

Liberty and the Rule of Law in Two Strands of Republicanism

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Abstract

Republicanism has been divided into two strands, neo-Athenian and neo-Roman. This division, unlike others, is made in its historical origin. These strands are distinctive in their own conceptions of liberty: neo-Athenians view liberty as self-government while neo-Romans it as non-domination. Accordingly they have different views of the relationship between liberty and the rule of law: neo-Athenians see it as circular while neo-Romans as constitutive. Their views give us new perspectives and make us conscious of their defects as well; neo-Athenians cannot expel domination from self-governing politics while neo-Romans cannot show that legal rule protecting non-domination has its own public legitimacy. However, they prove to be complementary and give rich resources for our debate over the rule of law.

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1. Introduction

Civic republicanism, rooted in ancient times in Europe, has lied under the history of political thought. It has experienced a lot of transitions adapting to each era and circumstance through a long history until today. Its implications amount massive and complex, therefore it is difficult to understand republicanism as a unique thought which integrates them all into a clear and strict doctrine. A number of alleged republicans has emerged in

many times and societies, but a simple line of republican tradition including all of them seems almost impossible to assume.

Then it is no wonder that republicanism is taken as complicated and intertwined 'strands' and often divided into some strands in order to unravel them. Among such divisions of republicanism is one made from the viewpoint of origin or birth. Under this kind of division, republicanism is supposed to have two strands: one is rooted in ancient Greek, Athena in particular, while another is in ancient Rome, the Roman Republic. Though this type of division might have been made before, it becomes more clearly conscious and shared in some materials on republicanism in recent days. Its source seems to be found in Philip Pettit's commentary on Michael Sandel's book, *Democracy's Discontent*, in 1998.

Before that moment, the so-called revival of civic republicanism had emerged in the history of political thought since the 1950s through the works by Hans Baron or John Pocock. By their academic influence, it had been an almost common recognition that republicanism was rooted in ancient Athena, or at least was vaguely mixed with some thoughts in ancient Greek and Rome. It had been shared by other republican successors, for example, Cass Sunstein and Frank Michelman in the republican theory of constitutionalism, or Charles Taylor and Sandel in the communitarian theory of politics.

After the late 90s, however, new republicans such as Quentin Skinner or Pettit began to show that republican origin is actually ancient Rome, not Greek, and call a group of republicans in English Civil War, successors via Renaissance rooted in the Roman Republic as 'neo-Roman'. It is within this context that Pettit's commentary on Sandel, as mentioned above, was published. In this article, Pettit named a strand of republicanism assumed by Sandel, 'neo-Athenian', meaning that this term is distinct from that of neo-Roman, for they have different views of liberty. Sandel himself didn't deny this term in his reply to Pettit. After their communication, it seems, the difference between neo-Athenians and neo-Romans has been more clearly conscious by many theorists, and they have identified their own position to either strand of republicanism in this difference.

However, these strands don't seem to have much academic interaction thereafter, and few pieces of research which compare them in detail are

found.⁽¹⁾ This might be because each of them tends to set up its own position against its rival political theory, modern liberalism, and then has little interest in internal difference within republicanism. But it seems strange to me that republicans have little interest in their historical roots, though they often try to derive authority from their origins.

This article, then, aims to compare these two strands of republicanism. Its main focus is on their conceptions of liberty and of the relationship between liberty and the rule of law. An abstract is mentioned above. In 2. I introduce the difference between neo-Athenians and neo-Romans in comparison to other divisions of republicanism. In 3. I explain their conceptions of liberty respectively. In 4. I consider how each strand derives a role of the rule of law from their conceptions of liberty. In 5. I raise some insights and defects in their views by shedding light on them from each perspective.

2. Two strands of republicanism

The tradition of republican thought can be divided into two strands from the viewpoint of origin or birth. I call this kind of division as ‘genealogical.’ In the genealogical division, on the one hand, it is supposed to be born in ancient Athena, the Greek polis in which democracy first emerged and had been the most prosperous. And the classical authority, which has often been quoted and commonly affirmed in this strand, is Aristotle’s *the Politics*, and his famous formula ‘man is by nature ζῷον πολιτικόν or a political animal’ has inspired a number of these republicans. In this strand *vita activa*, not *vita contemplativa*, has been recommended as the intrinsic happiness or the supreme good for human life. In other words, the most valuable human life is neither seeking the divine revelation through religious faith, nor finding the objective truth through philosophical reflection, but taking part in political arena positively with civic virtue and deliberating the common good all together as citizens in a republic. The ideal life in this strand is in a free polis, observed in democratic polities like ancient Athena, where people governed themselves and were not dominated by despots or foreign forces.

(1) A rare exception is Honohan 2002. He argues comprehensively republican theories and gives us the best introduction to them. And Richard Bellamy also deals with these strands, though he points out that both of them are ‘mistaken’ in that they argue for U.S. constitution in a legal sense. Bellamy 2008, pp.159-78.

If we raise some of the modern representative scholars in this strand, they would be Hanna Arendt,⁽²⁾ Pocock,⁽³⁾ Adrian Oldfield,⁽⁴⁾ Sandel,⁽⁵⁾ Michelman,⁽⁶⁾ Sunstein,⁽⁷⁾ Patchen Markel,⁽⁸⁾ Jürgen Habermas.⁽⁹⁾ I call this strand 'neo-Athenian' after Pettit's naming his rival strand.⁽¹⁰⁾

On the other hand, republicanism is also supposed to have its origin in ancient Rome, the Roman Republic in particular. The classical authorities are Cicero or Sallust, civic humanists who revived their heritage in Renaissance, Niccolò Machiavelli who was supposed to be influenced by them, and James

(2) Arendt stated in *The Human Condition* that the term such as *vita activa*, or *bios politikos*, derived from the polis life in Greek and Aristotle's sense. Arendt 1958, p.13.

(3) Pocock regards the civic humanist tradition in and after Renaissance as originated in Aristotle, in particular his *the Politics*. Pocock 1975, p.67. "We are, in short, confronted by the problems of interpreting a tradition of thought; but that tradition (which may almost be termed the tradition of mixed government) is Aristotelian, and *the Politics*, as well as forming the earliest and greatest full exposition of it, makes explicit so many of the implications which it might at one time or another contain[...]"

(4) "[...]if there is one place in western political thought where one might expect the themes of citizenship and community to be considered together, then it is the civic-republican tradition that has its beginnings in the ethical and political thought of Aristotle." Oldfield 1990, p.5.

(5) He cited Aristotle's *the Politics* and Arendt's *The Human Condition* as examples of 'strong' republican view. Cf. Sandel 1996, p.355, n.1.

(6) One might question that Michelman is really neo-Athenian. For he states with Sunstein that among republican premises is the anthropological that participation is 'public happiness' in Arendt's sense and the epistemological that 'practical reason' can solve social issues, and declared that the right path 'lies not through "public happiness," but rather through "practical reason".' Michelman 1986, pp.21–24. But it is sure that he understands the republican liberty as self-government with other neo-Athenians, except he attributes this idea to Kant — Kant, according to him, accepted the republican conception of liberty through Rousseau — not Aristotle.

(7) Sunstein suggests that elements of deliberation, one of the republican creeds, have been spread in American thoughts, which 'can be found in Aristotle' or Harrington.

(8) Markell says that control is different from involvement and questions the usurpation of involvement more than the control of domination. Markell 2008, pp.12, 31.

(9) He is basically critical of republican theories, for he refers to his own position as proceduralist that integrates both republicanism and liberalism, assuming that republicanism has some theoretical flaws. However, even though critical of it, he regards the republican conception of liberty as self-government, and at least takes a republican attitude when discussing the relation between liberty and the rule of law. Certainly, he quotes Michelman favorably. See Habermas 1996, pp.1485–86.

(10) Pettit 1998, p.82. As mentioned, Sandel himself does not deny this label.

Harrington in the English Civil War. In this strand, it is commonly recognized that the centralization of political power must always incur corruption and declination. Historical examples are too numerous to mention. Whoever or whichever branch seized the supreme power, increasingly abused it against others, and finally lapsed into ruin; whether a king or elites hold the power, the corruption was always an inevitable fate. Even people could not avoid the corruption after they held the sovereign power, as Polybius observed, for populist demagogues emerged or the majority oppressed the minority. It was never expected that corruption would be overcome by cultivating civic virtue on them: democracy or education was not a solution. Addressing this issue, Romans invented the republic constitution for the decentralization of political power. It was a mixed government composed of one, a few, and mass rule, as Consuls, Senatus, and Plebs in the Roman Republic, where these three branches were supposed to check the abuse of power each other lest one branch held the supreme power. If we raise some of the modern representatives in this strand, they would be Skinner,⁽¹¹⁾ Pettit,⁽¹²⁾ Maurizio Viroli,⁽¹³⁾ Jean-Fabien Spitz,⁽¹⁴⁾ Frank Lovett.⁽¹⁵⁾ I call this strand 'neo-Roman' after Skinner's naming this strand.⁽¹⁶⁾

(11) He first named Harrington and others 'neo-Roman', finding the Roman view of civic liberty in the Civil War during the middle of the 17th century. Skinner 1998, p.ix.

(12) Pettit 1998, p.83. He is consent with Skinner to be in the neo-Roman strand.

(13) He asserts that Machiavelli, which he regards as the source of republican thought, is a person attributed to the Roman tradition. "[W]e should study his[Machiavelli's] works as the highest point of the tradition of Roman *scientia civilis*." Viroli 1998, p.4

(14) He is considered to be in a position closer to neo-Roman, for he early introduced the idea of liberty as non-dependence and tried to put his interpretation of Rousseau in the strand. Cf. Spitz 1995, p.180, "La meilleure manière de comprendre en quoi consiste l'aspiration républicaine à la liberté est sans doute de partir de ce qui, aux yeux de cette forme de pensée, en constitue la négation, à savoir la servitude. La servitude est la condition de celui qui dépend de la volonté d'autrui, qui est exposé à ses caprices, qui est vulnérable aux fantaisies et à l'arbitraire de sa volonté," pp.405-06, "Rousseau montre ainsi que le sort de la liberté est solidaire de celui des lois."

(15) A reservation may be necessary to add him in the neo-Roman strand, for his main concern is the analysis of domination, not republicanism itself. Cf. Lovett 2010, p.9. "[C]ivic republicanism is, for me, a ladder to be thrown away once it has been climbed." However, he can be regarded as one of neo-Romans, to the extent that the idea of domination itself is a neo-Roman theme.

(16) Skinner 1998, pp.ix-x. He actually titles 'neo-roman' by lower-casing the initial letter of

It is often controversial in the history of political thought to which strand republicans belong. The main focus of the conflict is on Machiavelli or James Madison. Whether they are neo-Athenian or neo-Roman is not an easy problem to solve and needs much effort to consider. But this kind of problem is irrelevant to my argument because it aims to consider how republican conceptions of liberty relate to the role of the rule of law. Then I don't step in this matter and will leave enough room for later considerations on whether each republican belongs to neo-Athenian or neo-Roman. For the moment I only assume that there are two strands of republicanism.

Some comparisons with other divisions

Republicanism is divided not just genealogically but also in other manners. Here I try to compare these divisions because they will make some presuppositions to the latter argument. It might be rather complicated or bothersome, so you readers, who don't have much interest in such a trivial argument, may skip this sector to 3.

