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## Republicanism, Liberalism, and the Law

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## ARTICLE

### Republicanism, Liberalism, and the Law

BY MORTIMER SELLERS\*

#### INTRODUCTION

“[A] republic signif[ies] only a government, in which all men, rich and poor, magistrates and subjects, officers and people, masters and servants, the first citizen and the last, are equally subject to the laws. [I]t signif[ies] a government, in which the property of the public, or people, and of every one of them, [is] secured and protected by law. This idea implies liberty; that the property and liberty of all men, not merely of a majority, should be safe; for the people, or public, comprehends more than a majority, it comprehends all and every individual; and the property of every citizen is a part of the public property, as each citizen is a part of the public, people, or community.”

John Adams<sup>1</sup>

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<sup>1</sup> III JOHN ADAMS, DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF

Much recent scholarship contrasts republicanism with liberalism as the two central and contradictory ideals of modern legal and constitutional thought.<sup>2</sup> Some lawyers contrast the liberalism that regards legislation as a necessary evil with republican visions of cultural self-expression through law.<sup>3</sup> This misstates the historical origins and best usage of both terms. Properly understood, republicanism and liberalism do not conflict, and both endorse law as the necessary vehicle of social justice. Republicanism is the parent of liberalism in Western Europe. They share a fundamental commitment to liberty and differ only in their relative ambition. Liberalism grew out of republican theory and has never found stability or security without the protection of republican structures of government.

### I. REPUBLICANISM

By "republicanism" I mean the legal theory of republican Rome, as revived in renaissance Italy, restated in commonwealth England, realized in George Washington's North America, and reanimated by the French revolution.<sup>4</sup> The most important authors in this tradition include Polybius, Marcus Tullius Cicero, Titus Livy, Niccolò Machiavelli, James Harrington, Algernon Sidney, John Adams, James Madison, and Jean-Jacques Rousseau.<sup>5</sup> Essential elements of a republican legal system include (in approximate order of importance): (1) pursuit of the common good, through (2) popular sovereignty and (3) the rule of law, under (4)

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THE UNITED STATES OF AMERICA 159-60 (1788).

<sup>2</sup> See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996); Jürgen Habermas, *Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism*, XCII J. OF PHIL. 127-128 (1995); John Rawls, *Reply to Habermas*, XCII J. OF PHIL. 179 (1995); see also Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987-1988); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988); Symposium, *Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory*, 84 NW. U. L. REV. 1 (1989); Symposium, 41 FLA. L. REV. 409 (1989).

<sup>3</sup> See Horwitz, *supra* note 2, at 73.

<sup>4</sup> See M.N.S. Sellers, *Republican Liberty*, in JURISPRUDENCE OF LIBERTY (Suri Ratnapala & G.A. Moens eds., 1996).

<sup>5</sup> See Mortimer Sellers, *The Republican Legal Tradition*, INT'L J. OF CLASS. TRAD. (forthcoming 1997).

a mixed and balanced government comprising (5) a deliberative senate, (6) an elected executive, and (7) a popular assembly or representative lower house in the legislature.<sup>6</sup> This system secures “liberty,” a word that entered Western political vocabulary to describe the status of citizens protected by republican institutions.<sup>7</sup> Republican liberty signifies government in pursuit of the common good, where no citizen is subjected to the unfettered will of another.<sup>8</sup>

The central meaning of republican government since Cicero has been legislation for the “*res publica*” or common good of the people.<sup>9</sup> Popular sovereignty follows because the people or “*populus*” itself constitutes the fairest judge of public welfare — unfettered magistrates and factions will pursue their own interests instead.<sup>10</sup> The rule of law constrains the people and magistrates from favoring private interests in specific litigation.<sup>11</sup> The elected “senate” or upper chamber in the legislature, serving for long terms, moderates the swings of popular emotions.<sup>12</sup> The public assembly controls the usurpations of the senate, and vice versa.<sup>13</sup> So the mixed republican structure of government balances magistrates against the senate and people (or their representatives) to preserve the liberty of the whole.<sup>14</sup> If any single faction, including the majority of the people, should seize power, liberty would be lost, the common good forgotten, and the republic gone, until balance is restored.<sup>15</sup>

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<sup>6</sup> See M.N.S. SELLERS, *AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION* 6-245 *et passim* (1994).

<sup>7</sup> See Sellers, *supra* note 4; see also TITUS LIVIUS, *AB URBE CONDITA* II.1.1-2 (n.p., n.d.); George Washington, *The First Inaugural Speech* (Apr. 30, 1789), in *GEORGE WASHINGTON: A COLLECTION* 462 (W.B. Allen ed., 1988).

<sup>8</sup> See ALGERNON SIDNEY, *DISCOURSES CONCERNING GOVERNMENT* I.5 (1698); I ADAMS, *supra* note 1, at xxvi,123.

<sup>9</sup> See MARCUS TULLIUS CICERO, *DE RE PUBLICA* I.xxv.39. “[R]es publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus.” *Id.*

<sup>10</sup> “[I]taque nulla alia in civitate, nisi in qua populi potestas summa est, ullum domicilium libertas habet.” *Id.* at I.xxxi.47 “[Q]uodsi liber populus deliget, quibus se committat, deligetque, si modus salvus esse vult, optimum quemque, certe in optimorum consilii posita est civitatum salus” *Id.* at I.xxxiv.51.

<sup>11</sup> See MARCUS TULLIUS CICERO, *DE OFFICIIS* II.xii.42 (n.p., n.d.).

<sup>12</sup> See MARCUS TULLIUS CICERO, *DE LEGIBUS* III.xii.27-28 (n.p., n.d.).

<sup>13</sup> See CICERO, *supra* note 9, at II.xxxi.53-56.

<sup>14</sup> See *id.* at II.xxiii.41, II.xxxiii.57

<sup>15</sup> See *id.* at III.xxxii.44-xxxiii.45.

When any one element in this republican formula of government is missing, there is no republic, in the usual sense of the term, because (republicans believe) the common good and liberty cannot be preserved. Popular sovereignty without balance is simple democracy, and no republic — the majority will abuse unprotected minorities;<sup>16</sup> the rule of law can advance the tyranny of despots;<sup>17</sup> and senators and magistrates may exploit their authority in the manner of Caesar, the Long Parliament, Cromwell, or Napoleon.<sup>18</sup> So although republicans praise and require popular sovereignty, the rule of law, and balanced government, no one of these by itself is fully “republican” without the others. All exist to promote the common good, and to prevent “corruption” in the government or courts.<sup>19</sup>

## II. LIBERALISM

“Liberalism” as such was not known before the nineteenth century and first emerged in the wake of the French revolution to accommodate those partisans of liberty who, having reconciled themselves to constitutional monarchy, could not be “republicans” any longer, in the strictest sense of the term.<sup>20</sup> This required a new conception of liberty, articulated most influentially in 1819 by Benjamin Constant in his speech distinguishing the “liberty of the ancients” from the “liberty of the moderns.”<sup>21</sup> Constant defined the liberty of the ancients as actual

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<sup>16</sup> See, e.g., THE FEDERALIST No. 10 (James Madison).

<sup>17</sup> See I ADAMS, *supra* note 1.

<sup>18</sup> See *id.* at 1v; 365-371. Cf. “Cato” (pseudonym for John Trenchard & Thomas Gordon), Letter No. 25 (Apr. 15, 1721), in CATO’S LETTERS OR ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 179-88 (Ronald Hamowy ed., 1995) (1720-23) [hereinafter CATO’S LETTERS] (“All should proceed by fixed and stated rules, and upon any emergency, new rules should be made. This is the constitution, and this is the happiness of Englishmen” *Id.* at 186).

<sup>19</sup> “Corruption” is a technical term in republican discourse, derived from Roman political vocabulary, meaning public action motivated by anything other than the common good. See, e.g., CORNELIUS TACITUS, ANNALIUM AB EXCESSU DIVI AUGUSTI LIBRI, at III.27 “[I]amque non modo in commune sed in singulos homines latae quaestiones, et corruptissima re publica plurimae leges.” *Id.*

<sup>20</sup> For the earliest English uses of “liberal” and “liberalism,” and their dependence on France, see 8 THE OXFORD ENGLISH DICTIONARY 881-83 (2d ed. 1989). For the French Liberals, see LOUIS GIRARD, LES LIBÉRAUX FRANÇAIS: 1814-1875 (1985).

