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REPUBLICANISM
AND
MULTICULTURALISM

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MAY 2001

A THESIS SUBMITTED FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY OF
THE AUSTRALIAN NATIONAL UNIVERSITY
DECLARATION

This dissertation is my own work, except where otherwise acknowledged.

Deborah Faye Russell
DEDICATION

This thesis is dedicated to my husband Malcolm, to our daughter Ruth, and to the babies who are on their way.

ACKNOWLEDGMENTS

My thanks first of all to my supervisor and friend, Professor Philip Pettit, who has been all that I could have wished for in a supervisor. It is a great privilege to work with such an eminent scholar. I feel very fortunate to have been his student.

Dr Sue Dodds has been on my advisory panel throughout my candidature; not only has she given me valuable insights in the area of multiculturalism, but she encouraged me to persist at times when I felt that I should never have attempted to do a thesis. I am grateful for her help and support.

Dr Natalie Stoljar, Dr Ian Hunt and Professor Peter Schouls have all at various times been on my advisory panel. My thanks to each of them for insightful conversations about my work, and special thanks to Natalie for her support.

One of the many joys of studying at the Research School of Social Sciences at Australian National University is the constant succession of visiting scholars. I have had valuable conversations with many of these visitors. I am particularly grateful to Professor Sue Mendus, who when she visited the School took a great interest in my work, gave me some very useful things to think about, and inspired me with her approach to doing philosophy.

Dr Andrew Brien first encouraged me in doing Philosophy as an undergraduate student, and he has continued to discuss philosophical and other matters with me ever since. I thank him for his friendship and continuing assistance. I also thank my friends and fellow students Hamish Cowan and Barbara Nunn for their conversations and support. I am very grateful to Di Crosse in the Philosophy Program office who helped me to overcome the administrative difficulties of completing my thesis at a distance.

Finally, my family has been very supportive. My uncle Dr Tony Russell was the first to suggest that I should contemplate undertaking a doctorate. He has encouraged me throughout. My mother-in-law Elena Wright proofread my thesis, and came and cooked meals and looked after our daughter when I was in the finishing stages. My parents David and Marie Russell have provided encouragement and support at all times. Most importantly, my husband Malcolm Wright, in addition to discussing my ideas at any and all times, has sustained me emotionally and financially. I could not have completed this thesis without him.
ABSTRACT

One of the most pressing problems facing contemporary polities is the issue of accommodating multicultural diversity. Various political theorists have developed accounts of multiculturalism in an attempt to understand the problems raised by multicultural diversity, and to respond to that diversity. This thesis is a contribution to the ongoing conversation about multiculturalism. It draws on contemporary republican theory, as developed in particular by Philip Pettit, to understand and respond to issue of multiculturalism.

Contemporary republican political theory embraces freedom as non-domination. Freedom as non-domination is instantiated through traditional republican institutions of the rule of law, checks and balances, and civic virtue, and in Pettit's account, contestatory democracy. This thesis uses the account of freedom as non-domination to analyse the claims made by diverse ethnic groups, utilising in particular the republican understanding of how individuals may be subject to domination in virtue of their membership of a group. It then draws on the institutions of republicanism to respond to those claims, developing a comprehensive set of proposals for accommodating ethnic diversity.

As part of the ongoing discussion of multiculturalism within political theory, the republican response to issues of multiculturalism is compared to other theoretical responses to multiculturalism, in particular to the responses developed by Will Kymlicka in Multicultural Citizenship, and Chandran Kukathas in The Liberal Archipelago. It also attempts to consider what minority ethnic groups would say about the republican response, drawing on James Tully's Strange Multiplicity to access a possible minority ethnic group response.

The republican response to issues of multiculturalism developed in this thesis is robust when it is compared to both other theoretical responses, and to the possible response from minority ethnic groups. This robustness serves two ends. It demonstrates that republicanism is a viable political theory, because it can respond effectively to a pressing problem in both political theory and in political life. It also validates the republican response as a valuable contribution to the continuing discussion about issues of multicultural diversity.
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CHAPTER 1 - INTRODUCTION

In recent years we have seen a growing awareness of and focus on issues of ethnic group politics, both in political philosophy and in the general business of politics. Sadly, this interest has been motivated in part by savage conflict between ethnic groups. It could be that the level of conflict now is no different from what has always been the case, and that our increased awareness of ethnic group conflict is driven by the wonders of electronic media and global communications technology. Nevertheless, awareness of the existence of such conflict has reached new levels. We seem to live always in the shadow of ethnic group conflict. As I write, ethnic Albanian freedom fighters, or rebels, or guerillas, are fighting in Macedonia, and the Macedonian government is responding with increased force. In the last years of the twentieth century, Tutsis and Hutus slaughtered each other in Rwanda, Serbians drove ethnic Albanians out of Kosovo, and allegedly Indonesian-backed militias persecuted the East Timorese.

It is not only violent conflicts that press the urgency of the problem of ethnic discord upon us. In almost any nation state, it is virtually impossible to walk down the streets of major cities without noticing that the passersby seem to come from a variety of ethnic backgrounds. Very few nation states are 'ethnically pure'; most nation states are ethnically diverse, with two or more, sometimes many more, ethnic groups living within their borders. One way of solving the problems of ethnic group conflict within nation states would be to ensure that each ethnic group has its own state. This however, would be impossible; there are about 200 independent nation states in the world, and about 5,000 ethnic groups, together with over 600 language groups, not including 'dead' languages.\footnote{See Kymlicka (1995), p. 1, Kymlicka and Norman (2000b), p. 19, Levy (2000) p. 6. Tully (1995) gives a figure of "twelve thousand diverse cultures, governments and environmental practices" (p. 3).} The proliferation of nation states in this case is almost unimaginable. It is hard to see how it would not render the already fragile international system unworkable. Moreover, ethnic group conflict might then just become a matter of state against state, especially given the geographic interpenetration of many ethnic groups. The alternative then, is to find workable
methods of accommodating ethnic groups within existing states. Diverse ethnic
groups have differing beliefs, differing understandings of the world and their roles in
it, differing ways of living. States need to find ways of recognising this diversity,
and ways of responding to the claims that are being made by ethnic minority groups.
We are being asked to find new ways of living together, of regulating our polities,
of accommodating the differences between groups.

Political theories play a role in finding these new ways of living together.
Issues such as multiculturalism provide a hot house, as it were, in which political
theories grow and change, seeking to understand and respond to particular problems.
Problems in the real world thus become an inspiration and a test for political theories.
If a theory cannot develop an adequate response to a pressing problem, then so much
the worse for the theory. This thesis presents a republican understanding of how we
can all live together. In particular, it asks why and how a republican polity could
respond to the claims that are made by ethnic minority groups. As such, it is part of
the ongoing conversation in political theory about how to accommodate minority
rights, both within political theory and within the polities we live in.

It might seem surprising to use republican theory to address these problems.
Civic republicanism is not thought to have the capacity to address the varying claims
made by ethnic minority groups. Republicanism has its roots in the Roman republic,
and was further developed by Machiavelli in the reference to the Italian city-states of
the 15th and 16th centuries. The tradition, up to and including Machiavelli, is
embedded in the homogenous city state. Even in its subsequent development, it
assumes localised, homogenous states. Moreover, it is perceived as a theory which
identifies citizenship as each citizen's most important identity. Given its assumption
of homogeneity, its small scale politics, and its ideas of citizenship, critics assume
that it cannot tolerate the varying identities that are commonplace within
multicultural states. Two writers whose works I address in this thesis draw on this
older republican tradition. David Miller argues that all citizens should acquire a
sense of allegiance to the nation that outweighs their other allegiances. James Tully

Norman, nor Rainer Bauböck specify any republican writers in relation to their claims.
includes republicanism in his discussion of the ways in which constitutionalism stifles diversity. 4 This apparent inappropriateness of republicanism is easily dismissed however, when we find that writers such as Miller focus only on one or two aspects of civic republicanism, usually citizenship and civic virtue. They not only neglect other aspects of republicanism; they also do not attempt to develop an understanding of why citizenship and civic virtue are important parts of republicanism. And James Tully's rejection of republicanism is based only on the republican tradition, not on contemporary republican theory.

This thesis examines multiculturalism using the account of republicanism developed by Philip Pettit. Drawing on the republican tradition, Pettit develops a distinctive account of freedom, and uses that account to understand the republican attachment to institutions such as the rule of law, checks and balances, and civic virtue. It is an account of freedom that is consistent with the tradition, but not bound by it. 5 In Chapter 2, I set out that account of freedom, and show why it has particular appeal with respect to minority ethnic groups. Republican theory is distinctive in that in addition to having a commitment to a certain account of freedom, it has a theoretical as well as an historical commitment to certain institutions, such as the rule of law, systems of checks and balances, and civic virtue. It also has a commitment to democracy, in Pettit's account, to contestatory democracy. I discuss these institutions and the nature of republican democracy in Chapter 3.

These first chapters set up the ground work for developing a republican response to issues of multiculturalism. In Chapter 4, drawing on Jacob Levy's analysis of the types of claims made by minority ethnic groups, I develop a republican understanding of, and response to, these claims. In addressing the claims, I attempt to develop a sympathetic understanding of the underlying logic of the claims, and not just treat them as claims that must be met. The response to the claims differs from the usual discussion of possible responses to ethnic group claims in that I also discuss the institutional implications of each claim, and consider just what institutions could be introduced, or which existing institutions used or modified to meet the claims. In particular, I draw on republican institutions; I think that not

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4 Tully (1995), especially Chapters 2 and 3.
only does the republican account of freedom have particular appeal to minority
groups, but that the institutions of republicanism have a peculiar capacity to address
minority group concerns.

However it is not enough to show that republican theory can be sensitive to
the needs and aspirations of minority ethnic groups. I also want to demonstrate that
the response I develop is robust, that it offers responses that are at least as good, if
not better, than the sorts of responses that are developed within other political
theories. Accordingly, in Chapter 5, I compare the republican response to issues of
multiculturalism with the responses developed by other theorists, in particular Will
Kymlicka and Chandran Kukathas. I also briefly consider responses to
multiculturalism developed by two other theorists who claim that they are working
within the republican tradition, David Miller and Richard Dagger. In Chapter 6, I
take up a different sort of challenge, attempting to find out whether the response I
develop could be acceptable to members of ethnic minority groups, not just to
theorists working within the Western tradition. To achieve this, I draw on James
Tully's *Strange Multiplicity*. These two chapters represent a 'top-down' theoretical
critique and a 'bottom-up' practical critique of the republican response to issues of
multiculturalism. If the republican response to multiculturalism developed in this
thesis survives both these critiques, then it will have added something of value to the
ongoing discussion in political theory and political philosophy about
multiculturalism. Moreover, this is one of the first, if not the first, applications of
contemporary republican political theory to a particular issue within political theory.\(^6\)
As such, this thesis represents a test of republicanism. Surviving this test will help to
establish republican political theory as a viable alternative to more traditional liberal
and communitarian theories.

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\(^6\) Anne Phillips examines whether any of the various accounts of republicanism have particular
relevance to feminism. She looks briefly at Pettit's contemporary republicanism, but she does not
attempt to apply it to particular problems in feminism. See Phillips (2000).
CHAPTER 2 – WHY REPUBLICANS ARE INTERESTED IN ISSUES OF CULTURAL DIVERSITY

“If I was in America, I’d be an octoroon...It’s very strange, but whereas by blood, flesh and inheritance, I am but an eighth Maori, by heart, spirit and inclination, I feel all Maori.” Keri Hulme, The Bone People

“Malcolm, one of life’s first needs is for us to be realistic. Don’t misunderstand me, now. We all like you here, you know that. But you’ve got to be realistic about being a nigger. A lawyer - that’s no realistic goal for a nigger. You need to think about something you can be. You’re good with your hands - making things - why don’t you plan on carpentry?” The Autobiography of Malcolm X

2.1 Clarifying the issues

The primary task of this thesis is to develop a republican response to issues of cultural diversity. Before I begin to develop this republican response to issues of cultural diversity, I want first to clarify some issues and terminology. First, what sorts of claims are made by ethnic groups? Second, just what are ethnic groups? I address these questions in the next two sections of this chapter. The most important question is why republicans should be interested in issues of multiculturalism at all. Given that political theories attempt to deal with the ways that we should structure our societies, then obviously republicanism ought to do the same. However this is a reason based on comparison with other approaches rather than a reason or reasons drawn from within the structure of republicanism itself. I think that such reasons do exist within the theoretical structure of republicanism, and in particular, within its account of freedom. In the second half of this chapter (sections 2.4 - 2.6) I look at this account of freedom, and why it has particular resonance in relation to issues of multiculturalism.

Some notes about terminology. Throughout this thesis I will refer to ethnic groups, and in particular, minority ethnic groups. This term is meant to capture both
indigenous groups, and immigrant groups.\(^1\) I also want to capture a sense of the position that many ethnic groups occupy, that of being minority groups existing within a larger society with a majority culture. Maori in New Zealand, Aboriginal peoples in Australia, Chinese and Indians in Malaysia, Native Americans and the First Nations in Canada all exemplify this position. There are some cases where two or more ethnic groups within one society enjoy some sort of parity, such as the Flemish and the Walloons in Belgium, but this is relatively rare. And in some very unusual cases, a minority group has exercised considerable power over majorities; consider the position of white South Africans during the rule of apartheid. By and large however, a minority ethnic group is just that, a smaller group within a larger society.

I want to avoid the terms 'nation' and 'nation state', given the way they have been deployed by various theorists, and the meanings they can bear. I will use the term 'polity' when referring to a state or nation or nation state, that is, to the sorts of entities that can and do contain minority cultures within larger dominant cultures. Roughly, when I refer to a polity I am concerned with the entities that we call nation states, that is, those entities that are treated as individual countries in international terms. My concern in this thesis is to consider whether and how existing political entities can respond to the claims made by minority ethnic groups, rather than designing the world *de novo*. This is a familiar cast in republican thinking. Republicanism has traditionally been concerned with making changes in what already exists rather than starting from the beginning all over again. Moreover, my intention is to consider whether and how the very real claims made by minority ethnic groups can be accommodated within the very real political entities that now exist, that is, nations and nation states, which in order to avoid complication, I will refer to as polities.

\(^1\) See Kymlicka (1995).
2.2 Claims made by ethnic groups

The claims made by ethnic groups are many and varied. They have been widely canvassed in the literature and various classification schemes have been developed. These classification schemes range from very broad brush approaches to very fine grained approaches. Without necessarily endorsing his approach, I will use Jacob Levy's classification of cultural rights as a starting point for this exercise. Levy's fine grained classification will enable me to address many differing types of claims, and thus will assist in developing a detailed republican response to issues of multiculturalism.

Levy classifies cultural rights thus.

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<td>Sikhs / motorcycle helmet laws, Indians / peyote, hunting laws</td>
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<tr>
<td>Assistance to do those things the majority can do unassisted</td>
<td>Multilingual ballots, affirmative action, funding ethnic associations</td>
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<tr>
<td>Self government for ethnic, cultural or &quot;national&quot; minorities</td>
<td>Secession (Slovenia), federal unit (Catalonia), other polity (Puerto Rico)</td>
</tr>
<tr>
<td>External rules restricting non-members' liberty [in order] to protect members' culture</td>
<td>Quebec / restrictions on English language, Indians / restrictions on local whites voting</td>
</tr>
<tr>
<td>Internal rules for members' conduct enforced by ostracism, excommunication</td>
<td>Mennonite shunning, disowning children who marry outside the group</td>
</tr>
<tr>
<td>Recognition / enforcement of traditional legal code by the dominant legal system</td>
<td>Aboriginal land rights, traditional or group-specific family law</td>
</tr>
<tr>
<td>Representation of minorities in government bodies, guaranteed or facilitated</td>
<td>Maori voting roll for Parliament, U.S. black-majority Congressional districts</td>
</tr>
<tr>
<td>Symbolic claims to acknowledge the worth, status, or existence of various groups</td>
<td>Disputes over name of polity, national holidays, teaching of history</td>
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Like any typology of examples, this one can be criticised for what it does, and what it fails to do. It fails to recognise the broad similarity between claims about

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5 Levy's classification was originally published in 1997 (see Levy 1997); it was subsequently included in his recent book on multiculturalism (Levy 2000).
self-government and claims about minority representation, both of which are issues of governance. It implies that all these claims are of equal importance, and it could even be said to imply that the claims ought all to be addressed at the same level within a polity. It does not recognise one of the most common of claims made by indigenous ethnic groups, that of reparation for past injustices, and especially the form this claim often takes, of demands for restoration of lost or stolen lands. This is often not just a matter of restoring customary rights, but a claim for full ownership of the lands. The listing of the claims made by ethnic groups is just that, a list, based on the contingent history of relations between ethnic groups. It is possible that there are some claims which will arise in future that do not fall into any of Levy's categories. Levy himself notes that in some lights, the list is too fine grained.\textsuperscript{7} The list however, serves a useful purpose in providing a map of the sorts of claims that republican theory, and other political theories, need to consider and accommodate, or perhaps reject.

Although it is possible to discuss each of these types of claims in turn, examining whether and how each one should and could be addressed, I think that it is also important to develop a theoretical understanding of why ethnic groups might make claims that are attendant upon their status as an ethnic group, and why it might be important to address these claims. This strategy is more promising not because it will necessarily offer better answers for the particular sorts of claims listed above, but because it addresses the issues in a coherent fashion, rather than by developing piecemeal responses in an \textit{ad hoc} fashion. By developing a coherent set of responses, the groundwork is laid for responding to future claims consistently. In particular, we would then be able to respond to possible future claims that do not fall into Levy's categories by employing the same theoretical understanding of why the claims made by minority ethnic groups might be important.

\textsuperscript{7} Levy (2000), p. 159.
2.3 **What are ethnic groups?**

As the first part of developing this coherent response to the sorts of claims that minority ethnic groups make, I want to move on to the second question I signalled above, that is, the question of what ethnic groups consist in. It is possible to say of ethnic groups, that I know one when I see one. This is however, too loose, and more importantly, too capricious. As will be discussed below (see section 2.4), one of the dangers that republicanism sets out to constrain or avoid is the capricious exercise of power. Before the claims made by ethnic groups can be addressed, the groups themselves must be recognised as genuine ethnic groups. If that recognition is dependent on the subjective perceptions of other people, as implied in the phrase, "I know one when I see one", then recognition may be withheld. Whether the lack of recognition is intentional or not, it leaves the group at the mercy of those who hold the power to recognise them or not.

Roughly, an ethnic group is a group of people associated with each other through culture, geographic location, and histories. One ethnic group can be distinguished from another through differing histories, geographic locations and cultures. By histories, I mean not the stories that a group of people tell about themselves and their interactions with other groups – for my purposes, this is better considered under culture – but what the group of people and their forebears have actually done in the past, and what has been done to them. Members of a particular ethnic group can tell stories about their past as a group, and can claim on on-going connection with that past. This connection with the past can be reconstructed through these stories, and through the stories that other groups of people tell about the particular ethnic group. Geographic location is straightforward. Members of ethnic groups tend to live in reasonably close contact with each other, particularly in nation states, but also within nation states. While this characteristic may not be as strong in an era of cheap and rapid mass transport, it has been the case in the past, and the effects of this past geographic closeness persist into the present.

Culture is rather more difficult to define. A number of definitions are available. For example, Kymlicka defines a culture as being synonymous with a nation or people, that is, an intergenerational community, more or less institutionally
complete, occupying a given territory or homeland, sharing a distinct language and history. What this definition does, however, is equate a 'culture' with an ethnic group; for my purposes, it is circular. A culture is that which is borne by groups of people; a particular group of people is distinguished from others by its culture. The circularity does however, point to an interesting feature of cultures, that they are borne by people. If there are no living people who are part of a culture, the culture is for all practical purposes, dead. While preservation of its artefacts might be of academic interest, the requirements of members of that culture need no longer be considered.

A culture might consist in any number of these things: language, religious practices, modes of governance, social structures, dress, cuisine, art, sport, and literatures, including oral literatures. One ethnic group can be distinguished from another by differences in these markers of culture - for example, the language of one culture may differ from the language of another culture - and by differing histories and geographical locations. Note that this definition is consistent with definitions offered by other writers, except that many writers also discuss the subjective nature of ethnic groups. For example, James Kellas defines an ethnic group as a group of people who feel themselves to be bound together by ties of history, culture, and common ancestry. Anthropologist Jack David Eller says that ethnicity requires "...a certain consciousness of difference, a certain objectification of culture and cultural difference, and a certain 'distance' - cognitive if not temporal - from culture, a certain reflexive relation with one's own culture." If a group is not aware of itself, or properly, if individuals are not aware of themselves as constituting a group that has a distinct culture, then it is not properly an ethnic group. In summarising the accounts of other anthropologists on ethnicity, Eller argues that the basic commonality between the varying definitions of ethnic groups is difference between

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9 This might seem to be a harsh way to speak of a culture, but it is an accepted way of doing so. We are happy to speak of Latin as a dead language, and to acknowledge that the Roman empire has disappeared, and with it, Roman culture.
10 There may be one exception to this, in that the sacred sites of the culture may continue to command some respect. For example, it might be wrong to needlessly blow up the tombs lining the Via Appia, although perhaps if there were other uses for the site, it wouldn't be such an issue.
12 My thanks to Dr Gillian Brock for pressing me to address this point in detail.
14 Eller (1999), p. 11.
groups, however it is conceived or employed, that is important to the members of the group. The definitions also have a relational quality: ethnic groups do not exist in isolation from other groups, nor do they exist 'at home' - the Japanese are not an ethnic group in Japan. By this Eller means that the Japanese in Japan do not perceive themselves as an ethnic group, not that they are not, or could not be defined as an ethnic group. Social scientist Rodolfo Stavenhagen says that ethnic group identity "… is the result of internal factors (common lifestyles, shared beliefs), but also the outcome of the relations the group entertains with other distinct but similarly constituted groups and with the state in any given country." In a survey of ethnic minorities in Britain, Tariq Modood and his team of researchers found that while the allegiance of second and third generation descendants of immigrants to distinctive cultural practices weakened, they nevertheless expressed ongoing pride in their origins, identification with certain group labels, and sometimes a degree of political assertiveness. Ethnic identity still mattered to these descendants of migrants, even when they did not participate in the practices of the ethnic group.

What becomes clear from these varying definitions is that ethnic group membership is a subjective and relational matter as much as an objective matter. However while acknowledging the importance of the subjective aspect of the ascription of ethnic group and ethnic group membership, I want to avoid it for reasons that I discuss below (see section 2.5). I want to avoid arbitrariness, and in particular, the sort of arbitrariness that arises when someone claims that something must be so simply because they say it is so. There is more to ethnic identity than a simple claim of ethnic identity.

If that was all there was to the story of differing ethnic groups, then it would be hard to see why there would be any need for ethnic groups to make the types of claims that they do. Being a member of one ethnic group rather than another seems on the face of it to represent only a difference in ways of life that ought to have no impact on other issues. This however, is not the case. As a matter of fact, because of the way that human societies operate, there are a number of other distinctive

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15 Eller (1999), pp. 12 - 14, emphasis original.
characteristics associated with ethnic groups. I propose to describe ethnic groups by locating them with respect to these characteristics, compared to some other groups, viz., lesbians and gays, religious groups, red heads, and chess clubs. Note that the characteristics I examine are not markers of ethnic groups in the same sense as histories, geographic locations and cultures. They are characteristics that can be used to differentiate ethnic groups from other groups in contemporary societies, based on the extent to which particular groups manifest the characteristics.

The characteristics I will discuss are: entry and exit; visibility; resources; multitracking; projectability. In all cases, I intend to talk about what is typically the case in respect of these characteristics for ethnic groups, and for the various other groups. There could conceivably be cases where an ethnic group or a chess club falls at the opposite end of the axis from where they are expected to fall. Intuitively, we would expect some religious groups to be very similar to ethnic groups - consider for example the Hutterites and the Amish. However in this instance I am focussing on what would be expected to be the more usual case. In each case I will look first at ethnic groups, then at chess clubs, and then the "in-between" groups.

What I have said about groups and their members up to now is somewhat ill-defined. There is, so far as I know, only one group of red-haired people. Thus there is a two level structure of the group, and all its members. The same structure applies to lesbians and gays, although there might be some subdivisions, for example, between those who are out and those who are not, and of course, some lesbians and gays choose to belong to support groups and social groups and activist groups and so on. Conceivably, the same sorts of distinctions might exist within the group of all red heads. We can imagine divisions between straight haired and curly haired red heads, and support groups and social groups and so on. However the matter is somewhat different in the cases of the other three groups. In the case of chess clubs, there is a three level structure. There is the group of all chess clubs, of which each chess club is a member, and then each club has its own members. So I am not exactly comparing apples with apples. There is however, another grouping, which is the group of all members of chess clubs. Individuals are members of particular ethnic groups, not of the group of all ethnic groups. But there is another group which is the group of all members of ethnic groups. My purpose is to work out the
implications, for an individual, of belonging to an ethnic group. Thus in respect of each of the characteristics, I try to work out what matters for an individual who belongs to one or other of the groups I have mentioned, whether it is direct membership in the overall group, or membership in a group that in turn is a member of the group of groups.

ENTRY AND EXIT

By entry and exit, I mean the ease with which a person can join or leave a particular group. Typically, people are born into ethnic groups. They have no choice about whether or not to be a member of the group in the first instance. It may be possible in later years to leave a particular ethnic group, by choosing not to live within the bounds of the group, to ignore its culture and institutions, to not speak the language. Usually, in order to do this, a person must try to enter the culture of another ethnic group, although it may be possible to live without a particular cultural identity. Most plausibly, movement from one ethnic group to another is possible for second generation immigrants who choose to live within the culture of the society their parents immigrated to, rather than the culture and society their parents emigrated from. It does however, seem to be rather more difficult for a person who has been brought up within one ethnic group to simply move to another ethnic group. As discussed below, ethnic groups provide significant resources to their members; simply leaving these resources behind is not usually an option. Similarly, simply entering another ethnic group is not as easy as it sounds, even when the target group does not erect any extra barriers to entry. To enter another ethnic group, a person must acquire at least the rudiments of that group's culture, especially, but not limited to, language. Again, this may be comparatively easy for children of migrants, who will be exposed to both their parents' culture at home, and the 'new' culture in the larger society, thus in effect learning two cultures, but it is typically a difficult task for adults. One way of accomplishing the move may be to 'marry in', but even this seems to create very real difficulties. Moreover, some groups discriminate against those who marry in; for example, some Native American tribes do not allow those who marry in to participate in the governance of the tribe, nor to hold land in

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18 See Waldron (1995) for an account of how this may be done.
reservation areas. In summary, the difficulty of entry to and exit from ethnic groups is considerable, and no choice is involved in the first instance.

In contrast, it is comparatively easy to enter chess clubs. Typically, membership is open to all comers, provided of course, that they play, or want to learn to play chess. In some circumstances, entry may be limited by capacity (for example, golf clubs often limit entry in order to conserve their resources), but typically, entry does not hinge on making significant changes and learning new skills, other than the skill of playing chess. Although it is possible to imagine situations where a person might be coerced to join a chess club, this is in the realm of the possible rather than the probable; entry to chess clubs is virtually always a matter of choice. Exit is similarly easy; a member need only choose to resign, hand in his or her membership card, and stop paying membership fees.

Red heads, and lesbians and gays, are like members of ethnic groups, simply born that way, although there is some (ill-informed) dispute about this in respect of lesbians and gays. Nevertheless, for people in these groups, it is a matter of being that way, rather than choosing to be that way. Consequently, entry and exit is not so much a matter of choice as it is for chess clubs, bottles of hair dye notwithstanding. Belonging to a religious group is much more a matter of choice, although not nearly so much as belonging to a chess club. This is so for two reasons. First, people can, as it were, be born into a religion, and thus be steeped in it, and in extreme cases, such as the Hutterites, it can be very hard to leave. Second, belonging to a religious group is presumably at least somewhat a matter of belief, and beliefs are not changed on a mere whim. Nevertheless, entry and exit is typically a matter of choice.

Visibility

Ethnic groups are more visible within society than chess clubs are. Ethnic groups are recognisable within a population; they are picked out by their language, the place they live and their modes of dress, and often enough, by the colour of their skin and hair and the cast of their eyes and so on. Thus members of particular ethnic groups are highly visible. This is most obviously so in countries such as Australia and New Zealand, where members of indigenous ethnic groups, and many immigrant
groups, have different coloured skin, hair and eyes from the descendants of European settlers. There are however, individual exceptions to the general case even in countries such as New Zealand, with some Maori who look pakeha,\(^{19}\) and some pakeha who look Maori. In the United States, some people who identify as black have lighter skins than some people who identify as white. In Western Europe, it might be the case that ethnicity is picked out only by accent, whatever the propensity of people to think that there is an Irish look, or an Italian look. However identification as a member of a particular ethnic group is not based solely on physical appearance; a street address can give a clue to ethnicity, as can speech styles and clothing. In other words, a variety of indicators can make a person's ethnicity apparent. In contrast, a chess club is almost an anonymous grouping. Its members are not obvious within a society; they are distinguished neither by their language nor their modes of dress nor the place they live. It would be possible for someone to be a member of a chess club, with his neighbours knowing nothing of the matter. The same thing is not true for members of ethnic groups. Red heads are similarly visible, but as a general rule, members of religious groups are not, nor are lesbians and gay. Members of these latter two groups may to a large extent choose the degree of visibility they want. Again, there may be some particular issues here for lesbians and gays, given the prejudice they may be subjected to, but it is nevertheless possible for lesbians and gays to choose to pass as straight.

**RESOURCES**

Ethnic groups provide a wide range of resources to their members. Most obviously, ethnic groups are repositories of language and culture, both integral to human flourishing. Included within 'culture' are not only things such as literatures and cuisines, but also the institutional structures of human existence, such as family relationships, governing structures, religious institutions, employment patterns, and so on. They are a rich source of those things that make up the pattern of daily life for most human beings. In comparison, a chess club provides little in the way of resources other than those specifically related to the playing of chess. A person may develop relationships within the club, but these are incidental to the purpose of the

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\(^{19}\) Roughly, New Zealanders of European descent.
club. A person could belong to a chess club and never form a relationship with another club member, other than playing chess games at the club’s meetings, yet still be a full member of the club. Similarly, no resources are provided by virtue of membership in the group of redheads, or membership in the group of lesbians and gays. Religious groups offer considerably more resources to their members, including belief structures, and ‘the meaning of life’. They tend not, however, to offer the same tapestry of institutional structures that ethnic groups offer.

**Multitracking**

Members of ethnic groups have many things in common, though not necessarily all the same things in common. They will share many of those things listed above as markers of culture, that is, language, religious practices, modes of governance, social structures, dress, cuisine, art, sport, and literatures, including oral literatures. Conversely, members of a chess club need have only one thing in common, a desire to play chess. They may, incidentally, have more things in common, such as common languages and modes of dress, but these will be derived from the common cultures that members of the chess club share, rather than from the club itself. Red heads have just the one thing in common, as it seems, do lesbians and gays. Given however, that our societies are arranged in structures that suit straight people, we may find that lesbians and gays share certain political attitudes, but this is not a given. Those who share a religion may share other things, such as patterns of marriage and so on, in fact all of the things dictated by their religion. However, this would not hold true across all religious groups. Members of some sects, such as Anglicans (Episcopalians) and Catholics, especially in Anglo-Saxon countries, would lead lives that were determined far more by their ethnic culture than by their religion.

**Projectability**

Once we know that a person is a member of a particular ethnic group, we will be able to predict certain things about them. That is, we will be able to infer from their membership of their ethnic group a number of other things about them; we will be able to project from this one facet of their identity to various other facets of their
identity. We will be able to predict, with varying degrees of accuracy, their religion, language, family structures, work structures, cultural practices, type of food eaten, what holidays they celebrate, and so on. As a contingent matter, we may also be able to predict their socio economic status, what level of education they have, and where they are likely to live. We may be able to make quite good guesses about what sports they follow, what sort of music they listen to and so on. Of course, our predictions are unlikely to be accurate all of the time, but we may have a reasonable degree of accuracy a reasonable amount of the time. In comparison, knowing that a person is a member of a chess club enables us to predict relatively little about that person that is not directly connected with playing chess. We may predict a reasonable degree of education - chess is, after all, an intellectual game - and along with that would go various predictions about socio-economic status. Similarly we might predict that members of a rugby union club are likely to be reasonably fit, that members of a hiking club like being outdoors, and even that members of an embroiderers guild are likely to be female. However we are unlikely to be able to predict what language they speak, what foods they eat, what holidays they celebrate, and so on just from the fact of their membership of a chess club (or rugby club, embroiderers guild or hiking club). Similarly we can predict virtually nothing about red heads, although we can predict a bit more about lesbians and gays, for example that they are unlikely to have children, and quite a lot more about religious people, such as patterns of marriage and child rearing, and perhaps even propensity to donate to charities.