A difference from the division of intrinsic / instrumental republicanism

First, the genealogical division is different from the well-known one between intrinsic / instrumental republicanism. The latter division is often made by contemporary liberals, like John Rawls and Will Kymlicka. This liberal division is set to judge republicanism from the viewpoint of value pluralism — whether it is incompatible with modern pluralistic societies, in other words, whether it would assume civic virtue and political participation as the supreme good. If republicans intend that people should take part in a public arena and the government must cultivate civic dispositions on them, they are supposed to be on the intrinsic side because they admit the highest value of virtue and participation among others. In contrast, if they suppose that people should take part in political deliberation for the sake of maintaining the constitutional system of basic rights, they are on the instrumental side because they take participation as just means for liberal goals. The former is not, but the latter is, compatible with pluralistic societies where people have various views of a good life. This division, which proves to be made

'Roman.' In this article, I use upper-case R because a contrast of neo-Athena and neo-'roman seems asymmetrical.

from the viewpoint of pluralism, has been argued elsewhere.⁽¹⁷⁾ In this article, I just focus on the difference between the liberal and genealogical division.

At a glance, the liberal division might seem to be paralleled with the genealogical one. You might have an impression that intrinsic republicanism accords with neo-Athenian, while instrumental with neo-Roman. This impression is not unnatural because Rawls, who made this division famous, assigned Aristotle and Arendt to the former, and Machiavelli and Skinner to the latter.⁽¹⁸⁾ And it might be enhanced because Sandel, who professes himself neo-Athenian, assumes the intrinsic position.⁽¹⁹⁾ It might be contributory that Skinner and Pettit don't tend to emphasize the conflict with liberals or theorists of negative liberty.

However, we should not forget that the criterion of division between neo-Athenians and neo-Romans is based on their origin or birth, and as the latter argument will show, there is a radical difference between their conceptions of liberty. At least theoretically, the reverse pairing is possible: neo-Athenians can take an instrumental position — self-government is a mean for protecting the basic right — while neo-Roman an intrinsic one — non-domination itself is important for our good life.⁽²⁰⁾ However, the liberal division is now widely accepted even by republicans themselves, like Sandel or Pettit, and hence predicted to be better-known. I suggested that it would confine the theoretical

(17) Omori 2013, pp.8-26.

(18) He distinguished classical republicanism from civic humanism. Rawls 1993, pp.205-06. In the passages, he stated that his political liberalism is compatible with the latter because it upholds the instrumental role of virtue for maintaining the constitutional regime, but not compatible with the former because it sustains the intrinsic value of virtue, the particular conception of a good life. His distinction has afterward been accepted by many liberal scholars. See Omori 2013, pp.4-13.

(19) Sandel declares in the controversy with Pettit that his position is intrinsic — 'strong' in his word — version of republicanism. "Of the two versions of republicanism — the modest version and the strong one — the second seems to me the most persuasive." Sandel 1998, pp.325-26. See also Sandel 1996, p.26. "[T]he republican sees liberty as internally connected to self-government and the civic virtues that sustain it. Republican freedom requires a certain form of public life, which depends in turn on the cultivation of civic virtue."

(20) Actually, Lovett's position might be considered as the intrinsic version of neo-Roman, while Michelman's and Sunstein's as the instrumental version of neo-Athenian.

potentials of republicanism within liberal framework, but this is not a central issue for the moment.⁽²¹⁾ In this article, I just say that this kind of parallel usage is misleading, so I take the genealogical division as different from the liberal one.

A subtle difference from the distinction of virtue / institution faction

Second, the genealogical division has a delicate relation to the difference between virtue and institution faction. These two divisions can be said to be either homogeneous or not. The latter is the difference of approaches to how we can establish sound integrity of polity by making public and private goods compatible, in other words, how we can save the polity from corruption by protecting a government from individual ambitions. On the one hand, the virtue faction implies that the sound government would be possible only if all of the citizens have good dispositions. Even the most stubborn regime could not work without virtuous governors and citizens who would cooperate to maintain it. On the other hand, the institution faction underlines that the government could be established and protected from corruption on the firm structure. It could work well under the sound legal system without allegedly 'virtuous' governors nor citizens who would fall into descent someday. This division refers to the difference of measures with which people defend against corruption, so I call this 'preventive.'⁽²²⁾

At first glance, the genealogical division seems to be parallel to this preventive distinction. That is, neo-Athenian strand looks homogeneous to virtue faction, and neo-Roman to institution faction. To be sure, already in ancient times, Aristotle assumed that citizens as the political animals had civic virtues, and Romans tried to set up the mixed government to prevent corruption after having abolished kinship. Also in recent days, neo-Athenian Sandel suggests that the formative project of civic virtue would be a

(21) I have already discussed this matter in Omori 2013, see pp.13–26.

(22) This difference between virtue and institution faction is what Skinner finds in the development of political thought since the Renaissance. Skinner 1978, pp.44–45. Among this distinction, Thomas Simpson clearly stands on virtue faction. He denies Pettit's 'institutions-only approach' and states that "[t]he lesson for the republican tradition is that civic virtue is vindicated as necessary for liberty", and the endorsement of virtue approach "is central to the republican tradition." Simpson 2017, pp.51–52.

prescription for democracy's discontent,⁽²³⁾ and neo-Roman Pettit envisages various institutional settings for reducing domination.⁽²⁴⁾

However, I don't think that the genealogical division is completely paralleled to the preventive distinction. At least each strand, neo-Athenian and neo-Roman, cannot be said to rely on either of virtue and institution. It seems that each strand has an interest in both approaches to protect and maintain liberty.

On the one hand, neo-Athenians, not unconcerned with institutions, prefer them as a mechanism for achieving self-government. Sandel, for example, devises the formative project for cultivating civic virtue. In this argument, he takes some institutional conditions called 'the Political Economy of Citizenship' by evaluating the activities and proposing enforcement of Community Development Corporations, Sprawlbusters, the New Urbanism, Communities Organized for Public Service and so on.⁽²⁵⁾ Sunstein also draws some implications of classical republicanism and offers various proposals which expel the interest groups from politics and promote the deliberation in public space. He introduces the institutional implications of republican approach like Campaign Finance Regulation that can improve the market-centered selection, Federalism and Intermediate Organizations that can promote local-level deliberations, Statutory Construction that can urge discussions in law-making process and so on.⁽²⁶⁾ These practical and concrete proposals make us conscious of the fact that neo-Athenians have much interest in institutions, not just in civic virtue.

On the other hand, neo-Romans, not indifferent to civic virtue, regard it as an indispensable premise to uphold the institution. Viroli, for example, states that republicans have constantly claimed for centuries that liberty could survive only by virtuous citizens. Even if there is a legal system, it will not work properly without patriotism and morality, for these can be said as the motivation to serve *res publica* or common goods, and the cooperative foundation that promises the proper operation of the legal system.⁽²⁷⁾

(23) Sandel 1996, pp.324-28.

(24) Pettit 1998, pp.129-240.

(25) Sandel 1996, pp.321-49.

(26) Sunstein 1988, pp.1576-89.

(27) Viroli 2002, pp.12-13, 63, 69.

Skinner also points out that republicans have inherited the recognition that the civic virtue is indispensable for maintaining and guaranteeing freedom. Among others, “Machiavelli is restating, freedom is a form of service since devotion to public service is held to be a necessary condition of maintaining personal liberty.” Skinner also suggests that Machiavelli mentioned public sacrifice not for denying the pursuit of private interests but for maintaining the constitution which protects personal liberty because he “say[s] that *libertà*, both personal and public, can only be maintained if the citizen-body as a whole displays the quality of *virtù*.”⁽²⁸⁾ In addition, Pettit, though he calls virtue as civility, offers a more detailed analysis on why it is necessary for the republican regime. It must widespread in order to enjoy non-domination because the law can be generally supported by social norms, people can actively take part in the contestable process, and the law can be implemented effectively by legal sanctions.⁽²⁹⁾ Without civic virtue, the legal system cannot assure freedom. In this way, neo-Romans also admit that civic virtue, in addition to the institutions, is essential for protecting liberty.

As mentioned above, it is difficult to think that neo-Athenian and neo-Roman strands of republicanism completely correspond to virtue and institution factions respectively. Both strands have the common recognition that both virtue and institution are necessary for preventing corruption. Certainly, it can be thought that two strands overlap to some extent with the two factions respectively. More precisely, these strands might differ on whether virtue or institution is the main goal; neo-Athenians, though not all of them, tend to regard civic virtue as the primary aim of republican politics while neo-Romans are more concerned with institutional arrangements. It is plausible that they are seen to be parallel. However, a reservation seems necessary in view that they are perfectly the same.

The neo-Athenian strand includes the CV / PV versions

Third and last, the genealogical division is clearly different from the distinction between the cultivating-virtue (CV) and participating-deliberation (PD) version of republicanism. This distinction is not generally affirmed but

⁽²⁸⁾ Skinner 2002, pp.163, 211.

⁽²⁹⁾ Pettit 1997, pp.241-51. See also Pettit 1998, pp.87-88.

derives from my own argument. Once elsewhere I have set up this distinction in order to characterize the republican theory of law along with the PD, not the CV version.⁽³⁰⁾ But I didn't intend to offer a comprehensive chart of republicanism which can classify republicans into this or that category. By this distinction, I tried to show the republican way to overcome the liberal separation of the public and the private and reunite them. The CV version is set up to bring the private persons up to public citizens by cultivating civic virtue on them in small communities like a church or township. This position may be distinct in civic education: direct conversion of personality. It is supposed to be assumed by communitarians, for example, Sandel. On the other hand, the PD version is designed to set courses which can deliver the private voices into the public institutions by multiplying channels of collective decision-making and enlarging forum of dialogue and communication. This position is supported by theorists of deliberative democracy: collective policy-making through dialogue and consensus. It is composed by reconstructing Michelman's and Habermas's arguments. This distinction is made in my argument for showing different ways in which republicans deal with the liberal separation of the public and the private, so I just call this distinction 'expedient.'

Then, what relation does the genealogical division have with this expedient distinction? Two versions of this distinction, though they differ on how to reunite the public and the private, are common in interpreting freedom as self-government, not as non-domination. As the later discussion will show, self-government is the neo-Athenian conception of liberty, while non-domination is the neo-Roman. In this sense, it is unquestionable that both the CV and PD version are *neo-Athenian*, not neo-Roman, which means that they are included in one strand of the genealogical division. However, if added in a hurry, it will be more precise to say that it is an internal distinction within the neo-Athenian subset, for not all neo-Athenians are classified into two versions in the expedient distinction. It just cuts across the subset of the neo-Athenian strand; there might be a case that some neo-Athenians belong to neither version.⁽³¹⁾ Too complicated and trivial. But note

(30) For readers who want to know the detail, see Omori2006 (though not written in English).

(31) Though it may make you more confused, I dare to add that while both the CV and

that this expedient distinction will be introduced and conduct the exploration in the later discussion.

Enough discussion has been done over distinctions of republicanism. In sum, the genealogical division in this article is not the liberal division, does not parallel to the preventive distinction, and includes the expedient distinction in one strand. It is a distinction, unlike others, which focuses on the origin or birth of republicanism. But it has another important meaning. These two strands of republicanism, not just different in their roots, but are supposed to have distinctive conceptions of liberty.

3. Their conceptions of liberty

In this section, I will show how two strands of republicanism interpret the concept of liberty. Either of them is regarded as a unique strand, particularly because it has its own distinct view of liberty. Both strands have tried to characterize their republican views of liberty in comparison to that of liberalism, but differ on how to define it.

The neo-Athenian conception of liberty: self-government

Neo-Athenians consider republican liberty as self-government or self-rule. The idea of self-government traces back to democratic politics in ancient Greek and implies the direct rule by citizens. The famous Aristotelian formula might be regarded as expressing the features of self-ruling citizens. According to Pocock, Aristotle believed it as the supreme good that citizens on an equitable position actively participate in the political arena and decide what is the common good for them through discussion.

