

## Which Republicanism, Whose Freedom?

*On the People's Terms: A Republican Theory and Model of Democracy*,  
by Philip Pettit, Cambridge: Cambridge University Press, 2012

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Like the feuds of similar and often related adjoining communities, academic disagreements have a tendency to manifest the ‘narcissism of small differences’. Given the indebtedness of so much of my own recent work to Pettit’s elaboration of the core republican idea of freedom as non-domination,<sup>1</sup> that may seem a potential hazard in the present case that naturally I wish very much to avoid. Yet, Pettit is fairly ecumenical so far as differences over the practical implications of the core normative desiderata of a legitimate political system are concerned. He presents his institutional recommendations as suggestions indicating how certain problems might be addressed, while noting that the details will always need to be adjusted to local circumstances (pp. 180-181). However, in one respect he suggests there is a big difference in the republican camp. He identifies a major divide between those thinkers he aligns with what he calls the Rousseauvian and continental tradition of republicanism, on the one hand, and those he locates within a putatively distinct Italian-Atlantic tradition, which he favours, on the other (pp. 11-18). While he views the two traditions as sharing the neo-Roman republican conception of freedom as non-domination, he regards them as diverging with respect to what he considers as the two other ‘core’ ideas of his preferred tradition of republican thought: namely, the constraints associated with the ‘mixed constitution’ and the importance of a ‘contestatory citizenry’.

He sees these last two ideas as linked, the one facilitating and making possible the other. By contrast, he regards the Rousseauvian tradition as promoting two alternative ideas – that of popular sovereignty and equal political participation in popular decision-making – that involve the rejection of the corresponding core ideas of this preferred Italian-Atlantic tradition. In what follows, I shall suggest these two traditions may be more compatible than he suggests, though small differences of emphasis may remain of the kind we agree one should not be too narcissistic about. To the extent big differences exist, which is no doubt the big difference between us, then priority should go to the features he associates with the Rousseauvian rather than the Italian-Atlantic tradition.

The argument I wish to make is analytical rather than historical – the contrast between what might be termed a *neo-Rousseauvian* tradition and a *neo-Italian-Atlantic* tradition, rather than, say, between Rousseau and Machiavelli *per se*. The nub of my case is that the mixed constitution and contestation, the second and third of the ideas Pettit identifies as core to his preferred republican tradition, have a different theoretical status to the first core idea, that of freedom as non-domination. They offer possible institutional arrangements that might be needed in certain circumstances to realize the main normative criteria regarding a political system that he identifies as following from the idea of non-domination. These two criteria – that of equal influence that is individualized, unconditional and efficacious, and that of equal control capable of ensuring the equal acceptability of collective policies (p. 153) – are better candidates for the two complementary ideas of republicanism that flow from the central idea of non-domination. Moreover, popular sovereignty and equal participation in what Pettit has elsewhere called ‘authorial’ democracy have a natural affinity with these ideas.<sup>2</sup> Certain sorts of mixture and contestation may be required in given circumstances to supplement or

modify the operation of these authorial mechanisms so as to realize the two normative criteria. However, these criteria also set limits to the ways and extent such supplementing can go and those limits turn out to be when they subvert popular sovereignty and equal participation. Put another way, the two republican traditions complement rather than being in conflict with each other, with the neo-Rousseauvian the primary and the neo-Italian-Atlantic secondary. Indeed, to some degree Pettit's own presentation of his thesis follows this logic.

What follows proceeds in three steps. First, I shall briefly show how the idea of a social contract can be shown to model a conception of non-domination that has a social and political system based on equal influence and control at its heart. Second, I shall suggest that popular sovereignty and equal participation offer straightforward ways of fulfilling these criteria. Finally, I shall suggest that while certain forms of mix and contestation are compatible with these two Rousseauvian mechanisms, the latter constrain how far either of the former can be taken and still meet the normative criteria of equal influence and control.