<sup>21</sup> BENJAMIN CONSTANT, POLITICAL WRITINGS 310-11 (Biancamaria

participation in government, while the liberty of the moderns meant the rule of law, and specific protections of the individual, including freedoms of opinion, property, association, speech, and religion — not popular sovereignty, but “peaceful enjoyment and private independence.”<sup>22</sup> For Constant, this “[i]ndividual independence is the first need of the moderns: consequently one must never require from them any sacrifices to establish political liberty”<sup>23</sup>

Defining “liberalism” remains difficult, as with any partisan term,<sup>24</sup> but Constant was not alone in considering individual freedom “the true modern liberty”<sup>25</sup> This attitude belongs more to England than to France, and English authors soon embraced the French term to describe their own tradition of limited government under the rule of law. John Stuart Mill explicitly criticized European liberalism as too solicitous of the power of the people,<sup>26</sup> and set out to formulate a more specific test of the propriety of government action.<sup>27</sup> He concluded that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”<sup>28</sup>

When scholars now speak of “liberal” legal principles they generally think of this formula and the British tradition of individual rights behind it,<sup>29</sup> running back through John Trenchard and Thomas Gordon<sup>30</sup> to John Locke<sup>31</sup> and Sir Edward Coke.<sup>32</sup> Mill distinguished this movement towards “political liberties” or “rights” from the parallel and largely unsuccessful pursuit of “constitutional checks” and popular sovereign-

Fontana ed. & trans., 1988) [hereinafter CONSTANT, POLITICAL WRITINGS].

<sup>22</sup> CONSTANT, POLITICAL WRITINGS, *supra* note 21, at 316.

<sup>23</sup> *Id.* at 321.

<sup>24</sup> For some attempts to put the term into historical context, see, for example, GUIDO DE RUGGIERO, THE HISTORY OF EUROPEAN LIBERALISM (R.G. Collingwood trans., 5th ed. 1967); RICHARD BELLAMY, LIBERALISM AND MODERN SOCIETY: A HISTORICAL ARGUMENT (1992).

<sup>25</sup> CONSTANT, POLITICAL WRITINGS, *supra* note 21, at 323.

<sup>26</sup> See generally John Stuart Mill, *On Liberty*, in JOHN STUART MILL. ON LIBERTY WITH THE SUBJECTION OF WOMEN AND CHAPTERS ON SOCIALISM (Stefan Collini ed., 1989).

<sup>27</sup> See *id.* at 12.

<sup>28</sup> *Id.* at 13.

<sup>29</sup> See *id.* at 75.

<sup>30</sup> See CATO'S LETTERS, *supra* note 18.

<sup>31</sup> See JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., student ed., 1988) (1690).

<sup>32</sup> See generally SIR EDWARD COKE, INSTITUTES (London, 1628-1644).

ty<sup>33</sup> So British liberalism separated liberty from its political foundations. Like Constant, Mill supposed that the content of liberty could be found and protected without a balanced structure of republican government to support it.

English proto-liberals under William III or George I shared the dilemma of the French *liberals* under Louis XVIII and Charles X. To subjects of a restored monarchy after a failed revolution, the very word “republic” breathed treason and the threat of anarchy. Friends of liberty hoped for legislative balance and a measure of mixed government under their constitutional monarchy,<sup>34</sup> but they had to support the King.<sup>35</sup> So American republicans found John Locke and others with this attitude a good authority for “principles,” but not for “forms” of government.<sup>36</sup> Locke recognized the King as “head of the Republick”<sup>37</sup> and used the English equivalent “commonwealth” only in the sense first “used by King *James the First*.”<sup>38</sup> This made him a good source during the early “liberal” phase of the American revolution, when Americans were disputing with Britain about rights, but not during the later “republican” phase, when they came to design their constitutions.<sup>39</sup> Liberals took their organizing principle of liberty from the republican tradition, but denied that it depended upon any particular form of government.<sup>40</sup>

### III. LIBERTY

The words liberty (“*libertas*”) and republic (“*res publica*”) grew up together in the political vocabulary of the Roman state and its would-be successors. Liberals separated the two by discarding the republican commitment to popular sovereignty and balanced government. But pursuit of the common good and the rule of law remained, at least initially, to support the idea that governments should rule by consent. This meant that liberalism and republicanism were not very different, at least at the outset. John Locke defined the “*Liberty of Man in Society*” as subjection

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<sup>33</sup> Mill, *supra* note 26, at 6.

<sup>34</sup> See Letter No. 61, in *CATO’S LETTERS*, *supra* note 18, at 420-26.

<sup>35</sup> See *id.* at 13-15.

<sup>36</sup> See Benjamin Rush, *Observations on the Government of Pennsylvania*, in *THE SELECTED WRITINGS OF BENJAMIN RUSH* 78 (Dagobert D. Runes ed., 1947) (1777).

<sup>37</sup> LOCKE, *supra* note 31, at II.XVIII.205.

<sup>38</sup> *Id.* at II.X.133.

<sup>39</sup> See Letter, “Locke, Milton, Hume,” *ADAMS*, *supra* note 1, at I.365-371.

<sup>40</sup> See LOCKE, *supra* note 31, at II.X.132.

to the duly enacted laws of a legislature established by consent, and independent of any private will.<sup>41</sup> The legislative power itself should be “*limited to the publick good*” of society<sup>42</sup> Benjamin Constant saw “liberty” in England, France, and the United States of America as “the right to be subjected only to the laws” and never to the “arbitrary will of one or more individuals.”<sup>43</sup>

These definitions simply repeat the old republican conception of liberty as service to the common good, under the rule of law. Republican vocabulary had distinguished liberty from “license” (*licentia*), meaning the unrestrained power to do what one wants.<sup>44</sup> Locke endorsed this distinction,<sup>45</sup> and castigated the monarchist theorist Sir Robert Filmer for identifying “freedom” as the ability “*for every one to do what he lists, to live as he pleases, and not to be tyed by any Laws*”<sup>46</sup> Locke’s liberty required having “a standing Rule to live by, common to every one of that Society, and made by the Legislative Power erected in it.”<sup>47</sup>

This republican distinction between “liberty” and “license” becomes hard to sustain without recourse to popular sovereignty and the procedures of balanced government. The early liberal commitments to law and the common good came into conflict once legislatures lost the legitimacy of their republican foundations. If the public good sets the “utmost [b]ounds” of the legislature’s power,<sup>48</sup> then laws that contravene the public good are void. But liberals need a new technique to distinguish the boundaries of valid legislation. This was the purpose of Mill’s harm principle, and remains the central dilemma of liberal theorists ever since. What is liberty, if not the simple ability to do what one wants? But who would be free with neighbors who could do whatever they wanted?

#### IV RIGHTS

The United States of America and its famous Bill of Rights<sup>49</sup> inherited the British tradition of restricted government, which the Union

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<sup>41</sup> *Id.* at II.IV.22.

<sup>42</sup> *Id.* at II.XI.135.

<sup>43</sup> CONSTANT, POLITICAL WRITINGS, *supra* note 21, at 310.

<sup>44</sup> See LIVY, *supra* note 7, at III.9.5, III.67.6.

<sup>45</sup> See LOCKE, *supra* note 31, at II.II.6.

<sup>46</sup> *Id.* at II.IV.22.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at II.XI.135.

<sup>49</sup> U.S. CONST. amends. I-X (ratified Dec. 15, 1791).



imposed on its component states after the American Civil War,<sup>50</sup> and onto the rest of the world through the United Nations after World War II.<sup>51</sup> French liberals had a similar list in their *Déclaration des droits de l'homme et du citoyen*,<sup>52</sup> based on the Declaration of Rights of the Commonwealth of Virginia.<sup>53</sup> These documents constitute the central political accomplishments of the liberal legal tradition and supply a provisional list of the fundamental requisites of liberty under liberal conceptions of government.

Mill saw an implied conflict between rights and popularly elected governments.<sup>54</sup> Since "liberalism" (as such) originated in the failure of the French revolution, there always has been a liberal tendency to contrast rights with the political participation of the people.<sup>55</sup> This is the basis on which more recent scholars have opposed "liberal" to "republican" institutions.<sup>56</sup> Their views would have some basis if "republicanism" simply meant "democracy." Maximizing majority power implies minimizing minority rights, and Mill was right to fear the "will" of the

<sup>50</sup> See U.S. CONST. amend. XIV (ratified July 9, 1868).