It is the degree to which ethnic groups manifest these factors, that is, ease of entry and exit, visibility, resources, multitracking, and projectability, that distinguishes ethnic groups from other groups. It turns out that the extent to which these factors are manifested in ethnic groups is significantly different to the extent to which they are manifested in other groups. It may well be the case that these are differences of degree only, but even so, it seems that the differences are so marked that there can be little dispute about the claim that ethnic groups are conspicuously different from other groups in society. What I hope has become clear is that membership of ethnic groups matters. It matters to each member of that group, and it

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20 There are of course exceptions to this; some lesbian couples use donor sperm to conceive children, and very rarely, some gay couples are able to adopt children.
matters to the society in which that person lives. It is a non-trivial feature of a person's identity.

Iris Marion Young discusses similar issues in relation to what she calls social groups, aggregates and associations. Mere aggregates can be based on any number of attributes, for example, eye colour, or the make of car that a person drives. Associations are more important in our societies than mere aggregates, but less important, that is, less salient socially and emotionally, than social groups. Associations are formally organised institutions such as clubs and churches, defined by specific practices and forms of association. Some groups carry emotional and social salience in our societies, even though they may seem to be based on a mere attribute, such as skin colour. A social group is different because it is defined not by a shared set of attributes, but by a sense of identity. Both aggregates and associations understand individuals as being ontologically prior to the collective. Social groups however, can in part constitute individuals. Young says that the key difference between associations, which are voluntary, and social groups is what Heidegger calls "throwness". A person finds himself as a member of a social group; he does not choose the identity so much as having that identity chosen for him. This is because our identities are defined in relation to others and how they perceive us. Social groups have a real existence over and above the aggregation of individuals. 21

Young's account covers much of the same ground as my account, albeit in different fashion. Her conclusion, like mine, is that social groups, or in my case, ethnic groups, matter. Where the accounts differ is in Young's claims that social groups to a certain extent constitute individuals. 22 Thus she rejects liberal individualism. At the same time she does not want to embrace communitarian accounts of individuals being entirely constituted by groups (although I am unsure that any communitarian would make such a claim in any case). She points out, contra the communitarian claim, that social groups are not internally consistent, that there is no common nature that members of a group share, and that group differences cut against each other - groups can be differentiated by age, gender, class, ethnicity

21 Young (1990), pp. 42 - 46.
and so on. Thus group differentiation is multiple, cross-cutting and fluid. Individual persons reflect the dynamic and cross cutting nature of groups; they are themselves heterogenous and not necessarily coherent.\textsuperscript{23}

I find it puzzling that Young does not specify just what the relationship between individuals and groups is, given that she rejects both liberal and communitarian positions, accepting the reality of individuals, but rejecting the idea that groups are mere aggregates or equivalent to associations. That is, they are something over and above the assemblies of individuals involved. However, if this is the case, that groups have some ontological reality, then they ought to be able to persist even when all the individuals involved have left the group. This seems to be at least somewhat odd; how can there be such as thing as the (present tense) group of Maori if there are no longer any Maori people in existence?

A possible answer to this puzzle lies in the relationship of individuals to the group. I suggest that contra Young, groups do not constitute individuals, but that individuals standing in certain relationships to each other constitute groups. That is, groups supervene on individuals. Change some of the individuals in the group, and the group changes a little. Change a large proportion of the individuals in a group, and the group changes significantly. Remove all the individuals in a group, and the group disappears. As we change the underlying elements in the physical world, we also change the patterns of behaviour (chemical, biological, psychological, structural, social and so on) in the world. This understanding of groups is consistent with Philip Pettit's arguments in favour of what he calls holistic individualism in \textit{The Common Mind}.\textsuperscript{24} The advantage of this account of groups is that it does not deny the reality of groups. In particular, it does not reduce groups to mere aggregates or associations. At the same time, it rules out the counterintuitive possibility that groups can continue to exist even if all the members of a group have left the group or have ceased to exist. However it retains the possibility that groups can have power, that is, that an individual can discover herself as someone who stands in certain relations to other

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\textsuperscript{22} Young (1990) actually makes two inconsistent claims, first, that group meanings partially constitute people's identities (p. 44) and second, that groups constitute individuals (p. 45). However she subsequently modifies this second claim and returns to the idea of partial constitution.

\textsuperscript{23} Young (1990), pp. 47 - 48.

\textsuperscript{24} Pettit (1993a). See Chapters 3 and 4 in particular.
people. That is, it preserves the quality of throwness that marks out social groups from associations and mere aggregates. And it supports both Young’s claim that membership of social groups, and my claim that membership of ethnic groups, matters.

2.4 Freedom as non-domination

Using republican theory, I want now to answer the third of the questions I posed at the start of this chapter - why might it be important to address the claims raised by ethnic groups? First, I look at the republican theory of freedom (this section). Then I look at vulnerability groups (section 2.5). These two theoretical constructs give me the machinery to answer the question as to why we ought to care about minority ethnic groups and the claims made by members of those groups.

Just as liberal political theory begins with an idea about freedom, so too does republican theory. Both theories leave people free to choose and live out their own accounts of the good life, within the constraint of not imposing on other people’s versions of the good life, provided that those accounts of the good life do not offend against freedom. However, where liberal theory claims that freedom is best construed as freedom from interference, republican theory construes freedom as freedom from domination. In classical and early modern republican writings, we find that the antonym of liberty was not interference, but slavery. The free person was one who was not subject to the arbitrary power of another, and the opposite of a free person was a slave, a person owned by a dominus, a master. Cicero wrote about the distinction between a free man and a slave; Machiavelli wrote of the difference between free cities and cities that were in slavery; Harrington takes unfreedom to be living at the arbitrary will of another. Other writers continued to use the language of

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25 The main source for this section is Philip Pettit’s Republicanism: A Theory of Freedom and Government Pettit (1997b). This is the only extended philosophical treatment of republican theory. Pettit has also written a number of papers developing the republican account of freedom; see Pettit (1996), Pettit (1994), Pettit (1993b), Pettit (1993c), Pettit (1992), Pettit (1989b), Pettit (1989a). Other writers have used republican themes, but they tend to adopt particular themes rather than analyse the theoretical structure of republicanism; see Dagger (1997), Miller (2000). Several historians of ideas have written on republican history; see Pocock (1977), Robbins (1959), Viroli (1998), and especially
slavery or servitude in contrast to freedom, so that where a person was dominated, there was no freedom, even if at the same time there was also no interference. A person who was subject to the will of another, even if that will was not exercised and she was able to go about her business without interference, lacked freedom.

The easiest way to understand the concept of freedom as non-domination is to consider what it is to be dominated, and by contrast, what it is to enjoy the state of non-domination. Domination involves three factors. For one person to dominate another, she must (1) be able to interfere (2) arbitrarily (3) in certain choices that the other is in a position to make. And for domination to occur to a significant degree, there must be common knowledge that it can occur.

INTERFERENCE

To interfere, an agent must make an intentional attempt to worsen another agent's range of choices, either by eliminating some choices, or by making some choices less attractive. The action cannot be accidental, or unintended. The interfering action must be performed by an agent; my situation might be worsened by an earthquake, but this is a natural chance of the world, not something for which another agent can be held responsible. If another agent's actions happen to obstruct mine through sheer chance, for example, another shopper taking the last carton of my favourite cereal off the shelf, then that is just my bad luck. There is no sense in holding the agent responsible for worsening my situation. It is not something that the agent has deliberately done to me. The agent chooses to act in such a way that the subject of the interference is prevented from choosing a certain course of action or inaction. An armed robber who forces a bank teller at gunpoint to empty her till does not leave the teller free to choose inaction. Acts of omission can constitute interference; the teacher who does not make any comments on a student's work and the doctor who refuses to consent to an abortion for no good reason both engage in interference. The more obvious forms of interference are acts of commission, including coercion of the body or the will, and manipulation of the range of choices available to agents, by agenda-fixing, the deceptive or non-rational shaping of

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Skinner (1998). Skinner and Viroli in particular endorse Pettit's reading of the tradition, agreeing that the type of freedom with which republicans are concerned is freedom as non-domination.
people's beliefs or desire, and rigging the consequences of people's actions. Interference, when stripped of its pejorative overtones, can be positive. The neighbour who intervenes to put an end to domestic abuse interferes, but does so in a positive manner. Interfering in this case increases the options available to the victim of the abuse, and even if it does reduce the options available to the abuser, it does not contribute to an act of domination.

In addition to being able to interfere, the agent must be aware that she has the capacity to interfere. The agent who could interfere, but does not, because she is not aware of the presence of the potential victim, is not in a position to dominate that potential victim. She cannot have the intent to interfere, because she does not know that she is able to interfere. There is a potential capacity to interfere, but not an actual capacity to interfere, and therefore there is no domination.

ARBITRARINESS

The second aspect of domination is arbitrariness. An agent can engage in arbitrary action to the extent that she is able to interfere at will and with impunity. There is no constraint on her actions, either in preventing her from taking the action in the first place, or in calling her to account and penalising her after the action. Action of this arbitrary nature was clearly available to masters in slave owning societies, and to despotic potentates in some contemporary regimes, but it is not so obviously available in modern, rule-governed societies. It is however, available in some contexts. Consider the husband who can beat his wife, the employer who can sexually harass his staff, the parent who can assault her child, the university lecturer who may put no effort into her teaching, all with little or no censure or fear of reprisal. These actions all exemplify the exercise of arbitrary power. The dominator depends only on her own (mis)judgement in exercising her power, simply imposing her will on the person she dominates. In many modern societies there are laws and institutions designed to prevent, or to detect and arrest such actions, but despite this the actions are familiar to us. It is only in recent years that some of these actions have been widely recognised as reprehensible. To the extent that agents who might be able to exercise interference are forced to track the relevant interests of others, their capacity to interfere is reduced.
The choices that an agent may make can be reduced in a number of ways: choices can be removed completely, for example by physical restraint; some choices can be rendered so costly that they are no longer available, as in the example of the gun wielding robber where the cost of resistance might be life threatening injury; some choices can be given extra value as happens with bribes; some choices can be hidden from view by manipulation and agenda fixing.

The examples of arbitrary power given above highlight one feature of the third aspect of the definition of domination, that a person may be dominated in one aspect of her life while not being dominated in others. A person may work for an employer who is able to sack her at will, thereby forcing her to behave in certain ways so that she ensures that she does not lose her job, but that employer's domination may not extend beyond the workplace, and even if it does extend beyond the workplace, it may not do so at the same intensity. The subject of domination may prefer to be dominated in the less important areas of life than in the more important areas – better an obnoxious employer than an abusive spouse; accordingly the variation in and the extent of domination becomes important. Domination need not be all pervasive.

Likewise, the capacity of a dominating agent to interfere at will and with impunity may be able to be exercised in some ways but not others; employment law may prevent an employer from simply firing employees, but it may not prohibit the employer from changing employees' working hours. A dominating husband may be able to regulate his wife's behaviour at home, but only to the extent that his behaviour is not observed by people he does not want to offend, and he may not be able to dominate her at all in activities outside the home. A school teacher may command the submission of her class, but only during class hours, and only to the extent that her actions are not constrained by internal school rules. Both the exercise of domination and the experience of being dominated may vary in intensity and extent.
These three conditions are sufficient for domination to occur, although perhaps only in a reduced measure and over a restricted domain. If domination is to occur to a significant degree, then it is likely that a further condition will obtain. It is likely to be a matter of common knowledge among the people involved in the relationship, and among others who are aware of what is happening, that the conditions have been fulfilled. This may not be explicit knowledge, in that agents may not state, even to themselves, that they are in a position to dominate or to be dominated, but the possibility and actuality of domination will tend to be a matter of general knowledge in the community, manifested in patterns of behaviour. Those who are powerless will recognise that they do not have the resources to resist domination; those who are able to dominate will be aware of the resources they have, such as superior physical or financial strength, political authority or standing in the community, and so on, which enable them to dominate others. Those surrounding the dominator and the dominated will know that the former has power over the latter. The patterns of domination will be seen and recognised by members of the community in a reflexive 'game' of "I know that you know that he knows..." and so on. There is one general exception: where domination is effected through backroom manipulation or agenda setting, then it will not be a matter of common knowledge.

The effect of the common knowledge of domination is that the powerful will be aware of their control, the powerless will be aware of the vulnerability, and both will be aware that the other is aware of their standing. The powerless will not be able to stand tall and look the powerful in the eye; they will not be able to act in the way that they would freely choose to act for fear of the reaction of the powerful.

The idea of domination is common in political theory, but as Frank Lovett argues, Pettit's analysis is one of the few sustained theoretical analyses available.26 There are sustained analytical conversations in the literature about other basic concepts such as liberty, power and equality, but not domination. Lovett uses Pettit's

26 Lovett (2001). My thanks to Professor Lovett, who kindly sent me a pre-publication copy of his paper.
analysis, along with analyses developed by Weber and Iris Marion Young to develop
an account of domination. He argues that there are three conditions that need to be
fulfilled in order for domination to occur: (1) imbalance of power (drawn from
Weber); (2) dependency (drawn from Young); (3) absence of rules (drawn from
Pettit). The imbalance of power condition arises because in a relationship of
domination, the agent must hold some power over the subject of domination, as a
master holds raw power over a slave. The subject must also be dependent to the
appropriate degree on the agent; I may be dependent on a monopolistic or
oligopolistic supplier of goods, but that may be only a very small degree of
dependence compared to say, the dependence between husband and wife. Neither
imbalances of power nor dependence are necessarily problematic in a rule-governed
society; however where there are no rules regulating the interactions between agents,
then powerful agents may act capriciously towards those who are dependent on them,
as in happens in kangaroo courts.

I do not think that Lovett's imbalance of power condition and absence of rules
condition add anything new to Pettit's account. (It would be very surprising if the
absence of rules condition did so given that it is drawn from Pettit.) Power is
meaningless unless it is power to do something. Lovett effectively argues that
holding superior power is sufficient in itself. However, holding superior power may
be enough in itself to enable an agent to do as she wished; for example, a person who
commands considerable wealth may be able to elect to spend her time surfing and
soaking in sunshine instead of working, while less wealthy individuals might have no
such choice available. Thus there is a power imbalance, but I cannot see that it is a
troublesome power imbalance. Lovett's analysis does however talk of power within
a social relationship. "Social relationship" implies interaction between agents.
Nevertheless Lovett does not specify what this interaction might comprise. If it does
not comprise some sort of interference, or capacity to interfere, then it seems again to
be harmless in itself. "Capacity to interfere" seems to be a more realistic way of
capturing the problems of power imbalances in social relations.

The dependence condition adds some depth to Pettit's account, but I suspect
that much of its flavour can be captured by the "range of choices" condition. Lovett
cashes out dependence in terms of freedom to choose to exit from the relationship. If
a person can choose to exit, then she has a much greater capacity to determine how the relationship should go, and thus domination is considerably reduced. However, as Lovett points out, freedom to exit is not so important when the relationship is trivial, even if one party holds much more power than the other. Lovett gives the example of Bill Gates; while Gates is immensely more powerful than Lovett, he does not impact on Lovett's life in any way other than through Lovett being required from time to time to use Microsoft products, simply because Microsoft effectively holds a monopolistic position in some markets. Were Bill Gates much more significant in Lovett's life, were he for example, Lovett's employer, then the capacity for Gates to dominate Lovett would be much greater. It is precisely this variability in relationships that is captured by the "range of choices" condition. A person may dominate another in certain domains, but not in others. Where Lovett's dependence condition adds depth to the "range of choices" condition is in the nuances of the word 'dependent'. A dependent person is in some ways reliant on another person, and thus she can be exposed to that other person's whims and caprices. Some of this flavour of dependence may be captured by the "capacity to interfere" condition; if people are independent of each other, then there can be no capacity to interfere.

In summary, Lovett's re-analysis of domination very nearly replicates Pettit's analysis of domination. What this suggests is that both writers have focused on something that can be characterised and analysed, that domination is something that is possible within human relationships, and that plausibly, it is an evil that individuals and states will want to minimise.

This raises the further issue of whether non-domination is the most important value for states to defend; I address this in sections 5.1.3 and 5.2.3. If it is the most important value for states to defend, then it ought also to be something which is precious to all members of a polity; I address this in section 6.2.3. At this stage, I want to foreshadow the discussion in these later sections.

One of the ways of understanding the nature of freedom as non-domination is to contrast it to the liberal account of freedom, usually cashed out as freedom as non-

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interference. In liberal accounts, a person enjoys freedom if no one interferes with his choices. Thus a liberal agent is free to choose his own version of the good life, because no one interferes with his choices. Republicanism has a similar approach to freedom as non-domination; a person who enjoys freedom as non-domination is able to choose her own version of the good life. However freedom as non-domination is a social good; it is the freedom than an individual enjoys as a person who lives in a network of social relations, where they are as a matter of course interdependent on each other. In contrast, a person may enjoy freedom as non-interference just because he lives alone; this is the freedom of the cowboy alone on the range rather than the freedom of the person living in a city. To the extent that we think that it is more realistic to describe human beings as living in complex social networks, we should prefer an account of freedom that is designed to work within social settings. Freedom as non-domination has this social orientation; freedom as non-interference does not.

As I discuss in section 5.2.3, one of the advantages of understanding freedom as non-domination is that freedom as non-domination recognises that all too often, the social relationships that people live in are distorted by the power that some agents can and do wield with respect to other agents. Freedom as non-interference does not recognise that the potential victims of interference may in fact adopt a variety of strategies to avoid interference; they may practise a kind of strategic deference or even abasement in order to avoid interference. Such a person will be free from interference, but it is hard to consider her life appealing. By recognising that power relationships can and do operate between agents, freedom as non-domination eliminates or at least mitigates the need to practise such strategic deference. A person who enjoys freedom as non-domination knows that he can plan his life, can interact with other people, can make and realise choices, subject only to the vagaries of fortune, and not the capricious exercise of power by other agents. He enjoys status and standing within a social setting, not as an isolated individual. Moreover, it seems that there is a universal desire to enjoy such freedom, even if it is not described in so many words. The language of resenting powerlessness, of being free to rule oneself, of being free from domination seems to be cross-cultural, and ubiquitous. I discuss this further in section 6.3.2.
In summary, freedom as non-domination means being free from arbitrary, capricious interference. Interference itself is not an evil; laws and rules interfere with the choices we may make, but to the extent that they track the interests of the people to whom they apply, they are not arbitrary.\textsuperscript{28} Non-interfering domination is an evil; even if the person who has the capacity to interfere chooses not to do so, the person who is subject to him must always keep a weather eye on him, must always act in the knowledge that her freedom to act could be curtailed at any time. She is not secure in her freedom to act, and thus she does not enjoy freedom as non-domination.

2.5 Vulnerability groups

What then, identifies those who are in a position to be dominated? It is a matter of experience. All other things being equal, a person who has once dominated another is in a position to dominate that person again because she knows that she has the capacity to do so. If some other factors have changed, the capacity for domination may be reduced. Such changes might include a change in the status of the victim of the domination so that he now has more resources to resist domination, or a change in the society surrounding the perpetrator and the victim of domination, so that it is no longer easy for the domination to occur. However, if the victim of the domination still bears the same markers that identify him as a candidate for domination, whatever those may be, then the domination may recur.

The capacity to dominate again does not extend only to future interactions between the dominator and the victim of domination. It also extends to other people who bear the same markers of identity as the first victim of domination. If a woman is dominated in virtue of being a woman, then all people who share the markers of identity that identify the first person as a woman, that is, all other women, may also be dominated in virtue of being women. If a person is dominated in virtue of being physically disabled, then all other people who share the markers of identity that

\textsuperscript{28} See the discussion of the rule of law in section 3.1.
identify the first person as physically disabled, that is, all other physically disabled people, may also be dominated in virtue of being physically disabled. And so on.

Note that the cases I have presented are extremely simplistic; it is unlikely that all women would be dominated solely in virtue of being women – we can all name without too much thinking women who have enjoyed such positions that they are simply unable to be dominated. It is likely that the cause of some women being in such a state where they cannot be dominated lies in a complicated conjunction of factors such as access to independent wealth, access to employment, access to education and so on. Nevertheless, it is the case that as a class or a group, women tend to display these factors which means in turn that they can be dominated. As a shorthand at least, it is useful to think in terms of the class of women, rather than in terms of the class of all people who display certain factors that are usually co-extensive with the class of women. Moreover, even women who do enjoy freedom as non-domination due to the sorts of factors listed above, will still be regarded as members of the vulnerability group of women if people do not know about these other factors, or if they are irrelevant to the particular circumstance. An assailant will care little about his victim's high powered job and healthy bank-balance that command respect elsewhere; he will be concerned only about whether the particular potential victim as the capacity at that time to withstand his attack.

Just as the dominator is able to exercise his capacity to dominate in future interactions with the person he currently dominates, so too is he able to dominate all those who are in a relevantly similar situation to the person he first dominated. All those people who are in a similar class or group to the first person will be vulnerable to the dominator. Consider the case of rape on campus. As soon as one woman is raped on campus, then other women know that campus is no longer a safe place, that they will have to take extra precautions if they want to go anywhere on campus alone, especially if there are no other people about, and so on. They are vulnerable in a similar way to the first woman, in virtue of the characteristics of gender that they share. They are members of the same vulnerability class.

Iris Marion Young discusses varying ways in which groups can be subject to oppression, via exploitation, marginalisation, powerlessness, cultural imperialism
and violence. Young argues that gender, race and class division, and divisions based on sexuality, age and professional status, mark out groups that are subject in varying ways to these types of oppression. Even though some members of these groups may escape oppression, or some forms of oppression, they are still potentially subject to oppression, *qua* members of the groups. Being marked as a member of a particular group may also mark a person as being subject to oppression. In Pettit's terms, being a member of a particular group may also mark that person as being vulnerable to domination.

Being a member of a particular ethnic group may mean being a member of a particular vulnerability class. It may be the case for some ethnic groups that events have turned out so that they are not in fact in a position to be dominated; this is clearly the case for people of Anglo-European descent in nations such as the United States of America, and Australia, to name just two. However for many ethnic groups events have turned out in such a way that they are in a position to be dominated. That is, members of the group are vulnerable to domination in virtue of their membership of the group. Recall the characteristic of ethnic groups that I called projectability (see section 2.3). Once we know that a person is a member of a particular ethnic group, we can predict certain things about that person. Just as we can predict what language a person will speak, what food he will eat, where he will live and so on, so too can we predict the extent to which he is subject to domination, once we know that he is a member of a particular ethnic group.

Some members of particular ethnic groups may reject their identification by others as being vulnerable to domination in virtue of their membership of the group. Moreover, they may be able to reject that domination in virtue of other characteristics. For example, assume that being Maori marks a person as being subject to domination. In a medical setting such as a hospital, a Maori doctor may be regarded first as a professional, particularly if she is wearing the traditional white coat and carrying a stethoscope, and therefore is seen as a professional not vulnerable to domination. Outside the hospital, her personal wealth and education and so on may enable her to live a comparatively undominated life. However, if she does not

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29 Young (1990), pp. 48 - 65.
carry these markers of her membership in other, non-vulnerable groups, then she would be marked as being vulnerable to domination.

In section 2.3 I said that even though there is a demonstrable subjective dimension to ethnic group identity, for the purposes of my argument I want to focus on objective markers of identity. The reason is, I hope, obvious. If a person bears no external, objective markers of ethnic group identity, then she can not be identified as someone who might be vulnerable to domination in virtue of her ethnic group membership. It is hard to imagine that someone who subjectively identifies himself as a member of a particular ethnic group would not also exhibit at least some of the external markers of membership of the ethnic group, but it is nevertheless possible. However to be vulnerable to domination in virtue of ethnic group membership, a person must be identified by outsiders as a member of that ethnic group. Hence the importance of external markers of ethnic group identity, and hence the need to avoid the subjective dimension of ethnic group membership. Furthermore, as Levy says, although we may be able to understand what a group thinks of itself, and perhaps how other groups think of the group if we attempt to understand what he calls 'the internal point of view', the internal point of view does not help us to understand possible institutions of coexistence, or help us to understand how to live with those whom we do not fully understand, or who do not fully understand us or even wish to.30,31

This understanding of how it is that individuals may be subject to domination in virtue of their membership of a particular group is, I think, one of the attractions of republican political theory. Pettit does not place so much emphasis on groups; his analysis is more attuned to minimising domination between individuals (dominium), and domination between an individual and the state (imperium). Considering the nature of ethnic groups and their vulnerability to domination highlights this aspect of

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31 There is another issue to do with ethnic group membership, that is the ability of the group to determine who counts as a member, and who does not. However even if an ethnic group does not accept someone as a member, that person would still presumably look like a member of the group, and perhaps behave in ways that are consistent with group membership. That is, she would still bear the markers of membership of the group, despite what the group said, and still be vulnerable to domination if membership of the group is a marker of vulnerability to domination. See Simpson (2000) pp. 128 - 136 for a fascinating account of how members of a group can define people as members or not.
republican theory. Republican theory thus incorporates an understanding of how groups can impact on a person's capacity to exercise freedom into its account of freedom. This analysis also explains why we think that groups of people can be subject to domination *qua* group; it is because the features that distinguish one group from another may also mark a group out as being vulnerable to capricious interference. To be sure the cost of capricious interference may be borne by individual members of a group; it is an individual who is unable to get a job, or is subject to racial vilification, and so on. Nevertheless, the individual bears these costs *qua* member of a group. Hence the importance of understanding how groups are treated in a polity. This understanding of vulnerability groups draws on the social nature of freedom as non-domination, not only because groups are of course social structures, but also through the understanding of how groups operate within larger social structures. It makes little sense to think of an isolated group, say an 'undiscovered' tribe in Papua New Guinea, enjoying freedom as non-domination as a group; put that group in a social setting, and freedom as non-domination becomes important.

The potential for members of ethnic minority groups to be vulnerable to domination is why republicanism concerns itself with the claims made by ethnic groups, and with issues of diversity in general. As a matter of fact, our societies are structured in such a way that members of particular ethnic groups are subject to domination. The republican aim is to end this domination, in order to ensure that all members of a society enjoy freedom as non-domination. In the next chapter, I discuss the principles and institutions that republicanism uses to ensure that freedom as non-domination is available to all citizens, and in Chapter 4, I discuss the particular ways in which republicanism can understand and if necessary respond to the claims made by ethnic minority groups.
CHAPTER 3 – REPUBLICAN PRINCIPLES AND INSTITUTIONS

"For to say that a Lucchese hath no more liberty of immunity from the laws of Lucca than a Turk hath from those of Constantinople, and to say that a Lucchese hath no more liberty or immunity by the laws of Lucca than a Turk hath by those of Constantinople, are pretty different speeches. The first may be said of all governments alike, the second scarce of any two; much less of these, seeing it is known that whereas the greatest bashaw is a tenant, as well of his head as of his estate, at the will of his lord, the meanest Lucchese that hath land is a freeholder of both." James Harrington, The Commonwealth of Oceana

In contemporary life, there are many powerful individuals, organisations and institutions that can, and do, interfere with the lives of ordinary citizens. Big businesses can set prices, influence government policy, monopolise resources, use resources to compel individuals to behave in certain ways, or to desist from practices that are not congenial to business, and so on. Professional groups can protect their members from charges of misbehaviour; consider the difficulties many individuals face in bringing charges of malpractice against doctors.¹ Physically strong people can attack weaker people, or make them avoid certain behaviours; think of the 'no-go' areas in many large cities. Wealthy people can use their resources to establish 'gated' suburbs which keep undesirables out, unless of course, they are there to take the rubbish away. In all these cases, an agent with the capacity to interfere arbitrarily does so.

How can we protect individuals from arbitrary interference? There are two possible routes to doing so. The first is to ensure that individuals have sufficient resources to deter arbitrary interference. So for example, if we ensure that people have adequate food, shelter and clothing, then individuals are less likely to be vulnerable to exploitation by employers, because they do not depend on their employers for their daily subsistence. We might provide physically weak people with defensive weapons, bolster the incomes of impoverished people, and so on. However, a moment's reflection shows that providing people with more resources is

¹ Outside the United States, at least.
ultimately a sterile strategy. As soon as a powerful person acquired more resources, those who could potentially be harmed by that person would need more resources. The end result would be a cold war of competing resources. The idea that resources are needed to counteract domination is what underlies the limitation of citizenship in the republican tradition. Citizenship was limited to propertied men, precisely because they were the people who had the resources to withstand domination. Contemporary societies are much more egalitarian; citizenship is determined by factors other than wealth and gender. In most modern nation states, the great majority of residents are citizens, regardless of factors such as gender and property. The resource driven strategy is not only theoretically unappealing; it is also unappealing in practical terms. In the real world, inequalities of resources are simply the norm, arising from differences in physical health, social influence and wealth, amongst other things. Inevitably, many of the strong deploy their resources so as to acquire more resources, resulting at worst in a world of masters and slaves. Even being less pessimistic about the nature of the world we live in, the result of allowing the strong to become stronger, or the weak to become weaker, results in at least some people operating at a disadvantage.

The alternative strategy for ensuring that all citizens are able to enjoy freedom as non-domination is by constitutional provision. Those with the capacity to interfere arbitrarily are restrained by the laws of the state. Agents with the capacities described above are normally constrained in some way by the state, in contemporary liberal democratic states at least. Businesses are subject to monopoly laws, public pressure has led professional bodies to establish ethics committees, governments have legislated to prosecute and punish malpractice, codes of criminal law prohibit the use of force and so on. The legislating authority in all these cases is the state. The problem then, is how are we to keep the state from interfering arbitrarily in people's lives? The question becomes more acute when we consider the extent to which governments in any polity ordinarily interfere in the lives of citizens.

To ensure that no agent can interfere arbitrarily in the choices of another agent, and that the most powerful agent of all, that is, the government, can not likewise interfere arbitrarily with citizens, that is, to ensure that there are no agents with the capacity to exercise dominating power, a republican polity embraces the rule
of law, and systems of checks and balances, including the dispersion of power and counter majoritarianism. Republican polities are also committed to democracy, and to civic virtue, all in order to create the conditions where freedom as non-domination can flourish. The relationship between these institutions and freedom is not a causal one; freedom as non-domination comes into being simultaneously with the institutions. Thus the 'effect' occurs at the same time as the 'cause'; the two things are not distinct, so this cannot be described as a proper causal relation. Pettit uses an analogy of immunisation to describe this relationship; just as antibodies in your bloodstream do not cause but rather constitute immunity, so these institutions do not cause freedom as non-domination but constitute it. They are a way of realising freedom as non-domination.  

Before I turn to discussing the institutions, a note about the goal oriented nature of freedom as non-domination. Any political ideal can serve as either a goal for the state to aim for, or as a constraint on what the state may do. If it is the former, then if necessary, the state can accept a decrease in freedom as non-domination in some way in order to secure a greater increase in freedom as non-domination in another way. It might accept a temporary or short term decrease in overall freedom as non-domination, in order to secure a long term increase, or it might choose to reduce some people's freedom as non-domination permanently in order to increase other people's freedom as non-domination permanently. The idea is that trade offs can be made; colloquially, the state may take one step back in order to go two steps forward. If the latter approach is taken, then a political ideal is viewed as a constraint on all actions, as a line in the sand which may not be overstepped. If the ideal of freedom as non-domination is taken as a constraint, then no measures taken by the state ought to compromise or reduce freedom as non-domination. There are dangers in both approaches: treating non-domination as a goal to be promoted may enable significant evils to be perpetrated in order to secure non-domination; treating it as a constraint to be honoured may mean that some actions that should be taken are nevertheless ruled out. Pettit argues that we should adopt a goal oriented approach. 

