

# Book Review

*Beyond the Republican Revival: Non-Domination, Positive Liberty and Sortition*  
by Eric Ghosh (2020) Hart Publishing, 264 pp  
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**Richard Dagger\***

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*Beyond the Republican Revival* is in some ways a curious title for Eric Ghosh's exploration of important controversies in recent political philosophy and constitutional theory.<sup>1</sup> As Ghosh is aware, 'Beyond the Republican Revival' is also the title of a much-cited article that Cass Sunstein published more than 30 years ago in the *Yale Law Journal*.<sup>2</sup> Ghosh barely mentions Sunstein's article, however, and reserves his most extensive comment on it to a few lines in a footnote on page 156 of his book. Notwithstanding the shared title, then, Ghosh's book is in no way a response to Sunstein's article.

Perhaps an even more curious feature of Ghosh's title is that he never makes clear the point of its preposition. To be sure, there is much discussion of attempts by notable scholars in the last half century or so to revive the republican tradition of political theory, and some of this discussion is quite illuminating; but in what sense Ghosh proposes to go beyond these neo-republican writers is never settled. Does he want the reader to regard his book as an attempt to deepen and extend the republican revival, or does he want us to conclude that the revival, interesting as it has been, is an exhausted effort that ought to be abandoned?

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\* Professor Emeritus, Program in Philosophy, Politics, Economics, and Law, University of Richmond, Richmond, Virginia, USA. Email: [rdagger@richmond.edu](mailto:rdagger@richmond.edu).

<sup>1</sup> Eric Ghosh, *Beyond the Republican Revival: Non-Domination, Positive Liberty and Sortition* (Hart Publishing, 2020).

<sup>2</sup> Cass R Sunstein, 'Beyond the Republican Revival' (1988) 97(8) *Yale Law Journal* 1539.

Although that question is never clearly answered, one of the virtues of Ghosh's book is that it calls into question the use of the singular word 'revival'. It would be more accurate, as he shows, to refer to two republican revivals in the last half century. The first is the one to which Sunstein and others referred in the 1988 issue of the *Yale Law Journal* devoted to 'the republican revival'. Ghosh associates this revival with the advocacy of positive liberty: that is, the 'conception of liberty ... so closely tied to the claim that the best life is one of active political participation aimed at the public good that one does not count as free unless one leads this life'.<sup>3</sup> Prominent figures in this revival, according to Ghosh, were Hannah Arendt, JGA Pocock, and Michael Sandel.

The second revival, which Ghosh takes to begin roughly with the publication of Philip Pettit's *Republicanism: A Theory of Freedom and Government* in 1997 and Quentin Skinner's *Liberty before Liberalism* in the following year,<sup>4</sup> centres on a different conception of liberty. This is not a 'positive' conception, Ghosh argues, but neither is it 'negative' as negative liberty is usually understood — that is, as freedom from interference. Instead, the distinctive feature of republican liberty, according to Pettit, Skinner, and their now-numerous followers, is that it is freedom from domination (or freedom as non-domination). Ghosh regards this shift in emphasis as important enough to warrant the use of 'the term "non-positive" [rather than "negative"] to include Pettit's and Skinner's interpretations of republican liberty'.<sup>5</sup> That is only half the story, however, for he later characterises 'liberty as non-domination as non-negative' and as 'non-positive' in order 'to distinguish it from the positive liberty associated with the [first] republican revival'.<sup>6</sup>

While the first revival took its inspiration largely from ancient Athens, the second has looked primarily to ancient Rome, as Skinner's application of the term 'neo-roman' to the vision of liberty shared by English republicans of the 17<sup>th</sup> century attests. This conception of 'neo-roman' or 'non-positive' liberty is Ghosh's primary concern throughout Part I, which is the longest of his book's three parts. He attends to positive-liberty republicanism in Part II, which concentrates not on Sunstein's 'Beyond the Republican Revival', but on two essays by another legal scholar, Frank Michelman.<sup>7</sup> In Part III, Ghosh makes the case for 'the republican device of sortition', or selection by lottery, as an effective response to the well-known counter-majoritarian difficulty posed by judicial review.<sup>8</sup> In particular, Ghosh proposes to establish randomly selected juries, constituted in the manner of James Fishkin's well-known deliberative polls, and to empower each 'Citizens' Court' to declare democratically enacted laws invalid.<sup>9</sup> In this way, Ghosh argues, the protection of individual rights that judicial review affords can be made compatible with the democratic will of the people.