<sup>51</sup> UNIVERSAL DECLARATION OF HUMAN RIGHTS, adopted and proclaimed by the General Assembly of the United Nations, December 10, 1948. Compare INT'L COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS and INT'L COVENANT ON CIVIL AND POLITICAL RIGHTS, both of which appeared in an annex to a resolution adopted by the United Nations General Assembly on December 16, 1966, and entered into force on January 3, 1976 (Economic) and March 23, 1976 (Political). See G.A. Res. A/RES/2200 (XXI), U.N. GAOR 3d Comm., 21st Sess., Annex, Agenda Item 62.

<sup>52</sup> DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN, first adopted by the National Assembly on August 26, 1789.

<sup>53</sup> THE VIRGINIA DECLARATION OF RIGHTS (*A Declaration of Rights Made By the Representatives of the Good People of Virginia, Assembled in Full and Free Convention; Which Rights Do Pertain to Them and Their Posterity, as the Basis and Foundation of Government*) (adopted unanimously by the Virginia provincial congress on June 12, 1776). For the links between France and Virginia, see R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO WESTERN CONSTITUTIONAL LAW (1995).

<sup>54</sup> See Mill, *supra* note 26, at 7-8 ("The 'people' who exercise the power are not always the same people with [sic] those over whom it is exercised; and the 'self-government' spoken of is not the government of each by himself, but of each by all the rest.").

<sup>55</sup> See generally CONSTANT, POLITICAL WRITINGS, *supra* note 21, at 310-11 (comparing the new meaning of liberty "with that of the ancients").

<sup>56</sup> See, e.g., Horwitz, *supra* note 2, at 63-73; Frank I. Michelman, Foreword, *Traces of Self-Government*, 100 HARV L. REV 17-23 (1986-1987).

nation.<sup>57</sup> But republicans equally condemn the tyranny of the majority.<sup>58</sup> The purpose of popular sovereignty in republican governments is not to subject individuals to the will of the nation, but to protect all citizens from subjection to any person's will, by coordinating the whole in pursuit of the common good. Republican procedures will discover human rights, and republicans differ from liberals about rights only in their stronger sense of where rights come from, and how to establish what they are.<sup>59</sup>

Republican conceptions of liberty treat rights as a basis for human well-being, existing to be discovered through public deliberation and reflection about human nature, individual autonomy, and the proper structure of government. The existence of the "*res publica*" implies a "*res privata*," protected by the laws of the state.<sup>60</sup> So Cicero thought that without private goods, no public goods would survive,<sup>61</sup> and John Adams insisted that "*res publica*" signified "a government, in which the property of the public, or people, and of every one of them, was secured and protected by law." This idea "implies liberty" and that "the property and liberty of all men, not merely of a majority, should be safe."<sup>62</sup> Early English liberals made the same assertion without any authority beyond tradition (Coke)<sup>63</sup> or a mythical state of nature (Locke)<sup>64</sup> to draw the line between citizens' rival liberties and establish the content of their natural rights.<sup>65</sup>

<sup>57</sup> See Mill, *supra* note 26, at 8 ("The will of the people may desire to oppress a part of their number. ").

<sup>58</sup> See CICERO, *supra* note 9, at III.xxxiii.45.

<sup>59</sup> See generally SUSAN FORD WILTSHIRE, GREECE, ROME, AND THE BILL OF RIGHTS (1992) (discussing Greek and Roman antecedents to the United States Bill of Rights).

<sup>60</sup> See CICERO, *supra* note 11, at I.vii.21, I.xvi.51.

<sup>61</sup> See *id.* at III.v.21-24.

<sup>62</sup> III ADAMS, *supra* note 1, at 160 ("[F]or the people, or public, comprehends more than a majority, it comprehends all and every individual; and the property of every citizen is a part of the public property, as each citizen is a part of the public, people, or community.").

<sup>63</sup> See STEPHEN D. WHITE, SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMONWEALTH," 1621-1628 ch. 7 (1979) (relating Coke's participation in Parliament's discussion of the Petition of Right).

<sup>64</sup> See LOCKE, *supra* note 31, at II.II.6.

<sup>65</sup> See *id.* at II.VII.87, II.XV.171. Locke found the Law of Nature "in the minds of Men." *Id.* at II.XI.136.

## V NEGATIVE LIBERTY

The history of liberalism until this century has been the European history of privileges wrested from power, *and* the gradual compilation of lists of violations that the state must never visit on its citizens. Law feasted on the corpse of philosophy, and reformers fought for practical guarantees in the absence of moral agreement. Moral pluralism yielded these minimum protections in Europe, while moral unanimity produced the same result in the United States.<sup>66</sup> This gradually created a new and narrower conception of liberty, as the area in which a person is “left to do or be what he wants to do or be, without interference.”<sup>67</sup> Isaiah Berlin called this “negative” freedom — the freedom simply to be left alone.<sup>68</sup> “Negative liberty” is greatest when people have the most protection against coercion by the State or anyone else in society — the most “rights” against interference by others.

This new sense of the word “liberty” followed naturally from Constant’s separation of law and politics. However, it offers no obvious formula for what will count as “coercion,” or who should be coerced when one individual’s desires conflict with another’s. Berlin adapted his vocabulary from Thomas Hobbes and other opponents of liberty, who used “freedom” to describe what even John Locke would have recognized as “license” and undesirable.<sup>69</sup> Hobbes often went much further, defining “liberty” or “freedom” simply as “the absence of external impediments of motion” applied to “inanimate creatures.”<sup>70</sup> So fear and necessity are entirely compatible with Hobbes’s sense of “corporal liberty,” which ended only with physical restraint, chains or imprisonment.<sup>71</sup> Hobbes specifically reprobated the “specious name” of tradition-

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<sup>66</sup> Although there was never a “liberal movement” or “liberal party” in the United States until after the Second World War, the protection of individual rights provided a unifying ideology from the beginning. *See* LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA. AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* 10-11, 47 (1955).

<sup>67</sup> ISAIAH BERLIN, *TWO CONCEPTS OF LIBERTY: AN INAUGURAL LECTURE* 7 (1958).

<sup>68</sup> *See id.*

<sup>69</sup> *See* LOCKE, *supra* note 31, at II.IV.22.

<sup>70</sup> THOMAS HOBBS, *LEVIATHAN* 139 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651).

<sup>71</sup> *See id.* at 141.

al liberty in his hostility to “popular states” or “Greek and Latin” proposals to restrain and balance the monarch’s absolute and sovereign power.<sup>72</sup>

Defining “liberty” as pure absence of restraint lowers its value as a social ideal. Liberty stops being a status to be sought and becomes a retained privilege, perhaps too often granted or properly withheld.<sup>73</sup> Jeremy Bentham considered “liberty” to be opposed to “government”<sup>74</sup> and his disciple John Austin confirmed that liberty is “altogether incompatible with law, the very idea of which implies restraint and obligation.”<sup>75</sup> So negative “political or civil liberty is the liberty from legal obligation, which is left or granted by a sovereign government to any of its own subjects.”<sup>76</sup> One should not be surprised at John Austin’s scorn for “ignorant and bawling fanatics who stun you with their pother about liberty,”<sup>77</sup> since Austin considered liberty “to be conceptually distinct from public welfare, and the State.”<sup>78</sup>

Of course Berlin, Bentham, Hobbes and the rest may use words however they like. Perhaps negative liberty follows naturally from liberal theory, and liberty itself has limited value beyond some “minimum area of personal freedom.”<sup>79</sup> But few liberals have really thought so. Austin proposed a form of “civil liberty” that would serve the government in its “furtherance of the common weal.”<sup>80</sup> Bentham proposed “utility” as the measure of our negative freedom.<sup>81</sup> Mill argued for his harm principle,<sup>82</sup> and even Berlin, who made Hobbesian views popular, lacked

<sup>72</sup> *Id.* at 143.

<sup>73</sup> See Mill, *supra* note 26, at 104 (“[O]wing to the absence of any recognised general principles, liberty is often granted where it should be withheld, as well as withheld where it should be granted.”).

<sup>74</sup> See JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 93 (J.H. Burns & H.L.A. Hart eds., Cambridge Univ. Press, 1988) (1777).

<sup>75</sup> JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 160 (Wilfrid E. Rumble ed., 1995) (1832).

<sup>76</sup> *Id.* at 223.

<sup>77</sup> *Id.* at 224.

<sup>78</sup> *Id.*

<sup>79</sup> BERLIN, *supra* note 67, at 11.