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3 A good illustration of the former evil is found in Ursula LeGuin's story The Ones Who Walk Away from Omelas (LeGuin 1975); the evils of the latter can be seen in the constitutional right in the United States for individuals to carry guns, which seems to have a direct connection with various schoolyard slaughters.
approach to freedom as non-domination, saying that treating it as a constraint can lead to a fetishistic faithfulness to an abstract ideal. It is better to tolerate some failures if doing so is the most effective means of increasing freedom as non-domination overall. If in assessing a particular measure, we find that our moral intuitions are outraged, then we have two options; we can either reject freedom as non-domination, or we can reconsider whether the measure really is a worthwhile one.4

The debate about the appropriateness of goal driven or consequentialist approaches, and constraint bound or teleological approaches is an old and as yet unresolved one in moral philosophy. It is one which is beyond the scope of this thesis. Nevertheless, I want to suggest that for political purposes at least, we may be better off taking a consequentialist approach. The real world of politics is driven by pragmatism, by a weighing of costs and benefits, rather than by commitments to ideals. We see this abandonment of ideals in the way that both left and right wing political parties attempt to position themselves as centrist parties, rather than parties with a commitment to say, labour on one hand, and business on the other. The newly elected president of the United States, George W. Bush, has justified abandoning the Kyoto protocol on greenhouse gases by saying it would more beneficial for business to do so. Even local body authorities routinely make decisions based on costs and benefits, or by assessing the preferences of their constituencies. If as political theorists we are to have some influence on real world politics, then we may need to attempt to cast our recommendations in the same sorts of terms, that is, practical, pragmatic, goal driven terms. We should of course, subject our recommendations to the test of reflective equilibrium; if on reflection we find that our recommendations are in some way repugnant, then they ought to be amended or abandoned. In the first instance however, we should adopt a consequentialist approach. This is the approach taken in this thesis.

3.1 Empire of laws

Republican thought is often associated with an anti-monarchical motif. When this is cashed out, it turns out that what is important is not so much the need to have a society without a monarch, but a society in which everyone, including the monarch, is subject to the rule of law. Someone who is above the laws, who can do as he or she wishes, has the capacity to interfere, arbitrarily, in the choices that other agents may make. This explains the anti-monarchical motif; under a rule of law, there is no place for the dictates of an autocrat.

The general features of the rule of law have been described by C. L. Ten. The laws should be general so that they apply to everyone, including those who make the laws. They should be public, in that they are promulgated and made known to those to whom they apply; they should be intelligible, consistent and not subject to constant change; they should be prospective and not retroactive. The laws should be administered by people other than those who make the laws.

The rule of law is interactive: law makers make a commitment to citizens that these are the rules that will be applied to citizens' conduct, and citizens in following the rules let the law makers know that their efforts are not in vain – they give law makers an incentive to frame good laws. Furthermore, any system of law requires interpretation. Laws are usually designed to cover general circumstances; it is up to judges and juries and other decision-making authorities to apply the law in particular cases. For example, a law proscribing and punishing murder may not discriminate between mercy killings and killings for so called snuff movies; a judge and jury can consider what punishment, if any, ought to apply in each case. To ensure that the decisions of those applying the law are not arbitrary, the decisions must be subject to review.

What sorts of institutions will help the rule of law to come into being? This is not a straightforward question, given that many of the features of an empire of laws

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5 Again, the material in this chapter is drawn mainly from Philip Pettit's work, especially Pettit (1997b), unless otherwise noted.
are qualitative, that is, their fulfilment is dependent on the nature of the laws themselves. So for example, the requirements for the laws to be general in nature, intelligible, and consistent, cannot be built into particular institutions, as these requirements apply to the laws themselves. What is needed then is some institution that is able to review the laws, perhaps a specific institution for reviewing laws, or perhaps a law review function could be added to the duties of a particular court. Something of this kind already happens in many polities with written constitutions; for example, legislation in the United States may be referred to the Supreme Court for review if it is thought to be unconstitutional. Review of the law could be an automatic function, with all new law submitted to the review body before receiving a final enactment; alternatively, laws could be referred to the law review body on a exception basis. To a certain extent this type of review happens in select committee procedures in Westminster democracies, and through similar procedures in other democracies.

The requirement for the law to be widely promulgated and known can be achieved by appropriate publicity, both at the time the law is in the process of being enacted, and when it comes into effect. This is standard procedure in most liberal democracies. The process of consulting in order to review proposed legislation carries with it a certain amount of publicity; other publicity can come through public notices sections in newspapers, advertising in specialist and general publications, and so on. Such duties can be handled by bureaus within relevant government ministries, or by specialist offices within parliamentary offices.

The application of the law should be separate from the enactment of the law. That is, it should not be administered by those who devise and enact it. This means that legislatures and judiciaries should be separate, a straightforward constitutional process. The application of the law should be subject to review, primarily through appeal procedures, but also through processes designed to bring apparent injustices into the open. Again, appeal processes are familiar in most liberal democracies; typically there are avenues of appeal from one court to another, and appeals from administrative tribunals to lower level courts. Processes designed to bring out apparent injustices are not as common. The overall application of the law should
also be subject to review, perhaps by the same sort of body that reviews law for its compliance with the qualitative features discussed above.

The law can not be effective if it is not accessible to all citizens. Impoverished citizens ought to have the same level of access to the law as wealthy citizens, so that an immaterial and contingent fact does not impact on the quality of the administration of the law. Thus a republican polity will have efficient and effective legal aid systems, in order to provide all citizens with access to legal specialists if they need to defend themselves before the legal system. It ought also to have a series of low cost tribunals where people can represent themselves, provided that both parties agree. Obviously serious cases, including criminal cases, ought not to be decided in such tribunals, but trivial matters, such as the siting of fences between neighbours, or liability for broken windows, or disputes between landlords and tenants and so on could be decided through negotiation at such tribunals. And as with all republican systems, there ought to be a series of appeal and review procedures associated with such tribunals.

SUMMARY – REPUBLICAN INSTITUTIONS FOR THE RULE OF LAW

- Review of proposed laws
- Publicity offices
- Separation of legislature and judiciary
- Review and appeal procedures for the application of the law, for both courts and tribunals
- Tribunals
- Legal aid

3.2 Checks and balances

In order to prevent the concentration of power in the hands of a few, the abuse of power by those who hold it, and the unimpeded use of power which creates the possibility of domination, all of which reduce non-domination, the republic has a
system of checks and balances. Those who hold power are subject to public scrutiny and accountability, and they are liable to impeachment for failures of duty. Power is dispersed by separation of duties and limitation of the length of time for which any one person may hold office before being subject to review. All of these reduce the extent to which any individual or group can manipulate the law and positions of power in their own interests, so that no one person has complete control over the entire process.

This system of checks and balances marks republican realism about human nature. It does not demand that those in power have any great claim to the virtue of selfless service, but acknowledges that they may and probably will act from time to time to achieve their own ends, unless they are checked. If there is no system of checks and balances, there is no guarantee that the holders of power will not seek to increase their power, reducing the extent to which other people in the state may live without interference or domination. To possess secure non-interference, citizens must know that those in power may not act to increase their power at the expense of others. This is what underlies the system of checks and balances in the republic.

In a republican polity, the structure of government should be such that no one arm of government can hold all power. Usually, this means that the people who make the laws should not be the same people who administer the laws, and nor should they be the same people who judge the application of the law. That is, the legislature, the executive and the judiciary should all be separate arms of government. This happens most obviously in the United States, where Congress and the Senate make the laws, the executive, assisted by various government ministries and departments, administers the laws, and the judiciary, headed by the Supreme Court, judges the application of the laws. The separation is not so apparent in Westminster systems of government, where members of the executive are also members of the legislature. However, typically in Westminster systems, 'Question Time' allows additional scrutiny of the executive.

Power can be dispersed by this traditional separation of powers, commonly found in modern liberal democracies. Power can also be dispersed by federal structures of government, where some areas of governance are reserved to a federal
parliament, and others to state governments. In Australia, for example, policing, health and education, among other matters, are reserved to the states; defence, welfare policy, foreign affairs, and overall fiscal strategy are reserved to the federal government. Similar patterns are found in other federal nation states. Other powers can be reserved to local body governments. Typically, city, town and district councils handle day to day affairs such as water and sewerage, parks and reserves, the provision of library services, and so on, taxing residents to pay for these services through rates.

Power within legislatures can also be constrained by the familiar system of bicameral legislatures. A lower house functions as a house that initiates and passes legislation, including bills of supply; an upper house acts as a house of review. Ideally, members of the two houses are elected by different procedures. Members of the lower house might be elected from particular electorates, while members of the upper house might be elected from a party list, or in a federal structure, a party list for each state. So for example, in Australia, representatives in the lower house are elected from particular electorates, while senators in the upper house are elected from party lists in individual states. Moreover, each state elects the same number of senators, regardless of the population in each state. A similar system is used in the United States. In the United Kingdom, until very recently, members of the upper house of review, the House of Lords, gained their seats through heredity, or by lifetime appointment; recent changes have ensured that the archaic aspect of selection via heredity has been eliminated, and all members are now appointed members (except for some limited transitional arrangements). Whatever the particular arrangements for appointment, the crucial factor is that the systems of appointment differ between the two houses, thus making it less likely that a party that holds power in the lower house also holds power in the upper house, thus reducing the capacity of the government to wield unrestrained power. In addition, in order for legislatures to be truly effective, there must be effective parliamentary opposition, so that all government law making and policy decisions are subject to contestation and review.

The performance of officials and representatives in all levels of government is subject to review through regular elections. This provides a check on
governments.\(^8\) Other checks and balances include the processes of appeal of legal decisions discussed above, and statutory review of administrative performance. Government ministries and departments are usually subject to annual financial and performance audits by an independent auditor. Many Western democracies have also set up ombudsmen to review particular administrative decisions and actions. Typically, citizens may make a complaint to the ombudsman, who will then investigate the complaint, and decide what remedial action, if any, need be taken. In addition, many government departments and local authorities have their own internal appeal procedures. With respect to issues of pressing significance, varying levels of commissions of enquiry can be used, such as House inquiries (in the United States) and Royal or Parliamentary Commissions of Inquiry (in Westminster systems).

A free press provides an important check on government activity. The actions of government can be scrutinised and discussed in the press, thus informing the electorate of government activity. The operation of the free press can be assisted by freedom of information procedures, whereby government departments can be obliged to release information, with the refusal to release information subject to review by an ombudsman.

**SUMMARY - REPUBLICAN INSTITUTIONS FOR CHECKS AND BALANCES**

- Separation of powers
- Effective parliamentary opposition
- Federal governments
- Local body governments
- Bicameral legislatures
- Parliamentary opposition
- Regular elections
- Legal system appeal procedures

\(^8\) In New Zealand's first parliament elected under Mixed-Member Proportional representation (1996 - 1998), minority parties became far more powerful. A number of members of Parliament in larger parties, despite having been elected under the banner of one party, jumped ship to form their own parties. Because a large proportion of Maori MPs from one party did so en masse, the process became known as *waka jumping*, even though some non-Maori MPs also changed parties. A *waka* is a Maori war canoe. In the elections in 1998, not a single waka jumping MP regained his or her seat.
3.3 Counter majoritarianism

Until now I have talked of domination as the power exercised by one person over another, or by an institution over another agent. Domination is not however, limited to relations between one individual and another; it can also exist in relations between one person and a group or groups of people, and in relations between groups of people. It is possible for groups of people to combine forces so as to be able to dominate others, whether as individuals or groups. A majority, through its superior strength, whether physical, financial, electoral or other in nature, can dominate others at its whim.

It is clear that in at least some cases, majority will should prevail. For example, a city council may be able to build and maintain a public swimming pool, or a public gymnasium, but not both. If this is the case, then all other things being equal, majority support for one option or the other is a reasonable way, and probably the best way, to decide which facility should be built. Where however, the will of the majority would constitute arbitrary interference in the affairs of the minority, then there must be some way for that interference to be constrained. For example, we can imagine a majority deciding that no people over a certain age, say sixty, ought to be able to drive cars, because they get in the way of younger faster drivers, or that parents of young children should not be allowed to take those children to public libraries, because they are too noisy. There are perhaps somewhat far fetched examples, but they are nevertheless possible. As a matter of strategic prudence, no person should endorse straightforward majority rule in all cases, unless he was certain that he would never be a member of a salient minority. Republicanism disavows straightforward majority rule because majorities can be capricious.
I will discuss some of the ways in which the minority can contest the will of the majority in the next section. Contestation of the will of the majority differs, however, from constraining the whim of the majority. The latter is far more serious, because if abused, it represents in itself a form of domination. What this suggests is that while a republican polity may introduce measures to constrain the will of the majority, it may not introduce measures that always defeat the will of the majority. However, it suggests that there should be measures to at least subject the will of the majority to review and appeal. It also suggests that if more or less permanent measures are to be taken to constrain the will of the majority, then those measures ought to be taken only in respect of institutions that exist in order to preserve freedom as non-domination. Measures that might command such status, that is, the status of being fundamental to the preservation of freedom as non-domination, include rights to freedom of speech and freedom of association, and basic constitutional arrangements. The types of constraints protecting these institutions might include: entrenched legislation, where a two-thirds majority of the legislative authority is required in order to amend the legislation; constitutional amendment by referendums with two-tier approval processes, such as that found in Australia where constitutional amendments must be approved by a majority of electors and a majority of states; houses of review, such as a Senate or a House of Lords, with differing voting procedures for lower and upper houses.

Many of the institutions that will instantiate counter majoritarianism are the same as the institutions needed to instantiate contestatory democracy. I will discuss these in more detail below, but roughly, they include institutions to allow avenues of appeal and review, and institutions to allow the voices of all citizens to be heard in debates. There are however, some other institutions, or perhaps prohibitions, that militate against simple majority rule. The most basic of these is a prohibition on binding citizen initiated referendums. This is not to say that referendums should not be used in some circumstances. For example, changes to a polity's constitution ought to be decided by the entire population, but perhaps by something other than a simple majority. A two-thirds majority might be appropriate, or, in federal systems, a majority of citizens and a majority of states, as in Australia, or in the United States, a
two thirds majority of state legislatures. This would ensure that any constitutional changes had widespread support.

Another way to limit majoritarianism is to allow non-binding citizens referendums. Citizens could use this process to signal a pressing need to legislators. It would be up to legislators to then respond to the results of a referendum, perhaps by initiating an on-going discussion on the subject of the referendum, so that any change that comes about as a result of the referendum is a change that has also been through the processes needed for contestation. In effect then, the referendum becomes part of the process of advising the legislature, rather than a direct route to change. A third way to limit majoritarianism is to prohibit referendums altogether. This however has a significant cost; it means that constitutional change can be approved only by legislatures. This concentrates power in the hands of legislatures, unnecessarily. What is needed in this case is a way to limit this power, perhaps by entrenching constitutional law, so that a two thirds majority of the legislature is required in order to effect change. A fourth way to limit majoritarianism is to use a hurdle for referendum questions. Those who want a particular issue to be addressed by referendum must demonstrate first that there is a reasonable degree of support in the electorate. For example, the sponsor of a referendum might be required to gather signatures from a certain percentage of the electorate before a question can be put to the electorate in a referendum. All of these measures should help to ensure that the advantages of referendums, that is, as a means of taking advice from the entire electorate, are not lost while at the same time acting against simple majoritarian government.

SUMMARY - REPUBLICAN INSTITUTIONS FOR COUNTER-MAJORITARIANISM

- Entrenched legislation
- Constitutional amendment by two tier processes
- Houses of review
- Limitations on the use of referendums
- Checks and balances
- Contestatory democracy
3.4 Contestatory democracy

Most contemporary political theories embrace democracy; most political commentators assume that democratic governments are the best form of government; most contemporary political entities, ranging from local governments to state governments to national and international governments, operate, or at least claim to operate as democracies. Republicanism is no different from other theories in embracing democracy. Writers in the republican tradition detail voting procedures and mechanisms for all the citizens of a polity to be involved in the governing of that polity. Contemporary republicanism claims that citizenship, and therefore suffrage, is an integral component of the institutions that create freedom as non-domination. In the remainder of this section I will discuss first the republican commitment to democracy, and second the form that republican democracy takes, that is, contestatory democracy.

Freedom as non-domination precludes the rule of a single person, that is, a monarch or dictator, and likewise, it precludes the rule of a few people, that is, an oligarchy, and even the rule of a simple majority (see section 3.3). This is because if one person, or a group of people, or even a majority of people rule, then by definition the remainder of the citizens of the polity are excluded from rule, and they are subject to the decisions made by the rulers. Recall that domination by the government comes about when that government that does not track the interests of the targets of that interference. If this is the case, then there is scope for the rule of one person, or the rule of a small group of people or a simple majority, to promote freedom of non-domination, or at least not undermine it, if those rulers are required to track the interests of the ruled, and to act in such a way that the interests of the ruled are promoted.

There are four problems with this claim. First, ruling in the interests of the ruled, without allowing the ruled any say in what is to be done, is paternalistic. As such, it undermines the standing of the ruled; they are not treated as autonomous agents, but more as children who need to be cared for. They are in much the same position as slaves with a benevolent, non-interfering master – they cannot look the

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9 This section also draws on Pettit (2000b), Pettit (1999).
other in the eye. This in itself undermines their possession of freedom as non-domination. Second, the ruled are by definition, subjects. Even though the rulers in practice may not attempt to interfere with their subjects, they can do so if they choose. And even if they do not act in a paternalistic manner, do not interfere, and always act for their subjects' benefit, the subjects are still subject to another person, or people. Their rulers are superior to them; they have an inferior status. Third, the rulers may not always rule in the interests of the ruled. Although it could be that as a matter of fact, the rulers do always rule in the interests of the ruled, expecting that this would always be the case seems to be at least somewhat unrealistic about human nature. It seems more realistic to think that the rulers would from time to time act in their own interests instead of in the interests of those they rule. Finally, the rulers might simply make a mistake about the interests of those they rule. Hence the need to practice widespread democracy, to represent the interests of as many people as possible in the rule of the polity.

Freedom as non-domination also requires the dispersal of power. Closely held power increases the capacity for domination. Those who hold power can use it for their own purposes, or they may collude with others. This process can only be intensified if the number of power holders is small, enabling power holders to make contact with each other easily, and reducing the number of arrangements that must be made in order to accomplish the power holders' ends. The rotten boroughs in England exemplified this. Where there were only a few electors in a borough, a person with influence in the borough was easily able to influence them to achieve his own ends, typically the election of the candidates he put forward; where there was a much greater number of electors, this was not possible.

Contemporary democratic forms of government, usually understood to include universal suffrage, spread power widely. Virtually all citizens in a polity hold, or will be entitled in due course to hold the power to vote. This reduces the capacity of those who have resources, financial, physical or political, to influence the

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10 This is why constitutional democracies such as Australia and New Zealand should become republics, albeit while remaining members of the Commonwealth of nations. Even though citizens in these countries are for all practical purposes free to order their own lives, they are nevertheless nominally subjects.
electorate in order to achieve their own ends. There are simply too many people involved in the process to enable one or a few individuals to exercise too much sway, thus reducing the possibility of domination.

Finally, democracy is a check on the power of government. As discussed above, in order to reduce the capacity of the state to dominate its citizens, republicanism institutes a series of checks and balances, including regular review of rulers. It is possible that in order to review the performance of rulers all that would be needed is some independent body, which need not be itself elected, but then that body would in turn need to be reviewed by yet another independent body, and so on. In one sense, democracy provides a short cut, ensuring that the review of government is carried out directly by the governed. There is however, another, better reason for democratic review of government performance. It ensures that the review of government is carried out by all the people who are subject to that government's rule. This reduces the capacity for any one person to be dominated by the government, because each person's voice counts when government is reviewed.

The republican tradition espouses democratic rule, but the reasons for doing so are different from those relied on in contemporary republican theory. A person can not be free unless he is a citizen of a free state. A free state is one which is not subject to the rule of any other entity, whether another state or an individual person or a small group of people. A free state is one which rules itself. Hence the need for a kind of democracy. These reasons do not carry so much weight in the late twentieth century, when most states describe themselves as democracies, and democracy is regarded as the best system of choosing governments, to the extent that patently non-democratic states nevertheless call themselves democratic, and often have some apparatus of pseudo-democracy. Moreover, it is taken as a given by most political theories that states ought to rule themselves. The reasons discussed above show why, in a world of free states where democracy is simply taken as a given, contemporary republicanism does not assume democracy, but requires it.

11 The usual exceptions are children below the age of majority, the criminally insane, and those in prisons.
Republicanism is not just committed to democracy in general, but to a type of democracy that allows citizens to participate meaningfully in the processes of government, and that operates in such a way that no one individual is excluded from participation in decision making. If citizens are excluded from decision making, then there is no guarantee that the decisions made will track their interests, and the capacity for the state to dominate its citizens is increased.

One obvious way to include all citizens in decision making is to use a series of referendums and majority rule. As discussed above, however (see section 3.3), majoritarian rule is itself inimical to freedom as non-domination. Moreover, in modern self-governing polities, typically nation states, the scale and complexity of even day-to-day decision making is enormous. It is simply not possible for all citizens to participate in all decision making. What is needed is some way of allowing and encouraging citizens to participate in government that is at the same time feasible and meaningful, that is, not merely tokenistic. This is no small task; the smallest of modern nation states comprise hundreds of thousands of people, and the largest, including the world's largest democracy, India, over one billion. Even smaller polities within nation states, such as local bodies, usually include tens of thousands of people. It is simply not possible for one billion people, or several hundred thousand people, or even, say, twenty thousand people to participate in all decision making. Republicanism realises this commitment to participation through representation, advice giving and contestation.

Representation and advice giving are familiar strategies within modern liberal democracies. Typically, each citizen is entitled, and in some jurisdictions required to vote in elections for representatives on a number of governing bodies, including national and state legislatures, local body governments, and so on. Those elected usually represent a particular electorate, usually defined by geography, but in some instances by factors such as race or gender. Through this, each citizen may attain a measure of representation in decision making bodies.

By advice giving, I mean the formulation and presentation of policy and advice to those in positions of power, especially those in the legislature. Advice giving is usually not deliberately constructed to achieve a measure of representation
Policies and advice are formulated by professional bodies, such as government departments and ministries, political party policy units, and public or private sector think tanks. Participation in these is often limited to those directly employed in the organisations, or to those invited to participate in the process. Commonly however, as legislation moves through parliamentary and deliberative processes, there are several avenues for public participation. Individuals or groups may lobby their own political representatives, and other members of the legislature, and they may participate in the committee stages of the formulation of legislation. In a Westminster system, this is the stage when a bill having been read for the first time in parliament, is sent to a committee for detailed review. These committees usually comprise political representatives from all major parties represented in the legislature. Public submissions to these committees are invited. By making a submission in the committee stage of a bill, any citizen may participate in formulating and giving advice.

Even with robust institutions for representation and advice giving, in modern nation states, it is still not possible for all citizens to participate meaningfully in governance. There are two limits to participation: 1. the sheer logistical problems involved, that is, the cost of administering participation; 2. the costs borne by individual citizens choosing to participate, such as lost wages. Imagine the logistical problems if all the citizens in Canada decided to make individual submissions to a select committee on a particular bill. The coordination problems involved are not so difficult in the case of elections for representatives in legislatures and other governing bodies, and moreover are now well practiced in modern democracies, to the extent that one of the largest nation states in the world, India, is able to hold regular elections that are generally acknowledged to embrace democratic ideals. Taking part in advice giving procedures provides a substantial measure of participation. It is however, limited both by the extent to which citizens are able and prepared to be involved – the costs to individuals who are not employed within advice giving institutions are considerable – and by the logistical problems of involving large numbers of people. What is needed is some mechanism for giving citizens a say in the decisions that affect them, such that even if they choose not to participate in the making of the decision, they can nevertheless feel some real sense that the decisions that have been made are fair and reasonable, and are decisions that
they would have made had they actually taken part in making them, without at the same time making the costs of participating a barrier to participation.

The mechanism for allowing citizens to participate meaningfully in decisions of governance is contestation. What is meant by this is that at the sites of decision making, at all levels of decision making, including policy, administrative and judicial decision making, there should be avenues of contestation, such that citizens can contest the decisions made, if necessary forcing reviews and readjudications of those decisions. Contestation obviously functions as part of the system of checks and balances integral to republican government. However, the question at issue here is how contestation serves the end of meaningful participation, particularly given that part of the reason for endorsing contestation as a means of participation is to solve logistical issues by deeming non-contestation to signify consent. That is, taking no action, not contesting a decision, is taken to mean that citizens have not just consented to the decision, but have in effect participated in the decision making to such an extent that their participation is meaningful.

I will discuss the less contentious issue first, that non-contestation signifies consent. Non-contestation could of course simply show that the decision is not-contested, that is, that non-contestation signifies nothing but non-contestation. While this 'interpretation' is appealing in its simplicity, it under determines the possible complexity of human behaviour. Non-participation is used as a protest measure in some instances, such as refusing to vote, either by not turning up to vote or by deliberately casting invalid votes. Similarly, not working is used as action against employers, and non-compliance with the law can be interpreted as civil disobedience. Typically however, these 'non-actions' are accompanied by other actions, such as the release of statements to the media and other active protest measures, to show that the non-action is in fact part of an overall strategy. At the very least, non-participation might signal that the citizens concerned know nothing of the decision. This could either be due to a failure of communication, or arise simply because the matter is so trivial that it is of no concern. While the first alternative is of concern to a republican

13 Eloquently put in Robert Bolt's *A Man for All Seasons*, when Thomas More argues that remaining silent on the issue of the Henry VIII's marriage to Anne Boleyn signifies consent to the marriage. "Silence signifies consent."
state, in that one of the concerns of the state ought to be ensuring that at the very least, citizens are fully informed about that matters that directly affect them, the second is not. Where citizens have been fully informed about the issues, and where the issues are non-trivial, if decisions are not contested, then it is reasonable to assume that citizens have in effect consented to the decisions.

The second, stronger claim, that non-contestation is in effect a form of participation in decision making, is rather more difficult. If, however, citizens have been fully informed about the decisions, and they have been fully informed about the avenues by which they may contest the decisions, and those avenues of contestation are reasonably accessible, that is, there is no great personal cost to be borne in contesting a decision, and the matter at hand is non-trivial, so that the costs of contesting the decision are either insignificant or such that they do not become a factor in deciding whether or not to contest a decision, then it may be possible to assume that the citizens concerned have effectively participated in the decision.

Pettit uses a rich metaphor to describe the process. He divides the process of making and administering the law into two parts, authoring and editing. In a magazine, or newspaper or journal article, the work is produced in the first instance by its author. However it is then subject to an editorial process of selection, review, rewriting and so on, until the final piece that appears for publication is in effect the work of two or more people. Making and administering the law is an authorial process, contesting it an editorial process. Both processes have a hand in the final shape of the law.

If non-contestation may signify consent, contestation clearly signifies disagreement. This does not create a problem for freedom as non-domination if the process of contestation results in decisions being amended or rescinded, or in those contesting the decision coming to agree with the decision. What happens in the case where citizens contest a decision, but at the end of the processes of contestation the decision either remains unchanged, or the modifications to that decision are not sufficient to satisfy the contestees? Does this mean that their freedom as non-domination has been diminished?
This turns out not to be the case. That is, their freedom as non-domination may not be diminished even though the decision has not been amended. This claim rests on two ideas, one of procedural fairness, and one of the extent to which people are satisfied by procedural fairness. Procedural fairness comes into play in order to cope with the likelihood that no one decision will please all citizens at all times. There are two possible ways in which procedural fairness can operate. An assumption can be made that if the procedures by which a decision is made are fair, then the decision itself is fair. That is, the character of the decision is formed by the character of the decision making process. This seems to me to be implausible for both metaphysical and empirical reasons. Metaphysically, we would need to be able to argue that properties are imparted to objects by the processes that form the objects, rather than inhering in the objects themselves. This seems at least somewhat contentious. Empirically, we would need to show that all decisions formed by fair processes are themselves fair, but this seems implausible.

The other, and I think better way of interpreting procedural fairness is to focus on the procedures themselves, and to accept that if a decision has been made as a result of fair procedures, then it is likely to be at least an acceptable decision, if not necessarily the best or fairest decision that could have been made. What I mean by acceptable decision is a decision that can be accepted by all the participants in the decision making process. This does not mean that all participants have to endorse the decision; it simply means that all participants can agree to at least live with the decision. This might seem to be entirely possible for small issues, where although participants in the process have a stake in the decision, it is not something that will have a significant impact on their lives. What of the case however, where the impact of the decision will be significant? How is it possible for someone who has contested the decisions to nevertheless accept the decision, even though it is a significant matter?

The capacity for acceptance of the decision lies in the nature of the decision making process. If someone feels that she has had a fair chance to put her views, that her views have been listened to, that she has had a chance to exchange views with other participants in the decision making process, and that the discussion throughout has been reasonable, then the chance that she will at least be able to accept the
decision is greatly increased. This is particularly the case if the process of decision making and contestation is one that she has agreed with and is happy to participate in, that is, she does not feel that the pitch has been queered from the start. Note that this does not mean that the contestee has to receive concessions in order to accept the decision. This is not a process of bargaining or negotiation, where one side may concede some things to the other side in order to get agreement. It is a process of deliberation with the aim of achieving an acceptable result, which may or may not include changes to the original decision. The end result is a citizen who can accept that this time, things went against her. It is just bad luck, not a conspiracy. The rubbish dump or power plant or jail has to go somewhere; as long as a person’s objections have been properly noticed and heard, then it is easier to accept the sheer bad luck of having such facilities in your backyard.14

The most noticeable feature of contestatory democracy is the institutional demands it imposes on the state. Note the series of conditions imposed on the state in order for contestatory democracy to work effectively. Citizens must be fully informed about the decision. They must be fully informed about the avenues of contestation available. Those avenues of contestation must be reasonably accessible, so that the cost of using them is not prohibitive. The procedures used for contestation must be procedurally fair. These are significant demands.

Full knowledge requires procedures for disseminating information. This can be done either by using any or all of the channels of communication commonly available, including television, radio, newspapers and the internet. These basic forms of communication should include information about where further, more detailed information can be obtained. However, in order to be sure that that information has reached all the people to whom it should be communicated, the state will need to use other means as well. For example, if policy is being developed regarding extra resources for disabled people, then the state should contact disabled persons support and welfare groups, as well as consulting the relevant ministries and agencies. Changes to education policy might entail contacting all schools and inviting students and their parents and staff to take part in developing or reviewing the policy. As is

commonly done, decisions about industrial and residential zoning should be advertised in the relevant geographical areas, perhaps by writing to every home and business in the area. And so on. In order to effect all of this, all government bureaus need to have policies and procedures aimed at ensuring this communication takes place, and resources to do the job effectively.

As discussed above, avenues of participation are already provided in many instances, through select committee procedures and consultative procedures. If the full information requirements are met, then it should be possible for citizens to use these procedures. However, in most modern democracies use of these procedures is comparatively limited. What may be needed is some way of allowing more widespread, albeit perhaps less significant participation in the formulation of advice. There are some low level means of doing this; for example, many modern nation states allow citizens to use postal systems free of charge to contact their political representatives. What may be needed however is some middle path between making submissions to and appearing at select committee hearings, and writing a letter to a political representative. The former incurs significant costs; the latter may be so trivial, from the point of view of the recipient of the letter, that it is ignored. Perhaps during the process of policy formation, the bodies which normally offer advice could request submissions with the intent of collating all submissions received, or inviting further comment where necessary. Representatives from policy making bodies might consider conducting public meetings to gather further advice. The scale of this activity may need to be considered in relation to the significance of the issue at hand, but nevertheless, this would provide a further way of participating in the process of formulating policy and taking decisions.