A social contract offers a way of modelling what collective policies might be agreed in circumstances in which the parties to the contract possess equal influence and control over the relevant decisions and are equally subject to them. Note that it is not enough that the parties possess equality of input, it is as important that the outputs of any decision making process fall equally on them in a substantive as well as a purely formal sense. In other words, they need to have a roughly equal stake in the totality of collective policies and perceive them as forming a common good. Only then will they be motivated to pursue equitable policies. As Albert Weale has recently noted, a republican social contract can be compared in this respect to common property resource regimes that have been formed amongst roughly equally placed individuals in order to

secure a common good – such as wood from a local forest - to their mutual advantage.<sup>3</sup>

The notion of sovereignty comes in here. If the terms of the social contract are to be met within a political system, then citizens need to regard themselves as making policies for the collectivity and not just for themselves. Hence the need for the individual parties to the contract to incorporate themselves into the body politic. Such reasoning lies behind Rousseau's arguments linking the popular sovereignty of an incorporated citizenry with the general will and majority rule. The legitimacy of the general will and its link to majority rule rest on citizens seeking to identify policies that are to the advantage of everyone, taken as a collectivity, rather than of each person taken individually. For example, a policy such as London's Congestion Charge may be deemed beneficial to most Londoners, including London drivers, taken as a whole, but not to each and every individual driver taken in isolation. To identify such collective policies you need both to ensure all voices get an equal hearing, so that those who shout the loudest do not make policy, and to encourage each decision-maker to give equal consideration to these different voices when deciding what might be a good policy for the group as a whole. Therein lies the difference between 'the general will' and the 'will of all'. Only majority decision-making that has this dual aspect of encouraging equal inputs, on the one side, and placing them into mutual dialogue, on the other, will have the desirable qualities that Rousseau associated with the general will.<sup>4</sup>

Decisions possessing these qualities will not only accord different views equal respect, they will also show them equal concern. However, Rousseau's contention is that they will only manifest the latter feature to the extent citizens act as, and within the context of, a single sovereign body. By contrast, the former feature depends on citizens being equal and

active participants in decision-making. Rousseau was every bit as anxious as Pettit that not only should the determinations of the people give a direction to government policy, they should also be unconditioned by the executive and administration or any other persons or bodies external to the popular deliberative process. Yet, notoriously he felt that this goal required the rejection – or at least a strong suspicion of – representative government. In other words, it was essential to his argument that the direction for policy came directly from the people themselves and that they played an active role along with their fellow citizens in its positive articulation. Moreover, citizens could only be expected to modify their self-interest to conform to the common interest to the extent that they were directly engaged in deliberating with others.

Of course, Rousseau's arguments are fraught with ambiguities and obscurities that have given rise to contested interpretations. As I noted above, my purpose is not to expound let alone defend Rousseau *per se* so much as to put a case for the two elements of the neo-Rousseauvian position Pettit explicitly renounces – namely, popular sovereignty and equal participation. Just as he offers novel ways of developing the Italian-Atlantic traditions recommendations regarding the mixed constitution and contestation, including dropping elements that seemed crucial to earlier thinkers but seem less so to us (one will look in vain, for example, for any discussion of a citizen militia), so I would want to suggest that a similar licence can be granted to developing the Rousseauvian argument. In particular, Rousseau's strictures against representative government might be dropped to the extent the involvement of citizens in electing representatives to a sovereign legislature can be shown to capture the logic of his arguments regarding both sovereignty and participation without the drawbacks of direct democracy within a plenary assembly noted by Pettit. The crux here is whether emphasising these two elements

is incompatible with giving either a space or role to any form of contestation, as Pettit avows (pp. 14-15).

The neo-Rousseauvian aims at establishing a form of decision-making that comes from all and applies to all in ways that allows common interests to emerge that are informed by, but not just the sum of, particular interests. Pettit grants that his own arguments have a number of family resemblances to this project. In a similar way, he sees the aim of a democratic system as being to obtain ‘equally accessible influence in the imposition of an equally acceptable direction’ to public policy (p. 207). He also starts out by endorsing the ‘common sense’ opinion that equal participation in elections provides a key mechanism for meeting these conditions (p. 207). Moreover, he suggests that is most likely to happen in conditions that can be aligned with neo-Rousseauvian reasoning. For example, he favours a responsive over an indicative form of representation, and a representative assembly over an assembly of representatives on the grounds that the resulting legislature can thereby take ‘the form of a corporate agent that primarily tracks the electorate in the decisions it takes as a body.’ As a result, ‘the aggregate decisions of its membership are responsive to the dispositions in the electorate as a whole’ (Pettit 2012: 205-6). In other words, equal participation is most likely to generate a will that meets the criteria of equal acceptability in circumstances where the particular preferences of citizens get fairly balanced against and related to those of other citizens in the context of framing policies for the collectivity. A responsive electoral system based on majority rule that feeds into a representative assembly achieves this goal indirectly by giving representatives incentives to appeal to broad coalitions of citizens on the basis of a **wide-ranging** legislative programme in order to form a government.