<sup>80</sup> AUSTIN, *supra* note 75, at 224.

<sup>81</sup> BENTHAM, *supra* note 74, at 99.

<sup>82</sup> See Mill, *supra* note 26, at 13 (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his

Hobbes's fortitude, suggesting that liberty depends on how many possibilities are open, how easy they are to achieve, how important and how widely shared they are, and so forth.<sup>83</sup>

## VI. POSITIVE LIBERTY

Berlin distinguished his preferred "negative" liberty from "positive" liberty. The distinction is instructive, though not exactly in the sense that Berlin used it. If "negative liberty" means not being interfered with in doing what one wants, "positive liberty" should mean being able to do what one wants, or being made able to do so. Negative liberty is "freedom from" constraint. Positive liberty is "freedom to" realize one's goals.<sup>84</sup> In saying that the extent of my negative freedom depends in part on "how many possibilities are open to me,"<sup>85</sup> Berlin obscured the difference by attaching the benefits of positive liberty to his negative ideal. But Berlin feared constraint more than he valued opportunity. Perhaps in restraining human passions the state might maintain a new orthodoxy, and through the "specious disguise" of liberation impose its own "brutal tyranny."<sup>86</sup>

Positive liberty is negative liberty writ large, and neither is liberty at all, in the original republican sense of the word. "Negative" liberty is license to avoid restraint. "Positive" liberty is license and ability to fulfill one's desires. Berlin suggested that human desire may often run to imposing some collective will on recalcitrant individuals.<sup>87</sup> However, in the absence of constraint, negative liberty might have similar results.<sup>88</sup>

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will, is to prevent harm to others.").

<sup>83</sup> See BERLIN, *supra* note 67, at 15 n.1.

<sup>84</sup> See *id.* at 16.

<sup>85</sup> *Id.* at 15 n.1. The extent of freedom also depends on (b) how easy or difficult each of these possibilities is to actualize; (c) how important in my plan of life, given my character and circumstances, these possibilities are when compared with each other; (d) how far they are closed and opened by deliberate human acts; [and] (e) what value not merely the agent, but the general sentiment of the society in which he lives, puts on the various possibilities.

<sup>86</sup> *Id.* at 16.

<sup>87</sup> See *id.* at 17.

<sup>88</sup> Berlin admits as much. See *id.* at 19 (stating that "as in the case of the 'positively' free self, [the 'negatively' free self] may be inflated into some super-personal entity — a state, a class, a nation, or the march of history itself,

Reducing liberty to the positive or negative ability to do what one wants does not resolve what to do when people's wants conflict. Berlin criticizes Spinoza, Locke, Montesquieu, and Kant for believing the subject of a commonwealth free, "because the common interests must include his own."<sup>89</sup> Instead, he insists, in agreement with Bentham, that "liberty to do evil" is liberty too and deserves public protection. "Every law is an infraction of liberty."<sup>90</sup>

Berlin's sense of "positive" liberty borrows something from Constant's "liberty of the ancients," in that it concerns who is to determine the limits of the law,<sup>91</sup> and implies democratic rule.<sup>92</sup> Using a public-regarding procedure to limit private initiatives violates Berlin's negative conception of liberty because it implies controlling what people may do, for their own good,<sup>93</sup> and so violates Mill's dictum that "[t]he only freedom which deserves the name is that of pursuing our own good in our own way."<sup>94</sup>

When everyone pursues his or her own good in his or her own way there will be collisions that need to be resolved. Berlin criticizes the conception that a free state should be governed by laws that rational persons would accept.<sup>95</sup> In other words, he rejects Cicero's republican aim of constructing institutions that will harmonize citizens' interests in order to give everyone a worthwhile life.<sup>96</sup> But it is hard to see where else to draw the boundary between citizens' desires. As Berlin noted, Spinoza has suggested that "[t]he subject of a true commonwealth is no slave, because the common interests must include his own."<sup>97</sup> This is not the sentiment of a "Jacobin" or a "communist," as Berlin would have it, but the common sense observation that we all have an interest in

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regarded as a more 'real' subject of attributes than the empirical self.").

<sup>89</sup> *Id.* at 32.

<sup>90</sup> *Id.* at 33 (quoting Jeremy Bentham).

<sup>91</sup> *See id.* at 7 (asserting that positive liberty "is involved in the answer to the question 'What, or who, is the source of control or interference, that can determine someone to do, or be, one thing rather than another?'").

<sup>92</sup> *See id.* at 14.

<sup>93</sup> *Id.* at 17.

<sup>94</sup> *Id.* at 11 (quoting Mill).

<sup>95</sup> *See id.* at 30.

<sup>96</sup> *See* CICERO, *supra* note 11, at III.vi.26 ("Ergo unum debet esse omnibus propositum, ut eadem sit utilitas unius curusque et universorum; quam si ad se quisque rapiet, dissolvetur omnis humana consortio.").

<sup>97</sup> BERLIN, *supra* note 67, at 32 (quoting Spinoza).

protections against each other, through which no individual citizens will be preferred above the rest.

Setting out to harmonize private interests for the public good does not imply that there is "only one correct way of life."<sup>98</sup> It is an unavoidable task. "Negative liberty" leads to conflicts between private interests. "Positive liberty" does too. Yet decisions must be made. A responsible theory of liberty will explain how to make them. One solution might be a despotism of the best and wisest, as in Mozart's Temple of Sarastro in *The Magic Flute*.<sup>99</sup> But the "best and wisest" have interests of their own.<sup>100</sup> The republican formula has been to seek systems of popular sovereignty that will harness the reason of all citizens in search of a just result.

"The fathers of liberalism," Mill and Constant, sought the greatest amount of government non-interference that would be consistent with the basic requirements of social life.<sup>101</sup> But even Mill's notion of a liberty limited only by the danger of doing harm to others requires a definition of harm. The French revolution illustrates the dangers of unfettered majorities, but its worst excesses bypassed the sovereign people.<sup>102</sup> Isaiah Berlin himself concedes that political "positive" rights may protect the liberals' "ultimate value" of "individual — 'negative' — liberty"<sup>103</sup>

The liberal fear of democracy derives in large part from a belief that "human goals are many, not all of them commensurable, and in perpetual rivalry with one another."<sup>104</sup> This may be true, but it should not rule out the search for synthesis. The ideal of freedom to live as one wishes, and the pluralism of values connected with it, need not lead to the war of all against all. "Liberty" to be oppressed by one's neighbor is no liberty at all. Hobbes cheapened the language when he redefined "liberty" as unfettered action: Liberals make a profound mistake when they adopt his vocabulary

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<sup>98</sup> *Id.* at 36. "In this way the rationalist argument, with its assumption of the single true solution, has led from an ethical doctrine of individual responsibility and individual self-perfection, to an authoritarian state obedient to the directives of an élite of Platonic guardians." *Id.* at 37

<sup>99</sup> *See id.* at 39.

<sup>100</sup> *Cf.* Madison, *supra* note 16.

<sup>101</sup> This is the view, at least of Isaiah Berlin. BERLIN, *supra* note 67, at 46.

<sup>102</sup> For Berlin's strictures on government by the people, quoting Mill and Constant, see *id.* at 48.

<sup>103</sup> *Id.* at 50.

<sup>104</sup> *Id.* at 56.

## VII. NATURAL LAW

Law supplies the traditional boundary between liberty and license. This was the view of Cicero,<sup>105</sup> Livy,<sup>106</sup> Harrington,<sup>107</sup> Sidney,<sup>108</sup> Montesquieu,<sup>109</sup> and Adams.<sup>110</sup> Even John Locke fully accepted that there can be no liberty without law,<sup>111</sup> properly understood not as limitation, but as “*the direction of a free and intelligent Agent to his proper Interest,*” which “prescribes no farther than is for the general Good of those under that Law”<sup>112</sup>

This sanguine conception of law preceded the sullen positivism of Hobbes and John Austin, and accompanies the Stoic tradition of natural law that inspired the natural rights theories of modern Europe and America.<sup>113</sup> It assumes law to be “right reason, commanding honesty, and forbidding iniquity, [and] founded in eternal morals.”<sup>114</sup> “Law,” in this sense, must be the product of reason, which governments serve through the establishment and implementation of just and equal laws. “The great question is, [w]hat combination of powers in society, or what form of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that the citizens may constantly enjoy the benefit of them, and be sure of their continuance.”<sup>115</sup>

Liberals distinguished themselves from republicans by refusing to answer this question. Their claim of natural rights against kings and governments requires the existence of truth about justice and human nature. But the liberal technique of accommodation with power limited

<sup>105</sup> See CICERO, PRO CLUENTIO.