The types of procedures and institutions necessary for effective appeal and review of decisions have already been discussed, in relation to the systems of checks and balances in republican polities. What has not been discussed are the related information and accessibility requirements. The type of information required differs from the information required for particular policies and decisions, in that it is likely to be required on an on-going basis. Information for particular polices and decisions is likely to be disseminated as 'one offs'. That is, the information will have to be collated and distributed for each policy and each decision. Procedures for appeal and
review are likely to be used many times. This means that the information need not be created afresh each time a policy formulating or decision making process is under way. This has both benefits and potential pitfalls. Provided that information about how to use the procedures is widely disseminated in the first place, then there is no need to expend extra resources in disseminating that same information with each and every policy or administrative decision. More importantly, the knowledge that there is a well established avenue of appeal for policy and decisions in itself enhances freedom as non-domination. It provides an extra level of reassurance about constraints on the actions of governments and government agencies. The potential pitfalls lie in complacency about the level of knowledge of the appeal procedures. If information about the appeal procedures is not distributed sufficiently often, then general knowledge of the procedures may decline, perhaps leading to the procedures not being used, and through lack of use, losing legitimacy. Just as a high level of knowledge about the procedures enhances freedom as non-domination, a low level of knowledge can undermine freedom as non-domination. Furthermore, if the information is not distributed and redistributed frequently enough, a citizen who has had no previous need to use the procedures may find himself at a loss when he needs to use them, perhaps resulting in a loss of freedom as non-domination for that citizen in particular. What this means is that while governments and government agencies need not readvertise appeal procedures in detail with every decision and policy formulating procedure, they must advertise the existence of the procedures and the means of using the procedures on a regular basis.

The procedures for participation in the initial policy formulating and decision making processes, and in appeal and review processes, must be accessible. Citizens who have an interest in the proceedings, or who are affected by the policy and decisions, must not be barred from participation by excessive costs, financial or otherwise. Similarly, other barriers to participation must not be erected, such as limiting participation to physical meetings in distant locales. On the other hand, the resources of the state are not unlimited, and logistical problems may prevent all citizens from taking part. What is needed is some way of limiting participation to those who are genuinely interested in or affected by the policies and decisions without creating excessive barriers to participation, but also without imposing impossible burdens on the state. This suggests a sliding scale of the extent and
intensity of participation. Where the matter concerns all citizens, and so the voice of all citizens is important, the extent of participation may be very wide, encompassing the whole population, but the intensity of participation from each citizen may be very low. A good example of this occurs in elections, where all citizens may or should participate, but the actual intensity of involvement from each citizen is very low. Alternatively, where the matter at issue is of specialist interest only, then only a few citizens are expected to participate, but the intensity of their involvement is likely to be much more significant. They may expend days or weeks of effort in preparing, presenting and defending submissions, and listening and responding to submissions made by other participants. Submissions to a select committee on primary sector taxation law reform might have this character. We would normally expect that only a limited proportion of the population would be directly affected by the output of the committee, and that an even more limited proportion of the population would have the necessary expertise to participate meaningfully in the process. It may not be sufficient for a state to simply invite the relevant parties to participate; in some cases it may be necessary to fund participation, perhaps by paying some of the costs associated with participation. It seems reasonable however, to expect individual citizens to bear some of the costs themselves; this should deter vexatious litigation of decisions. No citizen however, should be deterred from participation because they can not afford to participate. The familiar institutions of appeals and reviews could be used to decide whether or not particular citizens should be funded to participate in specific decision making procedures.

A final comment. This account of contestatory democracy clearly has many affinities with deliberative democracy. Many of the institutions discussed could also be used to foster deliberative democracy. The key difference lies in the idea of appeal and review, and fair process. Deliberative democracy usually hopes to achieve a consensus ad idem, a meeting of minds. Melissa Williams describes the ideal of deliberative democracy thus.

We make arguments to one another about the requirements of the common good, and try to persuade one another of our understanding of that good. Our arguments are grounded in reasons which we believe others can accept, and they aim at what
is common rather than what is particular to individual or group…
The claims we make … must be framed not in terms of … narrow interests, but in terms of shared commitments to public ends, including the public end of justice. In speaking, then, we take up our identity as citizens concerned with the common good. 15

Contestatory democracy does not have this goal of commonality. Instead it hopes to achieve a modus vivendi, a way of living together even if there is disagreement. I discuss deliberative democracy and its relationship to contestatory democracy and republicanism in more detail in section 6.3.1.

SUMMARY - REPUBLICAN INSTITUTIONS FOR CONTESTATORY DEMOCRACY

- Avenues for disseminating information
- Select committee and consultative procedures
- Robust systems for soliciting participation
- Appeal and review systems
- Checks and balances
- Assistance to participate

3.5 Civic virtue

A republic is a self-governing body, but in order to be self-governing, it needs citizens who are prepared to take part in government. Citizens must be prepared to deliberate about the laws of the polity, to involve themselves in making the laws, to obey the laws, and to subject the decisions of those who apply the law to review, to keep the decision makers from arbitrariness. They must also take part in public life, by standing for office, scrutinising the actions of those who are in office, and deliberating carefully about those to be elected to office. Without citizens who are prepared to do this, there can be no rule of law, and no checks and balances. The republic needs citizens who exhibit civic virtue; they must adopt and live by norms

about what a citizen should or should not do. These norms are norms about the value of freedom as non-domination, and the need to participate in the life of the polity, supporting the rule of law, and "doing your bit" to ensure that the checks and balances actually operate.

The need for civic virtue is a private as well as a public necessity. To enjoy freedom as non-domination, a citizen must not only hope that the other citizens of the society will treat her in an appropriate manner, but she must also take active steps to ensure that they do so. She does so by contributing to her own and others' non-domination, through civic virtue. She must also be able to rely on other people to be virtuous, to refrain from interference, and to deal appropriately with those who do interfere. In other words, each individual must behave in a manner that guards the non-domination of every other citizen, and so on.

In some senses it seems odd to think that civic virtue could be created through particular institutions in the way that an empire of laws and systems of checks and balances can be created through institutions. It is certainly the case that civic virtue cannot be created directly through particular institutional structures and constitutional devices. It is however, an essential component of a republican system of government. Systems of checks and balances and contestatory democracy will not work if citizens are not prepared to scrutinise the actions of government, participate in consultation and contestation, and offer themselves for public office. At the most minimal level of participation, citizens must at least cast a vote in elections. This last activity is one that can be legislated for; several polities have compulsory voting (Argentina, Australia, Belgium, Brazil, Greece, Italy, Liechtenstein, Luxembourg, Singapore, and some cantons of Austria and Switzerland\(^\text{16}\)) and many more have compulsory enrolment, under which citizens must enrol to vote, even if they choose not to vote.

There are however, very few other actions that can be legislated for. Consider for example, newspaper reading. Imagine that a polity required its citizens to read a newspaper, in order for them to be informed about the actions of

\(^{16}\) Puplick (1996).
government. Should the legislation require citizens to read a particular paper, or just one of any of the newspapers freely available in the polity? If the latter, then a tabloid paper would be adequate for fulfilling the requirements of the law, but tabloids typically do not carry sustained political and economic analysis, so the spirit of the law would not be met. This would then require the government to endorse particular newspapers, which in turn would create the possibility for the government to refuse to endorse certain newspapers that were perhaps too searching in their political and economic reporting and analysis for the government’s comfort. That is, this could become an avenue whereby the government could dominate the electorate through influencing its views. Moreover, despite all the checks and balances in a republican polity, it is hard to see how a law compelling a certain sort of behaviour, instead of proscribing particular misbehaviours, could escape the charge of being dominating. Its effect is to treat all members of the polity as potential knaves; that is, it shows a profound distrust of ordinary citizens on the part of those who govern the polity. Far better to persuade people to be virtuous than to compel them to be so. And far better to treat people as being virtuous until they have proven otherwise.\(^{17}\) That is, they are treated as having standing as citizens, rather than being treated as potential criminals.

The question then, is how to create participation in the governance of the polity, if it can not be done by compulsion in such a way that freedom as non-domination is not violated? The need to encourage participation is not an idle question; polities all over the world are grappling with this question. As I see it, there are two things needed for this to happen. The first involves creating, or restoring, public faith in the institutions of government. The second lies in developing what might be called norms of behaviour among the population, so that failing to participate is seen as, if not an offence, at least as a grave dereliction of duty.

The creation, or restoration of public trust in the institutions of government is part of the process of creating civic virtue. The people who are elected or appointed

\(^{17}\) An appropriate analogy might be with a teacher punishing a whole classroom of school children for the misbehaviour of a few. Those pupils who deserved the punishment might feel that they had gotten
to public office, including civil servants at all levels, must fulfil their roles in a virtuous manner. That is, they must seek to serve the public efficiently and effectively, and responsively. A republican state can put in place measures to achieve this, either by rewarding those who do so behave, or by censuring and punishing those who do not comply with these norms of service. It must also provide the resources in order to allow government ministries and departments to function effectively; no matter how virtuous the incumbent of a government role, if he or she does not have the resources to perform that role, then the job simply can not be done. If government institutions are run in such a way that the public interest is served, then citizens will see that government structures can be trusted. If they trust these institutions to function effectively, then they know that their own participation in these institutions will be effective. That is, they will not be wasting their own time and effort in fruitless ventures. This will remove disincentives to participation.

Over and above removing disincentives to participation, the republican state must create incentives to participate. These incentives ought not to be in the form of crude bribes; this after all represents a manipulation of the choices that citizens may make. Instead, there ought to be a norm of participation, a prevailing ethos of taking part in bearing the burdens of a republican state, a feeling that those who do not participate are in effect reaping the benefits of republican freedom without doing any of the work required. Yet it ought not to be the case that participation is perceived as a heavy burden. The fear that participation might be a heavy burden ought to be relieved by the knowledge that participation will not go unrewarded, in that the state will respond to the directions of its citizens. What however, of creating the norms in the first place? As Pettit says, we know very little about how to create norms, either when they have ceased to exist, or when they have never existed in the first place.

One way of creating these norms may be to institute civics classes in schools, so that young people are aware of the rewards of freedom as non-domination, understand why it is worth protecting, and understand what needs to be done in order to protect it. This is not a difficult task; citizens of the United States have a clear no more than their just deserts, but those who did not might feel aggrieved, in particular those who were in general, well behaved.
sense of their constitutional rights, and a clear understanding of freedom as non-interference. Citizens in Australia have a clear understanding of the need to vote, and an accompanying distaste for those who refuse to vote.\textsuperscript{18}

Norms could also be created through the public campaigns. Consider the rule of law. If citizens choose not to obey the law, and non-compliance is widespread, then the legitimacy of the law is called into question. For example, for many years, drivers could drink as much alcohol as they wished, and then drive, without being subject to any meaningful restraints. In Western liberal democracies at least, laws were introduced to control the amount of alcohol a driver could consume before being subject to penalties if caught drinking and then driving, but these laws were not enforced, and were routinely ignored. It was only when the laws were enforced, and publicity campaigns about the dangers of drinking alcohol and then driving were introduced, that people began to comply with the law, and moreover, to regard those who chose not to comply as wrongdoers. Traffic legislators around the Western world are now beginning to apply the same techniques to dangerous drivers, in particular with respect to drivers who exceed the legal speed limit. The hope is that with increased enforcement and publicity campaigns, road tolls will be reduced, because drivers will begin to comply with the law voluntarily, rather than risk penalties and social opprobrium. Thus norms of complying with the law are encouraged and reinforced. This means that citizens become virtuous in respect of the law.

The most general norm that is required is a norm of participation, a norm of doing one's bit. This is a norm that seemed to be present in many Western liberal democracies until the later part of the twentieth century, but in recent years as market ideologies have come into force, citizens have been turned into consumers of services rather than partners in government. Accordingly attitudes have changed. Perhaps what is needed now is some way of reversing this alienation of citizens. One way to do so may be to create and fund avenues for participation, so that citizens do not feel that there are no means for them to participate.

\textsuperscript{18} New Zealand has compulsory registration, but not compulsory voting. Nevertheless, it routinely achieves turnouts of about 90\% of electors, in part because citizens feel that it is their chance to do
SUMMARY - REPUBLICAN INSTITUTIONS FOR CIVIC VIRTUE

- Limited use of legislation to compel participation
- Effective and efficient representation and administration
- Awareness campaigns with respect to the need for participation
- Creating and funding avenues of participation

3.6 Summary

What the preceding discussion makes clear is that many of the institutions required to instantiate republican freedom are already in place. Modern liberal democratic polities operate within an empire of laws, and with systems of checks and balances. Many of the institutions of participation are already in place – most modern liberal democratic polities have processes of consultation, appeal and review, and these institutions are not beyond the reach of most citizens. The conditions for contestatory democracy already exist. These institutions need only some alteration or some additions in order to create the conditions necessary for freedom as non-dominination. What is not so clearly in place is civic virtue; at the most basic level, participation rates in elections at all levels have declined significantly in the last few decades of the twentieth century. In the next chapter I turn to the sorts of institutions that can be created within the framework of a republican state to respond to the challenges of multicultural societies.

something about the government of the day, and in part because people feel that it is their (none too onerous) duty to vote.
CHAPTER 4 – REPUBLICAN RESPONSES TO ETHNIC GROUP CLAIMS

"...the question for Pettit is: in what kinds of institution can the republicanism which he advocates be embodied?" Alasdair MacIntyre

In this chapter I want to address the claims set out by Levy, developing a series of responses that both meet the claims, and fit within the republican framework set out in Chapters 2 and 3. I intend to add two areas of claims that Levy does not discuss, claims about self-determination and land claims (see my earlier discussion in section 2.2). I will discuss the claims in the following order; this order has the advantage of discussing claims that have a family resemblance together.

Issues of governance

- Representation of minorities in government bodies, guaranteed or facilitated
- Self-determination in specific areas
- Self-government for ethnic, cultural or 'national' minorities

Rules

- Internal rules for members' conduct enforced by ostracism, excommunication
- External rules restricting non members' liberty [in order] to protect members' culture

Special treatment

- Exemptions from laws which penalise or burden cultural practices
- Assistance to do those things the majority can do unassisted

Symbolic claims to acknowledge the worth, status, or existence of various groups

Land claims

As it turns out, many of the institutions required in order to instantiate republican freedom already exist in early twenty first century liberal democratic nation states. This might seem at first glance to create a problem for my overall argument that republicanism does better with respect to minority ethnic groups than
other political theories. As a matter of fact, ethnic minority groups in liberal democracies are just as likely to make any of all of the claims listed by Levy as ethnic minority groups in other sorts of polities. I have claimed that many of the institutions that can be used to instantiate republican freedom already exist. Clearly, minority ethnic groups think that these institutions have not resolved their problems, or they would not have made the claims in the first place. What hope then, that much the same institutions can serve the needs of ethnic minority groups in republican polities? Clearly at least some changes will be needed. The requisite changes may in part be a matter of stance; were the particular institutions explicitly directed to accommodate diversity, then perhaps they would be able to do so. That is, existing liberal democratic institutions might be able to meet the demands of ethnic diversity. Alternatively, existing liberal democratic institutions which have been amended to become republican institutions might be able to meet the demands of ethnic minority groups without further amendment. If not, then either the republican institutions described in the last chapter could be amended, or new institutions devised.

I do not wish to claim that many liberal democracies are already republics in disguise, a common theme in the later republican tradition, where England was often so described. Nor do I wish to claim that with some amendment liberal democracies could easily become republics. Although the institutions of liberal democracies are often the same as, or very similar to republican institutions, the values they uphold differ significantly (see sections 5.1.3 and 5.2.3). However one of the important tests of the viability of any political theory is whether the recommendations it makes, institutional or otherwise, could be put into practice. That is, is the theory feasible? One way of assessing the feasibility of a particular theory is to test its recommendations against what already exists in the real world. If the institutions required by a theory already exist, or if existing institutions could be adapted to meet the recommendations of the theory, then it seems that the theory passes the feasibility test, at least in part.

The republican response to the claims made by ethnic minority groups need to fit within the republican framework in two ways. First, and most importantly, they need to enhance freedom as non-domination. If the claims make no sense in terms of freedom as non-domination, then it is difficult to see why a republican ought to care
about them. They would simply be claims made by a particular group that are about things that the group desires, but not about things that are important within a republican polity. As such, there could be no need for a republican polity to respond to the claims. Second, the institutional responses must fit within the framework of an empire of laws, checks and balances, civic virtue and contestatory democracy. In each case, I will describe the claims, drawing on Levy and other sources. Then I will develop a republican understanding of the importance (or not) of the claims. To do this I draw on the understanding of freedom as non-domination discussed in section 2.4, vulnerability groups as developed in section 2.5, and in particular, on the extent to which ethnic groups may also be vulnerability groups. Where an ethnic group is also a vulnerability group, then there is a prima facie republican case for doing something to address the claims that ethnic group makes. Next I will set out potential republican responses to the claims, answering the question posed by Alasdair MacIntyre which I quoted at the start of this chapter. Note that none of the suggested responses are requirements; there could be other ways of responding to justified claims. They are simply avenues of action that are open to a republican polity. The particular response used in each situation will be mediated by empirical matters, and by the desiderata discussed below in section 4.1.4. Each response to each claim will be a matter of judgement in relation to specific conditions. Finally I consider any possible problems with the various sets of proposals. First, however, I want to consider some preliminary matters: 1. republican criminal justice; 2. immigrant groups and indigenous groups; 3. equal treatment and special treatment; 4. desiderata for addressing the claims.

4.1 Preliminary matters

4.1.1 Republican criminal justice

Recall that in Chapter 2 I developed an overall understanding of why republicans should be interested in issues of multiculturalism; it is because, as a matter of fact, membership of a minority group is a good predictor of the extent to which a person will experience domination. My focus in this chapter is much more
detailed; I want to understand how it is that minority groups experience domination in relation to each of the areas where they make claims. That is, instead of simply pointing out that domination occurs at a global level for these groups, I want to understand the mechanics as it were, of instances of domination.

In addition to using the formal framework discussed in Chapter 2, I want to introduce a further way of understanding what it is to be undominated, drawing on the theory of criminal justice developed by John Braithwaite and Philip Pettit in *Not Just Deserts: A Republican Theory of Criminal Justice*, and more recently by Pettit in "Republican Theory and Criminal Punishment".\textsuperscript{1} I do not wish to suggest that the actions and circumstances which give rise to the claims made by minority ethnic groups ought to be considered in the first instance as crimes. Nevertheless, I think that the ideas of criminal justice developed by Braithwaite and Pettit can be adapted to help us to understand why such claims might be made, and thus why they should be addressed.

Recall that freedom as non-domination is a social good. It is not the freedom of an individual alone on the heath, but freedom enjoyed in a social setting, the freedom of the city. A republican citizen is free if in this social setting she is not subject to unrestrained interference by another agent, and if she is secure in that freedom. Crucially, she must know that she possesses that freedom, and other people around her must know that she possesses that freedom, just as she knows that they possess that freedom. Moreover, to the extent that any one citizen enjoys less freedom than another citizen, the freedom of all is reduced. This is because if one citizen may be subject to unrestrained interference, so too may others. With citizenship comes status, the status of being someone who enjoys the good of freedom as non-domination.

In republican thinking, a crime has the effect of denying that a person enjoys the good of freedom as non-domination. The criminal interferes with the victim, and does so without restraint. This is particularly obvious with respect to crimes such as murder, rape, assault, kidnap, harassment, extortion, theft and fraud, where the

\textsuperscript{1} Braithwaite and Pettit (1990), Pettit (1997a).
offender interferes with a victim's person, province or property. The offender does not recognise that the victim has, or ought to have, control over such things. He does not recognise the status of the victim as a citizen who enjoys, or ought to enjoy, freedom as non-domination. Furthermore, he reduces the range of choices available to the victim: crudely, murder reduces the range of choices entirely; theft reduces a victim's resources; coercion eliminates some choices by making them too costly; assault reduces the victim's physical resources and usually their psychological capacities as well - women who have been raped are often reluctant to engage in intimate relationships, and people who have been assaulted often refuse to return to the scene of the crime, or even to places similar to the scene of the crime. Standing is compromised and choice reduced not only for the immediate victim of the crime, but also for people who are relevantly similar to the victim (see the discussion of vulnerability groups in section 2.5). Thus the community's freedom as non-domination is also compromised by crime.

As I said above, I do not want to characterise the claims made by ethnic groups as claims about crimes (although claims about land rights are obviously very similar to claims about crimes concerning property). However, the actions and circumstances which give rise to the claims can be understood as denying the citizenship of those people who are making the claims. Normally, we think that a citizen ought to be able to decide what language she will speak, what ceremonies she will use at important times in her life, what clothes she will wear, and so on. We also think that she ought to be able to be heard in the councils of the polity, and that so far as possible, she ought to be able to choose to order her life in the way that she thinks fit. Very generally, a citizen ought to be able to choose to do whatever she likes, as long as her choices are consistent with the freedom as non-domination of other citizens. If we remove some of those choices, then we not only reduce her range of choices, thus offending against freedom as non-domination, but we also deny that she is a citizen of the polity. We deny her status as someone who enjoys the good of freedom as non-domination.

Braithwaite and Pettit's analysis of criminal justice is also useful in respect of understanding how to address some of the claims, especially with respect to the security of the response to the claims. By security, I mean the extent to which a
citizen knows that the particular responses that are made will endure, so that she will know that she does not have to fight over and over again in order to maintain her standing as a citizen. Braithwaite and Pettit argue that where a crime has been detected, and where the offender has been convicted, then there should be recognition, recompense and reassurance. The offender must recognise that she has offended against the victim, compromising his standing as a citizen who enjoys freedom as non-domination. She must take steps to make good the victim's losses, through compensation or whatever other steps are thought necessary. And she must reassure the victim that the actions or circumstances which created the crime will not re-occur. That is, the victim must be secure in her restored and continuing enjoyment of freedom as non-domination. That reassurance must extend to the wider community, that is, to those who are in a relevantly similar position to the victim.

Again, without wanting to characterise the responses made by republican polities to claims made by ethnic groups as the same as responses made to crimes, I want to use this understanding of criminal justice in developing the sorts of responses that should be made to secure freedom as non-domination in the future. First, the circumstances giving rise to the claim can be recognised as circumstances where members of minority groups are, or have been treated as not having the status of citizens. The steps taken by polities can be understood as restoring the standing of those members of ethnic minority groups. The polity takes steps to ensure that ethnic minority group members can exercise choice, and can take part in the social and political life of the polity, as they must be able to do in order to enjoy freedom as non-domination. Creating institutions that do this provides reassurance that this enjoyment of freedom as non-domination will not be removed at whim; the enjoyment of freedom as non-domination is secured.

I will consider whether or not the claims, or rather, the conditions or treatment that precipitate the claims fit into the framework of domination, either by reducing the range of choices that a member of an ethnic minority group may make, or by compromising the standing of members of ethnic minority groups. This serves a dual purpose. It provides a justification for the claims made by the groups, thus creating an obligation on the part of the polity, and it tests the claims. If it turns out
that a particular claim can not be justified in terms of freedom as non-domination, then it is not a claim that a republican polity need address.

4.1.2 Immigrant groups and indigenous groups

As has been discussed elsewhere, there may be a difference between claims made by immigrant groups, and claims made by indigenous groups. The difference is that claims made by the latter may have stronger currency because in most cases, indigenous groups have been forcibly incorporated into new polities. Ideally of course, this enforced incorporation would not have happened, but it is impossible to restore the world to the position it was in before the process of colonisation began. This underlies the need to give priority to the claims made by indigenous groups; their ways of living have at best been disrupted by the processes of colonisation, and are more likely to have been seriously damaged, if not destroyed, and they had no choice about the matter. On the other hand, most immigrants have chosen to seek a new way of life. The onus seems to be on them to fit into the ways of the polity they have chosen to join. Of course, this claim is weakened to the extent that some immigrants are not willing to leave their own homes, but have been forced out, whether by economic or political imperatives. It is hard to imagine, for example, that Indian Fijians leaving Fiji following the attempted coup in 2000 felt that they had much choice in the matter. Nevertheless, because most immigrants are able to make a choice about joining a new polity, and most indigenous groups are not so able, there does seem to be a difference between the claims that each group can make. However, it may well be the case that in respect of some claims, this difference is irrelevant. Where I think that the difference between the two groups does make a difference in the republican understanding of, and response to, claims made by minority groups, I will discuss the particular difference, and the ways in which a republican polity might respond given the existence of the difference.

4.1.3 Equal treatment and special treatment

In Chapter 3 I argued that the reasons supporting the participation of all citizens in the governing of a polity included the need to reinforce the standing or status of each citizen. In the first instance, a citizen who is not allowed to participate in the governing of the polity has no guarantee that her interests will be considered. Even if the governors of a polity are required to track her interests, there is no guarantee that they will do so: they may pursue their own interests instead; they may not take seriously what an individual considers to be her interests; they may simply make a mistake. In addition to this, and perhaps more importantly, her standing as a full citizen is compromised. Because she is treated as a person who is not able to participate in government, she is not equal with other citizens; she is as a child who may be looked after, but not trusted. She has no standing, and thus she cannot enjoy republican freedom.

A similar issue arises in relation to special treatment. By treating some citizens differently, perhaps by offering special assistance or by creating special conditions for them, they are treated in some sense as not being the equal of other citizens. Even if the special measures are designed to enhance their freedom as non-domination, the very existence of the measures compromise may compromise freedom as non-domination, by undermining the status of those who receive the special treatment as citizens of equal standing. Giving someone special treatment can imply that they are not capable, independent adults; they are in effect like dependent children.

There are two possible ways to assess whether special treatment is something that republican polities can pursue, given that they are committed to freedom as non-domination. The first is to assume that differential treatment does treat members of ethnic minority groups as not having equal standing with other citizens, and then to assess whether on balance, each measure nevertheless contributes more to freedom as non-domination overall. Does the increase in freedom gained through the special measure outweigh the negative impact on a person's status? If the overall balance is positive, then the measure in question ought to be sanctioned. That is, if the increase in freedom as non-domination gained via the measure outweighs the decrease in
freedom as non-domination lost through treating citizens as being in need of special assistance, then the measure ought to be undertaken. The second way of assessing the possibility of pursuing special treatment is to consider whether it really does, as a matter of principle, undermine freedom as non-domination.

I think that the second method is preferable. Although it is certainly possible to pursue the first way, it is in some senses capricious. Each case would need to be judged, perhaps by panels of experts, or in courts and tribunals, thus subjecting it at each stage to the possibility of unrestrained interference. Of course, under a republican system, measures can be taken to preclude the possibility of unrestrained interference, through a by now familiar system of appeals. Nevertheless, an elaborate structure might be unnecessary. There could be no guarantee that particular measures would receive an imprimatur. The case for special treatment would have to be made over and over again. Presumably over time a body of precedent would be created, but the need to engage in creating this could be avoided through considering the more general case for special treatment. Moreover, the first way assumes that special treatment is necessarily an evil. By considering the nature of special treatment in general, the capacity for a case by case analysis to be capricious is avoided, as is repetition. This does not mean that each special measure that is proposed ought not to be scrutinised carefully. It does mean however, that there is no need to argue in each and every case that on balance, the recipients of the special treatment gain more freedom as non-domination than they lose due to the very fact of receiving special treatment. In any case, it seems to me to be mistaken to assume that prima facie, special treatment offends against freedom as non-domination through not treating citizens as equals.

Special treatment does treat some citizens differently from other citizens. How then, does it not offend against freedom as non-domination? There are two answers to this that I want to discuss here. The first possible answer is canvassed by Will Kymlicka in *Multicultural Citizenship*, although it is grounded in liberal theory rather than republicanism. It is however, an argument that is possible within republican theory. Kymlicka argues that in fact, the dominant group in a polity is afforded special treatment as a matter of course. The language of the dominant group is privileged in its use not only in the daily life of most citizens, but also in its
use in government and government funded institutions, including parliaments, courts, and schools. In some polities, the religion of the dominant group is similarly privileged. Even in polities where no particular group's arrangements are entrenched in the institutions of the polity, the religious festivals of the dominant groups may be marked by public holidays, their family arrangements entrenched in law, their values reflected in state symbols and uniforms. By weight of numbers, the dominant group also dominates membership of institutions of government and so on, so that these institutions function in a way that is at least consistent with the behavioural norms of the majority culture. In other words, there is a systematic preference for the culture of the dominant group. In order to redress this imbalance, extra resources may be granted to minority ethnic groups. What appears to be special treatment rendered to assist members of other ethnic groups is actually no more than a simple 'catch up' that genuinely provides equal treatment. Thus the special treatment given to members of particular groups does not undermine their standing as citizens; it is instead a means of ensuring that their standing as citizens is not compromised in the first place.

There seems to me to be a problem with this argument, in that it could allow for equally bad treatment of all citizens. The state might decide to remove itself from all education, in order not to privilege one group over another by providing education in one language rather than another. It might refuse to provide health care or welfare at all, rather than providing health care and welfare in ways that privilege one group. Alternatively, aiming for what seems to be state neutrality might create particular hardship for some groups. For example, one way of creating genuine religious equality is to disallow all religious expression in state institutions. While this would not create problems for those for whom religion is a private matter, it is problematic for those whose religious beliefs entail expression in every day life, so that as a matter of course when they are dealing with, or part of, state institutions, they must either deny their religion, or act against the law. A classic example of this is the 'chador affair' in France, where Muslim schoolgirls were not permitted to wear head coverings while attending public schools.³

As a matter of practice, this minimalist approach tends not to be the case. Where genuine inequalities have been brought to the attention of governing authorities, instead of removing privileges from the dominant group in order to provide equality of treatment, governing authorities have tended to attempt to provide similar resources for minority groups. For example, in New Zealand, even though English is very much the dominant language of the polity, Maori is an official language which may be and is used in Parliament and in courts, and special assistance is provided to ensure that Maori can be and is used as the main language in some schools. Nevertheless, this type of approach is not required by Kymlicka's argument.

The 'catch up' argument can be characterised as being consistent with republican theory, in this way. Recall that there are two ways of ensuring that citizens of a polity enjoy freedom as non-domination. One is to use constitutional means to do so; another is to provide each citizen with sufficient resources to resist those who might attempt to dominate them. The former is the preferred approach of republicans, as the latter seems to result only in a cold war of competing resources (see Chapter 3). Where special treatment is seen as a way of ensuring that no one group is privileged, equality must be achieved by providing more resources to particular groups in order to enable them to catch up with other groups, and typically, with the dominant group in a polity. If any one group is through some means able to access more resources, then other groups must then be given access to those same resources. That is, each group tries to buttress itself against the others with more resources. Kymlicka's justification for the provision of resources to ethnic groups could be characterised as just such a war of competing resources. Accordingly, republicans ought to reject this type of reasoning with respect to special treatment.

The second answer to the question of why it is that the provision of special resources does not offend against equality begins by considering vulnerability groups. Membership of a minority ethnic group means that a person is likely to be subject to domination. In order to combat this domination, that is, in order for members of minority ethnic groups to enjoy the republican good of freedom as non-domination, then the state may need to provide extra resources. Philip Pettit discusses this issue in *Republicanism: A Theory of Freedom and Government*. He
argues that where extra resources need to be expended in order to ensure that a citizen is able to participate in the life of a polity, then those resources should be provided. For example, it may cost significantly more to provide schooling and transport and communication facilities to rural areas on a per capita basis, but there should be no objection to such expenditure, as these are basic requirements in contemporary life. These extra resources are not a 'catch up', but simply what is required in order to participate in the polity.

This argument has several advantages. As discussed above, it avoids the possibility of equally bad treatment of all cultures, and the possibility of wars of competing resources. Most importantly, it mandates unequal treatment where necessary in order to achieve a specific goal, freedom as non-domination. This means that in order for a particular measure to be taken, there is no need to compare the measure with existing standards that other groups enjoy. The proper question to be asked is not, "Do the resources that one group of people enjoy compare to the resources that other people enjoy?" Instead we should ask, "What is needed for a particular group of people to enjoy freedom as non-domination?" Ethnic groups are thus able to make claims, and a republican polity is able to respond to these claims, without considering what other groups of people enjoy. Each claim and the response to that claim can stand alone. The assessment of each claim will be an empirical matter, with the standard of assessment being whether or not freedom as non-domination is enhanced by the measure. However, the bare fact of 'special treatment' will not be at issue.

4.1.4 Desiderata

Unlike Plato's Republic, and Thomas More's Utopia, and even Harrington's Commonwealth of Oceana, contemporary political theories are grounded in what is able to be achieved as well as in ideals. Hence the need to consider the feasibility of the responses that can be made to ethnic group claims (see discussion above). There are further constraints that ought to be held in mind when considering the responses that can be made.