However, although Pettit accepts that ‘electoral institutions’ form a ‘centrepiece of any democratic system’ (p. 207), he contends they are not strictly necessary to it if other ways can be shown to be more effective in giving citizens an appropriate form of equal influence and control over government policy. He identifies a number of potential problems with electoral mechanisms in this respect for which contestatory mechanisms offer an appropriate response (pp. 209-38). These problems boil down to three: elections may register either false negatives or false positives; the degree of control and influence they offer may be conditioned by the government’s capacity to evade, resist or manipulate it; and government’s may be subject to other channels of influence and control beyond those stemming from the electorate.

The first issue results from possible defects in the electoral process itself. Discreet and isolated minorities may have less than equal bargaining power because they can simply be ignored, yielding false negatives and raising the spectre of the tyranny of the majority. By contrast, other minorities may have more than equal bargaining power, perhaps as crucial partners in securing a majority, thereby producing false positives and the under acknowledged democratic problem of the tyranny of pivotal and powerful minorities. The second and third issues stem from the circumvention of the electoral process or its subversion from the outside. For example, executives possess an agenda setting power that can limit their responsiveness to the electorate. Additionally, they often have considerable discretion when reaching agreements at the international level. However, in doing so they may themselves feel their bargaining power is conditioned by the preferences of powerful business and financial interests or foreign governments. As Peter Mair noted, governments increasingly feel constrained by various unaccountable economic interests and institutions to act in ways they deem ‘responsible’

even when that involves ceasing to be ‘responsive’ to the preferences and concerns of voters.<sup>5</sup>

In both sets of cases, Pettit suggests that contestation offers a solution. Individuals need some alternative forum whereby they can reassert their influence and control by appealing to the norms of equality that underlie the democratic process itself. However, he argues the space for contestation is only possible in the context of a form of mixed constitution that even a neo-Rousseauvian would regard as both a confused and illegitimate undermining of sovereignty. The confusion arises from the way the mixed constitution multiplies the loci of decision-making, raising the concern that decision-making will either be incoherent if different bodies make decisions in different areas of policy, or become dead-locked if a decision can only arise through their concord or agreement. The illegitimacy of contestation stems from the suggestion that individuals can withdraw from the political process and claim a right against it. Rousseau, following Hobbes, suggests that we would then end up either with an infinite regress or anarchy, for ‘if individuals were left some rights ... there would be no common power who might adjudicate between them and the public’ (cited Pettit 2012, pp. 13, 229).

Pettit suggests that in adopting the objections of Hobbes (and Bodin) to these traditional republican forms, Rousseau is betraying republicanism. However, the underlying worry is very much a republican one, that of factionalism. Although the contestation allowed by a mixed constitution may offer a response to the three problems mentioned above, it can also itself be a source of them. Any mechanism will prove easier for some groups to use rather than others. Voting in free and fair elections may have its limitations but has the advantage of being relatively costless for the voter. Most forms of contestation require more in the way of direct organisation and effort by citizens themselves. As such, they



favour those who can be easily organised and have the time and resources to do so, and who have clear and effective forms of protest available to them. A strike by air traffic controllers will be easier to organise and have a far greater impact than, say, action by the disadvantaged protesting against their poverty or unemployment. A dispersed group with little bargaining power may form an even more discreet and isolated minority when it comes to contestation than they do in elections, where parties have incentives to recruit their votes. As a result, contestation may itself give rise to false negatives and false positives. Likewise, contestation by powerful groups may be a factor in conditioning government responsiveness. For example, powerful private interests may threaten to contest public interest legislation through the courts as a way of winning concessions. If the worry with electoral mechanisms is that a concern for the general interest may fail to give due weight to the particular interests of certain individuals or groups, then the problem with contestatory mechanisms is that the empowerment of particular interests may subvert the general interest. The mixed constitution has a way of multiplying veto points, benefitting vested interests with most to lose from any change in the *status quo*. Instead of motivating the search for public policies that meet Pettit's equal acceptability criteria, contestation risks only allowing those policies that each accept.