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<sup>3</sup> Ghosh (n 1) 5–6.

<sup>4</sup> Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997); Quentin Skinner, *Liberty before Liberalism* (Cambridge University Press, 1998).

<sup>5</sup> Ghosh (n 1) 8.

<sup>6</sup> *Ibid* 106.

<sup>7</sup> Frank I Michelman, 'The Supreme Court, 1985 Term — Foreword: Traces of Self-Government' (1986) 100(1) *Harvard Law Review* 4, Frank Michelman, 'Law's Republic' (1988) 97(8) *Yale Law Journal* 1493.

<sup>8</sup> Ghosh (n 1) 206.

<sup>9</sup> *Ibid* ch 9.

This proposal, and its attendant discussion and defence, is likely to be the part of *Beyond the Republican Revival* that commands the attention of readers who are more interested in constitutional theory than in political philosophy. For political philosophers, Ghosh's extended analysis of republican liberty, or liberty as non-domination, will be of greater interest. In both cases, Ghosh's conclusions are likely to be controversial. In the case of the proposal to institute a form of judicial review that replaces judges with panels of randomly selected citizens, the grounds for controversy are easy to anticipate. In the case of Ghosh's analysis of republican liberty, however, the controversy will turn on more abstract matters of scholarly dispute.

In part, Ghosh's claims about the nature and value of republican liberty are likely to prove controversial because the topic is already the subject of an ongoing controversy, and his intervention is not likely to settle the matter. Ghosh is well aware of this controversy, however, and he is generally fair to all parties — to Pettit, Skinner, and other neo-republicans, on the one side, and on the other to critics such as Ian Carter and Matthew Kramer, who maintain that there is nothing to be gained by replacing liberty understood as non-interference with liberty understood as non-domination. Ghosh also deserves praise for tracking most of the ways in which Pettit and Skinner have clarified, modified, elaborated, and defended their positions in the 20-plus years since the publication of *Republicanism* and *Liberty before Liberalism*. Most of all, in my view, he should be applauded for moving away from the dichotomy of negative versus positive liberty to a more complicated understanding not only of republican liberty, but, by implication, of liberty in general. For Ghosh to say that republican liberty is both 'non-negative' and 'non-positive' is perhaps not in itself of much help. The point, however, is that republican liberty incorporates elements of the negative and positive conceptions, and presumably is all the stronger for doing so. Ghosh also makes the point that the negative and positive conceptions are each more complex than they are often acknowledged to be. This point is especially important with regard to positive liberty, which he shows to be a term comprising several dimensions, not all of which neo-republicans ought to forswear. Pettit and Skinner have taken pains to deny that republican liberty is a form of positive liberty, he notes, because 'their interpretation of positive liberty is a narrow one: I describe it as a *full-blown positive conception of liberty*'<sup>10</sup> — that is, the kind of liberty advanced by Arendt, Pocock, and others in the first of the republican revivals. But republicans can reject this full-blown conception without rejecting other 'positive-liberty dimensions', such as the exercise of normative reason in the governmental sphere and the emphasis on civic participation as a way of protecting individual rights.<sup>11</sup> In these respects, Ghosh claims, Pettit and Skinner are advocating dimensions of positive liberty, and properly so, even though they have eschewed its 'full-blown conception'.

In making his case for this non-negative, but also non-positive, conception of liberty as non-domination, Ghosh relies almost as much on historical considerations as on conceptual analysis. He resembles Arendt, Pocock, Sandel, Pettit, and Skinner in this regard, despite his differing conclusions. Where Pettit and Skinner provide

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<sup>10</sup> Ibid 138 (emphasis added).