[T] he highest conceivable form of human life was that of the citizen who ruled as head of his *oikos* or household, and ruled and was ruled as one of a community of equal heads making decisions which were binding on all.⁽³²⁾

PD versions are neo-Athenian, if we notice that neo-Athenian strand overlaps virtue faction in the preventive distinction, the CV version is more connected with neo-Athenian to the extent which it emphasizes on virtue, but the PV version is less connected with neo-Athenian to the extent that it is close to institution faction. Please note that there is no assertion that the expedient distinction is a comprehensive classification of neo-Athenians.

⁽³²⁾ Pocock 1975, p.68.

This Aristotelian view of liberty is said to have inspired neo-Athenians. They have believed that self-government is the supreme good, and at the same time, the essential activity for human beings. Self-government has the intrinsic value itself. This view is often contrasted with that of modern liberalism. Sandel, for example, states that the liberal view of liberty consists in an individual's freedom to choose private matters of his or her own. In other words, each person is free to decide his or her own matters concerning a way of life such as clothes, hairstyles, partner or faith, etc. But he insists that the republican idea of liberty is different from the liberal one, and notes,

Central to republican theory is the idea that liberty depends on sharing in self-government. This idea is not by itself inconsistent with liberal freedom. Participating in politics can be one among the ways in which people choose to pursue their ends. According to republican political theory, however, sharing in self-rule involves something more. It means deliberating with fellow citizens about the common good and helping to shape the destiny of the political community. But to deliberate well about the common good requires more than the capacity to choose one's ends and to respect others' rights to do the same. It requires a knowledge of public affairs and also a sense of belonging, a concern for the whole, a moral bond with the community whose fate is at stake. To share in self-rule therefore requires that citizens possess, or come to acquire, certain qualities of character, or civic virtues. But this means that republican politics cannot be neutral toward the values and ends its citizens espouse. The republican conception of freedom, unlike the liberal conception, requires a formative politics, a politics that cultivates in citizens the qualities of character self-government requires.⁽³³⁾

For neo-Athenians liberty does not mean what has been familiar to us since modern liberalism emerged and flourished, but lies in the tradition of classical republicanism that has already lost influence. The features of

(33) Sandel 1996, pp.5-6.

Sandel's definition is that this view of liberty is linked to the idea of civic virtue.⁽³⁴⁾ Participating in politics or discussing common goods is an only burden for us, especially for those who are accustomed to the freedom of choice in private life. In order to invoke responsibilities in citizens, empathy or common sense must be cultivated in small communities, like associations, synagogues, schools, shopping streets, and townships that were seen in the past days. The idea of cultivating civic virtue through such communities can trace back to the republican tradition since Aristotle. For him, the cultivation of civic virtue is essential to dealing with democracy's discontent.⁽³⁵⁾

However, some neo-Athenians, while they share the view of liberty as self-government by contrasting it with the liberal view, characterize it in a different way. Michelman, for example, suggests that liberty has been considered since Descartes in a negative sense, as being able to choose what an individual desires as long as there is no external compulsion. He calls the position that insists on this kind of idea as 'decisionism,' though he doesn't seem to identify it to liberal tradition, by attributing it to our common sense since the modern times. Contrasting to this negative view of liberty, he calls the positive view as 'self-government' by consulting the Kantian philosophy. In this positive view, selecting as one desires, which means the obedience to one's inclination, is regards not as freedom but as subjection. Michelman

(34) Sandel 1996, p.26 "[T]he republican sees liberty as internally connected to self-government and the civic virtues that sustain it. Republican freedom requires a certain form of public life, which depends in turn on the cultivation of civic virtue. Some versions of republicanism construe the dependence of liberty on self-government more strongly than others. The strong version of the republican ideal, going back to Aristotle, sees civic virtue and political participation as intrinsic to liberty; given our nature as political beings, we are free only insofar as we exercise our capacity to deliberate about the common good, and participate in the public life of a free city or republic. More modest versions of the republican ideal see civic virtue and public service as instrumental to liberty; even the liberty to pursue our own ends depends on preserving the freedom of our political community, which depends in turn on the willingness to put the common good above our private interests."

(35) Sandel 1996, p.274. "Republican political theory teaches that to be free is to share in governing a political community that controls its own fate. Self-government in this sense requires political communities that control their destinies, and citizens who identify sufficiently with those communities to think and act with a view to the common good. Cultivating in citizens the virtue, independence, and shared understandings such civic engagement requires is a central aim of republican politics."

points that Kant worked well the internal tension of subjective and objective elements into a profound theory of freedom, and states,

In Kantian terms we are free only insofar as we are self-governing, directing our actions in accordance with law-like reasons that we adopt for ourselves, as proper to ourselves, upon conscious, critical reflection on our identities (or natures) and social situations. Freedom thus is compounded of both a volitional and a cognitive element of both will and self-knowledge. One might well call this Kantian ideal freedom as integrity. The Kantian sense of freedom has deep roots in the republican tradition. Kant himself was directly linked to republicanism through Rousseau, whose work inspired him.⁽³⁶⁾

In his explanation, the idea of self-government is characteristically linked to the function of participation and deliberation. Michelman, by deriving the premise of self-government from Kant, approves the Kantian ideal of self-legislation with the idea of citizenship. He states by citing Richard Bernstein that self-legislation is not made alone in oneself but 'socially situated,' which means that it must be made 'by encounter with different outlook in public arena.'⁽³⁷⁾ That is the feature that distinguishes him from those who emphasize on the cultivation of civic virtue like Sandel (remember the difference between the CV and PV version in neo-Athenians, as discussed in 2.). This difference, though not discussed in this section yet, will influence how neo-Athenians understand the relationship between liberty and the rule of law, as the later discussion will show.

Anyway, as we have seen so far, the neo-Athenian strand of republicanism, inherited Aristotelian philosophy, is supposed to be one union in that they share the view of liberty as self-government while contrasting it to the liberal view. However, it is not the only course of republican tradition. Another strand interprets the concept of liberty in a different way.

⁽³⁶⁾ Michelman 1986, pp.25-26.

⁽³⁷⁾ Michelman 1986, p.27.

The neo-Roman conception of liberty: non-domination

Neo-Romans consider republican liberty, in a way distinct from neo-Athenians, as non-domination or absence of dependence. The idea of non-domination can trace back to the Roman Republic, and its ancestors are regarded as Cicero, Sallust, and other historians. The Roman Republic, unlike Greek polis, was not governed in a democratic way by citizens. The Romans feared that democratic politics might fall into populism and majoritarian tyranny so that it would collapse the Roman regime itself. Likewise, the kingship and aristocracy also have the risk of falling into despot and oligarchies: Every single regime, through making a monopoly of political power, risks the corruption and depravity. Then it became their common recognition that the political regime must be composed of several branches, not one agency, so that any of them could not take control of all powers. They tried to protect the free polity by establishing the mixed government by one, the few, and the mass rulers so that each branch restrain and check each other not to monopolize political power. This commitment to the mixed government depends on their recognition that power always corrupts and their distrust in self-government by all citizens. Of course, it is also necessary to cultivate civic virtue for maintaining the regime, but if human beings cannot be kept fully virtuous, it would be the second best to prevent the corruption by the institutional system.

In this way, for neo-Romans, the greatest enemy to freedom is domination and dependence. They maintain that an unfree person is under the arbitrary will of others and is exposed to their interference at whim at any time. Whether a king, nobles, or a majority of people, whoever holds power, will end as tyranny, so that he or she would control vulnerable people and interfere with them at whim. So it is the most important for protecting their freedom to avoid such domination.

Great historical figures, whom Skinner describes as neo-Romans, like Machiavelli, Harrington, Marchamont Nedham, are supposed to have argued how inconveniently people depended on corrupt government in light of Sallust's ideal of life in *civitas libertas*. They asserted, Skinner points out, that people would lose their freedom when they depend on the arbitrary power of their ruler even if he or she would not actually exercise the power. Skinner notes,

You will also be rendered unfree if you merely fall into a condition of political subjection or dependence, thereby leaving yourself open to the danger of being forcibly or coercively deprived by your government of your life, liberty or estates. This is to say that, if you live under any form of government that allows for the exercise of prerogative or discretionary powers outside the law, you will already be living as a slave. Your rulers may choose not to exercise these powers, or may exercise them only with the tenderest regard for your individual liberties. So you may in practice continue to enjoy the full range of your civil rights. The very fact, however, that your rulers possess such arbitrary powers means that the continued enjoyment of your civil liberty remains at all times dependent on their goodwill.⁽³⁸⁾

For neo-Romans, liberty means the absence of dependence, that is, a circumstance where people are not subject to the whim or mercy of their ruler as a slave is. And neo-Romans also explain this view of liberty as non-dependence in comparison to the liberal view.⁽³⁹⁾ According to them, liberals don't take liberty as non-dependence; people don't lose their freedom simply by being subject to the arbitrary will of their master, because there is no real obstacle to their acts. Rather, people lose their freedom when they are actually subject to interference, for example, by suffering physical violence or intimidation by others. In contrast, for neo-Romans, interference itself doesn't mean a lack of freedom; people don't lose their freedom even when their ruler would restrain their bodies or deprive their income. Imprisonment or taxation is certainly a form of interference but doesn't make them unfree by itself. What matters to freedom is that there is no *ex-ante* rule; if a government declares in advance that it will exercise the public power when people commit a violation or public goods are needed, imprisonment or taxation, certain forms of governmental interference, doesn't infringe their freedom. People lose their freedom when their ruler would exercise the

(38) Skinner 1998, pp.69–70. Cf. Skinner 2008, pp.84–94.

(39) However, Skinner does not seem to make an emphasis on the contrast with the liberal view. He believes that “the fruits of Rawls’s hypothetical convention and of Machiavelli’s historical reflection turn out to be virtually the same.” Skinner 2002, pp.178–79.

power without any control of their will. Without any rule, a ruler would interfere with their free acts at whim whenever he or she likes to do.

Pettit also distinguishes the neo-Roman view of liberty from the liberal one. He asserts that while the emphasis in the liberal tradition is placed on 'quantity' of the conception of liberty, focus in republican tradition on 'quality',⁽⁴⁰⁾ and states that,

The quantity-centred conception is a conception of liberty under which the antonym is any form of restraint or interference. If unfreedom consists in being restrained, then freedom involves not being restrained: it involves non-interference, pure and simple. The quality-centred conception of liberty, on the other hand, is a conception under which the antonym is slavery or subjection or, more generally, any condition in which a person is vulnerable to the will of another. If unfreedom consists in being vulnerable in this way, then freedom involves not being vulnerable: it involves secure non-interference.⁽⁴¹⁾

This 'secure noninterference' mentioned above seems to mean a condition in which a person is guaranteed not to be 'vulnerable to the will of another' under a rule that restrains it: non-domination. It does not matter how much freedom is threatened, but *how* freedom is threatened. When a person is vulnerable to the arbitrary will of another, even if the former does not suffer actual interference by the latter at all, he or she would lose freedom. Liberty implies "emancipation from any such subordination, liberation from any such dependency."⁽⁴²⁾

Neo-Romans often consider their conception of liberty as 'the third way', which is different from two conceptions that have been widely accepted so far. The concept of liberty has been usually interpreted as either of two different kinds. Isaiah Berlin, for example, understood it in either positive or negative sense. In short, he suggested that the positive notion of liberty

(40) Pettit 1993, p.166.

(41) Pettit 1993, pp.169-70.