The above might be thought to suggest that what is needed is a balance between electoral and contestatory mechanisms that would itself favour some form of mixed constitution, so that the critique of the neo-Rousseauvian insistence on the sovereignty of a single collective decision-making body stands, even if electoral mechanisms get a more prominent role than Pettit gives them. In assessing this contention it is helpful to distinguish constitutional forms that *separate* power in various ways, on the one hand, from those that *balance* power, on the other, while

noting that only certain kinds of both need involve *sharing* power. As Pettit notes (p. 221), the problem lies with sharing whereas there are versions of separation and balance that remain compatible with - and possibly even require - the final decision resting with a single body. For example, separating the political sphere from the influence of powerful private companies through such measures as limitations on campaign finance is entirely in line with neo-Rousseauvian prescriptions, although in enhancing the equity of the electoral process it arguably limits the scope for contestation – albeit, *pace* the Supreme Court in *Buckley*, legitimately so. Likewise, the devolution of the power to decide certain issues to discreet territorial subunits simply makes those bodies sovereign within these domains. Though Pettit says comparatively little about the mechanics of electoral, parliamentary systems, perhaps the most important form of balance in working democracies is between government and opposition parties both at elections and within the legislature. This balance combines electoral and contestatory mechanisms in a powerful way, giving politicians a continual incentive to ‘hear the other side’. Again, it can operate very effectively in single chamber democracies such as the Nordic countries. There, as elsewhere, it often involves a form of sharing power that is again compatible with a sovereign decision-making chamber: namely, coalition government. Though coalitions are often criticised for distorting the electoral process and can give undue weight to minority views, they can also serve to enhance equal influence and control and offer incentives to seek policies that are equally acceptable.

Contemporary understandings of constitutionalism tend to downplay or even ignore these forms of separating and balancing power in which contestatory and electoral democracy go hand in hand, and which played a strong role in earlier constitutional thinking, and

concentrate instead on those mechanisms that place them at logger-heads. Rights based constitutional judicial review is the most well known example. Yet, when it involves a strike down power, then arguably it generates precisely the problems that Rousseau worried about. On the one hand, it raises the problem of who is to judge between two bodies, the Court and the legislature, each of which may have conscientiously considered the rights at issue. If the Court has a strike down power, then sovereignty has effectively passed to a body with minimal democratic credentials. On the other hand, in claiming a right to counter the considered view of rights offered by the representatives of fellow citizens, the individuals or groups making such claims put themselves outside the political process and the search for a collective view of rights on an equitable basis with others.<sup>6</sup> A standard way of attempting to meet this critique is to argue that a constitution represents the will of the constitutive if not the constituted people. In its standard form, that suggests - in ways Pettit criticises - that the original consent of the people trumps their on-going control. It also begs the issue of whether Courts are truly bound by that consent rather than simply deciding uninfluenced and uncontrolled by either people or their law. Of course, that does not deny that Courts can have an important role to play in highlighting inconsistencies in legislation and unforeseen anomalies and injustices in their application to particular cases. Yet, as in Westminster and Nordic political systems, that fire alarm role only requires 'weak' rather than 'strong' judicial review, of a kind consistent with the legislature remaining sovereign.<sup>7</sup>

Similar considerations arise with a second chamber. If these are seen not as legislative so much as review and scrutiny bodies, then that need not involve two chambers sharing in the legislative process in ways that deny the sovereignty of one of them ultimately to decide. Indeed, a

second chamber's scrutiny role may be best served through its members being separated from participation in the executive or from proposing legislative measures of their own, so as to guarantee their independence from government or governmental and legislative ambitions proper.<sup>8</sup> By contrast, bicameral legislatures that require concord between two sets of elected bodies, each of which has pretensions to govern, can create a joint decision trap, as Fritz Scharpf memorably put it, that increases transaction and policy costs as pork gets barrelled out to all the interests looking to be bought off.<sup>9</sup>

The mixed constitution originated in class divided societies, its aim being to prevent the majority, as the popular element was known, from over-ruling the interests of the aristocracy or minority.<sup>10</sup> Counter-majoritarian devices risk continuing this historic role of upholding the interests of the privileged against the demands of the underprivileged into the democratic era. Pettit takes MacDonagh's classic studies of the British nineteenth century revolution in government as illustrating the power of a process of democratisation to harness an evolving understanding of general public norms to promote social equality (pp. 270-72). Yet it is notable that during precisely this same period many of the measures he records – such as the lowering of working hours and the abolition of child labour – were, along, of course, with the even worse evil of slavery – actively blocked by the ultra contestatory Italian-Atlantic system of the United States.<sup>11</sup> The changes charted by MacDonagh were effected by the responsiveness of a representative assembly to the general will of the majority.