<sup>106</sup> See LIVY, *supra* note 7, at 2.1.

<sup>107</sup> See JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS 19-20 (J.G.A. Pocock ed., 1992) (1656).

<sup>108</sup> See SIDNEY, *supra* note 8.

<sup>109</sup> See MONTESQUIEU, DE L'ESPRIT DES LOIS, pt. 2, bk. 11, ch. 3 (Geneva, 1748).

<sup>110</sup> See III ADAMS, *supra* note 1, at 159-60.

<sup>111</sup> See LOCKE, *supra* note 31, at II.VI.57

<sup>112</sup> *Id.*

<sup>113</sup> See generally WILTSHIRE, *supra* note 59; BENJAMIN FLETCHER WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT (1931).

<sup>114</sup> I ADAMS, *supra* note 1, at 282 (quoting CICERO, II In Anton. 28); CICERO, *supra* note 12, at II.11, *id.* at III.2.

<sup>115</sup> III ADAMS, *supra* note 1, at 128.



liberals' ability to question arbitrary decisions. Their triumphs in England relied on the natural "reason" of judge-made law, and recent history in the United States repeats this pattern.

### VIII. POSITIVE LAW

Prominent liberal lawyers once minimized the connection between law and justice or morality, including law's role as the arbiter between liberty and license. Their commitment to the rule of law as a fence against oppression led some liberals to deny the incorporation of moral standards into law, fearing ambiguity and unwanted administrative discretion.<sup>116</sup> The utilitarians Jeremy Bentham and John Austin sought to establish a sharp distinction between law "as it is" and law "as it ought to be,"<sup>117</sup> notwithstanding the traditional view of law (found in Blackstone) that human enactments contrary to justice are void and not law at all.<sup>118</sup>

Self-identified liberals such as H.L.A. Hart accepted (as they had to) that courts may be asked to incorporate morality into their decisions, but still praised "positivism" as having "delivered law from the dead body of morality."<sup>119</sup> Although liberals such as Hart admitted that laws confer rights, they also claimed that rules can confer rights without being moral.<sup>120</sup> These arguments aimed at separating moral or natural rights from law, viewing bad decisions by judges about rights as bad law, but law nonetheless.<sup>121</sup> Social policies may influence judges, but are not themselves "law" to positivists, who suppose that maintaining this distinction makes law easier to criticize and reform.<sup>122</sup>

Restricting the conception of what constitutes a "legal rule" so as to exclude "policy" or "morality" protects the determinacy of law and a core of settled meaning through which rules can control the judiciary.<sup>123</sup> Liberal positivism developed to protect the rule of law against judicial

<sup>116</sup> See, e.g., H.L.A. Hart, *Positivism and the Separation of Law and Morals*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49-87 (1983).

<sup>117</sup> For a discussion of the antecedents of this viewpoint, see *id.* at 50.

<sup>118</sup> See *id.* at 52.

<sup>119</sup> *Id.* at 55 (quoting AMOS, *THE SCIENCE OF LAW* 4 (5th ed. 1881) (who attributed this statement to his predecessor, Austin)).

<sup>120</sup> See HART, *supra* note 116, at 62.

<sup>121</sup> See *id.* at 68.

<sup>122</sup> See *id.* at 69.

<sup>123</sup> See *id.* at 71.

usurpation and maintain the conviction that rules have authority<sup>124</sup> As positivists understand it, the spiritual message of liberalism lies in opposing bad laws openly, not in making bad laws good through judicial chicanery<sup>125</sup> Direct appeals or references to morality by judges assume a greater union of social aims and judgment than liberals either expect or endorse.<sup>126</sup> This does not mean that they deny the existence of moral truths, but rather that these truths should be used to judge the law In positivist theory such truths are never part of the law itself.<sup>127</sup>

Legal positivism represents a seriously altered liberalism in its effort to curb judicial activism. English liberalism began as a battle by English judges to enforce natural justice against the kings. Judicially-interpreted bills of rights constitute the liberals' first great triumph and most lasting legacy Positivism arose when liberals began to question the authority of judges, as they had questioned kings and parliaments before. Where judges once had "found" the law, now liberals wished them to follow it, which meant that legal decisions must be determinable by reference to facts alone, facts concerning the intentions of authorities who promulgated the laws involved.<sup>128</sup>

This approach raised new problems for liberal theory While early liberals placed their faith in judges, rights, and the rule of law, positivist liberals with their "sources thesis" squarely face questions of legitimacy and the basis of legislative authority<sup>129</sup> So long as "law" meant "right reason," liberals could endorse the rule of law without further explanation and avoid questions of political legitimacy But as soon as law comes to be seen as obedience to some particular person's authority, that authority needs justification. The rule of law ceases to be a universal moral imperative and applies only to certain societies, meeting certain determinate criteria. This leaves liberals unable to escape the issues their progenitors first disavowed republicanism to avoid, and particularly the question, which system of legislation will most likely get law right.<sup>130</sup>

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<sup>124</sup> See *id.* at 72.

<sup>125</sup> See *id.* at 75.

<sup>126</sup> See *id.* at 80.

<sup>127</sup> See *id.* at 82.

<sup>128</sup> See Joseph Raz, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 194-221 (1994) [hereinafter *ETHICS IN THE PUBLIC DOMAIN*].

<sup>129</sup> See *id.* at 200.

<sup>130</sup> See, e.g., Joseph Raz, *The Politics of the Rule of Law*, in *ETHICS IN THE PUBLIC DOMAIN*, *supra* note 128, at 354-62.

Once liberals set out to construct their own theory of political authority, questions of truth and soundness emerge that contemporary liberals usually hope to avoid.<sup>131</sup> For example, democracy, long taken for granted by many liberal theorists as desirable, must be justified in terms of its instrumental value in realizing good government.<sup>132</sup> Liberals need a political theory of their own. If law has no inherent moral value, and yet judges must obey the law, there must be some authority behind the law to make its directives binding.

#### IX. POLITICAL LIBERALISM

Republicanism and liberalism first diverged when some "liberals" (formerly republicans) accepted the shackles of autocratic power. Liberalism asserted the value of being left alone, even at the price of accepting an "enlightened" despot. This liberal policy of avoiding conflict seemed very appealing in an era when public controversies cost many subjects their lives. Liberalism began as a retreat into the private sphere and developed as the private sphere expanded, incorporating more and more formerly public functions. So, liberalism started as a flight from politics, embracing a new definition of liberty as the ability to do what one wants, in one's own way. But this definition has political implications, and gradually a new political science of liberalism emerged, reflecting liberalism's new conception of "liberty."

To claim rights against authority implies that rights somehow exist independently of the powers that promulgate or enforce them. It implies truth about justice. Liberals cannot support skeptical or relativist views without undermining the foundations of their own philosophy. Yet, at the same time, they seek maximum private autonomy in all areas, including the autonomy to make mistakes without shame or criticism. This often means avoiding questions of truth, which imply the possibility of error and the burden of disapproval. Political liberalism faces its greatest difficulty in maintaining the value of autonomy while avoiding the implicit denigration of private views that are wrong.

John Rawls developed the best known and most compelling recent argument for a liberal theory of politics.<sup>133</sup> His first solution to the

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<sup>131</sup> See Joseph Raz, *Liberalism, Scepticism, and Democracy*, in *ETHICS IN THE PUBLIC DOMAIN*, *supra* note 128, at 101.

<sup>132</sup> See *id.* at 102.