(42) Pettit 1997, p.5. *Ibid.*, p.52. "One agent dominates another if and only if they have a certain power over that other, in particular a power of interference on an arbitrary basis."

means that a person wishes “to be his own master”, not to depend “on external forces of whatever kind”, while the negative notion means that I am not “prevented by others from doing what I could otherwise do”.⁽⁴³⁾ Benjamin Constant also distinguished the view of liberty in a similar way; *la liberté des anciens et celle des modernes*.⁽⁴⁴⁾ Both Berlin and Constant prefer the latter to the former. Regardless of the pros and cons of both author’s conclusion, many theorists have contested over these two types of liberty along their terms. However, neo-Romans don’t believe that their conception of liberty falls under any of them.

Viroli, for example, asserts “[i]t is easy to see that the republican conception of liberty is neither the negative nor the positive liberty described by Berlin and Constant.” On the one hand, it is not negative in the sense that a person is not “merely in interference (being obstructed by others, as Berlin puts it) .” One is supposed to be free to the extent that he or she is guaranteed not “in the *constant possibility* of interference due to the presence of arbitrary powers.” On the other hand, it is not positive, though he calls ‘democratic,’ in the sense that a person has “power to establish norms for oneself and to obey no other norms than those given to oneself.” Rather, one is supposed to be free insofar as he or she is autonomous by being “protected from the *constant danger* of being subjected to constraint.”⁽⁴⁵⁾

Spitz also points out that Rousseau, whom he lists as a republican, is not caught up in Berlin’s dualist view of liberty. On the one hand, according to him, Rousseau’s conception of liberty is surely negative in the sense that it is defined as not being dependent on other’s will. But it also implies that it is impossible to act as one wishes without the preliminary rule that everyone defines together, an expression of *la volonté générale*. On the other hand, Rousseau does not support the definition of freedom that Berlin regarded as positive, because, for him, self-government is merely a means for being released from the surveillance of every master. But self-government, which is a translation of *la volonté générale*, is also the means constitutive of liberty, for citizens cannot have any security necessary to develop their

(43) Berlin 1958, pp.169, 178.

(44) Constant 1819.

(45) Viroli 2002, pp.40–41 [emphasis added by the author].

autonomous will without just and common rules.⁽⁴⁶⁾

However, neo-Romans often assert that though their conception of liberty does not fall under Berlin's dualist view, it has unquestionably a negative sense. The concept of liberty has so far been interpreted by liberals like Berlin in the negative sense that there is no interference or obstruction on what one wishes to do. However, it can also be interpreted negatively in a different sense from the liberal one. Skinner, for example, suggests that neo-Romans have consistently seen liberty as negative. "They have no quarrel", according to him, "with the liberal tenet that, as Jeremy Bentham was later to formulate it, the concept of liberty 'is merely a negative one' in the sense that its presence is always marked by the absence of something, and specifically by the absence of some measure of restraint or constraint." They just don't agree with liberals "that force or the coercive threat of it constitute the only forms of constraint that interfere with individual liberty." They admit that other forms, such as dependence on master's will, can infringe on your freedom.⁽⁴⁷⁾

Pettit also agrees with Skinner that the conception of liberty as non-domination is negative in a different sense from one that Berlin ascribed to it. According to Pettit, by Constant, Berlin, and even Pocock, republicans have long been regarded as preferring positive over negative liberty, "[b]ut this representation, I believe, is mistaken." In viewing the concept of liberty negatively, two possibilities are open; to be free from interference may mean simply to lack interference, but also to be protected against interference. The former option is assigned to the liberal tradition while the latter to the republican. Therefore, "the main figures in that [republican] tradition also show themselves to be mainly concerned with negative liberty."⁽⁴⁸⁾ The dualist view of liberty, which has been made up so far, is just misconceiving and misleading. The republican conception, non-domination, is "a third, radically

(46) Spitz 1995, p.445. "Mais la conception rousseauiste montre qu'il est impossible d'agir comme on le veut si l'on n'a pas au préalable défini avec d'autres la règle à l'intérieur de laquelle notre volonté peut se développer[...] cet auto-gouvernement qui se traduit par le règne de la volonté générale est un moyen constitutif de la liberté puisque, sans règles communes et équitables, les citoyens ne disposent pas de la sûreté nécessaire pour un développement véritablement autonome de leur volonté."

(47) Skinner 1998, pp.82-4. See also, Skinner 1990, p.300, Skinner 2002, pp.210-12.

(48) Petti 1993, pp.164-66.

different way of understanding freedom.”⁽⁴⁹⁾

In sum, neo-Roman republicans, inheriting the ideas of Cicero and Sallust through Machiavelli, understand liberty as non-domination, the guaranteed absence from interference, in contrast to the liberal conception as non-interference, a simple absence of obstruction. The neo-Roman conception is the third way, which does not fall under the dualist view of liberty, and an alternative to the liberal negative conception. For that, it is no wonder for them to lean toward the critical position against the idea of self-government, which Berlin defined as positive liberty.

Both strands conscious of the difference in their views of liberty

The difference between neo-Athenian and neo-Roman view of liberty, which has been mentioned above, is recognized by themselves. Both of them are conscious of the fact that they disagree on how a person is free. In the conclusion, the neo-Athenian conception of liberty as self-government, as connected to civic virtue, is regarded as dangerous by neo-Romans, while the conception as non-domination, just negatively conceived, is seen as insufficient by neo-Athenians.

The neo-Roman view of self-government

For neo-Romans, self-government, which neo-Athenians identify with the central feature of political liberty, is a misinterpretation of freedom and even the source of domination. Viroli, for example, asserts that it is a misunderstanding that republicans have regarded self-government as the highest political value among others. Republicanism has often been misconceived as one version of communitarianism, in which a self is supposed to be ethically identified with and embedded in a community. However, “[t] his interpretation of republicanism as a form of political Aristotelianism is a historiographical error. Republican theorist believed that being a citizen meant not so much belonging to a self-governing ethno-cultural community.” Therefore, it is also misleading to say that republicans have thought participation in self-government as the only, best way of life for citizens. For them, “it was not the main value or objective of the republic; it was a means to protect liberty

⁽⁴⁹⁾ Pettit 1997, pp.19–22.

and to select the best-citizens for positions of responsibility. It is often more important to have good rulers than to have citizens participate in every decision.”⁽⁵⁰⁾ The republican view of freedom is completely different from the democratic view of it as self-government. My autonomous free will is protected when I am not vulnerable to the arbitrary will of others, “not when the laws or regulations that govern my actions correspond to my will.” Rather, self-governing politics itself would generate domination by imposing some member’s will on others through legislation. “A law accepted voluntarily by members of the most democratic assembly on earth may very well be an arbitrary law that permits some part of the society to constrain the will of other parts, thus depriving them of their autonomy.”⁽⁵¹⁾

Pettit is also wary of self-government that might bring misunderstanding of freedom and harmful results. He is critical of neo-Athenians, particularly of Sandel. Pettit denounces him for that although he talks much about the significance of small communities such as school and church, he fails to find how to realize self-government in a complex and large society such as the United States today. And he doesn’t say enough about design of public regime, for example, what kind of institution can protect the republic against majoritarian tyranny. In addition, although he insists on the importance of civic virtue, he fails to explain concretely what kind of disposition it contains or how it supports the republic regime.⁽⁵²⁾ However, the main focus for Pettit is on Sandel’s view of republican liberty. Sandel regards it as internally and conceptually connected to self-government by attributing its root to ancient Greece and tracking the republican tradition from there. But Pettit puts “he is quite wrong.” What has been found in republicans in the long tradition, such as Machiavelli and Madison, “is a distinct neo-Roman republicanism, Ciceronian rather than Aristotelian in inspiration.” Therefore, the definition of political liberty as self-government is misleading in that it does not understand the history of republicanism properly. “Republican freedom is distinct”, of course, from the non-interference as liberals conceive, but at the same time, “from liberty as democratic participation.”⁽⁵³⁾ The neo-Roman

(50) Viroli 2002, pp.65–66.

(51) Viroli 2002, pp.41–42.

(52) Pettit 1998, p.81.

(53) Pettit 1998, pp.82–83.

view of liberty as non-domination is the better and more sophisticated interpretation than Sandel's, in that it gives us a proper explanation of the role of institutions protecting it and of civic virtue sustaining them.⁽⁵⁴⁾

The neo-Athenian view of non-domination

The neo-Roman view of liberty as a non-domination is, in turn, evaluated as insufficient and incomplete by neo-Athenians. Sandel, for example, criticizes neo-Romans like Pettit in that they disgrace the value of political participation and civic virtue as a result of viewing liberty as non-domination. According to him, republicanism is divided into two versions: one considers participation and virtue as its goals, another as only means for freedom. This division responds to the liberal one, as shown in 2., which distinguishes the strong or intrinsic version from moderate or instrumental one. Sandel explicitly confirms that he assumes the strong version by stating that this “seems to be the most persuasive.” He admits the inherent value of participation and virtue through tracing back to Aristotle and approves self-government of political community that influences our destiny. Pettit, in contrast, rejects the Aristotelian notion that they are essential for good lives of citizens in the political community and argues for the instrumental version whose goal is to secure negative liberty as non-domination. However, for Sandel, this is “unlikely to be stable” in that it makes them only means for the sake of maintaining a regime that enables the pursuit of private ends. If we view liberty as self-government, not non-domination, they must be ends themselves, not just means for other goals. “Unless citizens have reason to believe that sharing in self-government is intrinsically important, their willingness to sacrifice individual interests for the common good may be eroded by instrumental calculations about the costs and benefits of political participation.”⁽⁵⁵⁾ The negative view of liberty as non-domination, he implies, would impair a clue of solution that might otherwise be gained in the republican tradition, as the liberal view does, so that it might aggravate democracy's discontent.

⁽⁵⁴⁾ On this point, such Pettit's negative conception of democracy is criticized by John Maynor, who notes that “he unnecessarily limits certain positive features brought about by active democratic participation.” Maynor 2006, pp.125-38.

⁽⁵⁵⁾ Sandel 1998, pp.325.

In tune with Sandel, Markel also points out that the neo-Roman view of liberty as non-domination is insufficient and incomplete. He states that though Pettit appraises non-domination as an ideal, he “question[s] Pettit’s claim that this ideal can serve as a *supreme* and *overarching* political value” because the notion of domination cannot explain a total map of what is at stake in imperialism.⁽⁵⁶⁾ The matter of imperialism is not only in that the empire would make people subject to the arbitrary will of the ruler, but also in that it usurps the right to take part in politics and decide by themselves what they do. In order to get back freedom from the empire, we have to give people opportunities for involvement, as well as control by putting the arbitrary will of the ruler under the law. However, Pettit, having made only non-domination effective for freedom, then comes to “have the unintended consequence of obscuring the significance of involvement and of usurpation.”⁽⁵⁷⁾ And Pettit suggests that *imperium*, the public domination in contrast with the private *dominium*, is problematic because the government puts people under the arbitrary will of the ruler, so to say, in the vertical relationship. However, for Markel, it is also problematic, if we look back to the case of Romans, because political power “was unduly concentrated; that is, because of the horizontal distribution of involvement it established among those who held *imperium* and those who did not.”⁽⁵⁸⁾ The case of master and slave, which is often invoked by Pettit, seems to have a different appearance if we observe it from the viewpoint of both control and usurpation; “Slaves are dominated to the extent that they are subject to a power of arbitrary interference by their masters; they are usurped to the extent that their involvement in this or that activity is interrupted or displaced. In many respects, slavery as a social form involved domination and usurpation simultaneously.”⁽⁵⁹⁾

The focus on the usurpation of involvement, Markel suggests, has significant implications for the idea of democracy. For Pettit, democracy is considered as a contestatory process, only a means to achieve the supreme goal of non-domination, while democratic participation is seen as a negatively

(56) Markell 2008, p.11 [emphasis added by the author].