It might be countered that the anti-slavery and civil rights movements in the US, along with the woman's movement and the development of organised labour in the UK, support Pettit's contention that we should prioritise the constitutive over the constituted people as

the source of popular sovereignty, and that people's control over government rests on their being ever ready to resist and reconfigure the established order. This interpretation makes the willingness to contest – what Adam Ferguson called the 'refractory and turbulent zeal' of the people - the ultimate source of their liberty (cited p. 173). Pettit also presents this argument as an anti-Rousseauvian point, since Rousseau held that moving outside the constituted order entailed returning to the state of nature. Yet, Rousseau's point was that republican liberty is a civic achievement – it is not what Pettit once referred to as the natural liberty of the heath but achieved within the city.<sup>12</sup> As such, it requires that a people remain sufficiently constituted that they see themselves as a people, possessing the tools – that only political society can offer – of ongoing, collective control. In conceiving such control as politically constituted through the practices of democracy rather than a pre-political legal constraint on governments, the neo-Rousseauvian can see the constituted people as being at the same time involved in a process of continuous self-constitution. Again, the achievement of nineteenth century Britain relative to either continental Europe or the United States is instructive. It showed how 'the refractory and turbulent zeal of this fortunate people' required neither revolution nor war to obtain the necessary reforms, whereas in the United States the constitutive people were constantly appealed to as a block on the majority will of the constituted people.

To conclude, I have argued that the Rousseau-Continental tradition of republicanism can accommodate more of the Italian-Atlantic tradition than Pettit allows. Indeed, to a degree the one needs the other – they complement each other. Yet, this complementarity takes place within the confines of a broad neo-Rousseauvian concern with sovereignty and participation and the link between the collective deliberation of a

constituted people with an equitable concern with the common good. Contestation plays an important part in any democratic system of equal influence and control. However, contestation can only avoid creating the very distortions it seeks to mitigate when it offers a supplement to, rather than a substitute for, electoral mechanisms designed to reflect the majority will of the people.

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<sup>1</sup> E.g. R. Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise*, London: Routledge, 1997, especially Ch. 5 and R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* Cambridge: Cambridge University Press, 2007, especially Ch. 4.

<sup>2</sup> P. Pettit, 'Democracy: Electoral and Contestatory', *Nomos* 42 (2000): 105-44.

<sup>3</sup> A. Weale, *Democratic Justice and the Social Contract*, Oxford: Oxford University Press, 2012.

<sup>4</sup> See Brian Barry, 'The Public Interest', *Proceedings of the Aristotelian Society* (1964), 38: 1-18.

<sup>5</sup> Peter Mair, 'Smaghi vs. the Parties: Representative Government and Institutional Constraints', Paper prepared for the Conference on Democracy in Straightjackets: Politics in an Age of Permanent Austerity, Ringberg Castle, Munich, March 23-26, 2011.

<sup>6</sup> I make this argument in detail in *Political Constitutionalism*, Chs 1-3.

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<sup>7</sup> On the ‘weak’/‘strong’ judicial review distinction, see J. Waldron, ‘The Core of the Case Against Judicial Review’, *Yale Law Journal* (2006) 115: 1354-55.

<sup>8</sup> J. Waldron, ‘Bicameralism and the Separation of Powers’, *Current Legal Problems*, 65 (2012), pp. 31–57.

<sup>9</sup> F. W. Scharpf, ‘The Joint Decision Trap: Lessons from German Federalism and European Integration’, *Public Administration*, (1988), 66:3, 239-278.

<sup>10</sup> R. Bellamy, ‘The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy’ *Political Studies*, (1996) 44: 436-56.

<sup>11</sup> Details in Bellamy, *Political Constitutionalism*, pp. 34-35.

<sup>12</sup> A point Pettit himself endorsed in his ‘The Freedom of the City: A Republican Idea’, in A. Hamlin and P. Pettit (eds) , *The Good Polity: Essays on the Normative Theory of the State*, Basil Blackwell, Oxford, 1989, pp. 141-88