<sup>133</sup> See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter RAWLS, *A THEORY OF JUSTICE*]; JOHN RAWLS, *POLITICAL LIBERALISM* (1993)

liberal difficulty about truth was to assert the primacy of the “right” over the “good,” where the right concerns basic rules of public interaction, and the good concerns private judgments about one’s own life. Agreement about the right avoids controversies about the good.<sup>134</sup> But people disagree about public rules of justice, divided by their differing religious, philosophical, and moral doctrines. Rawls accepts most such disagreement as “reasonable” and seeks to construct a similarly “reasonable” form of politics that reaches consensus by avoiding controversy.<sup>135</sup>

This liberal commitment to avoiding conflict distinguishes political liberalism from its republican antecedents in two important ways, both of which are rooted in the new liberal conception of liberty as the ability to do what one wants. First, contemporary liberals assume the inevitable pluralism of religious, philosophical, and moral ideas.<sup>136</sup> Second, they eschew all arguments about the validity of these doctrines, preferring to act only in areas where all can agree. Liberal politics does not seek the general good, but rather a scheme of public cooperation that respects each individual’s antecedent moral and philosophical affiliations.<sup>137</sup>

Political liberalism views politics as the vehicle through which individuals propose and accept fair terms of cooperation<sup>138</sup> to advance their own ends, including their private conceptions of the public good.<sup>139</sup> Liberal politics is not epistemological or in any way concerned with truth.<sup>140</sup> Centuries of conflict about religious, philosophical, and moral beliefs have created a liberal sensibility that assumes the practical impossibility of reaching reasonable and workable political agreement about truth.<sup>141</sup> Liberals now separate reason from the truth, taking “reasonable” to refer to a willingness to get along,<sup>142</sup> and supposing that references to “truth” may preclude agreement.<sup>143</sup>

Liberal publicists sometimes seem simply to avoid the forbidden word, while acting in every other respect as if certain propositions were

[hereinafter RAWLS, POLITICAL LIBERALISM].

<sup>134</sup> See RAWLS, A THEORY OF JUSTICE, *supra* note 133, at 446-52.

<sup>135</sup> See RAWLS, POLITICAL LIBERALISM, *supra* note 133.

<sup>136</sup> See, e.g., *id.* at 36-37

<sup>137</sup> See RAWLS, A THEORY OF JUSTICE, *supra* note 133, at 303.

<sup>138</sup> See *id.* at 53.

<sup>139</sup> See, e.g., *id.* at 36-37

<sup>140</sup> See *id.* at 62.

<sup>141</sup> See *id.* at 63.

<sup>142</sup> See *id.* at 64.

<sup>143</sup> See *id.* at 94.

“true”<sup>144</sup> or “probably true,”<sup>145</sup> but the fundamentally liberal viewpoint goes further, recognizing a wide range of views as reasonable, even when mistaken.<sup>146</sup> Holding a political conception as true is exclusive, even sectarian, to the committed liberal and likely to foster political division.<sup>147</sup>

The liberal return to politics reveals how liberal conceptions of human nature have diverged from their republican (and early liberal) antecedents. Republicans view all humans as possessing reason and a certain degree of humility, capable of being swayed by argument and deferring to reasonable deliberation, even when not fully convinced.<sup>148</sup> Early liberals, such as John Stuart Mill, agreed but feared this natural tendency towards consensus as leading to error and oppression.<sup>149</sup> Contemporary liberals, mostly in the United States, have developed a new view of citizens as inevitably and irredeemably divided by conflicting and incommensurable opinions about truth and morality.<sup>150</sup>

Liberals consider the psychic pain of being wrong too great to allow politics to prefer true doctrines over others which are widely believed.<sup>151</sup> The liberal search for political consensus depends on avoiding controversy, while republicans embrace it. A reasonable liberal respects wrong views. A reasonable republican is open to persuasion that his or her own views may themselves be wrong. Liberals want to apply their principle of uncritical acceptance to philosophy itself.<sup>152</sup> Republicans tolerate wrong views, but encourage the search for truth when truth affects the common welfare of society.

The liberal conception of persons as self-directed individuals requires a new conception of political society, which forbids the creation of community through politics.<sup>153</sup> Since political liberalism avoids divisive issues, which may threaten social harmony,<sup>154</sup> political liberals must

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 113.

<sup>146</sup> *See id.* at 127.

<sup>147</sup> *See id.* at 129.

<sup>148</sup> *See* Mortimer Sellers, *Republican Impartiality*, 11 OXFORD J. LEGAL STUD. 273 (1991).

<sup>149</sup> *See, e.g.*, MILL, *supra* note 26, at 8-9.

<sup>150</sup> *See, e.g.*, RAWLS, *POLITICAL LIBERALISM*, *supra* note 133, at 133.

<sup>151</sup> *See id.* at 138.

<sup>152</sup> *See id.* at 152.

<sup>153</sup> *See, e.g., id.* at 146 n.13.

<sup>154</sup> *See id.* at 157.

keep the scope of political discussion as narrow as possible.<sup>155</sup> “Common ground,” therefore, replaces the common good as a basis of social cooperation.<sup>156</sup>

This is not to say that political liberalism rejects the ideal of social cooperation. On the contrary, it is only in seeking a basis for such cooperation that liberalism becomes “political” in the first place.<sup>157</sup> Contemporary liberalism has also largely abandoned the fear of democracy that separated liberalism from republicanism in the early nineteenth century, and liberals now usually encourage the widespread political participation of a vigorous and informed citizen body.<sup>158</sup> But liberals reject the idea that social cooperation and common projects provide any essential element in human well-being,<sup>159</sup> or that citizens can find agreement about issues of fundamental importance.

#### X. PUBLIC REASON

The liberal return to politics revives the area of public reason that characterized republican legal discourse. Republican statecraft made truth about justice and common good the measure of legal validity, as verified through balanced mechanisms of popular sovereignty and public debate. Contemporary liberals now generally accept democracy without argument, and with it the concept of public reason, advanced in pursuit of the public good.<sup>160</sup> But liberals still tend to limit the arena in which public reasons may be advanced, restricting their province to the “constitutional essentials of society.”<sup>161</sup>

Political liberals limit acceptable public debate to a very narrow range of public reasons, excluding appeals to controversial truths that not all citizens yet accept.<sup>162</sup> Liberals argue that philosophical and moral diversity are permanent features of public culture that foreclose the exercise of political power unless all citizens may reasonably be expected to endorse the proposed intervention in the light of their own constitutional beliefs and ideals. This liberal principle of political legitimacy<sup>163</sup>

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<sup>155</sup> *See id.* at 180.

<sup>156</sup> *See id.* at 194.

<sup>157</sup> *See id.* at 201.

<sup>158</sup> *See id.* at 205.

<sup>159</sup> *See id.* at 206.

<sup>160</sup> *See id.* at 213.

<sup>161</sup> *Id.* at 214.

<sup>162</sup> *See id.* at 216.

<sup>163</sup> *See id.* at 217

requires citizens to govern themselves in ways that each thinks the others might reasonably be expected to accept.<sup>164</sup> It repeats the old republican formula, modified only by the liberals' new sense of "reasonable" debate. Liberals would forbid appeals to the whole truth of a question, even when it might be readily available.<sup>165</sup>

This more sophisticated liberal view rejects the questionable doctrine that people should simply vote their private preferences and interests. But it also rejects the republican commitment to voting what is right and true or just and good. Instead, liberals would restrict public reason to those constitutional essentials that others would "reasonably" accept.<sup>166</sup> Rawls's famous liberal theory of justice suggests that such essentials will best be found by imagining oneself in an "original position,"<sup>167</sup> where no one knows which philosophy or position in society each will hold in the real world.<sup>168</sup>

American liberals often take the Supreme Court of the United States as their central exemplar of public reason in a democracy.<sup>169</sup> If the United States Constitution is "a principled expression in higher law of the political ideal of a people to govern itself in a certain way,"<sup>170</sup> then the Supreme Court must take responsibility for making the Constitution just. Liberals ascertain the idea of right and just constitutions and basic laws by looking directly to the most reasonable political conception of justice and not to the result of any actual political process.<sup>171</sup> By applying its own public reason, the Court prevents private factions in the legislature from running the government in their own self-interest.<sup>172</sup> Once again, liberalism must return to the republican criteria that stand behind it to determine what the Constitution means and how it should be interpreted.

## XI. THE REPUBLICAN REVIVAL

The crucial assumption of liberalism, as understood by its modern defenders, is that citizens will never relinquish their different and

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<sup>164</sup> *See id.* at 218.

<sup>165</sup> *See id.*

<sup>166</sup> *See id.* at 219.

<sup>167</sup> *Id.* at 227.

<sup>168</sup> *See id.* at 222-28.

<sup>169</sup> *See id.* at 230.

<sup>170</sup> *Id.* at 232.

<sup>171</sup> *See id.* at 233.

