each government's international role depends on internal popular sovereignty and self-determination. Federalism reinforces the basic purposes of republican government by preventing the excesses of popular sovereignty. But popular sovereignty remains the best test of justice, and private perceptions of the common good.

9 Conclusion

The basic attributes of republican legal systems include service to justice and the common good through popular sovereignty, the separation of powers, the rule of law, and an independent judiciary. Strictly speaking, only the first is essential (Paine 1792, Part II. iii),⁷ but experience and tradition have made it clear that the others must follow. Moral truths cannot be found without popular sovereignty, will not be followed without the separation of powers, cannot be delineated without the rule of law, or protected without an independent judiciary. Republican legal systems will display all four attributes, which bring liberty in their train, and are implicit in the very idea of law, which always claims to serve justice and the public good.

Democracy, liberalism, and nationalism all entered modern legal discourse through the republican tradition, and will not be separated, when properly understood. Democracy is justified by its service to truth, liberalism by its protection of truth, and nationalism by its construction of truth. People need communities and communities create their own sense of justice and the common good. Both rest on human nature, but human nature locally expressed. Legal systems derive authority from their service to the basic aims of society. Without republics there will be no justice — without, within, or between states and nations.

Notes

1. "Res publica res populi [est], populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis juris consensu et utilitatis communiione sociatus."
2. George Washington claimed both when he inaugurated his new federal republic in 1789. See Washington 1988, 460-63.
3. "Ergo unum debet esse omnibus propositum, ut eadem sit utilitas unius cuiusque et universorum; quam si ad se quisque rapiet, dissolvetur omnis humana consortio."
4. At least in the eyes of Henry Clay (1959, 658-59).
5. See, e.g., the Constitution of the United States, art. III, sec. 1; and the English history behind it (Blackstone 1765, vol. I, 258).
6. The classic and most influential statement of this position was by Baron de Montesquieu (1748, I.viii.16).
7. "What is called a *republic* is not any *particular form* of government. It is wholly characteristic of the purport, matter, or object for which government ought to be instituted, and on which it is to be employed, *res-publica*, the public affairs, or the public good; or, literally translated, the *public thing*."

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