<sup>11</sup> Ibid 147 Figure 6.1.

accounts of 17<sup>th</sup> and 18<sup>th</sup> century political thinkers that sharpen the distinction between liberty conceived as non-interference and as non-domination, Ghosh reads the same thinkers — most notably Jeremy Bentham and William Paley, supposedly on the non-interference side, and James Harrington and Richard Price, in the non-domination camp — as encompassing elements of both conceptions of liberty. His defence of this position is well-grounded and carefully argued, but occasionally strained. This is notably so in the case of Harrington, whose response to Hobbes's critique of the non-domination view is often hailed by neo-republican writers. Hobbes's complaint, in Skinner's words, was that the citizens of the republican city of Lucca 'have no reason to believe that, as ordinary citizens, they have any more liberty than they would have had under the sultan in Constantinople', for 'what matters for individual liberty is not the source of the law but its extent'.<sup>12</sup> In other words, if the laws of a self-governing republic interfere more with the lives of its citizens than the decrees of a Turkish despot do with the lives of his subjects, then the Sultan's subjects may be freer than the republican citizens. Harrington's response, as Ghosh notes, was emphatic: 'in Constantinople, "the greatest bashaw is a tenant, as well of his head as of his estate, at the will of his lord"'.<sup>13</sup> To the neo-republicans, Harrington's retort places him squarely in the liberty as non-domination camp. Ghosh, though, argues that Harrington was not referring to the constraint imposed on the people of Constantinople that kept them 'from speaking or acting in such a way as to cause the sultan offence'.<sup>14</sup> In support of this claim, he offers some interesting comments on Harrington's position on property ownership in light of the Turkish system of land tenure. These comments, however, do nothing to diminish the force of Harrington's remark about the 'greatest bashaw' owing 'his head' as well as his estate to 'the will of his lord'.<sup>15</sup> Living one's life at the pleasure of a despot is surely a severe 'constraint', and Harrington's words here surely justify his placement among the champions of republican liberty as non-domination.

Of the historical figures he considers, Ghosh gives most attention to Price, the 18<sup>th</sup> century political and religious thinker. Indeed, Ghosh concludes that 'Priceian liberty' is not only a version of liberty as non-domination, as both Pettit and Skinner have held, but it is the best version. For one thing, it is a form that provides sufficient room for liberty as non-interference in addition to non-domination. Moreover, Priceian liberty includes dimensions of positive liberty while avoiding the over-reaching of the 'full-blown' conception of positive liberty. It also 'fits reasonably well within [what Judith Shklar called] the liberalism of fear'.<sup>16</sup> For these and other reasons, Priceian liberty is the conception of liberty Ghosh endorses.

This endorsement returns us to the question of what Ghosh means by the preposition in the title of his book. He endorses Price's conception of liberty as non-domination, but he insists that this is not a strictly republican conception, for it also accommodates at least one kind of liberalism. In similar fashion, he declares that his

<sup>12</sup> Ibid 62–3, quoting Skinner (n 4) 85.

<sup>13</sup> Ghosh (n 1) 63, quoting James Harrington, 'The Commonwealth of Oceana' in JGA Pocock (ed) *Harrington: The Commonwealth of Oceana and A System of Politics* (Cambridge University Press, 1992) 20.

<sup>14</sup> Ghosh (n 1) 63.

<sup>15</sup> Ibid 63 (emphasis added).

<sup>16</sup> Ibid 232.

proposed ‘Citizens’ Court’ relies on ‘the republican device of sortition’,<sup>17</sup> but he also is careful to qualify his position by saying, ‘while I tease out republican connections in these chapters [concerning sortition and judicial review], there is no intention to exclude other connections from being considered or highlighted’.<sup>18</sup> In the end, we are left to wonder whether Ghosh considers himself to be a republican, or perhaps a republican liberal, or something other than a republican. If we do move beyond the republican revival, will we be working within the republican framework or leaving it for something better?

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<sup>17</sup> Ibid 206.

<sup>18</sup> Ibid 215.