<sup>172</sup> *See id.*

permanently incommensurable conceptions of the good.<sup>173</sup> This denigration of reasoned argument as a source of consensus<sup>174</sup> has led a self-styled "republican revival" to reassert the value of reason in politics.<sup>175</sup> According to this argument, many clauses of the United States Constitution exist largely to prevent private interests from exercising undue influence on public policy.<sup>176</sup> The United States Constitution's republican roots seem to offer a basis for transcending society's diversity in pursuit of the common good, developed through a public process of collective self-determination.<sup>177</sup>

This conception of republican impartiality among contemporary lawyers rests largely on the writings of J.G.A. Pocock and Gordon Wood.<sup>178</sup> It reflects an ethos of "civic virtue" among certain recent critics of pluralism that stands beside the republican tradition, though somewhat outside it.<sup>179</sup> Proponents of constitutional "civil republicanism" criticize liberal pluralism as inviting interest-group politics and the exercise of raw political power.<sup>180</sup> To treat the political process as just another form of market offends neo-republican legal scholars, who invite courts to prevent "naked preferences" from capturing the political process.<sup>181</sup>

Cass Sunstein and Frank Michelman played a large role in bringing the word "republican" back into American constitutional discourse. Both saw republicanism as a vehicle for supporting judicial intervention against flawed political or legislative decision-making. Sunstein encouraged courts to disallow legislation that does not serve public values.<sup>182</sup> Judges should "ensure that government decisions are the product not of

<sup>173</sup> See *id.* at 303.

<sup>174</sup> See *id.* at 338-39.

<sup>175</sup> For a discussion and bibliography on the republican revival, see G. Edward White, *Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy*, 6 YALE J.L. & HUMAN. 1-35 (1994).

<sup>176</sup> See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689-1732 (1984).

<sup>177</sup> See *id.* at 1691.

<sup>178</sup> See, e.g., *id.* at 1691 nn.12-13.

<sup>179</sup> See e.g., JÜRGEN HABERMAS, *LEGITIMATION CRISIS* (1975); ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* (1975) (all cited by Sunstein, *supra* note 176, at n.27).

<sup>180</sup> See Sunstein, *supra* note 176, at 1692.

<sup>181</sup> See *id.* at 1693.

<sup>182</sup> See *id.* at 1695-96.



preexisting private interests but of broad and open-ended public deliberation."<sup>183</sup> Michelman suggests that the United States Supreme Court should constitute its own (as he terms it) "*paideia*," deciding cases in support of the common cultural inheritance,<sup>184</sup> rather than positive law or precedent.<sup>185</sup> Such decisions are "republican" in Michelman's view, to the extent that they concern themselves with "civic virtue and general good."<sup>186</sup>

Proponents of the republican revival present their republican vocabulary as a "deviationist doctrine" that provides a "counter-ideology"<sup>187</sup> to traditional liberal constitutional ideas.<sup>188</sup> This is true to the extent that a republican commitment to the common good contradicts modern liberalism's new conception of liberty as freedom to do what one wants. But neo-republican reliance on the judiciary closely mirrors liberal tradition. Even the republican challenge to interest-group pluralism<sup>189</sup> simply repeats liberalism's original reaction against democratic tyranny.

Traditional republicanism supposed that carefully structured public deliberation would reveal (or at least come closer than any other process to revealing) the truth about issues of public importance.<sup>190</sup> Out of deference to modern individualist sensibilities, contemporary republicans have sought to retain republican procedures of normative justification, while shedding their objectivist foundations.<sup>191</sup> For example, Frank Michelman concedes the republican premise of popular sovereignty or "self-government"<sup>192</sup> and embraces the possibility of reaching agreement through dialogue or "discourse,"<sup>193</sup> but presents these both as "associational" and socially contingent techniques.<sup>194</sup> He displaces

<sup>183</sup> *Id.* at 1731.

<sup>184</sup> Michelman, *supra* note 56, at 13 n.44.

<sup>185</sup> *See id.* at 16-17.

<sup>186</sup> *Id.* at 18 (defining civic virtue as "the willingness of citizens to subordinate their private interests to the general good") (quoting GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* (1986)).

<sup>187</sup> *Id.* at 17-18.

<sup>188</sup> *See also* STONE ET AL., *supra* note 186, at 5.

<sup>189</sup> *See* Michelman, *supra* note 56, at 21.

<sup>190</sup> *Cf.* Cass Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 32-33 (1985).

<sup>191</sup> *See* Michelman, *supra* note 56, at 23.

<sup>192</sup> *Id.* at 27.

<sup>193</sup> *Id.* at 31.

<sup>194</sup> *See id.* at 38.

republican deliberation from the people to the courts, where face-to-face deliberation more easily takes place.

Legal rights, above or beyond politics, do not give neo-republicans much trouble.<sup>195</sup> Of course they endorse law and rights as unavoidably part of contemporary American legal discourse, but these “objectivist moments” reflect a deeper, “inclusive” dialogue of social reconciliation.<sup>196</sup> So, neo-republicans follow a “deep tradition” or “first principle” of “positive freedom,” realized as “self-government” through politics.<sup>197</sup> This need not be real self-government or real politics, which may be subject to self-interest, but rather, as Michelman suggests, the “virtual representation”<sup>198</sup> of virtuous judges deliberating on behalf of the people, because the people cannot deliberate themselves.<sup>199</sup>

The new republicans depart from tradition in their tendency to treat “self-government” as an end in itself,<sup>200</sup> embracing the conception of freedom criticized by Constant as the liberty “of the ancients.”<sup>201</sup> This need not mean voting, however, as in the Greek democracies, but rather “dialogue,” as practiced by judges and “the reasoning class.”<sup>202</sup> Neo-republicans see liberty as “socially situated self-direction.”<sup>203</sup> This is neither liberal nor republican, in the traditional sense, but represents a new conception of “liberty” as social solidarity. According to this theory, Supreme Court justices owe deference to no other authority beyond themselves, but they owe each other a duty of dialogue on behalf of the people.<sup>204</sup>

Neo-republican theories constitute less of a challenge than a supplement to modern liberal constitutionalism.<sup>205</sup> What contemporary republicans challenge is the “pluralist” tendency of some liberals to deny the possibility of moral persuasion.<sup>206</sup> Where political liberalism rested

<sup>195</sup> See *id.* at 42.

<sup>196</sup> *Id.* at 42-43.

<sup>197</sup> *Id.* at 47.

<sup>198</sup> *Id.* at 51.

<sup>199</sup> See *id.* at 64, 73.

<sup>200</sup> See, e.g., *id.* at 73.

<sup>201</sup> CONSTANT, POLITICAL WRITINGS, *supra* note 21, at 311.

<sup>202</sup> Michelman, *supra* note 56, at 73-74.

<sup>203</sup> *Id.* at 75 (defining “socially situated self-direction . . . [as] self-direction by norms cognizant of fellowship with equally self-directing others”).

<sup>204</sup> See *id.* at 76-77.

<sup>205</sup> See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1496 (1988).

<sup>206</sup> See *id.* at 1507.

on the perception that people will never agree about fundamental public issues, "republican" liberals hope to take all perspectives into account in constructing social consensus.<sup>207</sup> Recognizing an "indissoluble plurality of perspectives," republicans still hope to construct a common good through which citizens may maintain their equality.<sup>208</sup>

Cass Sunstein, one of the first theorists of this quasi-"republican" revival, quickly embraced "liberal republicanism" as his chosen program for the future.<sup>209</sup> This represents the natural culmination of modern liberalism's turn to democratic politics. Sunstein presents his republican principles as important liberal methods of controlling and limiting governmental power,<sup>210</sup> explaining most rights as either the preconditions or the outcome of an undistorted deliberative process.<sup>211</sup> Sunstein's "liberal republicanism" understands the private sphere as constituted by public decisions, but treats this unsurprising insight as a reason for the preservation, not obliteration, of liberal constraints on government.<sup>212</sup>

"Liberal republicans" retain the old republican conviction that sometimes choices must be made between competing conceptions of the good life.<sup>213</sup> Republicans recognize that some perspectives are better than others.<sup>214</sup> So, in the end, must liberals, if they are to establish universal rights and standards for preventing harm to others. The republican revival first developed in American law schools to provide a rationale for judicial activism after President Reagan's reelection in 1984. But the fundamental republican insight that neo-republicans embraced remains convincing and effective: that people can agree about law and justice if they set out to deliberate in a spirit of humility and shared commitment to the common good.

## XII. REPUBLICANISM, LIBERALISM, AND THE LAW

Republicans and liberals both seek liberty through the protection of the law. Republican laws arise in turn through service to the common

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<sup>207</sup> See *id.* at 1511.