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The responses ought not create resentment amongst other groups in the polity. Consider the rules about business ownership in Malaysia. Until new rules were put in place, while *bumiputras*\(^5\) held most political power, immigrant groups (primarily ethnic Chinese and Indians) held most commercial power. Legislation was passed to ensure that all businesses had a certain percentage of bumiputra ownership, thus giving bumiputras more commercial power. This has created great resentment amongst the so-called immigrant groups.\(^6\) Similar examples are found in the documented backlash against women,\(^7\) and in rhetoric from so-called red-necks about all New Zealanders (or Australians, or Americans, or Canadians, or whoever) being the same, and therefore not in need of any special treatment. While only some of this resentment may be 'reasonable', it nevertheless indicates a potential problem with responding to ethnic group claims. Any moves towards changing the status quo may be met with resentment, and perhaps overt hostility. This in turn may jeopardise the effectiveness of any changes. What this points to is a need to gather broad support for changes. It may be the case that change cannot be made immediately, no matter how desirable, because there may not be sufficient support for the required changes. This may simply be due to a lack of knowledge; were those who opposed the change more aware of the need for and the impact of the change, then such opposition may diminish. This seems to have been the case in New Zealand. The (nominally) left-wing 1984 Labour government introduced dramatic changes to the constitutional standing of the Treaty of Waitangi. There was long and agonised public debate over the standing of the Treaty, with a large proportion of the pakeha population against any process of reinstating the treaty and settling claims. However both the Labour government and the following centrist right wing National government pushed ahead with treaty settlements. By the turn of the millennium, there was rather more support for the whole process of Treaty settlements, even amongst the pakeha population, perhaps because by 2001 many of the settlements

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\(^5\) Literally 'sons of the soil'; that is indigenous Malays and some long-standing groups of descendants of indigenous Malays and colonists or settlers.

were a fait accompli, but also because there had been much more widespread debate as a result of the changes. The prevailing sentiment in New Zealand seems to be one of agreement that Treaty claims should be settled, although there is still widespread disagreement about the content of those claims, and the nature and scale of the settlements that should be made.⁸

Just exactly what should be done in terms of getting broad support for changes, and thus avoiding resentment is an empirical matter. It may simply be a case of proceeding slowly, or it may be a case of engaging in widespread discussion and debate before changes, if any, are made. It may suggests incremental change rather than radical change. By saying this, I do not wish to imply that we ought to give way before majority sentiment, or give in to the rule of the mob. I do want however, to be at least somewhat realistic about human nature.

PATERNALISM

It may be that the responses made to ethnic minority groups claims could infantilise minority groups, in the way that special treatment might be thought to be paternalistic (see discussion above). There are several ways that this could happen.

1. Members of a dominant group might decide that a minority group had a particular grievance to be addressed, even if the minority group did not think that it had a grievance. 2. The response to a claim might entail treating the minority group in such a way that the capacity of members of that group to choose their own course of action is compromised. 3. The bare fact of providing special treatment might compromise the standing of a minority group.

I have addressed 3. above. Problem 1. could easily be avoided by responding only to claims that are actually made by minority ethnic groups. This is however, problematic. What of cases where a clear injustice is perpetrated, but no one calls for change? I address this issue in section 4.3.1, where I argue that it is possible to intervene in the affairs of ethnic minority groups in order to prevent gross injustices,

⁷ Faludi (1991). Faludi's evidence and claims may well be overstated, but I think that they are not without some substance, and that they do give at least some evidence of the possibility of resentment and backlash.
but that such intervention must itself be subject to the standard of freedom as non-domination.

Problem 2. is not so straightforward. It could be the case that the responses to the claims create the possibility that minority groups become dependent on the special measures that have been taken. For example, if provisions are made to ensure that representation in parliament is guaranteed, perhaps through reserved seats, then it could be that members of the minority group are regarded as not being sufficiently competent to fill ordinary seats. If jobs or positions in say, medical school are reserved for members of particular ethnic groups, then the individuals who fill those positions may be regarded as not quite good enough compared to other employees or students. This is not a far-fetched possibility; many African-American and Maori doctors are anxious to proclaim that they did not gain their positions in medical school through quota schemes, but instead won them in open competition. I do not see an easy way to avoid this problem, except to suggest that quota systems may need to be transitional rather than permanent, as might other special arrangements. If however, such measures are understood as a response to situations of domination, then they should not be regarded as special assistance for those who do not have the capacity to fend for themselves, but as an attempt to restore the situation to what it would have been before the domination occurred. Nevertheless, the potential for special treatment to infantilise ethnic minority groups should be regarded as something to guard against when designing such assistance.

Finally, there may be a problem with respect to entrenching minority groups once measures are put in place to assist those groups. The lives of the groups may be extended beyond what would otherwise have been the case had not the measure been introduced. I discuss this issue in section 5.2.6.

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8 See Sharp (1997) for a detailed account of the debate surrounding the Treaty in New Zealand.
4.2 Issues of governance

Levy lists two types of claims that I think are related, in that they are both issues of governance. They are self-government for ethnic, cultural or national majorities, and representation of minorities in government bodies. There is third type of claim that falls in between the two, that of self-determination in respect of at least some matters, for example, education. Levy does discuss the claims made in respect of traditional legal codes; in so far as these represent a claim by ethnic groups to rule themselves, and to rule particular physical areas, without becoming a separate polity, these claims can be understood as claims about self-determination. We have then a series of governance claims, ranging from a claim for participation to a claim for total self-government. I will discuss the general pattern of the republican approach to issues of governance, and then discuss each governance claim in turn.

Why might issues of governance matter to ethnic minority groups, in republican terms? The answer is straightforward. Recall that freedom from domination means being free from arbitrary interference, meaning that no one may interfere at will and with impunity in the affairs of another. This does not mean that there may be no interference, but it does mean that interference must not be capricious. That is, it should not be dominating interference. In the republican framework, non-dominating interference, that is, in this case, non-dominating governance, is realised through institutions that allow for participation by the governed, and for contestation of governmental policy making and decision taking. If the governed are not able to participate in and contest government, then they have to rely on others to track their interests. They are vulnerable to the government; governing bodies may fail to track their interests, whether through negligence or mistake or self-interest. This means that they will be vulnerable to arbitrary interference, and in that case, they do not experience the key republican good of freedom as non-domination.
4.2.1 Issues of representation

WHY DOES REPRESENTATION MATTER?

Ethnic minorities seek some form of representation in governing bodies for various reasons, including securing their interests or rights, preventing discrimination, and just having a say in the affairs of the state. As examples, Levy gives the reservation of seats for whites during Zimbabwe's first decade of black rule, and reserving three of the nine seats on Canada's Supreme Court for Quebec. A frequently given example is the Maori voting roll in New Zealand.

In a republican polity, why would representation be so important to ethnic minority groups? In general, it is because not allowing the voices of ethnic minority groups to be heard creates domination. The voices of the majority group, by sheer weight of numbers, or perhaps by design, drown out ethnic minority groups in the standard governing forums of a polity. Of course, ethnic minority groups may always resort to petitions and protest, but the outcomes of these activities are not secure. There are no guarantees that the bodies at whom they are directed will take any notice of such activities. Thus minority groups seek representation. Although representation may be acquired through the ordinary workings of electoral systems, minority ethnic groups often look for secure representation, that is, guaranteed representation. There are thus two aspects to the consideration of representation. The first is to consider why representation is required, and the second is to consider why it might need to be guaranteed. There is a third aspect, that representation is an acknowledgment of the status of minority groups' members as full citizens of the polity. I will discuss each in turn.

If minority voices are not heard, then it is possible for governing bodies to make decisions that either intentionally or unintentionally limit their choices. For example, conservation laws might preclude members of an ethnic minority group

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10 Interestingly, it is clear that the Maori seats were introduced in the nineteenth century in order to contain Maori political power, not to enhance it. It was not until after World War II that enrolment on the Maori roll or the general roll was a matter of choice for so-called half-caste Maori, and not until 1996 that the number of Maori seats was adjusted according to the number of Maori who chose the Maori electoral option (Royal Commission on the Electoral System 1986).
from using native animals and plants in religious ceremonies, thus preventing them from practising their religion. The legislated work practices of the polity might prevent attendance at events such as funerals; under New Zealand employment law, until recently employees could take a day off to attend a Western style funeral, but not three or four or five days to attend a tangi (Maori funeral). Public holidays may be set with regard to the needs of the majority group, but not minority groups; most Western polities celebrate Easter but not the end of Ramadan. Employment legislation may entrench a mode of discourse between employer and employee that is consistent with majority culture but not minority culture – for example, it may favour bargaining over consensus. If members of minority groups are present in the governing bodies of a polity, then as the need arises, they can press for legislation and policies that accommodate, or at least are not inconsistent with, minority practices. The governing bodies will be required to at least take notice of the interests of ethnic minority groups. Ideally, the governing bodies will be able to track the interests of ethnic minority groups, because they will have a greater capacity to track those interests accurately. Members of ethnic minority groups can both act as sources of information about what those minority group interests really are, thus reducing the possibility of mistakes, and prevent or minimise the chance of the majority group acting only in its own interests. Thus the capacity of the state itself to be a dominating agent is eliminated, or at least considerably reduced.

Why however, might representation need to be guaranteed? After all, members of minority ethnic groups might become members of the ruling bodies of a polity by the same means as members of the majority or dominant group, and this might achieve the same end without resorting to making provisions to ensure that these groups are represented. Moreover, guaranteeing representation seems to impose restraints on the electorate. It runs counter to the democratic premise that each person has one vote which counts for as much as, but no more than, any other citizen's vote.

The need for guaranteed representation arises from the need to avoid capricious interference. Recall that one of the markers of domination is that the power exercised by the dominating agent is capricious, that is, it can be exercised at will and with impunity. Republican forms work to eliminate or minimise the
capacity to be capricious, through constitutional forms which guarantee that interference will occur only through agreed upon processes which are subject to review and appeal. That is, republican forms aim to secure freedom. If representation depends on the whim of the electorate, then it is not secure. Now this is not normally a problem for members of dominant or majority groups; by definition, their culture is represented in the polity. Moreover, given the nature of most electoral systems, unless members of minority ethnic groups form local majorities in some places, members of the dominant culture are more likely to be elected to the governing bodies of the polity. In practice, this does turn out to be the case. As has been extensively documented, members of ethnic minority groups are systematically under-represented in legislatures world wide.  

There is a large chance that ethnic minority groups will not gain representation through normal means, simply because of the vagaries of the electorate. A contemporary example of this is in Australia, where the indigenous Aboriginal people do not have secure representation in federal parliament. There have only ever been two aboriginal members of federal parliament, and in 2001, the Minister of Aboriginal Affairs is not an Aboriginal. Each federal electorate contains roughly 70,000 people. Out of a total population of 18,000,000 there are roughly 300,000 Aboriginal people. However, they are not concentrated in particular electorates, so in no case do they form a local majority which could elect an Aboriginal person to the lower house of parliament. Upper house members are elected on a state-wide basis, so if an Aboriginal person is placed in a sufficiently high position on a party list in a particular state, he or she may be elected as a Senator. However, there is no guarantee that Aboriginal voices will be heard in the federal parliament. Thus Aboriginal people may be subject to capricious interference because they do not have secure representation.

As mentioned above, however, there is a third aspect to the need for representation, which reflects not just the need for minority voices to be heard, but also the need for recognition of the status of minority groups as full members of a polity. Recall that in a republican polity, each citizen enjoys the status of being non-

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12 This is not necessarily a problem, unless we adhere strictly to mirror representation (see Phillips 1995), but it is at least an oddity.
dominated; each citizen may stand tall and look the other in the eye, knowing that her own status is secure. If members of minority groups are excluded from the governing bodies in a polity, then the implication may be that they are not regarded as the equals of other citizens. They may not be able to stand tall, and look the other in the eye. In order to ensure that members of minority groups are full and equal citizens of the polity, they must be included in the governing bodies of the polity. This is different from the governing bodies just tracking the interests of those they govern. Tracking the interests of the governed is a laudable ideal, but if those who are governed have no say in how they are governed, then they are treated as children, who may be loved and cherished, but not respected and trusted. Those governed are dependent on the charity and good will of the governing bodies. This is a familiar theme in republican thought; when citizenship was restricted to propertied males, part of the reasoning was that only such people had the capacity to be independent. In contemporary republican thought, citizenship is universal; no mentally competent adult is excluded from participation in the polity. If however, members of a minority ethnic group are excluded from governing, then in effect, their citizenship is compromised. Hence the need for members of minority groups to be included in the governance of the polity. Moreover, inclusion in the day to day governance of the polity signifies that members of the minority group are trusted to govern for all the polity, not just for their own group. Their role is not just to be a voice for members of minority groups, but to take due thought for the governing of the polity as a whole. Including them in the governing of the polity recognises their status as full citizens of the polity.

Finally, representation satisfies the republican ideal of due process. As discussed earlier (see section 3.4), if an individual or a group assents to a process, and agrees that the process is fair and equitable, and if after all processes and appeals have been exercised, and that citizen is still required to submit his will to the majority, then he ought nevertheless to feel that his cause has been served. It has been acknowledged, and counted, as it were, even if at the end of the process, his cause is dismissed from further consideration. Representation in parliament is part of

a due process that helps to ensure that minority ethnic groups enjoy full standing as republican citizens.

**Republican Institutions for Representation**

In considering political representation, I want first to consider at what levels political representation can occur. Levy's examples and discussion emphasise representation by membership in the polity's decision making bodies, especially the legislature. He makes passing reference to representation at other levels in the decision making apparatus of the state, but his focus is on membership in parliaments. This unnecessarily narrows his consideration of the various possibilities for representation. Representation can of course be managed through seats in a legislature, but this is, as it were, the highest level of representation. Representation can also be managed through participation in advice giving, participation in policy making, and through appealing against decisions or policies that are perceived to be injurious to minority groups. I will consider each in turn.

Representation in legislatures can be achieved through various means. Seats can be reserved for members of ethnic groups, or electorates can be devised in order to ensure that members of minority groups can elect their own representatives, who may or may not be members of that minority group. The Maori seats in New Zealand function in this latter way. Maori can choose to enrol on the Maori roll, which means that they then vote in one of six Maori electorates, in which all the voters are Maori. Alternatively, they may choose to enrol on the general roll, and vote in an ordinary electorate. The number of Maori electorates varies according to the number of Maori who choose the Maori electoral option, offered every five years. In the 1996 parliament there were five Maori electorates; by the time of the 1999 election the number had been increased to six, and all projections suggest that by the 2002 general election, there may be seven or even eight Maori seats.\(^\text{14}\) Candidates standing for election in these seats do not have to be Maori, but in practice, all candidates are. The reserved electorates are not based on arguments in favour of mirror representation, where the number of Maori in the House reflects the

\(^{14}\) The Maori electoral option, when Maori have their quinquennial chance to change from the general roll to the Maori roll, or vice versa, is running from April to August 2001.
proportion of Maori in the population, but on providing vehicles for Maori to ensure that representatives of their choosing are present in the House.\textsuperscript{15} Alternatively, the borders of electoral districts can be drawn in such a way that what is normally a minority group forms a local majority, and thus has more electoral power. This is the process known as 'redistricting' in the United States, where the boundaries of electoral districts can be formed in such a way that blacks or Hispanics form local majorities. Although in practice this system might work, I think that a republican polity ought to pursue options similar to the Maori roll in New Zealand. Redistricting is dangerously close to creating gerrymanders, and it has a significant capacity to be capricious. Abuses of a redistricting system can be guarded against by using politically non-aligned commissioners to draw up district boundaries, and by providing systems of appeal and review. Nonetheless, avoiding the capacity to be capricious in the first place is preferable. Overall, the advantage of a system of reserved seats or special electorates is that it guarantees ethnic group representation in legislatures. There is one obvious question with respect to systems of reserved seats; at what stage do they become desirable? When an ethnic minority group is equivalent to 1\% of the general population, or 5\%, or 10\%? Are they desirable only when there are indigenous ethnic minority groups, but not whether then are immigrant ethnic minority groups? I think that this is an empirical matter that will vary from polity to polity. The number of Latinos in the United States seems to argue for some form of guaranteed representation, as might the number of Pacific Islanders in New Zealand, even though both groups are what Kymlicka would call immigrant groups.\textsuperscript{16} However some immigrant groups despite their relative size might not need special representation. Over 400,000 New Zealanders live in Australia, and about 50,000 Australians live in New Zealand, but they experience no particular domination,\textsuperscript{17} and their cultures are very similar indeed, so there is no particular need for special representation.

\textsuperscript{15} See Phillips (1995), especially Chapter 4, for a discussion of mirror and other forms of representation.

\textsuperscript{16} Pacific Islanders in New Zealand have started to achieve representation through party lists and through geographic concentration; the Otara electorate in Auckland is largely populated by Pacific Islanders, and it is represented by a Pacific Islander.

\textsuperscript{17} Except for affectionate (?) ritual name calling, and on-going sporting rivalry. The relationship is somewhat similar to the relationship between Canada and the United States.
Less secure means of achieving representation include using party lists and proportional representation or preferential voting systems to increase the likelihood of candidates from ethnic minority groups being elected. In systems of complete proportionality, such as in Israel, a small percentage of the vote can be enough to guarantee representation. Most proportional systems however have some minimum percentage of the vote that must be won before seats can be taken, thus minimising the danger of radically divisive parliaments, but at the expense of achieving representation for smaller groups. Where party lists are used to achieve proportionality, as in the Mixed-Member Proportional Representation systems used in New Zealand and Germany, political parties are under pressure to display some degree of representativeness in their party lists by including members of ethnic groups in senior positions on the list, thus virtually guaranteeing them a position in the legislature. In the first two elections held under the Mixed-Member Proportional Representation system in New Zealand, several Maori were elected on party lists, and yet others won general electorate seats; in the current house, about 15% of the members of parliament are Maori, although only 6 (5%) of the 120 seats in the House are reserved Maori roll seats. Although in practice these systems can work and do work, there is no guarantee that they will do so. One way of making them more secure would be to legislate to ensure that party lists include members of minority groups. However, if the aim is to secure minority representation, then reserving seats may be more effective.

How would the reservation of seats in itself not constitute a breach of freedom as non-domination? At first glance, it might seem that the will of the majority of the electorate might be compromised, and their choices restricted. However the reservation of seats can function as a simple counter majoritarian measure, that is, as part and parcel of a republican framework of government. The reservation of seats is not a dominating procedure; it is in fact a procedure used to mitigate the dominating potential of the majority. Moreover, the reservation of seats can be done in such a way that the members of a minority group achieve a fair level of representation which does not in itself constitute domination.

An alternative means to ensure minority representation in legislatures and governing bodies might be to use a second house of review that is elected, or perhaps
appointed, in such a way that minority groups are guaranteed representation. Typically upper houses are able to review, but not introduce legislation. An upper house with the power of review could scrutinise all legislation to ensure that it did not restrict the range of choices for minority groups. This could be one of the stated aims of the upper house. The upper house in the Australian parliament has a similar mandate with respect to the states of Australia. One of its stated aims is to ensure that the interests of smaller states are not swamped by the interests of the larger states. Thus all states, no matter what their population, have equal numbers of representatives (Senators) in the upper house; Tasmania, with a population of 300,000 has as many senators as New South Wales, with a population of over 4,000,000. Using an upper house of review may be one way to ensure that minority ethnic groups achieve effective representation.

Representation is not however, simply a matter of having members of minority groups present in governing bodies. Governance is carried out in houses of parliament, but it is also carried out in government departments and ministries. It occurs not just through discussing and passing legislation in parliament, but also in forming policies and drafting legislation. If members of minority cultures are not included in these processes, then the effect of representation in the legislative chambers may just be to create a single hurdle, or place of review, before bills are passed into law. This means that there would be no secondary measures to ensure that poor policies are not formed in the first place, nor poor legislation presented, and so on.

How then, to ensure that minority groups are included in the processes of formulating policy and devising legislation? A republican polity could encourage participation in advice giving by: providing avenues that may be used to give advice, such as select committee procedures in which anyone may participate; inviting participation in such procedures; actively soliciting advice from ethnic minority groups; requiring participation in such procedures. Participation in policy making could be facilitated by: requesting policy advice from minority ethnic groups; providing funding to ethnic groups to develop policy; ensuring that government

\[18\] The upper house in the British parliament, now that hereditary peers have been excluded, is an appointed upper house.
agencies and departments have ethnic affairs units specifically dedicated to examining the impact of policies on various ethnic groups; separate government departments devoted to ethnic affairs. None of these institutions and procedures are unfamiliar; they all exist in some form or other in modern liberal democracies. Their existence signifies a concern for minority ethnic groups, and a determination to ensure that members of minority ethnic groups enjoy the same privileges and goods as other members of the polity. It also signifies that minority ethnic groups both may and are able to participate in the governing of the polity. Moreover, by including minority voices at every stage of governance, members of the legislature who belong to the dominant group will be reminded of the need to govern for all citizens. There may however, be a need to ensure that the forums and procedures used are such that members of minority ethnic groups are able to use them. The traditional form of select committee procedures, and congressional inquiries may not be appropriate for some ethnic groups. I discuss this issue below (see section 6.5).

SUMMARY – POSSIBLE REPUBLICAN INSTITUTIONS FOR REPRESENTATION

- Reserved seats
- Minority electoral districts
- Minority representation in an upper house
- Ethnic affairs departments
- Ethnic affairs units in government departments and agencies
- Facilitation of participation in policy formulation and advice giving
- Participation in policy formulation and advice giving

4.2.2 Issues of self-determination

Levy does not discuss self-determination. What he does discuss is self-government, by which he means ethnic groups governing themselves in most or all facets of government, perhaps as a unit in a larger structure, such as a state within a federal polity, or perhaps as totally separate polities. As Levy acknowledges, the possibility of such self-governing units is heavily influenced by the restrictions of
What is not so limited by the restrictions of territories and borders is some degree of self-determination. What I mean by this is delegated governance within specified areas of government. For example, an ethnic group may claim the right to dispense justice and to organise social welfare within its own group. This type of governance is not so restricted by geography: a parallel justice system or a parallel welfare system or health system can operate with respect to a particular group of people rather than within particular geographic areas, and indeed often do with respect to members of the armed forces.

**WHY DOES SELF-DETERMINATION MATTER?**

Self-determination matters in part for much the same reasons as representation, as would be expected given that it is an aspect of governance. People who are not trusted to govern themselves, or to participate in governance are not treated as full citizens. However self-determination differs from representation in that those who claim it are not looking for a voice, or for total self-government, but for jurisdiction over certain areas of life. What reason might there be to look for separate governance in some, but not all, areas? For example, why might a minority ethnic group want a separate health system, or a separate judicial system?

Typically, what is at issue is cultural sensitivity. Members of minority groups feel that institutions set up to meet the needs of the citizens of the polity in general in reality meet the needs of the dominant group. Education systems may not teach the history of minority groups, or may teach in ways that are not consistent with minority group culture; health services may be delivered in a way that offends against cultural taboos; welfare systems may assume family and social structures that fit the dominant group, but not minority groups.

This may seem to be a simple matter of cultural sensitivity, or cultural justice. That is, there is no need to understand these types of issues in terms of freedom as non-domination. In some respects, this may be because issues of welfare and health

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20 I am not referring here to federal systems, where typically some powers are reserved to federal governments and others to state or provincial governments, but to parallel systems.
and education involve the provision of extra resources, which clearly impacts on the polity's taxpayers, but it does not seem to create any other problems. After all, in many polities some groups already run parallel education systems; for example, the Catholic church typically runs education systems that complement systems run by the state. Parallel health and welfare systems are not so common, but there is no particular reason for this, other than reasons of funding. What is more problematic is a parallel justice system, where a minority group's justice system runs alongside the justice system of the dominant group.

Even though it might seem that parallel health and welfare systems raise no particular issues with respect to freedom as non-domination, or that the case for them is a simple matter of fairness, involving nothing more than the taxpayers' purse, I think it is useful to think about them in terms of freedom as non-domination. If a member of a minority group can't access health or welfare, or any of the myriad other services that contemporary states provide for citizens, because they are provided in such a way that their culture precludes them from accessing them, then their choices are limited. For example, in New Zealand, health care has been delivered in a way that is consistent with pakeha culture, but not Maori culture. Maori patients have been treated in ways that offend against tapu, which can then inhibit them from seeking health care again.

There is however, a further issue. If for example, health and welfare systems are run by the dominant culture, despite ethnic minority groups preferring to run their own systems, then in effect, minority groups are treated yet again as not being able to be responsible for their own destiny. They are treated as wards of the dominant group instead of being citizens of full standing. The goods that a modern liberal democracy typically delivers to its citizens are delivered as a gift, or perhaps as the right of all citizens, but they are not delivered to be used as the minority group wishes. Claims for self-determination can be understood in republican terms as the need to treat all citizens as fully competent adults. Roger Maaka and Augie Fleras

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21 A 'tapu' is something which must not be done, or something sacred. For example, it is 'tapu' to sit on a table, because sitting on a table associates defecation with food preparation. In hospitals, patients are normally confined to bed and given their meals there. Very ill patients are often required to use bed pans rather than going to the toilet. This is inappropriate for Maori patients, because of the tapu. Thus hospitals need to make special arrangements for Maori patients.
make exactly this point in discussing *tino rangatiratanga* (roughly, sovereignty) in New Zealand. They argue that indigenous and settler communities are inextricably linked together, and that both groups have to find ways of seeing each other, not simply as different in the trivial sense that all people differ from one another, but as consenting groups who are sovereign in their own rights. 22

Self-determination also matters because it restricts the capacity of the state to become a dominating agent. Health, welfare, education and legal systems, amongst other systems, are normally run by the state. The standard institutions of the states, that is, legislatures and government departments and ministries are used to deliver the services of each system to citizens. The institutions of the state thus have considerable power with respect to all citizens. This may be particularly salient for members of ethnic minority groups, in that if the institutions of the state are not sensitive to the needs of ethnic minority groups, then the state itself has removed choice from members of these groups.

Self-determination can seem to be straightforward if it is simply a matter of delivering to ethnic minority groups the right to administer parallel health, education and welfare systems. It is a matter of ensuring that their range of choice is not restricted, and that they are recognised as full citizens, and not treated as dependants of dominant groups. I want however, to discuss a further area in particular, that of traditional legal codes, or even parallel judicial systems. Levy discusses traditional legal systems, and notes that they are often linked to arguments for self-government. 23 I think however, that they are more usefully discussed in relation to self-determination, where the idea is that while a minority ethnic group may be satisfied with being part of the larger group in some aspects of governance, in other areas they may prefer some degree of self-determination. He also discusses land claims in the context of traditional legal claims; 24 I think that land claims are sufficiently important, and sufficiently different from issues relating to traditional legal codes, that they should be discussed separately (see section 4.7). As Levy notes, claims relating to traditional legal codes range from the purely formal, such as

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22 Maaka and Fleras (2000).
the types of marriage ceremonies used, to substantive rights, such as the rights that women may have in marriage. They may also relate to criminal codes, as well as to what in the Western tradition would be referred to as civil codes.\textsuperscript{25}

Why might a minority ethnic group prefer its own legal code? In the first case, especially in respect of civil laws, it is a matter of choice. If a minority ethnic group is forced to follow the laws of a dominant group, then the range of choices available to members of that culture is restricted. However, it is also a matter of standing. If a cultural choice is disallowed, possibly simply through oversight on the part of governing authorities, then that choice is treated as not being appropriate or valid. Those who would make that choice are not treated as citizens of equal standing; their choices are treated as being trivial or inconsequential, or as the choices of children, which may be ignored, or disallowed on the grounds of danger. That is, dominant groups either dismiss the practices of minority ethnic groups out of hand, or paternalistically rule the choices out.

Criminal codes traditionally cover areas where people do physical harm to each other, and in Western traditions at least, to each other's property. Why might it be important for a minority ethnic group to be able to elect to use its own criminal code? Again, roughly, it is a matter of choice and the restriction of choice, and of being treated as citizens of equal standing. To disallow the use of a traditional criminal code is to deny the standing of those who would use it. There is however, another dimension to criminal codes, and that lies in the analysis that each code makes of what it is that matters. A criminal code tells us what kinds of harm are recognised as being so deplorable that they must be dealt with by a justice system. For example, in Western traditions, arson is a criminal matter. Western traditions regard offences against property as serious harms. This is not the case with some traditional systems, where what matters is whether or not another person has been physically harmed. If dominant groups fail to recognise traditional criminal codes, then they fail to recognise what minority ethnic groups regard as being important. The traditions and beliefs of minority groups are treated as being inconsequential, or

irrelevant. This again means that their status as citizens is denied, and thus their enjoyment of freedom as non-domination is compromised.

There is a third area in which traditional legal codes are important, and it is an area that is not recognised in Western law, except perhaps in laws about sacrilege. That is laws about sacred places and practices. For example, in New Zealand, some places are 'tapu', meaning roughly, that they are sacred and out of bounds to most, if not all people. Places may be permanently or temporarily tapu, or tapu to men but not to women, and so on. The concept of tapu is not recognised in the New Zealand legal code. Similarly, in Australia there are places which are secret and sacred to Aboriginal people. Famously, Uluru (also known as Ayre's Rock) is a sacred place. The Aboriginal traditional owners of Uluru ask tourists to respect their sacred place, but they cannot prevent tourists from climbing it. This phenomenon of secret and sacred places is repeated in indigenous cultures all over the world. It is also common in dominant cultures; Westminster Abbey is a sacred place which may not be profaned, as is the Vietnam Memorial in Washington DC. However, while the sacred places of dominant groups may enjoy protection, sacred places of indigenous groups often do not, or where they do, it is protection afforded by the legal code of the dominant group rather than by the customs and traditions of indigenous groups.

There are two ways in which acknowledging and using traditional law might be important in this third area. The first is simply to afford some protection to what is deemed to be important to minority ethnic groups, whether that be particular places, or particular practices, and so on. If these places and practices are not given protection, then what is important to members of minority ethnic groups is deemed to be unimportant overall. That is, the beliefs of the minority group are not treated with the same respect as the beliefs of the minority group, and so their standing as equal citizens is compromised. The second is that not only are the traditional places and practices of the minority ethnic group discounted, but so too is their legal system, again undercutting their standing as citizens.
I have discussed a number of areas of possible self-determination. Instead of discussing possible institutions in each of these areas, I propose to discuss the sorts of institutions that could be used in respect of parallel justice systems. I think that this is *prima facie* the most difficult case with respect to self-determination, primarily because it seems to offend against the republican commitment to the rule of law. I will address this problem below. I think, however, that the types of institutions that could be used with respect to parallel justice systems could also be used in other areas of self-determination.

It seems relatively straightforward to allow parallel civil codes, especially where the issues involved are purely formal. For example, many nations already do so in respect of marriage codes. Marriages are recognised as valid when they are conducted within Catholic churches, traditional Protestant churches, synagogues, mosques and so on. If this can be done in respect of marriage, why not in respect of other civil matters? The issues do however, become more complex when what is at stake is not a formality, but a substantive difference in treatment. As Levy notes, the forms by which marriages are created and recognised may not be significant, but the rights that women enjoy in marriage may differ substantially between cultures.\(^{26}\)

I think that institutions could be developed in order to facilitate parallel legal codes, even where there are substantive differences between codes. I will describe the possible institutions that could be used for parallel criminal codes. I think that these institutions could also be used in respect of parallel civil codes of law.

Parallel criminal codes are not straightforward, especially when something that is recognised as an offence under one code is not recognised as an offence under the other code, or when punishments or sentences delivered by one code differ from the other, or seem to be utterly barbaric to people governed by the other code. For example, in Australia, one of the traditional punishments in Aboriginal tradition is spearing an offender through the leg. Many Australians of European descent regard

this as abhorrent. Equally, Aboriginal people are appalled by the European tradition of imprisonment; the terrible record of deaths of Aboriginal people in prisons may in part reflect how abhorrent this practice is to Aboriginal people. Other difficulties arise when a victim or an offender might prefer one code to the other, or when an offender who might be thought to 'belong' to one code is charged under the other, and so on.