(57) Markell 2008, p.12.

(58) Markell 2008, p.25 [italics added by the author].

(59) Markell 2008, p.27.

colored ‘populist’ act, which has given republicanism a bad name. By ‘depoliticizing democracy’, he draws merits from democracy by protecting liberty as non-domination. However, for Markel, this “depoliticization might be *at the same time* useful for and dangerous to democratic politics: the very mechanisms by which we effectively avoid certain forms of domination (like majoritarian tyranny) may simultaneously have the effect of undermining citizen involvement in the everyday practice of governance.”⁽⁶⁰⁾ Pettit, for Markel, viewing participation in democratic politics as only means, fails to properly understand liberty as self-government.

As mentioned above, both neo-Athenians and neo-Romans are mutually conscious of, and even hostile to, their rival view of liberty. On the one hand, neo-Romans criticize that liberty as self-government is misconceived and even dangerous source which might generate domination. On the other hand, neo-Athenians reproach the view of liberty as non-domination because it cannot explain the full meaning of democracy and provide a pathway for self-government. However, the more complex problem lies in the fact that the difference in their views of freedom influences their understanding of the relationship between liberty and the rule of law.

4. Their views of the relationship between liberty and the rule of law

Republicanism is sometimes misunderstood in ways that it disregards and even is hostile to the idea of the rule of law. It might be because it has at times been introduced vaguely as a theory of democracy in the historical context of anti-monarchy. Or it might be because liberals, which appeared as opposed to republicans, have exclusively developed theories of the rule of law. However, republicans have often affirmed the significance of the rule of law and even believed it as an ideal since ancient times. The recognition that the rule of law is important for maintaining the political regime and ordering social world has been widely shared by republicans, whether neo-Athenian or neo-Roman.

However, as shown so far, there is a difference between neo-Athenian and neo-Roman view of liberty. If the role of the rule of law is supposed to

⁽⁶⁰⁾ Markell 2008, p.29 [italics added by the author].

protect liberty, then there must be a difference about how to understand a relationship between them as well. In each strand, what relationship between liberty and the rule of law can be seen? This is the topic that I consider in this section.

The neo-Athenian understanding of the relationship: two subdivisions

How do neo-Athenians regard a relationship between liberty and the rule of law? Remember here, as shown in 2., that there are two versions in neo-Athenian republicanism; in the neo-Athenian strand, more exactly in its subset, cultivating-virtue and participating-deliberation versions are included. Repeatedly the CV version, assumed by Sandel and Oldfield, aims to bring up private persons to public citizens by developing their dispositions. By contrast, the PD version, sustained by Michelman and Habermas, seeks various channels to reflect private voices on public decisions by finding arenas of discussion in which ordinary citizens can take part. Both versions share an interest to overcome the liberal separation of the public and the private and to reunite them but diverge on how to do it. From the viewpoint of this article, both versions are considered to belong to neo-Athenian republicanism in their view of freedom as self-government, but they seem to differ in their views of the relationship between liberty and the rule of law. In conclusion, the relationship between self-government and the rule of law cannot be well depicted in the CV version but regarded as circular in the PD version. Let's see below.

No view of the rule of law in CV version

It is difficult to find some trace of the rule of law in the CV version. In the first place, it is said that CV theorists don't have so much interest in an ideal vision of political society as in an ontological assumption on the self. In a communitarian position, it tends to refuse the liberal view of the self, often called 'atomic' self, but does not go further to design public institutions in political society. Rather, it is inclined to find some hope for politics in small communities as a kind of seedbed to cultivate civic virtue.

Sandel, for example, proposes the formative project based on federalism. Federalism in its original sense is, neither a centralized state nor transnational government, based on a decentralized and local model. He finds hope for

self-government in dispersing sovereignty. Skeptical of global governance, he thinks it a right way to diffuse it 'downward'; Tocqueville's township or Jefferson's ward system will be a helpful example. However, "[i]f local government and municipal institutions are no longer adequate arenas for republican citizenship, we must seek such public spaces as may be found amidst the institutions of civil society — in schools and workplaces, churches and synagogues, trade unions and social movements."⁽⁶¹⁾ These small communities are important for self-government because they can offer their members local attachments, perspectives on common life, and habit of attending to public affairs.⁽⁶²⁾

In this way, CV theorists aim to educate citizens by cultivating virtue through small communities. However, in this course of argument, it is difficult to obtain suggestions on the role of the legal system in political society. Such an approach, which expects the ethno-cultural role of small communities, seems to tend to fall into the following difficulties — what I call 'trilemma of community politics.'

First, autism: self-governing politics is completely self-sufficient within each small community. Such a small community, even though it is self-governing, may be indifferent to other communities or wider society, so that it may not wish people from the outer world to join it. The Amish and Native Americans, for example, demand autonomy in education and territory but wish isolation from the secular society. Local attachment to a small community may make its members disdain the responsibility for a wide-ranging polity.⁽⁶³⁾ That means, as it were, the de-publicization of private concerns.

Second, overflow: Self-governing politics extends from a small community to a wide-ranging polity. A small community, though it occupies only some part of political society, would be strongly united around its intrinsic common goods, so that it might suppress and eliminate other members who cannot share it. In some Muslim countries, for example, a small number of members, who has a monopoly of religious and political power, maintains a society in which other religions and sects are excluded. These societies,

(61) Sandel 1996, p.348.

(62) Sandel 1996, p.314.

(63) Walzer 1998, p.176, Galston 1998, p.81.

which have been condemned by liberals, may violate the principle of separation of church/state and individual freedom of religion. That means, in contrast to autism, the full-publicization of private concerns.

Third and last, segregation: self-governing politics splits small communities and wide-ranging polity up to be coexistent and compatible. Each small community, although it does not wish to compel its doctrine over a wide-ranging polity, might not commit to and interact with the polity. Recent theories which expect the role of various institutions in civil society seem to be inclined to such a conclusion. That means, on a midway between autism and overflow, the re-separation of private and public spheres.⁽⁶⁴⁾

The CV version, an approach to reunite the public and private by civic education through small communities, seems likely to fall into this trilemma of community politics. From the perspective of this article, it gives us little suggestions about how a legal system would emerge from self-governing politics, or what limits the former would impose on the latter. In sum, this version cannot properly explain the function of the rule of law in relation to self-governing politics. It is difficult to find some neo-Athenian perspective on the relationship between liberty and the rule of law.

The view of the relationship in the PD version: circular

We can expect the PD version because it suggests, in contrast to the CV version, that liberty as self-government has a certain relation to the rule of law. Put briefly, it provides a model that political deliberation, through which liberty as self-government would be exerted, would generate law, which would, in turn, impose some restrictions on the deliberative process under legal framework. Here I will show, by introducing the view of PV theorists, that the relationship between self-government and the rule of law is considered as 'circular' in their arguments.

Michelman, for example, in order to interpret the U.S. Constitution in republican light, points out Harrington's influence on it. His famous phrase 'an empire of law and not of men', Michelman states, already fixed in the U.S. Constitution. Harringtonian idea is that the essence of politics is 'immediacy.'

(64) While I have ever pointed out '3. segregation' as one of the flaws in the CV version, here I generalize it within defects of community politics. Those defects were not mentioned in Omori 2006, pp.119-58.

Democratic politics means a process of self-government that brings 'not the freedom of rulers as a class apart,' 'but the freedom of each person as ruling and being ruled.' Of course, he thought like us today that it should not be distorted by passions or arbitrary will. However, what is supposed by him to stop an overflow of democratic politics is, not a law that goes beyond politics, but 'a reason in the debate of a commonwealth.' This phrase may give the impression of denying the rule of law, but actually not. Indeed, the reason in the debate of a commonwealth is the law for him. Thus political deliberation, while it is subject to legal restraints, would bring about legal results. "Deliberative political reason, it seems, must end by enunciating something — law — that ought to constrain the deliberation itself."⁽⁶⁵⁾

In another article, Michelman finds the circular relationship between self-government and law in Federalist's arguments as well. Through reading their texts, he calls 'jurisgenerative' a political process that gives the character of the law binding upon all citizens as self-given. This jurisgenerative process of politics, a term of not his but Robert Cover's, implies the circular relationship between politics and law. American constitutionalism, he asserts, depends on two assumptions over political freedom. The first means that people should determine for themselves the norms which will govern their social life, while the second means that people should enjoy legal protection against abuse of arbitrary power of government. In other words, the meaning of political freedom, on which U.S. Constitution assumes, includes both self-government and the rule of law. These two aspects are often the focus of discussion as contradictory, but after all it should be possible to think that they are "amounting to the same thing." We must regard these two as an essential requirement of political freedom and seek to integrate them. It is necessary to think both a role of politics as successive law-making and a role of law as political-distortions-correcting. Thus "law" in the "government of laws" formula must stand in a circular

(65) Michelman 1986, pp.41-43. "It is the legal character that marks the output of the debate both as the product reason[...]." And he also states in a note, "I can say at least (what must obvious) that republican legal rights are bound to be concerned with participation, capacitation, and emancipation. These themes are evident in various works of legal rights advocacy, and of rights-supporting normative theory, based on aims and assumptions that strike me as, broadly speaking, republican[...]." Ibid., p.43 n.94.

relation with politics as both outcome and input, both product and prior condition.”⁽⁶⁶⁾

This understanding is also sustained by Habermas.⁽⁶⁷⁾ He argues for a logical genesis of rights (*logische Genese von Rechten*) by contrasting it with the Kantian principle of law. This principle, he argues, upholds individual rights in the way that the liberty of each is compatible with equal liberty for all against the background of general law, what Kant called the Categorical Imperative. But this course of thinking leads to subordinate law to moral self-legislation, so that it cannot realize the idea of autonomy into the medium of law itself. Then what the idea of self-legislation by citizens requires that “those subject to law as its addressees can at the same time understand themselves as authors of law[...] It is only participation in the practice of *politically autonomous* lawmaking that makes it possible for the addressees of law to have a correct understanding of the legal order as created by themselves.” Only if those who obey the law at the same time make the law by themselves, they could have confidence in the law as legitimate and be subject to the compulsion of the law. “The key idea is that the principle of democracy derives from the interpenetration of the discourse principle and the legal form.” Habermas calls this ‘logical genesis of rights.’ It is a process whose beginning is applying the discourse principle to the general right to liberties and which ends by institutionalizing a legal condition of political deliberation. And this process, at the same time, retroactively makes the general right to liberties, which was at first abstractly posited, into a more elaborated and concrete shape. He seems to mean here that in this process political deliberation and legal framework interactively affect each other, and they progress simultaneously in parallel. “The logical genesis of these rights comprises a circular process in which the legal code, or legal

⁽⁶⁶⁾ Michelman 1988, pp.1499–1502.

⁽⁶⁷⁾ His stance is, as mentioned in the previous note, basically critical of republicanism, while he integrates it into his proceduralist theory. However, even though it is an object of criticism, he sees the republican freedom as self-government, and at least when he argues on the relation between liberty and the rule of law, republican colors appear. Certainly, he sometimes cites Michelman’s arguments favorably. Habermas 1996, pp.1485-86. I have argued that Habermas’s theory of ‘logical genesis of rights’ could be more easily understood along with and supplemented by Michelman’s idea of ‘jurisgenerative politics.’ Omori 2006, pp.159-231. Here I write on its summery.

form, and the mechanism for producing legitimate law — hence the democratic principle — are co-originally constituted.”⁽⁶⁸⁾

Perhaps Michelman may not accept the theoretical premises of Habermas, such as the co-originality of public and private autonomy or the discourse principle. However, it is important to find that both shares the recognition that law and politics, whichever comes first, have a certain relationship: circular. They seem to agree on that law as a public framework imposes restraints on and guarantees a sound function of deliberative politics, in which participants can exercise the freedom of self-government, and in turn such a political process results in legal crystals and makes concrete the general system of rights to liberties, in ways that individuals can enjoy them. In their understandings, legal framework and deliberative politics are constantly influenced and are in a relationship that supports each other. Thus neo-Athenians understand the relationship between self-government and the rule of law as circular.