<sup>208</sup> *Id.* at 1526.

<sup>209</sup> Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988).

<sup>210</sup> See *id.*

<sup>211</sup> See *id.* at 1551.

<sup>212</sup> See *id.* at 1569.

<sup>213</sup> See *id.* at 1570.

<sup>214</sup> See *id.* at 1574.

good, discovered by popular sovereignty under a mixed and balanced constitution. Liberals first differed from republicans in their disregard for the sources of law, so long as citizens were left alone. This led eventually to new conceptions of liberty, first as freedom from government, then as the ability to do what one wants.

Repeating this brief history reveals the reason why republicans and liberals diverged, but also why they have come together again towards the end of the twentieth century. The ability to do what one wants needs some restriction. Those who follow Hobbes in seeing liberty as the complete absence of restraint still need to explain when unfettered "liberty" should exist and when it should be suppressed. My "liberty" (in this sense) to hurt you infringes your liberty not to be hurt. Liberals must offer rules for when Hobbesian "liberty" should be respected and when it should not.

In the era of kings and despots, liberals avoided the name "republican" and the cry of popular sovereignty for fear of the consequences. Liberals feared public power and the majority's ability to dispossess and degrade their neighbors, as happened during the French and English revolutions. So early liberals embraced law as the proper line between liberty and license, and took judges or the common law tradition as the best source of authority, rather than any public deliberative process.

The liberal technique of avoiding controversial issues grew out of the wars of religion in Europe. Proponents of freedom in politics found it easier to advance their position when they exhibited flexibility about religion. Similarly, advocates of religious and other freedoms found their lives easier when they took no position on politics. Religious affiliations developed an ethnic or tribal significance and many people found it easier to be reasonable in practice when they overlooked or set aside religion. Religious doctrines often stood as totems, symbolic of affiliation, but not of real belief. When this was true, toleration became easier, and religion lost its political significance.

This is the model liberals apply when they speak of "different and irreconcilable conceptions of the good."<sup>215</sup> The implication is that people, left to think freely, will develop opinions that they will absolutely refuse to discuss, and which can only be modified "by the autocratic use of state power."<sup>216</sup> Such opinions do exist, but they usually reflect the traditions in which we are raised.<sup>217</sup> Liberals promote toleration and

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<sup>215</sup> RAWLS, *POLITICAL LIBERALISM*, *supra* note 133, at 303.

<sup>216</sup> *Id.* at 304.

<sup>217</sup> Rawls admits as much. *See id.* at 314.

accommodation of “reasonable” differences. However, most intractable differences are not “reasonable,” which is precisely what makes them so difficult to reconcile.

To the extent that republicans and liberals necessarily disagree, it is over this point of human nature. How can people create a worthwhile society in the face of natural self-interest, faction, misperception, stubbornness, and ignorance? Early liberals wanted everyone free as much as possible to pursue private projects. Later liberals wanted everyone supported as much as possible to realize private projects. Recent liberals even admit the value of certain public projects. But all liberals have sought to avoid the public search for truth about contentious issues. Liberals think that people will cooperate best by avoiding issues of substance. Republicans think that people will cooperate best when called upon to act together, in pursuit of the common good.

This difference between republicans and liberals appears clearly from the standpoint of Rawls’s “original position” in which no one knows his or her position in society or moral and philosophical beliefs.<sup>218</sup> Liberals suppose that in such a position people would choose a conception of justice that respects everyone’s beliefs equally, however erroneous.<sup>219</sup> Republicans suggest that not knowing which beliefs each would hold, people in the original position would prefer that correct or useful beliefs should prevail, and would select a system of justice that favors truth over falsehood, by promoting rational deliberation.

The problem, of course, with saying that truth should prevail is that misinformed or self-interested leaders have often imposed error and oppression under the banner of truth and justice. This is why republican doctrine has always specified the political structures most likely to serve justice and the common good. There can be no republic under a king or without balanced government and a democratic branch in the constitution. Early liberals who jettisoned the republican form of government were left to make unsupported assertions about rights, which unchecked powers sometimes endorsed (perhaps in the face of revolution) but never respected.

The liberals’ proposal of maximum autonomy, limited only by harm to others, quickly faced two major difficulties: first, the question of what constitutes a “harm,” and second, the problem of the common or public good. Under a liberal theory, “harm” defines the limits of autonomy and the proper province of law and politics. Are harms to the common good

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<sup>218</sup> *See id.* at 22-28.

<sup>219</sup> *See id.* at 310-11.

cognizable as harms under a liberal theory of justice? If they are, then liberalism simply repeats the republican formula without the support of a republican form of government. This seems to have been the position of early liberals such as Locke in England and Constant in France. If not, then one very important aspect of human well-being has been overlooked, vitiating the entire theory

John Stuart Mill and his followers took a somewhat different position, fearing social solidarity as a source of oppression. Unlike many modern liberals, these Englishmen (rightly) viewed stable free societies as naturally tending towards consensus. The difficulty for government in such situations is to nurture and protect private expressions of autonomy against overwhelming public opinion. Stable societies develop practices and traditions that outlive their usefulness. Mill thought that dissent should be encouraged in order to prevent distorting monopolies in the marketplace of ideas.

Mill's conception of the marketplace of ideas reintroduced the social element that was central to the older republican tradition. Ideas are found, developed and refined through social interaction. This forces liberals to develop theories of public deliberation. What structures of law and society will supply individuals with the largest or best supply of ideas? If liberal liberty means in part "the right to be subjected only to laws," which laws will best support individual autonomy and useful public debate? Liberals need a theory of legislation to support the various laws and rights they have freely (and variously) proposed and supported.

For liberals, as for republicans, laws should draw the line beyond which public officials must leave private autonomy intact. Finding and applying such laws equally to all citizens, irrespective of prominence or position, constitutes the central responsibility of the state. Recently some liberals have adopted Sir Robert Filmer's conception of liberty as the ability "to do what [one] lists,"<sup>220</sup> but these new semantics do not obviate the need to draw the boundaries of this individual "liberty" or private "license" (to use John Locke's vocabulary). Positive bills of rights detail protections against the state, but not usually for citizens against each other. In any case, proposed lists need some basis of authority. Whose list should apply?

Verifying rights had little importance in an era when all rights depended on benevolent despots. One accepted the rights that were granted and sought to hold monarchs to their word. This tactical

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<sup>220</sup> LOCKE, *supra* note 31, at II.IV.22.

arrangement gave way as other possible sources of law emerged to challenge hereditary sovereignty. The better the legislator, the better the rule of law. Locke and others proposed "consent" as the measure of legal validity. But whose consent and for what purpose? Liberalism always feared the tyranny of the majority as much and perhaps more than the tyranny of kings. So as autocrats weakened, liberals turned back to the political issues their doctrine first emerged to avoid, and above all the question of legitimate authority and the proper sources of law.

Republicanism is the parent of liberalism in two senses: first, because liberalism grew out of republicanism when republicans lost their political will after the French revolution; second, because only republicanism can justify specific liberal rights and the boundaries drawn by law. Positive law needs a source of moral authority, which republicans supply in their commitment to the common good, and a technique of legislation, which republicans offer in their mixed and balanced democracy. The incomplete and half-understood "republican revival" in American law schools reflects contemporary liberals' dissatisfaction with the absence of moral foundations and sense of common purpose in contemporary judicial decision-making. Liberals need theories of justice and politics to support their commitment to law.

Perhaps there is still some room for a distinction between liberals and republicans in contemporary legal theory, or at least for a group of "liberal republicans" within the wider republican consensus. If there is any difference, it amounts to this: liberal republicans seek to make political and legal decisions in ways that avoid overruling any individual's private conception of the public good. Liberal republicans would keep the scope of public deliberation as narrow as possible, to avoid conflicts with factional beliefs or affiliations, while traditional republicans promote common interests, in which every citizen can have a part.

Republicanism, liberalism, and the rule of law share a long and tangled common history. For many years liberalism was simply republicanism that dared not speak its name, until in the end the name was forgotten, and with it the meaning of the "republican" guarantees in the United States Constitution. Now once again, as liberalism overcomes the constraints that first brought it forth, issues of democracy, rights, and justice are addressed together, and many old solutions emerge, already embedded in the constitutional structures of Western democracy. To seek or speak of liberty without the common good is arrant nonsense. Liberals who once made this mistake have become republicans again, without realizing it. There can be no rule of law without republican government, and no liberty without the law.