How then to set up parallel justice systems? I want first to consider how we might decide who would belong to one system, and who to another. Then I want to consider what minimal standards each justice system ought to meet, and finally, I want to consider how appeals from one system to another might be managed. First, a reminder. I do not want to argue that running parallel justice systems is a requirement of republican polities. Indeed, none of the institutions discussed in this chapter is a necessary component of a republican system. Instead, each of them is designed to meet a specific need raised by a specific claim made by minority ethnic groups.

One way of deciding which justice system people ought to belong to, that is, under which system they ought to be held accountable, is to use geographic boundaries. If an offence is committed on a particular ethnic group's territory, then it should be assessed under that ethnic group's justice system. This is a familiar practice; in federal nations, offences are usually assessed using the law of the state where the offence was committed. There are of course cases where jurisdiction is disputed; these can be resolved through a federal court, or through various appeal procedures.

The matter is not so straightforward where members of a minority ethnic group are not associated with a particular physical territory. For example, in New Zealand, although traditional Maori iwi (tribes) and hapu (sub-tribes) have connections with, and ownership of particular areas of land, most Maori live in urban areas that are not connected with a tribal authority. Moreover, Maori are dispersed throughout New Zealand. So if there was to be a parallel justice system, using physical territory to set out areas in which Maori law would prevail is not a possible solution.
One way to decide who was to be covered by which system might be to use a process of election. Citizens could elect, in advance, which system they would be subject to. This election could be made periodically, say every five years, in order to prevent chopping and changing to take advantage of being judged under one system or another for particular offences where both victim and offender have elected to be judged under one system, then that system would be used. As a matter of practicality, one system could be deemed to be the one chosen unless a specific election to use the other system is made. This is not an unfamiliar type of procedure. In New Zealand, electors who wish to vote on the Maori roll make an election to do so every five years. The parliamentary electoral cycle in New Zealand is a triennial one. Thus it is not possible to chop and change between electoral rolls in order to influence a particular election, or at least, if an elector does decide to do so, he or she is then committed to that choice for a time period that will span more than one election.

Problems may arise when an offender has elected one system, and a victim another. Under what system should the offence be assessed? I think that in this sort of case, the victim's system should be used. This is based on the republican understanding of criminal justice. As I discussed above, one of the main proposals of republican criminal justice is that the process must restore the victim's standing as undominated. In order to do this, the victim must feel that justice has been done. If her system of justice is not used, then one of the implications is that it is not fit to be used, an implication that strikes at her standing as a citizen who enjoys freedom as non-domination. Now clearly, there is potential for this type of system to be abused, but again, in order to prevent abuse, or at least, to arrest it when it is detected, a familiar system of appeals can be used. An offender who feels that a grave injustice would be done if her own system of justice is not used could appeal for a reconsideration, and likewise, a victim could then counter appeal.

The question of how to decide which legal code should be used in which cases leads on to a consideration of how to set standards for each legal code. If all parties are to be satisfied that justice, that is, legal justice, has prevailed, then each party to a conflict needs to be sure that the system used is fair. Republicanism
embraces the rule of law, as I discussed in section 3.1, and as I will discuss later, parallel justice systems and the rule of law do appear to be incompatible. However, what I want to discuss here is the overall standard which each system in a republican polity ought to meet. Clearly that standard within a republican system is one of non-domination. To the extent that a particular legal system results in domination, then it is unjust.

The question is how to assess when domination has occurred? Moreover, who is to do the judging? If for example, a member of an ethnic minority group feels that the legal system to which she is subject creates domination, then she has at least the option of leaving the group. This may however, not be a palatable option; it may force her to reject part of her culture, or to try to move outside of her culture. Now while this is not an impossible task, it is nevertheless widely regarded as something that is very difficult to do, and something that comes at a cost. The other alternative is to try to change the particular feature of the system that results in domination, through a system of appeals. The type of appeal that I envisage is similar to appeals in the United States legal system about freedom of speech. The principle of freedom of speech is enshrined in the constitution of the United States. The content of this principle is not spelled out in detail in the constitution, but over many years, a body of law has been built up, based on court cases and appeals and so on, that establishes what freedom of speech consists in. In similar fashion, a citizen of a republican polity could appeal against a particular law, or an interpretation of a law, that resulted in domination, and over time, a body of case law would be built up that would, through practice and use, define freedom as non-domination, or more realistically, develop a practical judgement about what actions on the part of various agents would constitute domination. To develop this body of knowledge, I envisage a system of appeals, firstly within a particular legal system, and then outside it. For example, a member of an ethnic minority group could first appeal within his system, using whatever mechanisms are traditional or appropriate. If that fails, then he might have recourse to an overarching appeals authority, which would consider his case within the context of his own legal system. This would operate in a way that is similar to the operation of the Privy Council in New Zealand, and the Supreme Court in the United States. In New Zealand, the last avenue of appeal is to the Privy Council, where a case is considered, on its merits, in terms of New Zealand law.
That is, the Privy Council, although it is located in the United Kingdom, and is staffed by English law lords, does not consider a case within the context of English law, but in the context of New Zealand law. Now this might be sufficient for a case of apparent domination to be resolved. I want however, to consider what might happen in a case where within the context of one legal system, a case of apparent domination exists, and yet it is consistent with the standards set by that legal system. How then to appeal?

There are two possible ways to set up appeals from within a justice system to some institution outside of the system. One is for appeals to be made from one system to the other, perhaps to the highest authority in the other system. The other is to set up some overarching body to handle appeals, from both systems. So in a polity with two legal systems, I envisage both legal systems electing representatives to sit on a final court of appeal. In either case, the final appeal authority would function in a fashion similar to the Supreme Court in the United States. These types of review and appeal authorities are already familiar to us. They operate in most Western liberal democracies, and their brief is both to act as final courts of appeal and to review state justice system and laws to ensure that they are consistent with, or at least do not contravene, some overriding principles.

It seems inconsistent with recognising the status of minority ethnic groups as full citizens of a polity, to allow those citizens at the one time to have their own legal system, but at the same time to make it subject to an overriding principle of the polity. It seems likely that any principle embraced by the polity would simply be a principle that originated with the dominant group in the polity. So the members of minority ethnic groups would be told on the one hand, that their law is acceptable, but on the other, that it is only acceptable if it meets the standards of the dominant group. However, I think that freedom as non-domination is an ideal that has wide appeal, and that it is an ideal that is likely to be attractive to members of minority ethnic groups in as much as it addresses one of their deepest concerns, that is, how to be recognised as citizens of equal standing within their own polities (see section 6.3.2). At the very least, individuals care that they are not subject to domination themselves. If this argument is correct, then there ought to be no particular problem.
If it is not correct, and freedom as non-domination is not a principle that enjoys at least widespread, if not universal appeal, then the entire republican project fails.

There is however, another issue to be explored here, the issue of the extent to which one ethnic group may interfere in the affairs of another ethnic group. In the system of appeals I have just outlined, such interference would be at the behest of members of the ethnic group that was subject to the interference, and the interference would be subject to a series of reviews and appeals. It would not be interference with impunity and at will. Moreover, although it would be interference that might reduce the range of choices available to some members of a particular ethnic group, by the same action it would increase freedom as non-domination for other members of the ethnic group. I have in mind here interference to say, increase the recourse to the law for women who have been sexually assaulted within marriage, or employees who have been refused to be allowed to carry out industrial action in order to secure better working conditions. While a husband or employer might lose some choices, the freedom gained by a wife or employees might be correspondingly as great, or greater than the loss suffered.

This type of interference in the workings of another ethnic group seems comparatively innocuous, or at least free from harm. What of the case however, where one ethnic group sees some action taken within another ethnic group as an action of domination, and wants to intervene to end the domination? I offer an example that fits within the area of parallel legal systems. I should point out that while my example is based in reality, I have amended it to make it a clear cut instance of members of one culture wanting to interfere in the workings of another culture. I want to consider the issue I mentioned above, that is, the conflict between traditional methods of punishment amongst Aboriginal peoples in Australia, and methods of punishment amongst the majority population in Australia. Aboriginal people regard imprisonment as abhorrent; the dominant group regards spearing through the thigh as abhorrent. Each method of punishment is thought by the other group to be at least inappropriate, although a more common opinion would be that it is cruel and unusual punishment. The majority group would like to end the practice of spearing, and Aboriginal people would like to end the practice of imprisonment. If each group was thinking in republican terms, then the dominant group might argue
that spearing results in a permanent reminder of harm done, that the perpetrator of a crime could not 'do his time' and then start a new life, that the permanent marking of the crime would undermine his standing as a citizen, that the physical process of the punishment involves one person asserting his dominance over the other. Aboriginal groups might argue that imprisonment created the capacity for inmates to be abused by prison warders, and that it removes something that is essential for the continued well-being of Aboriginal perpetrators of crimes, a sense of space, and that removing this choice in particular undercuts a prisoner's standing as a citizen.

In both instances, members of one culture see a clear cut case of domination in the workings of the other culture. I believe, that in this instance, interference is justified. In order to prevent further domination, it is possible to intervene. This is consistent with treating freedom as non-domination as a goal to be achieved, rather than a principle to be honoured at all times (see Chapter 2). However, in order to minimise the possibility of the interference itself causing domination, a republican polity ought once again to have recourse to a series of reviews and appeals. Once a case of perceived domination has been discovered, a case could initially be taken to the courts and appeal tribunals with the ethnic group concerned. From there appeals and reviews could proceed through the same levels as any other case in the judicial system, perhaps ending with the highest court in the land, that is, parliament. This process of review and appeal serves two ends; it ensures that all parties to a dispute can at least be satisfied that their claims have been given a fair hearing, and importantly, it ensures that intervention or interference in the affairs of another group does not become an act of domination.

PROBLEMS FOR SELF-DETERMINATION

Throughout the discussion above about parallel justice systems, I have put to one side issues to do with the rule of law. I want now to discuss these issues.

Republicanism sets great store by the rule of law. As discussed earlier (see section 3.1) amongst the various requirements of the rule of law is that the law should be general; it should apply to all citizens in a polity, including those who make the law. This means that there can be no bills of attainder; no one person
should be singled out by a law. The law should contain no proper nouns. Equally, no particular group of people should be singled out by name for special treatment. Presumably there are some particular limits to this; it makes sense to allow women to take leave due to problems in pregnancy, but not men. However singling out a particular group, based on ethnicity, might amount to being named in law. I think however, that singling out groups by ethnicity does not amount to using proper nouns; no individual person is identified. Only a description that may or may not apply to individual people is included in the law. Where the description is sufficiently general there ought to be no problems. In general we have no problem with descriptions; for example only people who fall under the description "doctor" are caught within the ambit of medical malpractice laws, and only people who fall under the description "lawyer" are caught by laws that ban lawyers from certain activities, such as serving on juries. So singling out specific ethnic groups does not in itself create a problem with respect to the rule of law.

There is another possibility with respect to the rule of law. If the law is supposed to apply to all citizens in a polity, then parallel justice systems, with different understandings of what constitutes an offence, and what constitutes an appropriate way for dealing with offences, seem apply to some citizens but not to others. However, under existing rules of law, it is quite possible for citizens to be treated differently by the law. This happens in two ways. First, in federal systems, each state has its own laws. Depending on where an action is committed, then it may or may not constitute an offence. Even if the action would be considered to be an offence in every state of a federal polity, then it may be treated in different fashions depending on where it is committed. In some states, an offence might carry a jail term; in others, it might carry a fine. We are already accustomed to the idea that citizens can be treated differently by the law.

Of course, in most federal polities, there is an overriding body of law, federal law, to which all state law must conform. Moreover, in closely contested cases it is usually possible to appeal from state legal systems to federal legal systems, and state

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27 That is, men should not take such leave on their own account, although there may be family leave provisions that allow family members to take leave in order to care for sick relatives, including pregnant partners.
laws are usually subject to review, if necessary, by federal courts. Having some sort of overarching legal system might not be possible where there are genuinely parallel legal systems. The overarching system might simply be the system of the dominant group, or even if it was nominally a separate system, it might have been developed and formed in such a way that it is more congenial to one justice system than to the other. However, one way around this difficulty is to restrict an overarching authority to a single court, with equal representation from each justice system. I envisage the review and appeal structure described above rather than one system being placed in authority over the other.

The second way in which existing legal systems already treat citizens differently is in judicial discretion. Under a rule of law, laws are general. If a citizen is prosecuted under a particular law, then her particular case is assessed by a judge, and possibly a jury as well. The judge and jury have to assess the particular facts of the case, and then apply the general law, first to decide whether the citizen is in fact guilty of the offence in terms of the general law, and then to decide what penalty is appropriate. This means that citizens who have ostensibly performed the same action may be treated differently by the law. Again, we are accustomed to this concept already, and in fact, it is a part of the rule of law. The rule of law is not just a system of laws; it is also a system which relies on the judgement of ordinary citizens, and specialists in the law, to decide how particular laws should be applied. For example, an unemployed mother who steals food to feed her children is likely to be treated far more leniently than a wealthy person who steals food for no particular reason.28

There is however, one obvious objection to this argument. Of course, where the relevant particulars differ, then it is reasonable for the law to treat citizens differently. If in all relevant particulars, citizens are the same, then the law should treat them in the same fashion. In the example of the unemployed mother and the wealthy person, there is a relevant difference which could justify one being given access to welfare assistance and perhaps being required to undertake a course of study in budgeting skills, and the other being required to pay a fine, or spend some time doing community work, or if the offence is sufficiently serious, serving a prison

28 Or at least, she should be treated more leniently. There is some evidence that poorly educated, impoverished people are treated much more harshly than rich people.
sentence. Where there is no relevant difference, then no difference in treatment is permissible. This means that if a citizen of a minority ethnic group, and a citizen of a dominant group committed exactly the same offence, and all the relevant particulars were the same, then they should be treated in the same fashion. I believer however, that in at least one relevant particular, these citizens differ, and that is in the matter of their ethnicity. This is of course, a contingent matter; if there are no relevant differences, and if ethnicity is not a relevant difference, then this objection to parallel justice systems would hold. If ethnicity was not a relevant difference, then there would be no need for parallel justice systems.

None of the other requirements of the rule of law seem to be compromised by the bare fact of there being two or more parallel justice systems. In each system laws would still be clear, prospective rather than retrospective, and so on. The only possible point of difference lies in the possibility of differing treatment, but as discussed above (see section 4.1.3), differing treatment does not in itself compromise republican freedom. Finally, the traditional rationale for the rule of law is that it mitigates the possibility of arbitrary treatment. Allowing parallel systems does not compromise that goal. The capacity for arbitrary treatment is diminished as long as each system, and the overall system, conform to the rule of law.

OTHER AREAS OF SELF-DETERMINATION

As discussed above, there are many possible areas of self-determination, including health, education and welfare systems, and of course, parallel justice systems. I chose to develop the example of parallel justice systems, in part because it is perhaps more difficult to consider than parallel health, welfare and education systems. My thought is that the sorts of institutions developed to deal with parallel justice systems could be used in other areas of self-determination. In particular, I would expect to see systems of review and appeal, and procedures for electing which system was the relevant one for each citizen. This would be especially important where the sorts of outputs provided by a system could cover substantial periods of a citizen's life, as is usually the case with health systems.
There is another issue I want to discuss in respect of parallel health, education and welfare systems. In the first instance, establishing such parallel systems is simply a matter of funding. However, the governments of most polities demand accountability when they disburse government funds. This accountability is demanded in two ways; governments want to know that various systems generate appropriate outputs, and they want to know that government funds have been spent properly. Both these forms of accountability however, generate problems with respect to freedom as non-domination. If polities operate with systems of self-determination, then it seems to be contrary to that self-determination to demand some form of 'reporting back'. Reporting back seems to imply that minority ethnic groups can not be trusted to administer their own systems appropriately; that is, they are treated as not being citizens of full standing. On the other hand, simply disbursing funds and then giving no further thought to the matter could be equally patronising; it could be equivalent to more-or-less fobbing off a minority group with some money, but no real responsibility to deliver the goods. The governors of a polity could shrug off their responsibilities to minority ethnic groups by simply paying over enough money. However, in most liberal democratic nation states, and indeed in most polities, government expenditure is subject to audit and review. Furthermore, republican polities ought to engage in processes of audit and review as part of the checks on the exercise of power. When existing systems in a polity are subject to rigorous review and audit, then not subjecting the systems run by minority groups to the same standard of review and audit suggests that they are not expected to reach the same (presumably high) standards as the systems administered by the greater polity.

I do not think that there is an easy solution to this problem. Possible solutions might lie in developing standards of review in consultation with minority ethnic groups. These standards might be standards that must be met by both mainstream systems, and systems operated as part of self-determination for minority ethnic groups. Some use could be made of institutions such as ombudsmen. An ombudsman would have considerable power to hear complaints, and review standards within a system, and at the same time would report to government. The particular areas that would fall within an ombudsman's purvey could be negotiated, and renegotiated on an on-going basis, by the ethnic group to whom those standards would apply. The 'ombudsman' need not necessarily be one person; if it were
appropriate, it might be a council of elders, or a panel appointed by the judiciary, or someone elected by the members of a particular group, and so on. Using an ombudsman might provide sufficient accountability to avoid a 'run away and play' attitude on one hand, and heavy handed paternalism on the other, both injurious to freedom as non-domination.

**SUMMARY – POSSIBLE REPUBLICAN INSTITUTIONS FOR SELF-DETERMINATION**

- Procedures for electing which system applies to each person
- Review and appeal procedures, including appeal to bodies outside of a particular system, to consider cases of (1) determining who should be covered by which system and (2) domination within each system
- Ombudsmen

### 4.2.3 Issues of self-government

**WHY DOES SELF-GOVERNMENT MATTER?**

Self-government matters because in order to be free from arbitrary interference, the governed should be able to participate meaningfully in government. As discussed above, this can be realised through forms of representation and self-determination, but it can also be realised through self-government. Levy says that the claims made are similar in all cases, in that "there ought to be a government which members of the group can think of as their own. They should not be ruled by aliens. Borders ought to be drawn, and institutions arranged, to allow the group political freedom from domination by other groups."\(^{29}\)

What differs in the case of self-government rather than say a measure of self-determination or varying levels of representation is usually to do with several contingent matters. The minority ethnic group concerned may live in a particular physical area, or if an indigenous ethnic group, may have claims to particular areas

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of land. As Levy says, uniquely among cultural rights claims, self-government claims required the addressing of issues of borders and territory.\textsuperscript{30}

Self-government does however, seem to be a matter that is more relevant to indigenous ethnic minority groups than to immigrant ethnic minority groups. If immigration is voluntary, then after choosing to accept the government of a polity, it seems odd to ask for self-government. Indigenous ethnic minority groups, on the other hand, have often been forcibly incorporated into the polity. Not only have they had no choice in the matter, but all too often their ways of life and their possessions, typically land, have been taken from them. Self-government for such groups matters because it is about reinstating them as peoples who had always been self-governing. It also matters because it restores their standing as people who are capable of governing themselves. That is, it recognises them as citizens.

**REPUBLICAN INSTITUTIONS FOR SELF-GOVERNMENT**

Institutions for self-government are highly familiar in both liberal democratic nation states, and even within states that call themselves democratic without overly much justification for doing so. Most commonly, federal polities have the capacity for significant degrees of self-government. Typically in a federal state, some matters will be reserved for the federal government, and others for state governments. For example, taxation, economic policy, defence and foreign affairs may be the preserve of the federal government, and health, education, welfare, policing, and so on reserved to state governments. The exact division of powers may vary from federal polity to federal polity, but roughly the rule is that matters that concern the whole polity are handled by the federal government, and other matters by state governments. Some matters may be subject to on-going negotiation between federal and state governments; for example, the level of taxation, and the allocation of the tax take may be renegotiated annually. Where there is already a system of states in a federal polity, it may be possible to devolve power to minority ethnic groups through a state government. A dramatic example of this came into being on 1 April 1999,

when the federal government of Canada created a new, partially self-governing territory, Nunavut, to enable the Inuit to rule themselves as part of Canada.

Another possible structure is that of a self-governing federal unit, exemplified by Puerto Rico in the United States. Self-governing federal units are not exactly analogous to states in a federal structure; typically the extent to which the unit governs itself is not as great. Nevertheless, each unit enjoys a considerable degree of autonomy and self-government. It could be that these types of unit are more feasible structures than state-like structures within nations such as New Zealand and the United Kingdom which are non-federal nations. A third type of self-governing unit might be similar to the newly devolved parliaments in Scotland and Wales. Scotland and Wales are not states in a federal structure; they are part of the United Kingdom, and until very late in the twentieth century, were governed as part of the United Kingdom. Under changes brought in by the 1997 Blair Labour government, and passed by referendum in both Scotland and Wales, a parliament was set up in each former nation with the capacity to undertake various tasks, including raising a certain amount of taxation. Similar structures could be used for minority ethnic groups.

There is one other way of thinking about self-governing structures which has not, to my knowledge, been canvassed in the literature on ethnic diversity and government. It is what we know as local government. In most liberal democratic states, and in many other types of states, each township and city governs its own affairs to a certain extent. A city, town or district council may be responsible for such things as housing, policing, supply of utilities, providing recreational resources, maintaining roads and so on. In order to carry out these activities, they collect rates from the citizens of the city, town or district, who in turn elect a mayor and council members in a regular election cycle. Local government allows for a considerable degree of self-government, and it allows communities to decide how they would like to structure some of the more mundane aspects of their day to day lives. It could be that minority ethnic groups might be able to enjoy a considerable degree of self-government through a local government model.

What is clear about each of these examples is that the ability to form self-governing structures is dependent to a large extent on there being a recognised area
of land that belongs to, or is at least associated with, the ethnic group in question. Where no such territory is able to be clearly delineated, then perhaps it may not be possible to use these varying forms of self-governing units in order to ensure that an ethnic group may govern itself, and thus have greater access to the good of freedom as non-domination. In that case, varying modes of self-determination may be more appropriate.

**SUMMARY – POSSIBLE REPUBLICAN INSTITUTIONS FOR SELF-GOVERNMENT**

- State and federal structures
- Federal units
- Local government

### 4.2.4 Final comments on governance

In all the discussion above, I have assumed that the minority ethnic groups in question have wanted to remain part of the polity, albeit with varying degrees of participation in governance. What of those ethnic groups who can see no tolerable way of remaining within a particular polity? The obvious answer seems to be secession. However, secession is fraught with difficulty; the agonies in Kosovo and East Timor in 1999 are testament to this.

I think that there are two possible routes here. I suggest that if meaningful self-government is allowed, then there might be no need for secession. Thus if for example, under Suharto's rule, the East Timorese had been able to govern themselves, had been able to retain a fair degree of the tax take, and had not had to live with the constant presence of the Indonesian army, perhaps there would not have been the same pressure for independence. Similarly, the Kosovar Albanians might have been content to remain within the structure of Serbia had the Serbian rulers not overturned forms of participation in government and self-government that had been developed over many years. It is difficult however, to argue counter-factual cases. Moreover, there are cases to the contrary. Even though the Quebecois seem to have a substantial degree of self-government within a federal polity, and even though there
seem to be increasing efforts to recognise and accommodate francophone culture within the wider Canadian polity, there is increasing pressure within Quebec for independence from Canada. The last referendum on the issue was defeated by the narrowest of margins.

The second route might be to allow for secession, given that there seems to be an on-going trend towards the growth of supra-national structures, such as the European Community. At the start of the twenty first century, some supra-national structures are limited to trade issues; the Closer Economic Relations agreement between Australia and New Zealand and the North American Free Trade Association between the United States, Canada and Mexico are examples of these. Perhaps some secession might be possible within these supra-national structures. For example, if Scotland were to secede from the United Kingdom, presumably it could still be part of the European Community. Alternatively, perhaps England, Scotland and Wales might choose to form a smaller supra-national structure within the European Community. This would in a sense, be a limited form of secession.

I think that a republican polity must allow for secession. The alternative is to keep minority ethnic groups within a particular political structure, against their will, surely an instance of domination. Given the enormous difficulties of secession, I suggest however, that it would be reasonable to try various other forms of meaningful participation in government first. Throughout this discussion on government, I have assumed that governments of polities, and dominant groups within polities, are willing to respond to calls from ethnic minority groups for varying degrees of participation in government. If the government of a polity, and the dominant groups in a polity are committed to the republican ideal of non-domination, then they ought to be sympathetic to these claims. As is all too evident however, this turns out not to be the case in the real world. Even in Canada, an archetypal liberal democracy, when the province of Quebec last held a referendum on seceding from Canada, many commentators questioned whether the province had a right to secede at all. Even if each ethnic group did have a prima facie right to

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31 It might seem odd to talk of groups within polities being committed to particular ideals. However, I think that it is plausible to describe the citizens of the United States as committed to the ideal of
secede, if each group did so, there would be an almost unimaginable Balkanisation of the world’s polities. That is, even if there is a right to secede, it might nevertheless be enormously impractical.

However it does seem that pressures from international supra-national organisations can play a part in encouraging, or even forcing, governments of nation states to be more accommodating with respect to minority ethnic groups. Graham Smith describes the role of organisations such as the European Bank for Reconstruction and Development in linking aid to better protection of minorities in Russia. The Council of Europe has acted as a mediator in ethnic tensions, and the European Union has used trade measures to allow monitoring of the conflict in Chechnya. "In short, the price of international recognition and trade is linked to minority accommodation."

Some independent states may have an interest in some dominated minorities in other states, in cases where those dominated minorities originally came from another state. For example, during both the 1997 and 2000 coups in Fiji, India expressed concern about the fate of ethnic Indians in Fiji, even though the ethnic Indians in Fiji for the most part are no longer Indian citizens, nor have close links to their Indian homeland. Famously, pre-World War II Germany continued to take an interest in Germans in other states, although it then used this as an excuse for invasion rather than pressuring those other states to improve their treatment of German minority groups. However the capacity for independent states to pressure other states on behalf of resident minorities could be exercised capriciously. One way of avoid this type of power being exercised is simply for republican polities to endeavour to engage in non-dominating relations with ethnic minority groups. Alternatively, conflicts arising over such issues can be mediated through supra-national organisations, such as the United Nations.

I think that there are two practical lessons to be drawn from this. First, the onus is on dominant groups in existing polities to ensure that members of minority ethnic groups can find meaningful ways to participate in government, so that there is no pressing need for them to secede. Second, members of dominant groups and

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members of minority ethnic groups may need to find ways to accommodate each other while at the same time recognising what they have in common. As a practical matter, just as the first preference of existing nation states ought to be to work to maintain peace rather than engage in warfare, the first aim of the varying groups within a polity ought to be to try to maintain their union, rather than automatically look for separate structures. Finally, recall that republicanism has always been a pragmatic theory that works by modifying existing institutions and structures in order to meet new needs. This suggests working within the structure of existing polities rather than creating new polities altogether.

Finally, neither special representation, nor self-determination, nor self-government is required for ethnic minority groups within a republican polity. These are all possible republican responses to claims made by ethnic minority groups. That is, they are responses that are consistent with and informed by republican theory. The particular response to a particular claim will vary depending on the factual circumstances surrounding the claim.

4.3 Rules

Levy discusses two types of rules, internal rules for governing the conduct of members of a group, and external rules governing the conduct of people outside the group in order to protect the freedom of members of the group. In each case, there is a prima facie possibility of domination. In the case of internal rules, a group may restrict the conduct of its members in such a way that the only alternative is to leave the group, thus creating too high a price to pay for individual members who do not wish to abide by the rules. External rules are even more problematic, forcing one group of people to pay a price for a good that another group of people want to enjoy. In each case, the costs associated with particular choices seem to unfairly weight some choices in the range of choices available, thus in effect reducing the choices available. Limiting the choices available to a person is one of the ways in which freedom as non-domination may be compromised.
4.3.1 Internal rules

**WHY** **DO** **INTERNAL** **RULES** **MATTER**?

Internal rules and norms include such things as behavioural expectations, religious customs, patterns of treatment of children, and levels and types of education. For example, fundamentalist Jews expect members of their sects to observe the Sabbath strictly. Salman Rushdie offended against the internal rules of Islam in *The Satanic Verses*. The Amish have rules about what may and may not be worn, what activities members may engage in, and the extent to which their children should be educated. Marrying outside the group is often forbidden. Famously, many African cultures, practise clitoridectomy, often called either female circumcision or female genital mutilation, depending on what the speaker or writer thinks about the practice. Punishment for breaking these internal rules varies, but at the extremes it takes the form of exclusion from the group's activities, even to the extent of being expelled from the group. For example, African women assert that girls who do not have a clitoridectomy will not be able to marry, Amish who leave their communities leave with no assets, even if they have contributed to community asset building, and Jews who do not wish to observe fundamentalist practices may be shunned by fundamentalist Jews, including their own family members. Salman Rushdie lived in hiding for many years as a result of death threats.

These internal rules matter to complying members of the group because they are part of the cultural practice of the group, and because they help to maintain the group's identity. Not enforcing the rules could have the effect of diluting the culture of the group, so that over time the group's distinctive culture might simply be absorbed into a larger culture. This has two important consequences in a republican polity. First, if individual members of the group are allowed to change the nature of the group, then the choices made by other members of the group may be limited. Second, the choices of members of the group who wish to maintain the culture of the group are treated as unimportant, and able to be dispensed with. That is, they are not treated with the respect that a citizen of a republican polity commands.
On the other hand, these types of rules can impose intolerable costs on non-complying members. Imagine a member of a minority group who wishes to marry outside of that group. The cost of doing so may be ostracism from her family, and exclusion from the group. This means that her choices are weighted against marrying outside the group. Choosing to do so carries a very high cost, one that she may regard as intolerable. Hence her choices are manipulated, and her freedom considerably restricted. Another case – imagine a young adult who wishes to pursue a higher education, but doing so contravenes the group's understanding of itself. Someone who goes outside the group to pursue higher education might find that even if he wishes to continue his association with the group, they freeze him out, because his education means that he is no longer one of them. Thus the price he pays for his education is the loss of his identity as a member of that group. Again, the choices are heavily weighted in one direction, compromising his freedom as non-domination. Imagine yet another case, where a member of a group wishes to leave that group, but in doing so will leave behind community assets which he has contributed to, but may no longer access, and indeed, in leaving the group, will leave with no material resources. This means that his range of choices is severely restricted.

These types of problem bring a particular issue to the fore, that is, the balance, in a republican polity, between the interests of an individual and the interests of a group. Recall that I claimed that one of the attractions of republicanism is that it seems to deal with issues of groups better than other theories do. In particular, I claim that it gives us a better understanding of why, in issues of diversity, we may legitimately focus on groups rather than individuals. (See Chapter 2.)

Now if this claim is to be valid, then we would expect that republicanism says something distinctive not only about why it is that republican polities may focus on domination of groups, but also about how to manage the relationship between groups and individuals. This is not an issue in voluntary organisations or groups, where the group can insist on certain behaviours, such as attendance at church. However, ethnic groups are not voluntary associations, and continued membership in an ethnic group is not a voluntary matter.
A republican polity, in order to consider the interests of the group and the interests of individual members of that group, could focus on freedom as non-domination. In particular, it could consider cases where the cost that was to be paid by an individual or group was simply too high to enable that individual or group to make a particular choice. However, I do not see how a republican polity could sensibly make a choice, in advance, about whether the choices made by groups, or the choices made by individuals, should be given preference. What it can offer is some yardstick for adjudicating each case, which is the extent to which freedom as non-domination is compromised in each case, depending on what solution is reached.

What however, of cases where members of a minority ethnic group choose domination. This might be said to be what happens when, for example, a Mormon woman chooses to join a polygamous marriage, or in some circumstances when Muslim women choose to wear concealing clothes and to avoid activities that would take them outside the home, or when adherents of the Baha'i faith decline to take part in the process of electing public officials. In a Muslim country, all the people in the country may choose to follow sharia law, which has the effect of making women subordinate to men. Is it possible to choose domination? And should republican polities oppose this choice?