The neo-Roman view of the relationship: constitutive

In contrast, neo-Romans consider the relationship between liberty and the rule of law as constitutive. They think that freedom as non-domination consists of legal protection that would restrict the arbitrary will of rulers; no freedom without law. They share the recognition that liberty is closely connected to and inseparable from the law in the thought of republicanism, historically or theoretically.

Skinner, for example, points out this fact in the history of republican thought. He states that the Sallust’s argument that freedom does not depend on the arbitrary exercise of power and needs to submit it to the law, was inherited through Machiavelli, in the literatures authored by defenders of the Commonwealth in England, such as John Hall, Francis Osborne, Nedham,

(68) Habermas 1992, S.153-55 (pp.120-22) [emphasis added by the author]. “[...]daß sich diejenigen, die als Adressaten dem Recht unterworfen sind, zugleich als Autoren des Rechts verstehen können [...] Nur die politisch autonome Rechtsetzung ermöglicht auch den Adressaten des Rechts ein richtiges Verständnis der Rechtsordnung im ganzen [...] daß sich das Demokratieprinzip der Verschränkung von Diskursprinzip und Rechtsform verdankt [...] Die logische Genese dieser Rechte bindet einen Kreisprozeß, in dem sich der Kode des Rechts und der Mechanismus für die Erzeugung legitimen Rechts, also das Demokratieprinzip, gleichursprünglich konstituieren.”

Algernon Sidney, John Milton. They asserted, he notes, that

It is said to follow that, if you wish to maintain your liberty, you must ensure that you live under a political system in which there is no element of discretionary power, and hence no possibility that your civil rights will be dependent on the goodwill of a ruler, a ruling group, or any other agent of the state. You must live, in other words, under a system in which the sole power of making laws remains with the people or their accredited representatives, and in which all individual members of the body politic — rulers and citizens alike — remain equally subject to whatever laws they choose to impose upon themselves.⁽⁶⁹⁾

From the historical viewpoint, Viroli also indicates the fact that Harrington inherited the Machiavellian idea that freedom consists of law. Harrington, he notes, argued in his critics of Thomas Hobbes' *Leviathan* that the rule of law is a necessary condition for citizens to live free and to prevent them from being subject to the arbitrary will of a few individuals. In his *Leviathan*, Hobbes claimed that the citizens of the republic Lucca had no more freedom than the subjects under the rule of the sultan in Constantinople because both of them were subject to the law. But Harrington asserted that the citizens of Lucca had more freedom than the subjects of Constantinople because although the latter was subject to the arbitrary will of the sultan who was above the law, the former was subject to the law, shared by both rulers and citizens, that aimed to protect the liberty of them all. Republicans "believed that the rule of law makes individuals free," Viroli notes, "because the law is a universal and abstract command and as such protects individuals from the arbitrary will of others."⁽⁷⁰⁾

This view of the relationship between liberty and law is often characterized by neo-Romans in comparison to the liberal view. Pettit, for example, states that liberal and republican tradition, though both are associated with a faith in the rule of law, have a different view of law and liberty. On the one hand, liberals, he insists, adopts 'the quantity-centred notion of liberty,' which

⁽⁶⁹⁾ Skinner 1998, p. 74.

⁽⁷⁰⁾ Viroli 2002, pp.49–52. He adds that even liberals like John Locke had approved this view of the rule of law.

means ‘to lack the interference of others in your life and affairs,’ and states on this notion that the law is not a protection of but an obstacle to freedom. The law violates the property right and the right to security of person by imposing a tax on property and imprisoning offenders; an increase in law means a decrease in freedom. Certainly, Berlin stated that political philosophers such as Hobbes and Bentham considered law as a constant ‘fetter’ to freedom.⁽⁷¹⁾ On this idea, you are supposed to be free when you encounter no interference of others in your life, even if you are not protected by the law. The law and public institutions are justified “to the extent that they leave people as near as they can hope to get, while living in society, to that ideal which they could perfectly enjoy only in the condition of the solitary individual.”⁽⁷²⁾ On the liberal idea, the law is just an obstacle to individual freedom, so that it cannot be analytically tied to the concept of liberty.

On the other hand, republicans adopt ‘the quality-centred notion of liberty,’ which means ‘the status of being suitably protected against the sort of interference’ and state on this notion that the law is not an obstacle to but a constituent of freedom. The law, instead of violating freedom, protects each person from the arbitrary will of others. If the law does not prescribe any bans or sanctions, each person cannot be protected from the potential interference of others; without law, no freedom. On this notion, you are supposed to be free, not when you are isolated from others, but when you enjoy the freedom of the city, “the status of being fully enfranchised, fully incorporated within the body politic.” The law and public institutions are justified “by the extent to which they are so constituted that people flourish socially: they attain the status of full citizens.”⁽⁷³⁾ On the republican notion, the law is not extrinsic but internal to freedom. In Spitz’s words “outside of the rule of law, no liberty can exist absolutely.”⁽⁷⁴⁾ The law gives such a warranty that anyone would not dare to infringe other’s rights by violating the legal rule.

(71) “A free man’, said Hobbes, ‘is he that ... is not hindered to do what he hath the will to do’.[...] Law is always a fetter, even if it protects you from being bound in chains that are heavier than those of the law, say, some more repressive law or custom, or arbitrary despotism or chaos. Bentham says much the same.” Berlin 1958, p. 170, n.1.

(72) Pettit 1993, pp.180–81.

(73) Pettit 1993, pp.180–81. See also *ibid.*, p.166–67.

(74) “[E]n dehors du règne de la loi, il ne peut exister absolument aucune liberté.” Spitz 1995, p.188.

It is only the rule of law that can guarantee the situation in which no intervention occurs. The law establishes a certain circumstance of security, within which everyone can enjoy freedom.⁽⁷⁵⁾ In the republican tradition, over the relationship between freedom and law, they have said, Pettit states, that

The rule of law is inherently fitted, and not just fitted by the accident of circumstance, for the promotion of liberty. The rule of law is a crucial element in the standard way of bringing liberty into existence [...]⁽⁷⁶⁾

In this way, neo-Romans tend to draw the insight from the republican tradition, in contrast to the liberal view, that the law is constitutive to freedom.⁽⁷⁷⁾ However, the historical fact that law and freedom have been considered as linked is not enough to demonstrate that they are analytically connected as neo-Romans regards.⁽⁷⁸⁾ If neo-Romans wish to show the conceptual link, it will be necessary to reflect more theoretically on the relationship between liberty and law from the notion of 'domination' or 'non-domination'. This is another focus of their concerns.

(75) "[La loi] ne sacrifie pas une part de la liberté pour conserver l'autre, puisque, sans elle, il ne peut exister aucune liberté garantie ; la loi est donc constitutive de la liberté entendue comme forme d'existence qualitativement définie par la protection de certains droits grâce à la loi." Spitz 1995, p.191

(76) Pettit 1993, p.167. After this paper, Pettit raises 'the empire of law' as one of the conditions which republican regime needs to satisfy. Two aspects of that condition are 1) that the law should conform to some constraints designed by modern theorists like Ron Fuller, and 2) that the government has a choice on a legal basis. Pettit 1997, pp.173-77.

(77) Skinner also points out that neo-Romans have seen the relationship between law and freedom in a liberal way. Skinner 1991, p.58. "For Machiavelli, by contrast, the law is in part justified because it ensures a degree of personal freedom which, in its absence, would altogether collapse."

(78) It is somewhat dubious that liberals, as they insist, have actually seen law itself as an invasion to freedom. They often raise Hobbes in this context. Certainly, he has been usually considered as a natural right or social contract theorist, but very rarely as a liberal. Charles Larmore also points out that the Hobbesian theory of absolute sovereign has rarely been attributed to the tradition of liberal thought, and later liberal thinkers such as Bentham and Mill have developed a conception of freedom in a different way from Hobbes. Larmore 2000, p.119. "La théorie hobbésienne du souverain absolu ne ressemble guère à ce qu'on attendrait d'une philosophie libérale."

The relationship between liberty and law: more theoretical inquiry

Let's consider further how neo-Romans can think that liberty is analytically linked to the rule of law from the viewpoint of non-domination. Here Lovett's theory serves as a useful reference which deals more theoretically with the idea of domination. It will help to explain the neo-Roman view of the relationship between liberty and law.

Lovett attempts to establish a conceptual link between non-domination and law. He insists that the rule of law is the most effective and reliable constraint to reduce and minimize the arbitrary use of power by others and protect freedom from domination. Generally, he states, four methods to coordinate social activities are available. The first method is the authority, designating one person among others and making him or her decide certain policies and resolve whatever conflicts occur. The second method is the deliberation, making equal participants gather and debate on common interests and subjecting them to their own consensus. The third method is the bargaining, settling property right initially and making market parties pay most to what they prefer so as to determine the outcome. The fourth and last method is the convention, setting out certain rules in advance and protecting expectations given by those rules. The rule of law is equivalent to the fourth method of convention and is regarded as one of the means to coordinate social activities. Not just the rule of law, other methods are incomplete and not all-purpose, so there is no general answer as to which method is the best. Each method can only prepare a better answer than the others for some problems and situations.⁽⁷⁹⁾

Lovett continues to examine which of the four methods is better for avoiding a situation that neo-Romans condemn as unfree, a situation in which one is vulnerable to the arbitrary will of others. First of all, the authority is utterly useless. Although he does not describe it in detail, we can imagine that authority itself may cause domination. Second, the deliberation is also inutile. As the outcome of the deliberation will be influenced by various twists, it will not give us any expectation that it will result in limiting the arbitrary will of the ruler. In other words, it cannot be ruled out in advance that a majority may accept an opinion that permits the ruler to interfere

⁽⁷⁹⁾ Lovett 2016, pp.103-04.

forcibly with people. Third, the bargaining is not effective as well. Given some configuration of assets, a ruler may use large resources to purchase coercive services of people. Even if a ruler was not interested in them, he or she might change the mind and judge that paying for coercive services from people is worth the cost.⁽⁸⁰⁾

Therefore, no other options would be more effective and reliable than the fourth method of the convention, the rule of law, that can eliminate those cases in which the arbitrary will is exercised. Why? Because the other three methods leave the probability that the ruler would interfere with people. The probability cannot be ruled out to be close to 1 in the authority, for means of constraint on authority completely lack. It is always between 0 and 1 in the deliberation and the bargaining. It can be only expected to be reduced in the deliberation by incident agreement and in the bargaining by cost-benefit calculation. Neither method of them can change the situation itself in which people are exposed to the arbitrary will of the ruler. The rule of law is superior to these options because it can lead the probability to 0, at least normatively,⁽⁸¹⁾ that is, it can eliminate the probability itself. Only the method of law can give an expectation and guarantee that the ruler can never interfere with people. “[T]he benefits of law[...] involve broadening the robustness, so to speak, of that predictability. [...] The point is rather that the introduction of law significantly expands our freedom from domination by ensuring we will not be exposed to arbitrary coercive force.”⁽⁸²⁾

From this Lovett’s argument, it is possible to explain the general meaning of the neo-Roman view that liberty consists of the rule of law. For neo-Romans, liberty as non-domination is supposed to be guaranteed not with less probability of interference, but with the *impossibility* of interference.