Arguments against selling oneself into slavery may be relevant here. There are various arguments: slavery is always harmful to the slave; the contract of slavery is an onerous contract; that as a matter of empirical fact, no one ever really volunteers to be a slave; slavery damages human dignity, including the dignity of the master, and so on. The slavery case is not exactly analogous when an entire group elects to be dominated; in any slavery relationship there must be a master or masters. However if people voluntarily choose submission to another person, that is, to be subject in future to arbitrary interference, then provided that the original choice was uncoerced, at first glance it might seem that a republican polity ought not to interfere. The situation may be like Ulysses binding himself to the mast so that he could not respond to the lure of the sirens; to suggest that Ulysses should not have so

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33 Baha'is simply accept the government of the day, and obey all the laws of the government. In Australia, they are required to cast a vote; however they may still cast an invalid vote, thus obeying the law while observing the rules of their faith.
bound himself says that he should have preferred known disaster to a limited period of being bound. We routinely allow people to limit their future choices in some way: banks offer savings accounts where the money cannot be withdrawn until a certain date, or can only be withdrawn at a cost; athletes submit themselves to the direction of a coach; members of religious groups agree to live according to the orders of their spiritual leaders. The difference with the case of voluntarily submitting to domination is that in each of these cases the rules as to how long the binding will last, and over what areas of life it is to hold, are set out in advance. Voluntarily allowing domination to suffuse the whole of life, for an unspecified and possibly unlimited period, seems to be a different matter. By its nature it eliminates any future choice for the person who chooses domination; even if she starts to resent her situation, she cannot escape. This points us to an understanding of the conditions for a whole group choosing patterns of behaviour that will result in some people being subordinate; as soon as one person begins to regret her choice, then the situation is not one of chosen subordination that is subject to certain rules, but one of domination. That is, the situation is at all times precariously near to domination. So a republican polity ought to be very wary of such situations.

Finally, whether or not people would choose to be dominated is an empirical matter. Historically, some people did choose to sell themselves into slavery; in ancient Greece and ancient Rome, educated Greeks sometimes sold themselves into slavery as tutors to aristocratic Roman children, but they were protected by their own commercial value, if nothing else. The "slavery" was more akin to an employment contract with wages paid in a lump sum. I suspect however, that it would be very rare to find people who had voluntarily gone from a state of enjoying freedom as non-domination to a state of domination. The closest case might be people who follow some cult leader, even to the extent of dying for him or her. Consider Jonestown in 1978, and the cult of the Heavenly Temple in 1998. These cases are notable exceptions to the general case, which is that people do not usually choose less freedom over more, or more accurately, do not choose to be bound unconditionally in preference to being free. It is obviously not at all rare to find cases where people are born and bred always subject to domination, but that is a different matter.
There is a significant problem in that most internal rules are informal, and contravention of these rules is punished by informal practices that are not legislated. Moreover, they are rules that a republican state is unlikely to condone, given that they involve imposing high costs on individuals in order to force those individuals to make certain choices. This raises two questions. First, should a republican state intervene on behalf of a group when that group asks it to intervene? For example, the Amish asked the federal government to intervene in order to allow them to not educate their children. Second, should a republican state intervene on behalf of individuals when it thinks that those individuals are subject to domination, both when the individuals request assistance, and also in cases where they don't? For example, many Western nation states have ruled out the practice of clitoridectomy amongst immigrant groups, even though those immigrant groups typically resist such intervention.

Given the standard of non-domination, and given that intervention is requested, in the first case I think that a republican state can intervene in the affairs of a group when that group requests the intervention. However, there is no guarantee that the state will enforce the wishes of the group. Equally, I think that a republican state can intervene in the affairs of a group at the request of an individual, although with the same proviso, that there is no guarantee that the state would find on behalf of the individual. Moreover, given that many of the sanctions involve such practices as shunning and ostracism, it is hard to see how a state could try to ensure that this doesn't happen. However, where it is a matter of the division of assets, or physical protection of an individual, the state could sensibly have a role. 34

In a sense this is a non-answer. I have not provided a solution to the issue of when and how a republican state may intervene in the affairs of an ethnic minority group. I suspect that this is an intractable problem, given that it requires balancing

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34 Ayelet Shachar raises a number of concerns about internal rules. She is concerned in particular about the problem of allowing ethnic groups autonomy with respect to the internal rules, which may allow the continuation of existing hierarchies within the groups. She argues that we need a system that accommodates established traditions, but does not impose costs on vulnerable individuals. Shachar (2000a). I think that the republican approach may offer an answer to this problem.
the needs of an individual against the needs of the many individuals who make up a
group. As I said earlier, there is an unavoidable tension here. Some political
theories attempt to resolve this dilemma by opting for one or the other;
communitarian theories may opt for the primacy of the group, and liberal theories
may opt for the primacy of the individual. I think that it is not possible in advance to
specify when intervention may occur. However, I do think that it is possible to
develop a yardstick for judging each case, that is, freedom as non-domination.
Moreover, freedom as non-domination is a yardstick that is not predisposed to either
the individual or the group.

I have however, to this point avoided addressing the hardest case. What of
intervention where the immigrant group resists intervention, and the intervention has
not been requested? I will examine this issue by discussing clitoridectomy. The
received position in Western nation states and in most political theories, with respect
to clitoridectomy, is that it is an evil that must not be tolerated. This is because it
imposes a high cost on the individual. Moreover, it is typically carried out on young
girls who have no possibility of giving, or withholding, their consent. There is
however, an alternative view, expressed by Germaine Greer. Greer argues that
clitoridectomy can be a joyous affair, a celebration of a young girl starting to become
a woman, and that it is not for so-called enlightened women and men in Western
nations to condemn the practice. 35

Greer may well be right in some respects. Where the operation is carried out
with consent and without pain, and where it is carried out in such a way that the girl's
life and health is not placed and risk, and where it is carried out in such a way that
she experiences no fear, then it seems odd to forbid it, any more than we would
forbid someone from pursuing dangerous activities such as hang-gliding, or from
tattooing their body, and so on. Of course, there is one difference in that removing a
girl's or woman's clitoris significantly decreases her possibility of experiencing
sexual pleasure, and may have an ongoing effect on her development through the
diminution of her sexuality. However, in order to make this argument go through,
we would also need to posit that sexual pleasure is only available to women with

clitoris, and that not experiencing sexual pleasure is a serious diminution of what it is to be human. These two premises seem to be untenable; feminists have spent many years arguing that the clitoris is not the sole source of sexual pleasure for a woman, and many women, and men, choose to live celibate lives but nevertheless seem to live full and rich lives. Moreover, we seem to allow Western women to engage in breast enlargements and reductions without worrying about any resultant decrease in sexual pleasure.

Greer's argument however, relies on several contingent factors: consent, freedom from pain, no risks to health and life, and no fear. In practice, these conditions are not fulfilled. Moreover, the operation is typically carried out on children, who can have no comprehension of the enormity of what is happening. And it seems, on some analyses, to be part of the ongoing subjection of women in these cultures. A republican polity would be able to intervene to stop the practice. The assessment of the choices available to the girl would include the fact that in future, her range of choices would be severely limited because she would not be able to marry within the group. That is, she is subject to domination because her range of choices is manipulated.36

Thus the grounds for interference in another group are set. The interference must arise because of the presence of domination within the group. I have discussed the institutions through which one group may interfere in the workings of another group above in the discussion of parallel justice systems. I believe that similar mechanisms could be used in order to regulate interference of this nature, that is, interference in order to prevent domination. In order to prevent the interference being an instance of domination itself, the interference could be subject to appeals and reviews, suing systems already present in the legal system of the polity, or if a parallel legal system is in place, using the procedures and systems that are in place for that system.

36 For a much more extensive analysis of these issues see Hellsten (1999), and Parekh (1999), pp. 177 - 181.
SUMMARY – POSSIBLE REPUBLICAN INSTITUTIONS FOR INTERNAL RULES

- Standard of freedom as non-domination
- Appeal and review procedures

4.3.2 External rules

WHY DO EXTERNAL RULES MATTER?

External rules seek to control the behaviour and activities of people outside a particular group in order to benefit people inside the group. Famously, the Quebecois have attempted to control the use of English in Quebec in order to ensure that French continues to be spoken. This means that Anglophones are restricted in their use of English. The most obvious restriction is not a restriction as such, but a requirement that all commercial signs be written in French, although English may be used as well, if so desired. However English may not be used instead of French. Arguments can be made to restrict the voting and property rights of non-group members in some areas; for example, on some American Indian reservations, non-American Indians may not vote in local or reservation politics, nor may they hold property. Often, restrictions such as these are eased after a qualifying residency period, which can be quite stringent. Vetoes over certain activities, such as mining, can also be interpreted as rules restricting people external to a group.

Why might such rules be important to a minority ethnic group? Roughly, it is a matter of standing. A minority ethnic group cannot be considered to be of equal standing, with its members enjoying full citizenship and the status that goes with citizenship, if those things that are precious to it are swamped by the larger society in which it exists. For example, the language an ethnic group speaks may lose its currency if it is not used in the wider society. Land with spiritual significance may be violated by activities such as mining. People external to a group may not

\[37\] Commonly, even with freehold land, an owner may carry out whatever activities he or she desires on the land, but not under it, or at least, only to a certain extent under it. Activities that involve extensive excavation, such as mining, are reserved to the government. Alternatively, the government
understand the significance of activities within a group, and might distort or
undermine the group's patterns of governance if they were to participate in the
group's governance, whether as elected officials, administrators, or electors. If it is
possible for non-members to distort or damage those things that the group holds
precious, or that are part of the group's identity, then the group and its members are
not treated as full citizens. They are not treated in a way that reflects their possession
of the good of freedom as non-domination.

**REPUBLICAN INSTITUTIONS FOR EXTERNAL RULES**

The problem with external rules is that they can compromise the freedom as
non-domination of non-members. For example, an Anglophone in Quebec could
argue that because she is forced to use a particular language in public life, her status
as a speaker of English is not recognised. Moreover, she is not permitted to choose
to use English, and thus her range of choices is limited. A non-group member who is
not permitted to vote in elections to select the governors of the area in which he lives
has no possibility of participating in governance, one of the key republican
requirements for the instantiation of freedom as non-domination. The particular loss
to a mining company, or its shareholders, when they are not permitted to exploit a
particular resource is not so obvious, especially where they might be able to access
similar resources in other areas. Nevertheless, it does represent a limitation on the
range of choices that they might make. It seems then, that in most cases, there will
be a trade-off between the increase in freedom as non-domination experienced by
members of a particular group, and the decrease in freedom as non-domination
experienced by non-members. This suggests that there can be no hard and fast rules
about external rules. That is, it seems that each case might must be judged on its
merits. If that is the case, I want to consider the examples discussed above, and see
how a republican polity might view them, and what mechanisms it might use to
assess each case.

Consider the case of Quebec. As is well documented, before the Quiet
Revolution of the seventies, Francophone culture in Quebec was being swamped by

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may reserve to itself all rights to minerals discovered beneath the land. These rights may then be
leased to developers, such as mining companies.
the surrounding Anglophone culture of both Canada and the United States. However a concerted move in the seventies saw a revival in Francophone culture, led in particular by a new emphasis on language. As part of the emphasis on language, laws such as the law setting out the use of language on commercial signage were passed. In the first instance, the law with respect to commercial signage was that signs should be written in French only. After protest and debate, the law was amended to 'French always', having the effect that signs could be written in French, or in French and English, but not in English alone.

This points to one way in which a republican polity can discuss such issues. Laws can be passed through state legislatures, and then be subject to appeal, review, amendment or repeal. That is, a republican polity can use the familiar mechanism of legislation and judicial review to adjudicate such claims. As it turns out, language is an integral part of culture, and I will discuss it further below, in relation to special assistance. For now, with respect to issues of cultural practice, and especially with respect to language, I propose that where external rules are claimed, then the matter should be dealt with through legislation and courts. This means that if the appropriate institutions for representation and self-government are in place, then these claims should at least be subject to fair process.

Restrictions on voting seem to be more problematic for a republican polity, given its focus on participation in government. Note however, that in a republican polity, several restrictions on voting may already be in place. For example, in a federal polity, a resident of one state does not expect to vote in elections in another state. This is because a person is expected to be able to participate in governance where a particular government is of concern to her. Where it is not, then she is not required, or allowed, to participate. What a person who wants to participate in a minority ethnic group's internal governance must show then, is that he has a meaningful connection with that government. This could be done by using residency qualification periods. For example, where a person has lived in a particular area for say, five years, and has indicated that he intends to continue to live in that area, either by word or by other indicators (for example, continuing employment, location of assets, marriage to a member of the group), then he could be permitted to participate in the governance of the group. This is not unfamiliar. Existing polities already
require their electors to be citizens (Australia, United States), or at least permanent residents (New Zealand, United Kingdom). If it seems that a particular group's restrictions are unfair, then the usual republican recourse to consideration through the courts could be available.

**SUMMARY – POSSIBLE REPUBLICAN INSTITUTIONS FOR EXTERNAL RULES**

- Legislation
- Review and appeal through the courts
- Qualifying periods

### 4.4 Special treatment

I have already discussed the issue of special treatment (see section 4.1.3). In this section I want to discuss two sets of claims that by their nature demand special treatment, exemptions and assistance. In doing so, I will take for granted that the arguments I set out above are correct, and that a republican polity does not have a *prima facie* objection to special treatment.

#### 4.4.1 Exemptions

**WHY DO EXEMPTIONS MATTER?**

Sometimes a law that seems to be general or neutral has a disproportionate effect on members of minority ethnic groups; in order to avoid this disproportionate effect, those people so affected may seek an exemption. There are many examples of exemptions that have been requested and variously granted or denied; Levy lists at least fourteen different cases.\(^{38}\)

In republican thought, exemptions may be important for two reasons. First, some laws may make some activities unavailable to members of some minority ethnic groups, thus reducing their range of choices. Famously, adult male Sikhs are required by their religion to wear turbans, but this would contravene many uniform regulations. Sikhs have therefore sought exemption from uniform regulations. In republican thought, not allowing the exemption would unnecessarily restrict the range of choices available to adult male citizens who were Sikhs. For example, they might not be able to join the police or the armed forces. Second, some laws may override cultural choices, and in doing so, may treat these cultural choices as irrelevant, or trivial, thus undermining the status of people who would like to make those choices. For example, conservation laws may protect certain species of animals, but those animals may figure significantly in a group's religious or cultural practices. In New Zealand, all species of kiwi are protected, but Maori cloaks are made using kiwi feathers. Restricting Maori use of kiwi feathers could represent an instance of not holding Maori culture in high esteem, and thus failing to acknowledge the standing of Maori as citizens. In both cases, the intent of the law is not to limit cultural practices; the intent of uniform requirements is to identify which people serve in a particular role in the polity, and the intent of conservation laws is to preserve wildlife. The unintended consequence of the laws can be described as being capricious, which again affects the freedom as non-domination enjoyed by those whom the law touches in this manner. Moreover, because the capricious consequences come about as a result of law making, presumably by the governing bodies of the polity, those affected may have limited capacity to contest the law, given that the law is intended to serve another, presumably worthy purpose.

The examples given above may be relatively trivial. Suitable uniforms could be devised for Sikh officers, perhaps incorporating a uniform turban, and feathers from Maori cloaks could be gathered from birds which are past breeding age, or which are taken in a controlled fashion, and so on. Different issues may arise where the law at issue is one of fundamental importance for a polity. The 'chador' affair in France represents just such an issue. French law requires that government funded schools are thoroughly secular, with no teaching of religion or display of religious symbols. When Muslim girls wore the chador to school they violated this law. This represents a real challenge for a republican polity. On the one hand, the girls were
forced to forgo the education promised to all French nationals for as long as they wore the chador. The choices that they could make were weighted against wearing the chador, given that they did want to pursue their education. On the other hand, the French polity has a deep commitment to the separation of church and state, in order to prevent the state from preferring one religion to another, and thus imposing extra costs, or restricting the range for choices, for some citizens. The prohibition against wearing religious symbols is also designed to prevent discrimination on the basis of religion. Conflicts of this nature may demand a much more complicated set of institutions than simple exemptions. Furthermore, it is not an unintended consequence of the law that the practice in question has been ruled out. Therefore it is hard to describe it as capricious interference, even if it is interference.

**Republican Institutions for Exemptions**

The most obvious types of offices that could be used for considering exemptions are ombudsmen and tribunals. In most Western polities, ombudsmen are in place to allow citizens to make complaints against the government, and against government agencies. The office of the ombudsman is empowered to investigate such complaints, and to issue judgements. A minority group could first address a request for exemption to the ombudsman, who could then investigate the request, including investigating whether or not the request is genuine, that is, that it does flow out of concern at the prohibition of a significant cultural practice. The ombudsman could be empowered to recommend exemptions. Requests for exemptions could also be handled through various tribunals; typically, where ombudsmen can only recommend changes, tribunals can authorise changes, in this case, exemptions. A Human Rights tribunal might be the appropriate vehicle for hearing and adjudicating requests for exemptions. As in all other republican institutions, appeals could be made from the ombudsmen's or tribunals' jurisdictions to the courts, by either the ethnic group concerned, or the agency which administers the law concerned.

Where there is a deep conflict between the intent of the law, and cultural or religious practices of a minority ethnic group, then a more exacting approach may be required. By this I mean that instead of relying on ombudsmen to make recommendations, and tribunals to authorise changes, a case might need to be
considered through judicial review of the law in question, and perhaps even through special inquiries. The type of inquiry I envisage is that already common in many polities, where a question of national significance is investigated by a panel of experts, usually under the jurisdiction of a judge. Usually the governing body of the polity sets the bounds of the inquiry; for example, in this type of case, the inquiry might be limited to the particular exemption requested, or it might be required to consider the general case of conflicts between the laws of the polity and the cultural and religious activities of minority groups within the polity. Often 'retired' judges chair such inquiries. Witnesses and experts appear before the inquiry and they are subject to cross examination. The object of such inquiries is not to assign guilt, or to prosecute particular people, but to gather as much information as possible, and present it to the government with recommendations for action. At that stage, the government may make a final decision as to whether an exemption should be allowed. At this stage, and if this sort of process has been gone through and an exemption is still not allowed, because the polity has a overriding commitment to the law in question, then no further options are available to the minority group which has made the request. However, there has at least been a fair and rigorous consideration of the exemption request.

PROBLEMS FOR EXEMPTIONS

Levy says that republican and liberal theories have a particular problem with exemptions. Exemptions require unequal treatment, and by their nature, allow specific people to be captured by specific laws, or in this case, exemptions from laws. Republican theories however, require equal treatment before the law, and in particular, eschew the use of proper nouns in law making. There ought to be no laws of attainder in republican polities.39

In making this claim, I think that Levy has made two mistakes. First, he has misunderstood the nature of the republican commitment to the rule of law. As I argued above, the rule of law does not necessarily require that all citizens be treated in the same fashion by the law. Second, the granting of an exemption does not bring

39 Levy (2000), p. 132. See also my earlier discussion in this chapter about the rule of law.
proper nouns into law making. It gives a certain group of people a right to act outside of the law; that is, it does not name specific people. Exemptions do however, act by identifying people as belonging to one group or another. Given however, that members of a group claiming an exemption have already identified themselves as belonging to that group, it is not a problem that the exemption applies to each individual in so far as they make that identification. If the state were to use that group identification to place extra costs on the group, then there would be genuine concern. However, where that identification is used to claim a privilege, then there should be no particular problem. Levy's claim does however point to one problem with exemptions in that they can be ad hoc, and thus they may be capricious. However, the use of ombudsmen and tribunals and the possibility of appeals against the decisions provides for some degree of consistency in the original decision making, and for enforcement of consistency if necessary. Thus while exemptions may be ad hoc, they need not be capricious.

There is another potential problem in identifying which requests are genuine, and which are shams. If there is a perceived advantage in escaping the consequences of a particular law, then people who are not members of a group that has been identified as exempt from the law, may try to present themselves of members of the group. For example, if conscription is in place, a person might try to claim that she is a Quaker and therefore a pacifist, in order not to be conscripted to fight. Alternatively, an ad hoc group of people might try to claim the status of being a minority ethnic group, or its equivalent, in order to have a *prima facie* case for making a request for an exemption. However, both types of cases could be dealt with by the office of the relevant tribunals, with of course, the usual processes of appeal and review through the courts.

**SUMMARY - POSSIBLE REPUBLICAN INSTITUTIONS FOR EXEMPTIONS**

- Ombudsmen
- Tribunals
- Appeals through courts
- Special inquiries and reviews
4.4.2 Assistance

Requests for special assistance are made in order to enable a minority group to do something that a majority group does with ease, or even simply as part of the way a polity conducts its affairs. Such assistance is often claimed with respect to language and preferential policies. It can also be claimed with respect to other cultural activities, such as theatre and art and so on. Levy says that all these types of special assistance impose a cost on members of the majority or dominant culture, either as a group, or on particular members of the majority culture. 40

There are two broad reasons for a republican polity to be concerned with language claims. First, if citizens can not use their own language, or are forced to use a second language, in dealing with the state, then their ability to interact with the state, and to take part in the affairs of the state, may be considerably limited. In a republican polity, citizens are expected to take part in the governance of the polity, minimally by participating in elections, but also by using avenues of appeal and contestation. And in order to do any of this, a citizen must have some proficiency in the language that the state uses. If a citizen does not speak the language that the state uses, or her own language is not recognised by the state, then she can not participate in the governance of the state, and thus her freedom as non-domination is compromised.

Second, language is both an important component of culture, and a vehicle of culture. It provides connection with, and access to, other aspects of culture. Members of ethnic groups who do not speak the language of that ethnic group feel disconnected from their culture. The testimony of the children of the stolen children in Australia makes this point over and over. These quotes are all taken from submissions to the National Inquiry into the Separation of Aboriginal and Torres Strait Islanders from their Families, held in Australia in the mid nineteen-nineties.

I realised later how much I'd missed of my culture and how much I'd been devastated. Up until this point of time I can't communicate with my family, can't hold a conversation. I can't go

to my uncle and ask him anything because we don't have the language... Confidential Submission No. 305.

My mother and brother could speak our language and my father could speak his. I can't speak my language.... I never had a chance to learn about my traditional and customary way of life. Confidential submission no. 110.

When I come back I couldn't even speak my own language. And that really buggered my identity up. Confidential submission no. 170.

I could have at least had another language and been able to communicate with these people. You know I go there today and I have to communicate in English or use an interpreter. They're like my family, they're closer than any family I've got and I can't even talk to them. Confidential submission no. 313.

Submissions to the inquiry by the Kimberley Language Resource Centre and the Aboriginal and Torres Strait Islander Corporation of Languages make the same point, that language carries culture and identity. It is of central importance in people's understandings of themselves and their communities, and their place in the world.41

Language is thus linked to identity and self-understanding, and seemingly to status. A republican polity must be concerned with language, as an important part of a citizen's standing. If a person can not use her language of choice in her dealings with the state, then her status as a citizen is compromised.

Requests for assistance with other cultural activities have much the same sort of import as requests for assistance with language. That is, the reasons are the same as the second set of reasons for supporting language. They are to do with culture and standing. As I discussed above (section 4.1.3), one way of understanding requests for assistance with culture would simply be as a catch-up with the majority culture.

41 Bird (1998).
However, I think that a republican polity ought to be motivated by reasons of standing.

The reasons for supporting preferential treatment policies can also be cast as providing 'catch-ups'. The claim made by minority groups is that there is systematic bias in favour of members of the dominant culture. Members of the dominant culture are much more likely to gain access to education, welfare, health and jobs. Unless specific provision is made for members of minority groups, then they will not have the same access to education, welfare, health and jobs as members of the majority group. Hence the need for preferential treatment policies.

As discussed above, a republican polity could use these types of arguments to justify preferential treatment policies. However, as discussed above, this can simply create a cold war of competing resources. A better way to understand the need for affirmative action policies lies in increasing the range of choices available to people. For example, providing preferential entry to medical school makes it possible for members of minority groups to choose to go to medical school. It also however, increases the range of choices available to other members of ethnic minority groups. It means that in future years, members of the ethnic minority group from which student doctors have come will be able to see a doctor from their own ethnic group, again increasing their range of choices.

**Republican Institutions for Special Assistance**

As discussed above, there are two ways in which language is important. The first is as a means of participation in a polity, and the second is as an integral part of culture. I will discuss each in turn.

There are many levels at which individuals may need or want to participate in a polity, including casting votes, participating in the varying levels of governance, perhaps giving evidence in court, sometimes as a defendant in court, accessing health, welfare and education services and so on. Where a citizen does not have sufficient fluency in the official or usual language of the polity, the state could provide documents in her language, or provide translators. The state could provide
multi-lingual ballot papers, welfare documents, advice brochures, and so on. In
d-particular, where government agencies provide information in the dominant language
of the state, they could also provide it in other languages that are commonly used in
the state. In New Zealand, official information and advice is usually provided in
Pacific Island languages as well as in English and Maori, the official languages of the
state. In the United States a similar policy would see information provided in
Spanish as well as English, even though Spanish is not an official language of the
state. Where there is only a small group of people speaking a language that is not the
dominant language of the polity, the state could make provision for translators. All
of this could be done in order to facilitate the interaction of state and polity.

In order to protect and preserve languages, the state could fund such things as
broadcasting in languages other than the official language, and minority language
newspapers and magazines. This is already commonly done in multi-language
polities. It could also assist in providing education in languages other than the
dominant language. This is not so commonly done, but there are similar models
available. For many years, there have been parallel religious and state education
systems in many nations. Those religious groups who want their children to be
educated in a particular style have set up their own schooling systems in order to do
so. The same could be done with respect to various language groups, with
government funding, albeit with a certain degree of government supervision.
Similarly cultural activities could be funded by governments. All of these sorts of
activities can be administered through existing government agencies, perhaps
through special units within those agencies, or perhaps through newly established
government agencies, such as a Ministry of Ethnic Affairs. Such a Ministry, or units
within existing agencies, could also investigate, set-up and administer affirmative
action programs, and provide advice and assistance in respect of affirmative action
programs within non-government organisations.
PROBLEMS FOR SPECIAL ASSISTANCE

As Levy says, the costs of special assistance are borne primarily by members of dominant groups.\(^{42}\) Language and cultural assistance is perhaps not such a serious issue with respect to costs; the financial costs are spread across all members of a polity through taxation. However, for every minority group member who gains a place in, for example, medical school, through a preferential treatment scheme, a member of the dominant group who is at least as well qualified misses out.\(^ {43}\) Not only does this seem to create a \textit{prima facie} case of injustice, it means that one individual's range of choices is increased at the expense of another's.

This is a serious problem. One way of justifying this type of apparent injustice is to argue at the level of groups, that is, to argue that the minority group as a whole is disadvantaged, and the majority group advantaged, simply by the way that the social and economic structures of the polity are constructed. Preferential policies simply address some of this disadvantage. This however, does not address the issues of the injustice to the individuals involved. It does point the way to the sorts of arguments that might justify the apparent injustice. A marginal member of the majority group who gains a place in a restricted program does so in part because he or she has been assisted by the economic and social structures that benefit the majority group. That is, he or she had a head start. Were the playing field to be level, then she would not have been able to gain a place, because she lacked a sufficient level of whatever it is that is required for the program.

There is another way of addressing the problem, and that is to remember that freedom as non-domination is a goal, and not a constraint. That is, in order to increase freedom as non-domination as a whole, we may at times have to violate it. We may need to tolerate some loss in some individual's freedom as non-domination in order to make a longer term gain. If this is to be the case, then there can be no presumption in favour of affirmative action programs. Each program must be scrutinised individually, and its on-going justification re-examined on a regular basis.

SUMMARY - POSSIBLE REPUBLICAN INSTITUTIONS FOR SPECIAL ASSISTANCE

- Multi-lingual ballots and other documents
- Translators
- Funding for broadcasting in minority languages, minority language newspapers and magazines
- Affirmative action programs

4.5 Symbolic claims

WHY DO SYMBOLIC CLAIMS MATTER?

Levy says that symbolic claims are not about political power or creating the capacity to enjoy or live according to a particular culture, but about recognition. The claims made are about such things as national holidays, official languages, the names groups use, and the presentation of histories. In republican terms, symbolic claims are important because they are about recognition of identity. If a person's or group's identity is not recognised, then that group is person or group is treated as being less than equal; the members of the group are not treated as citizens of the polity. Not recognising a person's particular identity says that how people consider themselves is irrelevant to others, or trivial. Alternatively, it may signify that the dominant culture wishes to impose its self-understanding on other ethnic groups. The issue can be considered in light of vulnerability groups. A group's standing may be related to how it is perceived. If it is perceived as trivial, or as having no importance, then it has a badge of inconsequence. Correspondingly, members of the group may be thought of as having little importance, thus rendering them vulnerable to further disparagement. Recognising the importance or standing of a group may shift that badge of vulnerability.

43 Iris Marion Young argues that the standards used to assess fitness for such things as medical school, typically merit and equal treatment, are themselves biased and unequal. Young (1990), pp. 192 – 225.
It is difficult to devise specific institutions for accommodating symbolic claims, because they are many and varied. Given that they are claims about the identity of the state, then the most appropriate way to discuss them may be in the institution where all matters that concern the state as a whole are discussed, that is, Parliament. Minority ethnic groups can use the standard procedures for accessing parliament: petitions, lobbying members of parliament, organising protest activities, electing members to the house where the electoral system is designed to accommodate ethnic minority groups, making complaints through the office of the ombudsman and so on. Where necessary, special commissions could be set up to consider particular matters, such as making another language an official language of the state.

Using these institutions seems to be very ad hoc. Unlike the sorts of institutions I have discussed in earlier sections, there is no special institution for symbolic claims, and no defined route for ensuring that symbolic claims are addressed. However, if the institutions of representation are sufficiently robust, as they ought to be in a republican polity, then although a minority group might have to make a particular effort to get their claim heard, there ought to be no reason why it is not considered once it is made part of national discourse. The closest parallel might be to consider ways in which constitutional change is normally brought about. Typically, a special interest group begins to lobby for change, and eventually, the claim for change begins to gain national prominence, through discussion in newspapers and other mediums. Once it is part of national discourse, then members of parliament begin to recognise its importance, and start to address, or promise to address it as part of their electoral platforms. That is, most constitutional change begins as an ad hoc process. The danger for minority ethnic groups is that because of their small size, their claims may never be heard. In a republican polity, this danger is guarded against by robust institutions of representation.
SUMMARY – POSSIBLE REPUBLICAN INSTITUTIONS FOR SYMBOLIC CLAIMS

- Parliament
- Representation for minority groups

4.6 Land claims

WHY DO LAND CLAIMS MATTER?

Levy mentions land claims only as part of traditional legal systems, where indigenous groups want to continue their traditional use of the land, and to have their ownership of the land recognised under their own legal system.\(^{45}\) This is certainly important, but there is another vast area of claims relating to land, as an issue of justice. These sorts of claims arise where in the process of colonisation, ethnic groups were divested of their land, even though in many instances they had signed treaties that recognised their right to the land. This story is all too common in the New World, and in Australia and New Zealand. The basic claim then is not just that traditional ownership of the land should be recognised, but that land that was recognised as belonging to aboriginal and first nations under the law of the coloniser, and then stolen through various means, should be restored, or compensation paid.

Land claims matter in part because they are a matter of sovereignty. They are an expression of a people’s desire to rule themselves.\(^{46}\) As such, the arguments about self-government are relevant here. Land claims also matter because they are issues of criminal justice. Land was stolen in the past, and therefore some sort of assessment of the crime should be made. The difficulty is however, that typically, the acts of taking the land occurred several centuries ago. This means that the ethnic groups now making the claim for restoration of lands are not those people from whom it was stolen. However, typically the people making the claim also claim descent from, and identification with, the people from whom it was stolen.

\(^{46}\) See Bern and Dodds (2000) on this point.
The issue of showing how links may be established between people alive today, and people against whom a crime was committed is a vexed one. However, where a treaty has been signed, the issue is more straightforward. A treaty can persist even if the people who signed the treaty no longer exist. This is commonplace in international law; treaties signed by one government are not abrogated by a change in government. However there is also another more or less accepted custom in international law, that one party to a treaty may choose to repudiate that treaty. This type of action may be regarded as reprehensible, and the parties to such an repudiated treaty may choose to take action over it, but nevertheless, it can be done.