This point must be clearer if we contrast the neo-Roman view with the argument by ‘theorists of pure negative liberty.’ For them, liberty as non-domination implies a situation in which the probability of interference is extremely low. Matthew Kramer, for example, explains this implication by

(80) Lovett 2016, p.118.

(81) I give a provision ‘at least normatively’ because in an actual world, of course, violations of the law can occur even if they are banned by legal sanctions. In this case, we can condemn the actual violations as normatively illegal or wrong.

(82) Lovett 2016, p.117.

giving an example of 'Gentle Giant.' The Gentle Giant, he defines, is far larger and much stronger than any of residents living near him and lives in some cave on the hill near their community. He could threaten and coerce them to be his slaves if he would wish, but he is gentle and mild enough to prefer to seclude himself in the cave so that *ex hypothesi* he is almost unlikely to exercise his enormous power.⁽⁸³⁾ For theorists of pure negative liberty, the residents living near him are free from his interference and cannot be said to be dominated. It is not because they are not under his arbitrary will, but just because they live in a situation, in which he is almost unlikely to interfere with their lives. If he interfered with their lives at all, though that cannot occur *ex hypothesi*, it could be said that he infringed their freedom. However, in this case, it would be better to say that they are exposed under his probable interference than to say that they are dominated by him. For theorists of pure negative liberty, the low probability of interference is not equivalent to the idea of unfreedom which republicans call as domination. "In short, in the very rare circumstances where relationships of domination genuinely involve extremely low probabilities of nontrivial encroachments on the freedom of subordinate people, we should not characterize the state of subordination as a state of unfreedom[...] Pettit's republican inclination to equate domination and unfreedom does not illuminate such situations."⁽⁸⁴⁾

Neo-Romans don't think so.⁽⁸⁵⁾ Their emphasis is that the notion of domination is qualitative rather than quantitative. In other words, freedom from domination does not mean that the probability of interference is incidentally low, but that any intention to exercise the power of interference

(83) Kramer 2008, p.47.

(84) Kramer 2008, p.49. See also Carter 2008, p.70. "While Pettit and Skinner insist that unfreedom is created by the mere possession of power (even in the absence of its exercise), then, the pure negative theorist points out that, where A's mere opportunity to exercise power has some degree of probability of it would again be a very unrealistic theory of politics [...]" and Carter 1999, p.244. "So it is simply implausible, even on Pettit's own characterization of unfreedom, to say that B suffers unfreedom at A's hands despite there being a zero probability of A's interfering with B and despite B being aware of this."

(85) On this point, it seems more precise to say that the true contrast for neo-Romans is with this theory of negative liberty, rather than with liberalism. Neo-Roman republicans are contrasted to negative theorists, for they have divergence on views of the unfree situation.

is restricted by legal rules. Returning to the Gentle Giant case, even though the probability that he interferes with residents' lives is definitely close to 0, it cannot change the fact that they are vulnerable to his arbitrary will — he could interfere with them whenever he wished — and deprived of their freedom. What is at issue is not how likely he interferes, but whether he can interfere. Skinner notes,

[E]ven if there is almost no probability that such slaves will be subjected to interference in the exercise of their powers, their fundamental condition of servitude remains wholly unaffected. It is the mere fact that their master or ruler has arbitrary powers to intervene that takes away their liberty, not any particular degree of probability that these powers will ever be exercised [...] the situation in which slaves find themselves is that, while they may be stopped or penalized, they may be left entirely unconstrained.⁽⁸⁶⁾

Pettit also points out that alien control, a kind of domination, is not a matter of the probability of interference and states,

[T] he controller remains an agent, and an agent who is in a position to interfere or not interfere in an unchecked manner. Even if the probability of the controller's imposing a sanction is reduced, this will not remove the alien control exercised over the victims [...] A decrease in the probability of interference at the hands of an alien controller will not remove the specter of alien control[...] alien control will remain in place so long as the agent can interfere or not interfere, whatever the reduced probabilities of interference that are dictated by the agent's nature. A decrease in the probability of interference will only provide a reason for consolation[...] but it will not reduce the level of alien control and the associated unfreedom.⁽⁸⁷⁾

What makes the Gentle Giant abandon his intention to interfere with residents is the law. If legal restraints and sanctions do not ensure that he

⁽⁸⁶⁾ Skinner 2008, pp.96-7.

⁽⁸⁷⁾ Pettit 2008, pp.123-4.

would not interfere with them, they remain to be vulnerable to his arbitrary will, be anxious about being intervened at any times, and lose their free lives. Only by the rule of law, they can enjoy their freedom as non-domination. That is the meaning of ‘without law, no liberty’ for them. In this sense, neo-Romans assert that liberty consists of law.

5. Some comparisons

So far we have seen the different views of the relationship between liberty and the rule of law among neo-Athenian and neo-Roman republicans. In this section, I examine some findings and difficulties they provide in the light of each perspective. First, what kind of insight does each of them offer? Let's look at each view by comparing it with the liberal conception.

An insight in neo-Athenian view

We can learn from the neo-Athenian view of the relationship as circular that freedom and law can be supposed to be *mutually causal*. In other words, it seems to give us a recognition that self-governing politics is regarded as a process to legitimate legal norms, and in turn legal framework is considered as a procedure to regulate the dynamic process of politics.

In the liberal view, the relationship between law and politics seems to be defined as unilateral. That is, it is often emphasized that the basic rights to personal freedoms prescribed by law work as external constraints on the political process. In this assumption, democratic politics often tends to fall down into populism or majoritarian tyranny, and if some legislation resulted from politics violated the basic rights, it would be invalidated as unconstitutional by the court. Here legal framework protecting the constitutional rights is assumed to work as kind of ‘a cap’, which has a role to shut off the pressure of boiling political process; law tames politics. However, this sort of liberal argument, as I have shown elsewhere,⁽⁸⁸⁾ cannot show the democratic legitimacy of legal framework, which works as a constraint of politics. The public power will force the results of decisions to losers in the deliberative process of politics under legal prescriptions. But this cannot offer a course of

(88) I have ever made clear that Rawls's ideas of overlapping consensus and public reason lead to the conclusion that participation and deliberation are confined under the conception of justice and law. Omori 2006, pp.81-118.

reasoning that legal framework, on which public power is exercised, can be accepted as legitimate by citizens. It is because though the law is supposed to constrain politics, it is not considered to be generated by and derived from the deliberative process of politics, in which citizens take part.

In contrast, neo-Athenian republicans appreciate this reverse process. Certainly, as mentioned above, the CV version cannot explicate the role of law so that it would fall into the trilemma of community politics. However, the PD version can illuminate a side on which deliberative politics generates and legitimates legal norms. It can indicate the public legitimacy of law by showing the derivation and generative process of them. If legal framework is supposed to be a consequence of political deliberation by all participants, even losers in this process would be able to accept it as their own decision, whether they endure it or expect next chance. Neo-Athenians, particularly PV theorists, give us a recognition that the law constraints political process and at the same time deliberative politics legitimates legal framework.⁽⁸⁹⁾

This neo-Athenian view of mutually causal relationship should not be denied by liberals as well. It is because it admits with liberals that legal procedure should ensure that democratic politics would properly proceed as an implication of mutual causality. Neo-Athenian republicans have a common recognition that the rule of law is indispensable for basic rights to personal freedom. Their list would include civil, political, and social rights that liberals prefer to contain in the Bill of Rights, such as freedom of person, right to vote etc. Neo-Athenians also admit their significance and never deny their role as 'a cap' to close up boiling political process. Neo-Athenians, in addition to this assumption, attempt to show a foundation which legitimates legal framework that protects liberal rights. It seems that they aim to compliment an oversight that the rule of law is derived from self-government.

An insight in neo-Roman view

We can also learn from the neo-Roman view of the relationship as constitutive that freedom and law can be supposed to be *inextricably linked*. In other words, it gives us a further recognition that freedom cannot be possible without legal rule, which ensures that both public and private power

(89) If you wish to know the detail, please see Omori 2006, pp.177-231.

should not be exercised arbitrarily.

In the liberal view, more precisely in the theory of negative liberty, freedom is seen to have an only casual connection with the rule of law. Remember the Gentle Giant case. For he is defined as never or extremely less probably interfering with the residents, legal constraints and sanctions would not be needed. Even without law, they would be free to live, because they would not need to fear his interference. The law would be significant to the extent which he is defined as more probably or actually interfering with them. As long as they were unlikely free to live, the law would be indispensable for ensuring their free lives. He should be constrained not to exercise arbitrarily his power on them and if he interfered actually, he would be sanctioned by law. In this scenario the problem is that the need of the law for freedom depends on assumed cases and varies accordingly; when he is assumed to interfere unlikely, the law would not necessary, but when he is not, it would. In short, in the theory of negative liberty, freedom can exist independently of law, and if any interference is esteemed never to occur, the law would be seen even as unnecessary.⁽⁹⁰⁾

For neo-Roman republicans, in contrast, freedom cannot exist independently of law. Under their conception of freedom as non-domination, unlike liberal one as non-interference, people cannot enjoy freedom under the arbitrary will of others, even if actual interference does not occur. When they are vulnerable to other's will, in a situation where others can interfere with their lives anytime at whim, they will behave not to hurt the other's mood and act not against the other's intentions. Only by their internal fear of potential interference, their freedom will be infringed. Therefore, in order to have freedom as non-domination, we must restrict the arbitrary will of others and ensure that interference can never occur. It is in this context that the rule of law is seen to be indispensable for freedom. Under legal constraints and sanctions, people do not need to fear any interference and to act conscious of the other's will, so that they are free to live. It is irrelevant how likely others are to interfere with their lives. Even if the probability of other's interference is extremely low, the need of the rule of law doesn't change as

⁽⁹⁰⁾ Pettit cynically points out that one would enjoy the maximum of freedom in a lonely universe without other inhabitants if liberals interpret freedom as lack of interference by others. Pettit 1993, p.180.

ever.

This neo-Roman view of inextricably linked relationship should not be denied by liberals or pure negative theorists as well. They also acknowledge that the rule of law is necessary to guarantee freedom from interference. They remain to admit that freedom is infringed only by interference. Then it might not be unnatural that by admitting that freedom can possibly be violated by the arbitrary use of other's power, they would come to recognize that the rule of law is not only a necessary but an indispensable condition for freedom. Neo-Roman republicans give us this recognition, and attempt to direct a way toward the more elaborate model of the relationship between liberty and the rule of law.

These seem to be important insights offered by both sides, neo-Athenians and neo-Romans. Next, let's consider the problems that they raise. These will be made clearer when we compare their views from each perspective.

A problem in the neo-Athenian view

We can point out that the neo-Athenian view of the relationship as circular, in the light of the neo-Roman view, cannot comprehend the inextricable link between self-government and the rule of law. Although neo-Athenians claim that self-governing politics should take place under legal framework, they cannot ensure that legal framework would always restrict all exercises of arbitrary power in every phase of deliberative politics, if the role of law is regarded as restricting only actual interferences. In sum, there remains a doubt as to how domination would be excluded from all the courses of self-governing politics by legal rule.

CV theorists do not seem to fully consider how the mechanism of virtue-cultivation exclude domination. Sandel's formative project, for example, depends on the role of small communities in civil society, so it is difficult to think that it can stop intruding and structuring of domination into their relations. It is conceivable that teachers in school, bosses in workplace, or pastors in church might force their power to make obedient pupils, employees, or followers on the pretext of instructing them. For CV theorists have little interest in the rule of law, they do not seem to introduce the mechanism to eliminate the structure of domination.

PD theorists, though they introduce the notion of the rule of law, also have the similar problem that they do not succeed in avoiding domination in all the courses of deliberative politics. Michelman's jurisgenerative politics, for example, shares with Sandel an appreciation that communities in civil society should be central to politics. Then both of them cannot deny a fact that there must be a room for the subordination and servitude to enter into political deliberation in those communities. This kind of difficulty arises generally from the attitude of appraising uncritically the role of communities in civil society. As Micheman notes,

Much, perhaps most, of that experience must occur in various arenas of what we know as public life in the broad sense, some nominally political and some not: in the encounters and conflicts, interactions and debates that arise in and around town meetings and local government agencies; civic and voluntary organizations; social and recreational clubs; schools public and private; managements, directorates and leadership groups of organizations of all kinds; workplaces and shop floors; public events and street life; and so on. Those are all arenas of potentially transformative dialogue[...] Those encounters and transactions are, then, to be counted among the sources and channels of republican self-government and jurisgenerative politics.⁽⁹¹⁾

However, it cannot be denied that there include some subordinate relationships in 'these encounters and transactions' in civil society. In fact, Michelman, who is critical of the ruling of the Supreme Court in *Bower v. Hardwick*, attempts to admit for lesbian and gay couples the legal protection of privacy as a political opportunity to develop citizenship. But such homosexual couples, as well as any other relationship, are always accompanied by risks of sexual harassment or domestic violence against the partner. Probably PV theorists would claim that for political deliberation is involved in the circular relationship with legal framework, these types of relationship should be subject to the legal restriction. But if this restrictive role of law is confined to preventing incidental interference, they cannot introduce a mechanism to eliminate subordination from all the phases of political deliberation into their

(91) Michelman 1988, p.1531.

theoretical model. They might have to endorse that domination is also the enemy of freedom and to invent a new model which includes a mechanism penetrating the rule of law with every phase of political deliberation.⁽⁹²⁾

A problem in the neo-Roman view

We can also point out that the neo-Roman view of the relationship as constitutive, in the light of the neo-Athenian view, cannot comprehend the mutual causality between non-domination and the rule of law. Although neo-Romans assert that legal rule must exclude any species of subordination among people and protect freedom from the arbitrary will of others, they cannot show the democratic derivation of such a restrictive rule. We wonder how the law ruling out domination can be voluntarily accepted by citizens as properly exercising public power. In short, it is questionable whether neo-Romans intend to show the public legitimacy of legal framework in their view.

Certainly, neo-Romans tend to be somewhat cynical about self-government and democracy. They do not place much weight on political participation or deliberation, so are negative to the view that legal norms are the products of agreements through the deliberative process. They seem to fear that political discussion itself might be an opportunity for someone to exercise arbitrary power. Viroli, for example, does not trust democratic legislation and states,

Action regulated by law is free, in other words, not when the law is accepted voluntarily, or when it corresponds to the desires of the citizens, but when the law is not arbitrary that is when it respects universal norms (when it applies to all individuals or to all members of the group in question), aspires to the public good, and for this reason protects the will of the citizens from the constant danger of constraint imposed by individuals and therefore renders the will fully autonomous. A law accepted voluntarily by members of the most democratic assembly on earth may very well be an arbitrary law that permits some part of the society to constrain the will

⁽⁹²⁾ On this point, I might have to modify the theoretical model of law and politics I have ever described in Omori 2006, if I would introduce the neo-Roman view into it.

of other parts, thus depriving them of their autonomy.⁽⁹³⁾

In the paragraph above, Viroli looks afraid of a risk that the legislative branch, which is composed by representatives of citizens, might be forced to exercise their arbitrary power to enact the law, rather than to enact valid and legitimate law as a result of democratic deliberation. Pettit is also afraid of direct democracy. He regards democracy as contestation rather than a process by which people directly gather and discuss to make decisions by their agreement. In his view, democracy is not set up to be a decision-making process itself, but a process approving or complaining political decisions. Note that these decisions have already been made prior to the contestation process. His view of democracy as contestation assumes that the objects of protestation have given and been decided beyond political deliberation. Thus he states that it is certainly necessary to include a variety of voices in the legislative assembly, but “[w]hat is even more important, especially with the administration and judiciary, is that there is room for you and those of the relevant kind to protest to the representative bodies in question, in the event of your believing that things have not been properly done.”⁽⁹⁴⁾ Of course, such a contestation might also be included in a part of the deliberative process in a broad sense. However, can we expect citizens to accept the compulsory power of law as legitimate although they were foreclosed in the decision-making process of deliberation *ex ante* and involved only in an opportunity of contestation *ex post*?⁽⁹⁵⁾ Neo-Romans might have to affirm that self-government is also a part of freedom and to find a measure which ensures that the law ruling out domination would be accepted as legitimate by citizens who took part in enacting it.⁽⁹⁶⁾

⁽⁹³⁾ Viroli 2002, p.43.

⁽⁹⁴⁾ Pettit 1997, p.193.

⁽⁹⁵⁾ Since neo-Romans have traditionally approved the mixed government, they tend to think that democracy, the rule of majority, is only one branch in the total regime, which should be restrained by other branches. For democracy potentially falls down into majoritarian tyranny, they emphasize freedom from domination rather than self-government.

⁽⁹⁶⁾ Markell gives us a clue by asserting that self-governing participation is both a goal and mean in the sense that on the one hand it is preserved for its own sake, but on the

6. Interim conclusion

From the argument so far, both neo-Athenian and neo-Roman views of the relationship between liberty and rule of law prove to have difficulties as well. However, they can also be regarded as complementary, not confrontational, if we see that they throw positive challenges to each other. The mutual complement is possible only by introducing each insight into their respective defects. On the one hand, it is necessary to redefine political deliberation, in which citizens exercise freedom as self-government, in a way that any arbitrary exercise of power would be ruled out in all the phases by legal rule. On the other hand, it is also essential to reconsider legal framework, which ensures freedom as non-domination, in a way that it would be accepted by citizens as legitimate, their own products of political deliberation.

I have tried to construct a theoretical model of law and politics along with the PV version of neo-Athenian republicanism. From the conclusion of this article, I feel that the model must be amended by endorsing the neo-Roman view of freedom as non-domination and introducing the restrictive role of law which excludes any subordination. However, this is a task not of this paper, but in the future.

In any case, two strands of republicanism will enrich the conventional conception of the rule of law by adding new views of liberty. Until now, the arguments around the rule of law seem to have been monopolized by liberal constitutionalists and raised up within its framework. However, republicans have also traditionally built up the notions about the rule of law, together with the idea of liberty, which include rich resources liberals can also learn from. The republican views of liberty, both neo-Athenian and neo-Roman, will increase a range and depth of discussion over the rule of law.

Bibliography

- Allen, Anita L. & Regan, Milton C., 1998. (eds.), *Debating Democracy's Discontent: Essays on American Politics, Law, and Public Philosophy* (Oxford University Press)
- Bellamy, Richard, 2008. *Republicanism, Democracy and Constitutionalism in Labor* & Maynor 2008

other hand "such ongoing involvement is one of the conditions that enables and sustains the contestatory practices that Pettit counts on as a check against the arbitrariness of state power." Markell 2008, p.29.

- Berlin, Isaiah, 1958. Two Concepts of Liberty in Henry Hardy (ed.), *Liberty: Incorporating Four Essays on Liberty* (Oxford University Press, 2002)
- Carter, Ian, 1999. *A Measure of Freedom* (Oxford University Press)
- , 2008. How Are Power and Unfreedom Related? in Laborde & Maynor 2008
- Constant, Benjamin, 1819. De la liberté des anciens comparée à celle des modernes, Discours prononcé à l'Athénée royal de Paris
- Galston, William A., 1998. Political Economy and the Politics of Virtue: US Public Philosophy at Century's End in Allen & Regan 1998
- Habermas, Jürgen, 1992. *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp) (William Rehg (trans.), *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (The MIT Press, 1996))
- , 1996. Reply to Symposium Participants, Benjamin N. Cardozo School of Law in 17 *Cardozo Law Review*
- Honohan, Iseult, 2002. *Civic Republicanism* (Routledge)
- Honohan, Iseult, & Jennings, Jeremy, 2006. (eds.) *Republicanism in Theory and Practice* (Routledge)
- Kramer, Matthew H., 2008. Liberty and Domination in Laborde & Maynor 2008
- Laborde, Cécile & Maynor, John, 2008. (eds.) *Republicanism and Political Theory* (Blackwell Publishing)
- Larmore, Charles, 2000. Republicanisme et libéralisme chez Philip Pettit in 34 *Cahiers de philosophie de l'université de Caen*
- Lovett, Frank, 2010. *A General Theory of Domination and Justice* (Oxford University Press)
- , 2016. *A Republic of Law* (Cambridge University Press)
- Markell, Patchen, 2008. The Insufficiency of Non-Domination in 36 *Political Theory*
- Maynor, John, 2006. Modern Republican Democratic Contestation: A Model of Deliberative Democracy in Honohan & Jennings 2006
- Michelman, Frank J., 1986. Traces of Self-Government in 100 *Harvard Law Review*
- , 1988. Law's Republic in 97 *The Yale Law Journal*
- Oldfield, Adrian, 1990. *Citizenship and Community: Civic Republicanism and Modern World* (Routledge)
- Omori, Hidetomi, 2006. *Kyouwashugi no Houriron: Koushibunri kara Shingi Democracy e, or A Republican Theory of Law: From Public/Private Separation to Deliberative Democracy* (Keisoshobo)
- , 2013. A Testing Ground to See Whether Pluralist or Not?: Can Republicans Be Tamed? in 62 *Okayama Law Journal*
- Pettit, Philip, 1993a. Liberalism and Republicanism in 28 *Australian Journal of Political Science*

- . 1993b. Negative Liberty, Liberal and Republican in 1 *European Journal of Philosophy*
- . 1997. *Republicanism: A Theory of Freedom and Government* (Oxford University Press)
- . 1998. Reworking Sandel's Republicanism in Allen & Regan 1998
- . 2008. Republican Freedom: Three Axioms, Four Theorems in Laborde & Maynor 2008
- . 2013. Two Republican Traditions in Andreas Niederberger and Philipp Schink (eds.), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press)
- Pocock, John G.A.1975. *The Machiavellian Moment; Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press)
- Rawls, John, 1996. *Political Liberalism* (Columbia University Press)
- Sandel, Michael J. 1996. *Democracy's Discontent: America in Search of a Public Philosophy* (Harvard University Press)
- . 1998. Reply to Critics in Allen & Regan 1998
- Simpson, Thomas W. 2017. The Impossibility of Republican Freedom in 45 *Philosophy & Public Affairs*
- Skinner, Quentin. 1978. *The Foundations of Modern Political Thought vol.1: The Renaissance* (Cambridge University Press)
- . 1990. The Republican Ideal of Political Liberty in Gisela Bock, Quentin Skinner and Maurizio Viroli (eds.), *Machiavelli and Republicanism* (Cambridge University Press)
- .1991. The Maintenance of Liberty in Philip Pettit (ed.) *Contemporary Political Theory* (Macmillan)
- . 1998. *Liberty before Liberalism* (Cambridge University Press)
- . 2002. *Visions of Politics vol. II Renaissance Virtues* (Cambridge University Press)
- . 2008. Freedom as the Absence of Arbitrary Power in Laborde & Maynor 2008
- Spitz, Jean-Fabien, 1995. *La liberté politique: essai de généalogie conceptuelle* (PUF)
- Viroli, Maurizio. 1998. *Machiavelli* (Oxford University Press)
- . 2002. Shugaar (trans.), *Republicanism* (Hill and Wang)
- Walzer, Micheal, 1998. Michael Sandel's America in Allen & Regan 1998