I do not think that there is any easy way to understand the links between the members of an ethnic group alive today, and the members of the same ethnic group against whom a crime was committed. However, recall the markers of identity that I discussed in section 2.3, that is, shared histories, geography and culture. These markers might provide a way of assessing whether or not there is any continuing link between the two sets of people. (I take it for granted that the state continues, and that there is no problem with considering the state to continue to be a party to the dispute.) I suggest that where members of an ethnic group can demonstrate continuity, using the markers of ethnic groups discussed in section 2.3, then they can be considered to be party to the dispute. That is, they have a continuing claim to the land.

It is in understanding the importance of land claims that the republican analysis of criminal justice comes to the fore. Recall that a crime is characterised as an offence against freedom as non-domination, in that it restricts a victim's choices over their person, province or property. In the case of land claims, the choices that members of an ethnic group may make with respect to their property are limited. Moreover, their status as citizens who enjoy the good of freedom as non-domination is denied. This is why land claims matter. It is not a simple matter of distributive justice, that is, ensuring that each citizen of a polity has adequate access to the physical goods necessary to sustain life in the polity. It is also a matter of republican criminal justice.
Clearly, this is a claim that can only sensibly be made by indigenous ethnic minority groups. Immigrant groups might have some claim on lands in their country of origin, but they can make no such claim in their new countries.

**Republican Institutions for Land Claims**

As I argued above, land claims ought to be seen as a matter of criminal justice. If this is the case, then the obvious institution that could be used for settling land claims would be the legal system. However, the matter may not be so straightforward. Even if it can be shown that the land being claimed was unjustly taken, and that the ethnic group making the claim has a justifiable grievance against the state for taking the land, it may well be the case that the land in question is now held by private individuals rather than by the state. Settling the grievance of an indigenous group might create a further injustice against the current owners of the land. This could be particularly problematic where the land in question has been held privately for many generations, or has been passed down from one generation of a family to another. If this is the case, then the current owners might also feel that they have a good claim to the land. What this shows is that even if an indigenous group can show that they have a justifiable claim to the land, it may be unclear whom that is against. And this means that using the legal system to adjudicate claims may not be possible.

One solution may be to use a system based on the system that has developed in New Zealand. Maori in New Zealand suffered the usual effects of colonisation, including the theft of their land through confiscation and fraud. Their land was taken even though a treaty was signed in 1840 which promised them undisputed possession of all their lands, fisheries and treasures (taonga). In what is a familiar story, the treaty was more or less immediately disregarded by the colonising powers. The treaty, known as the Treaty of Waitangi (Te Tiriti O Waitangi), remained the focus of Maori grievance. After many years of agitation and argument, eventually in the 1970s a tribunal was established to investigate claims under the treaty. The nature of this tribunal has evolved over time; by the last decade of the twentieth century, it was investigating claims and making recommendations to parliament. These
recommendations are not legal requirements. That is, parliament is not required to follow the tribunal's recommendations. Nevertheless, its recommendations carry significant weight, and parliament has been disposed to follow them.

What the tribunal has become, in effect, is another court in the existing legal system. It has significant resources and powers to investigate claims. Its recommendations can be appealed through the court system, and similarly, disputes about how it should proceed and what premises it should operate on can be adjudicated in the courts. For example, the tribunal recently made a judgement about which Maori groups could make claims concerning fisheries; it found that traditional Maori iwi and hapu\textsuperscript{47} with traditional coastal lands could, but inland iwi and hapu, and urban Maori with no tribal affiliation could not. This finding was appealed in the High Court and the Court of Appeal. One of the founding premises of the tribunal was that claims could not be made over privately held land. However, iwi and hapu could make claims for compensation for land which was taken from them and then sold into private ownership. In the final instance, parliament can discuss claims, and the powers of the tribunal, and make decisions about what should be done.\textsuperscript{48}

These are the types of institutions that a republican polity could use to investigate land claims. That is, it could use special tribunals, the existing court system, and parliament to investigate and adjudicate land claims, and to make decisions about what should be done.

As with the system of special tribunals and appeals I suggested for exemptions from laws, this type of institutional framework may seem to be very ad hoc. However, the process of making and settling land claims is enormously difficult. It requires governments to understand the nature of the claims that are being made, and it requires negotiation between indigenous ethnic groups, the government of the polity, and the dominant groups in the polity. The process seems to be fraught with misunderstandings and grievance and with ill-will. Moreover, the particular claims being made, and the detailed history of each grievance and claim

\textsuperscript{47} Roughly, tribes and sub-tribes.
\textsuperscript{48} See Sharp (1997) for a detailed discussion of land claims in New Zealand.
can differ enormously within polities, let alone across polities. For example, although there are similarities in the history of indigenous dispossession in Canada and New Zealand, there are also significant differences. This may mean that it is not possible to specify a particular institution that can be used to consider land claims. Hence the recourse to special tribunals. However, as I argued previously, special tribunals are not an unfamiliar way of proceeding. Congressional and parliamentary inquiries, commissions of investigation and in Commonwealth countries, Royal Commissions, are all used from time to time to investigate particular matters and make recommendations to parliament. Tribunals to investigate land claims fit within this familiar group of review bodies.

**SUMMARY – POSSIBLE REPUBLICAN INSTITUTIONS FOR LAND CLAIMS**

- Special tribunals
- Appeal courts
- Parliament

### 4.7 Summary

The chart below comprises Levy's table of categories of claims and examples of those claims, and the possible republican responses to the claims which have been devised in this chapter.
<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>EXAMPLES</th>
<th>POSSIBLE REPUBLICAN RESPONSES</th>
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</table>
| Representation of minorities in government bodies, guaranteed or facilitated | Maori voting roll for Parliament, U.S. black-majority Congressional districts | • Reserved seats  
• Minority electoral districts  
• Minority representation in an upper house  
• Ethnic affairs departments  
• Ethnic affairs units in government departments and agencies  
• Facilitation of participation in policy formulation and advice giving  
• Participation in policy formulation and advice giving |
| Self determination in specific areas          | Maori land ownership / administration, aboriginal education systems, aboriginal health and welfare systems | • Procedures for electing which system would apply to each person  
• Review and appeal procedures, including appeal to bodies outside of a particular system, to consider cases of (1) determining who should be covered by which system and (2) domination within each system  
• Ombudsmen                                                                 |
| Self government for ethnic, cultural or "national" minorities | Secession (Slovenia), federal unit (Catalonia), other polity (Puerto Rico) | • State and federal structures  
• Federal units  
• Local government  
• Secession                                                                 |
| Internal rules for members' conduct enforced by ostracism, excommunication | Mennonite shunning, disowning children who marry outside the group | • Standard of freedom as non-domination  
• Appeal and review procedures                                                                                           |
<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>EXAMPLES</th>
<th>POSSIBLE REPUBLICAN RESPONSES</th>
</tr>
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| External rules restricting non-members' liberty [in order] to protect members' culture | Quebec / restrictions on English language, Indians / restrictions on local whites voting | • Legislation  
• Review and appeal through the courts  
• Qualifying periods |
| Exemptions from laws which penalise or burden cultural practices | Sikhs / motorcycle helmet laws, Indians / peyote, hunting laws | • Ombudsmen  
• Tribunals  
• Appeals through courts  
• Special inquiries and reviews |
| Assistance to do those things the majority can do unassisted | Multilingual ballots, affirmative action, funding ethnic associations | • Multi-lingual ballots and other documents  
• Translators  
• Funding for broadcasting in minority languages, minority language newspapers and magazines  
• Affirmative action programs |
| Symbolic claims to acknowledge the worth, status, or existence of various groups | Disputes over name of polity, national holidays, teaching of history | • Parliament  
• Representation for minority groups |
| Land claims | Claims to recover 'native' title to land  
Claims to recover full ownership of land  
Compensation claims | • Special tribunals  
• Appeal courts  
• Parliament |
What becomes clear from considering the possible responses as a whole is that most of the institutions are already familiar to us. Although some institutions might need some degree of change, for example, our methods of electing representatives to parliaments might need amendment, no institution is totally unfamiliar. Thus the republican responses to ethnic group claims pass the feasibility test that I discussed at the beginning of this chapter. Moreover, given that the responses involve incremental changes rather than radical changes, the possibility of resentment jeopardising the changes is decreased. None of the responses is set in stone; they could all be implemented as needed, and in a manner suitable to the polity and suitable to the empirical matters surrounding the claim. The responses are designed to guard against the governing bodies of a polity becoming dominating agents in themselves, through the inclusion of ethnic minority groups in the governing bodies of the polity, and through the possibility of appeals and reviews. This means that a republican polity can be very flexible with respect to the claims made by minority ethnic groups.

The cost of flexibility is increased uncertainty. To dominant groups living with secure and settled systems of government, and secure and settled ways of going about their daily business, this loss of certainty may be disconcerting at best, and perhaps even threatening. However the alternative is to suppress minority group claims altogether, in the interests of providing certainty for some people. Moreover, even people in dominant groups ought to welcome some degree of flexibility; there may come a time when they need that flexibility themselves in order to be able to address particular issues. The emphasis on institutions of appeal and review is noteworthy. Even if minority ethnic groups cannot or do not participate in the authoring of the law, that is, devising and administering the law, they can appeal against policies and decisions, through various agencies and offices. In Pettit’s terms, they can edit the law. This means that members of ethnic minority groups, along with other citizens of the republic, can participate meaningfully in governance. Their voices are heard in the affairs of the polity. Thus they enjoy standing; they can stand tall and look other members of the polity in the eye.
The analysis in this chapter of the claims made by ethnic minority groups also provides a framework for considering other possible types of claims in the future. It is possible that ethnic minority groups will make claims that do not fit within the categories devised by Levy. The republican approach to such claims would be first to consider whether they make sense in terms of freedom as non-domination. If the claims cannot be justified in republican terms, then a republican polity has no need to do anything in response to them. If on the other hand, the claims are justified, then a republican polity could draw on existing institutions, or it could devise new institutions to respond to the claims, or it might even in some circumstances elect to do nothing, if the only responses available created even more domination. In each case, the response to a claim would be determined at least in part by the empirical circumstances surrounding the claim.

This chapter is a visionary account of what a republican polity can do. In the next two chapters I test this vision against other political theories, and against the sorts of things that minority groups themselves might say.
CHAPTER 5 – DEFENDING THE REPUBLICAN RESPONSE TO ISSUES OF MULTICULTURALISM - THE VIEW FROM ABOVE

"... liberalism should seek to ensure that there is equality between groups, and freedom and equality within groups." Will Kymlicka

"We seek not a modus credendi but a modus vivendi." Chandran Kukathas

In previous chapters I have developed a republican understanding of and response to issues of multiculturalism. In this chapter I compare the republican response to other analyses of and responses to multiculturalism. In doing so, I identify possible objections to the republican account, and defend the republican response to issues of multiculturalism against these objections.

There are many and varied analyses of the issues of multiculturalism in the literature. The problem is not so much to find analyses to compare to the republican analysis, as to select which analyses to consider.¹ I have chosen to consider the analyses of the issues of multiculturalism developed by Will Kymlicka in *Multicultural Citizenship* (1995), Chandran Kukathas in *The Liberal Archipelago* (forthcoming), and James Tully in *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995). These are all comparatively recent, extended analyses of the issues of multiculturalism. They are devoted exclusively to the issues of multiculturalism, rather than considering other issues of diversity as well. Rather than providing an extended analysis of the arguments of each of the writers, I will concentrate on the differences between each account and my republican account of multiculturalism. This will provide a critique of republicanism, but at the same time

¹ In *Citizenship in Diverse Societies* Kymlicka and Norman (2000a) list 12 book length philosophical treatments of the issues of multiculturalism, nationalism, secession, immigration and indigenous rights, published since 1990. The Forum for Philosophy and Public Policy at Queens University, Canada, headed by Will Kymlicka, publishes a quarterly e-mail news letter listing recently published books and journal symposia relating to issues of citizenship, democracy and ethnocultural diversity. Each list has between fifty and seventy new publications in the field. This is without considering individual journal articles. The literature in the area is large, and growing.
it will provide a critique of particular aspects of the arguments made by the each of the writers.

Kymlicka and Kukathas both claim that their accounts are liberal theories of multiculturalism. They are nevertheless opposed accounts; drawing on the liberal tradition, Kymlicka advocates considerable intervention to advance the causes of minority ethnic groups, but Kukathas rejects intervention, claiming that each ethnic group ought to be left to its own devices. By considering both of these theoretical approaches, I subject the republican response to critiques from different places on the political spectrum. Moreover, as Kukathas says, Kymlicka's *Multicultural Citizenship* is "the most widely discussed and influential contemporary work on liberalism and the problem of diversity".\(^2\) Just as any work of political philosophy dealing with problems of justice must address John Rawls' *A Theory of Justice*, at the turn of the century any work dealing with problems of cultural diversity must consider Kymlicka's *Multicultural Citizenship*. Chandran Kukathas has been Kymlicka's most trenchant critic; he describes *The Liberal Archipelago* as "in large measure, a long response to Kymlicka's theory".\(^3\) Hence I have chosen to position the republican response to issues of multiculturalism in relation to both Kymlicka's *Multicultural Citizenship*, and Kukathas's *The Liberal Archipelago*.

Any selection inevitably begs the question of what, or in this case who, has been excluded. In particular, I have not considered any communitarian theorists, nor the work of Iris Marion Young, who like James Tully analyses issues of diversity from the perspective of various groups rather than from the perspective of theory. In respect of communitarian theorists, in part this is because there is no recent, extended analysis of the issues of multiculturalism. Charles Taylor examines some of the difficulties surrounding recognition, in particular why various groups have pushed for recognition and standing, and the political impact of that recognition. He does not however, engage in grappling with some of the specific demands made by minority ethnic groups.\(^4\) Iris Marion Young's work does engage with some of these particular issues, but she is concerned with diversity in general as well as with

\(^2\) Kukathas (forthcoming).
\(^3\) Kukathas (forthcoming).
\(^4\) Taylor (1992)
multiculturalism in particular. Moreover, I believe that the sorts of issues she raises with respect to diversity can be addressed by considering James Tully's analysis of constitutionalism.

Finally, some recent works have made use of ideas that are either explicitly republican, or consistent with republicanism. David Miller makes extensive use of the notion of republican citizenship in *Citizenship and National Identity*.\(^5\) Richard Dagger develops an account of republicanism in *Civic Virtues* that differs from Pettit's in several ways; accordingly his brief analysis of pluralism differs from the account of multiculturalism offered in this thesis.\(^6\) I will look briefly at both texts; in each case I want to compare the republican notions used by each of these authors, and the solutions they suggest, to the ideas and suggestions I have made.

### 5.1 Will Kymlicka and *Multicultural Citizenship*

#### 5.1.1 Kymlicka's arguments

Will Kymlicka's text *Multicultural Citizenship* has been much discussed. In *Multicultural Citizenship*, Kymlicka argues that the most important good in liberal societies is the good of autonomy. He cashes out autonomy as the individual's freedom to choose how to live his or her life. "It allows people to choose a conception of the good life, and then allows them to reconsider that decision, and adopt a new and hopefully better plan of life."\(^7\) We need to be able to do this because our beliefs are fallible; consequently we must be able to assess them in the light of new information and insights. These beliefs are personal to individuals; they should not be imposed by external authorities, such as governments. That is, choices about how to live the good life must be made from the inside, according to individuals' beliefs about what the good life consists in. The need for this underlies traditional liberal concerns with freedom of belief, expression and association, and access to education. These traditional freedoms create the capacity for individuals to

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\(^5\) Miller (2000).
\(^6\) Dagger (1997).
engage in such revision and reassessment. A liberal society does not demand such revision and reassessment, but it does make it possible.\footnote{Kymlicka (1995), pp. 80 - 81.}

Kymlicka claims that this is consistent with traditional liberal arguments. His next step is to link the liberal good of autonomy with what he calls 'societal cultures'. A societal culture "provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially concentrated, and based on a shared language.... they involve not just shared memories or values, but also common institutions and practices."\footnote{Kymlicka (1995), p. 76.} The freedom that lies at the heart of liberalism "involves making choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful to us."\footnote{Kymlicka (1995), p. 83.} Hence if a society or government is to embrace liberal values, that is, freedom to make meaningful choices and to assess and revise one's own ends, it must take steps to protect societal cultures. "...liberals should care about the viability of societal cultures, because they contribute to people's autonomy, and because people are deeply connected to their own culture."\footnote{Kymlicka (1995), p. 94.}

Governments can take two types of measures to protect societal cultures. Roughly, they fall into two categories, internal restraints and external protections. Internal restraints are those that a societal culture imposes on its members. A culture might require its members to wear certain types of clothing, to abjure certain foods and beverages, to forgo schooling beyond a certain level, and so on. External protections are restrictions or requirements that are placed on individuals external to the societal culture, in order to protect that societal culture. For example, the language laws in Quebec are external protections; they are requirements placed on non-francophones in order to protect the French language, and hence francophone culture in Quebec. However there can be no external protections that allow one group to oppress or exploit other groups.\footnote{Kymlicka (1995), p. 152.} A liberal society or government can support, and even create, external protections, but not internal restraints. A societal
culture can not expect a liberal government to help it enforce restrictions against the members of that culture. However, a liberal government will practice tolerance, in that while it will not intervene in order to assist members of a societal culture to enforce internal restraints, neither will it intervene on its own account to remove internal restraints. There is a limit on this tolerance; there should be no internal restraints that restrict the basic civil or political rights of group members. This is because if liberals are committed to autonomy, then they can not allow practices that restrict the freedom of individuals to assess and revise their ends. That is, there must be individual freedom of conscience. Kymlicka does not, however, endorse forcible change. Instead, in respect of illiberal groups within liberal societies, we should use the same sorts of tools that are used with respect to illiberal nation states, that is, education, persuasion, and financial incentives.

Kymlicka distinguishes between what he calls national minorities, and immigrant groups. National minorities arise when "previously self-governing, territorially concentrated cultures" are incorporated into larger states. They "typically wish to maintain themselves as distinct societies alongside the majority culture, and demand various forms of autonomy or self-government to ensure their survival as distinct societies." Examples of national minorities are American Indians, Puerto Ricans, and native Hawaiians in the United States, Anglophone, francophone and Aboriginal peoples in Canada, the Sami in Finland, and Maori in New Zealand. Immigrant groups come about as a result of immigration, especially where large numbers of individuals and families are accepted as immigrants, and allowed to maintain some of their ethnic particularity. Kymlicka argues that typically, immigrant groups come into being as a result of voluntary action on the part of migrants, whereas national minorities are usually incorporated against their will into larger states, often through the process of colonisation. Because immigrant groups are voluntary groups, they have lesser claims against the dominant culture. In choosing to uproot themselves and emigrate, immigrants voluntarily relinquish some

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of the rights that go along with their original national membership.\textsuperscript{18} Thus they cannot claim, for example, the same language and self-government rights as national minorities. Nevertheless, the mainstream society must enable integration, and must be prepared to accommodate at least some of the differences of immigrant groups. For example, laws about motorbike helmets can make special provision for Sikhs, and trading hours can be made more flexible to accommodate Jews and Muslims as well as Christians. The process is however, one of adapting the institutions of the mainstream society, rather than allowing immigrant groups to recreate their own societal cultures within the overarching state.\textsuperscript{19} Kymlicka notes that at least some immigration is involuntary; nevertheless, such immigrants have claims against the governments of the societies they have left rather than against the governments of societies they have joined. Thus involuntary migrants are in the same position as voluntary migrants with respect to claims against their new societies.

5.1.2 Comparison to republicanism

Many of the recommendations that Kymlicka makes are consistent with, or identical with, the recommendations that flow out of the republican analysis of multiculturalism. Both analyses support assistance to enable members of ethnic minority groups to maintain language and culture, to participate in the society and governance of the wider society within which they are located, and in some cases to self-government. The particular measures that both analyses support include: language rights; provisions or allowances to enable participation, such as the example given above of Sikhs and motor cycle helmet laws; self-government for what Kymlicka calls national minorities; group representation in the government of the dominant society. I take it that Kymlicka would have little disagreement with many of the measures that are proposed in Chapter 4 of this thesis. There are however, important areas of disagreement between Kymlicka’s liberal approach, and the republican approach outlined here. They are:

\textsuperscript{19} Kymlicka (1995), pp. 96 - 97.
• The justification for recognising the claims made by ethnic groups. Kymlicka's justification is based on the key liberal value of autonomy, that is, the capacity of individuals to assess and where so desired, revise their ends. The republican justification is based on the key republican value of freedom as non-domination, that is, the capacity to make choices and go about one's daily life without fear of unrestrained interference.

• Despite the need for autonomy, Kymlicka does not advocate interference in non-liberal cultures, except where groups engage in practices that restrict the capacity of individuals to assess and revise their ends. However, interference in such cases should be restricted to education, persuasion and financial incentives. The republican account allows for interference in non-republican groups, provided that such interference does not itself constitute domination.

• Kymlicka makes use of a distinction between 'national minorities' and 'immigrant groups', in particular with respect to the sorts of claims that each type of group can legitimately make. The republican approach makes no such distinction.

• When all is said and done, Kymlicka's response to the problems of multiculturalism tends to support the existing responses of liberal democratic governments to the claims made by minority ethnic groups. The republican account marks out several areas where new measures could be introduced, because existing measures are not meeting the needs of minority ethnic groups.

5.1.3 Autonomy and freedom as non-domination

Both Kymlicka's liberal account and the republican account of multiculturalism developed in this thesis justify their differing responses to the problems of multiculturalism by reference to key values. In the case of liberalism,
Recall that freedom as non-domination simply means being free from domination. An agent who is dominated is subject to the arbitrary, unrestrained interference of another, so that the range of choices that the agent may make is restricted, either because some choices are removed entirely from the range of choices, or because some are weighted in such a way that they become at least undesirable or impractical, or at worst, repugnant (see section 2.4). Kymlicka's account of autonomy emphasises being free to choose one's own version of the good life, that is, being free to choose one's own ends and being free to revise and reassess those ends.

Superficially, Kymlicka's account of autonomy and Pettit's account of freedom as non-domination look very similar. Both accounts discuss being free to make choices; Kymlicka is concerned that agents should be able to assess and revise the choices they have made, or could make, about their ends, and Pettit is concerned about the range of choices an agent may make. However, Kymlicka's account of autonomy emphasises the individual nature of the good, whereas Pettit's account of freedom as non-domination includes a social dimension. In Pettit's phrase, the type of freedom that Kymlicka is discussing is the freedom of the heath, whereas the freedom that Pettit discusses is the freedom of the hearth. Moreover, because Pettit discusses a social freedom, his account has an important dimension of standing, or status.

Let me explain these differences in more detail. Liberalism is an individualistic theory; it emphasises the freedom of the individual. This is common to all accounts of liberalism. A political theory that claimed to be a liberal theory, but did not place individual freedom at its centre, cashed out in whatever way, would not be accepted as a liberal theory. Liberalism is concerned with actual interference; it does not recognise a difference between the non-interference that an individual

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20 Other liberal accounts are based on different key values. For example, Chandran Kukathas' account (see below) is based on freedom of association. I do not intend to adjudicate this dispute myself; I will concentrate on the contrast with republicanism.
may enjoy because she happens to live alone, the non-interference that an individual may enjoy because no one happens to interfere with her, and the non-interference that an individual may enjoy because other individuals are restrained from interfering with her. In Kymlicka's account, each of these versions of non-interference would count as autonomy, because in each case, the individual is free to revise and reassess her ends. Thus under all liberal theories, a solitary hermit enjoys exactly the same sort of freedom as the citizen of a (genuinely) liberal polity. Each is a free agent, no one interferes with their choices, each is independent of other agents.

Freedom as non-domination is also concerned with individual freedom. It is however, the freedom of the individual in relation to other people. It is designed to take into account the fact that people do not live as solitary hermits; they live as members of families, ethnic groups, social groups and polities. That is, they live in a network of social relations, where they are necessarily dependent on each other. This is obviously so in the complex cities and nation states of the early twenty-first century, but it was also the case in antiquity when Polybius and Cicero were writing, during the renaissance when Machiavelli was writing, and in the years of revolution that inspired Harrington and the founding fathers of the United States. Aristotle's famous aphorism, that man is a political animal, reflects the social nature of human beings. Freedom as non-domination is designed to work within this constraint, that with very few exceptions, human beings live in social contexts. It makes no sense to talk of a hermit enjoying freedom as non-domination; because she lives in isolation, she does not need to consider her relationships with other people. In particular, she does not need to keep a weather eye out for the vagaries of those who may dominate her, or attempt to dominate her. However, this is because she lives in isolation, not because she enjoys the good of freedom as non-domination. In contrast, under liberalism, the agent who lives in the midst of social networks, whether in a village or a gargantuan city, must always keep that weather eye out for those who would interfere with his pursuit of the good life. Even if no one interferes with him, he must nevertheless be alert to those who would interfere with him, and take the requisite action to avoid or constrain such interference. In a republican polity, such action is not required, because he enjoys the security of freedom as non-domination.

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The difference between liberal freedom and republican freedom is shown in the differing assessments of whether interference matters. Liberalism is concerned about all interference, and thus demonises all interference. Republicanism however is not concerned about interference per se; some interference is acceptable, because it is not dominating interference. Liberalism has no concerns about actual non-interference; in contrast, republicanism is concerned about cases where actual interference is averted only because the potential victim of interference modifies her behaviour and kowtows to the powerful.

This difference between freedom as non-interference and freedom as non-dominination is simply a straightforward contrast between liberal theories in general, and republican theory. Where the contrast gains bite is when a comparison is made between Kymlicka’s account of autonomy, and Pettit’s account of freedom as non-dominination. Kymlicka’s autonomy involves having the capacity to make, and act on, decisions about what the good life entails. An autonomous person is one who is both free and able to do this. He is thus independent of other agents, except in so far as he wants to involve other agents in his decision making. There is however, no sense in which other agents must recognise his independence. It is something that he knows about himself, but not something that other agents know about him, or need concern themselves with. Pettit’s freedom as non-dominination however, carries with its social dimension an element of standing. For non-dominination to be enjoyed, there must be a degree of common knowledge that agents have the good of freedom as non-dominination. Each agent knows that other agents may not be subject to unrestrained, arbitrary interference, each agent knows that other agents may not interfere with him, and so on. Each agent can thus stand tall, and look the other in the eye, secure in their standing as someone who enjoys freedom as non-dominination.

This then, is the basic contrast between Pettit’s republicanism, and Kymlicka’s liberalism, that republican freedom is a social account of freedom, and that it carries with it a dimension of standing, or status. The question is why we should prefer Pettit’s account of freedom as non-dominination, to Kymlicka’s account of autonomy, as the basic value to be supported by a polity. In both cases, these are the only values that are to be supported by a polity. That is, both freedom as non-dominination, and autonomy can then be used to generate values that are traditionally associated
with liberalism, such as freedom of expression and freedom of association. Pettit argues that freedom as non-domination can, and does, precede autonomy; those who possess the good of freedom as non-domination are highly likely to possess the good of autonomy. That is, freedom as non-domination is an instrumental good. It enables those who possess it to pursue other goods as they see fit. The type of autonomy that Pettit is referring to is however, somewhat different from the type of autonomy that Kymlicka discusses. Pettit discusses autonomy in terms of self-mastery; the autonomous person is one who is in control of herself and her own destiny. Kymlicka, as discussed above, is concerned about the capacity individuals have to engage in thinking about their own ends, and their capacity to act on the outcome of their deliberations. This does not quite have the flavour of self-mastery that Pettit associates with autonomy.

It is reasonable to think that the person who enjoys freedom as non-domination will have the capacity to engage in the sort of deliberation and action about their own ends that Kymlicka discusses as autonomy. As discussed in previous chapters, in order to enjoy freedom as non-domination, a person must be secure in their freedom. This involves both the capacity to think for oneself, and the capacity to act in the sure knowledge that arbitrary interference will not be tolerated. Thus freedom as non-domination can, and does, support the sort of autonomy that Kymlicka talks about. A person who enjoys autonomy however, need not be free from unrestrained, capricious interference. She might have self-mastery, but have little control over the actions of those who surround her. Even if in practice those around her might not interfere with her decisions, she may not be secure in that non-interference. Imagine a woman who wishes to leave her religious community, especially say, a fundamentalist Christian community. Even though in practice she might be free to stop believing the doctrines of the community, to stop going to church and so on, she might not be sure that members of her former community would not attempt to bring her back into the fold. She could not be sure that she would not be presented with a prayer meeting on her doorstep every morning. She would have revised her ends, and changed her patterns of living in accordance with the revision of her ends, thus acting as an autonomous agent, but she would not be

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22 Pettit (1997b), especially pp. 81 - 82.
secure in her pursuit of that action. There is more to enjoying freedom than being able to exercise self-mastery.

In one sense however, it does not really matter which value supports the other. What matters is which value is more attractive, and which is more likely to be held as a universal value. This returns me to the discussion above. To be autonomous, a person must be an independent person; such a person has no dependence on other people, and thus can act without fear that she will be interfered with, because she is a solitary, independent person. A person who enjoys freedom as non-domination does not need to characterise himself as someone who is independent of other people. He can happily enter into relationships with other people, whether close relationships as in family circles and friendships, more distant ones such as those with work colleagues, or very formal relationships such as those with governing authorities. He may even enter into relationships where he is dependent on other people. Indeed, any good marriage could be described as a co-dependency relationship; each partner is thoroughly dependent on the other. Nevertheless, this does not render him unfree, because if he enjoys freedom as non-domination, then in none of those relationships will he be threatened with arbitrary, unrestrained interference.

The choice of which value to embrace will ultimately depend on which description of the way the world is seems more realistic. If it seems more plausible that the social world is made up of independent agents, each of whom is best characterised as (ideally) being free from dependence on other agents, then autonomy will seem to be a more attractive value. If however, it seems more plausible that the social world is made up of agents engaged in various relationships with other agents, of differing intensity, and with varying degrees of dependence, then a social account of freedom will seem more attractive, and hence freedom as non-domination will be the preferred value. I think that this second characterisation of the social world is more plausible, and consequently, freedom as non-domination is the more attractive ideal.

Another way to decide which value to embrace is to examine the consequences of doing so. I will discuss the institutional consequences of doing so.
below (see section 5.1.6). At present, I wish to examine the theoretical consequences of doing so. There are two issues in particular that I want to discuss: (1) the group orientation of republicanism, and (2) avoiding the need to posit societal cultures.

The group orientation of republicanism is a consequence of its social account of freedom. Republicanism assumes that nearly all people live in social networks, and that the type of freedom that matters is just the type of freedom that enables people to live within those social networks without being constrained by them, either by other people within a particular social network, or by agents external to the network. As I have argued previously (see Chapter 4), what this entails is that polities should take particular measures to ensure that group membership, that is, participation in a social network, does not carry extra costs, and especially does not carry the sort of costs that result in domination. This means that the justification for making special provisions for members of minority ethnic groups is tied directly to the analysis of freedom that lies at the heart of republicanism. In Chapter 4 of this thesis, each of the types of claims made by minority ethnic groups is analysed in terms of freedom as non-domination. The claims are not analysed in terms of supporting, or not supporting, particular groups.

In contrast, in order to develop a justification for defending group rights within the structure of liberalism, Kymlicka introduces the notion of a societal culture. That is, his justification requires an extra step. There has been a great deal of discussion of Kymlicka's notion of a societal culture, and I do not wish to cover the same ground here, except to note that Kymlicka does not consider whether any individual needs to belong to a particular societal culture, nor why any one culture would not do as well as any other for the purposes of enabling individuals to meaningfully assess and revise their ends, if so desired. Each of the minority group claims that Kymlicka discusses is then justified in terms of supporting societal cultures. The claims are not analysed directly in terms of autonomy. Thus in this respect, republican theory is more parsimonious than Kymlicka's liberal theory. All other things being equal, this should make republican theory more attractive than Kymlicka's liberal theory.

Finally, one of the attractions of republican theory is that it can, without undue stretching, accommodate groups within its theoretical structure. Recall the use of vulnerability groups in explaining how a person can be marked as someone who is subject to domination (see section 2.5). In so far as an agent is relevantly similar to another agent who is subject to domination, then she too is subject to domination. As I argued in Chapter 2, whether or not it should be the case, the fact is that many people are subject to domination in virtue of being members of particular ethnic groups; that is, ethnic groups can be vulnerability groups. Thus republicanism does not need to postulate extra entities over and above individual agents, instead working with the idea of resemblances between agents in order to explain the real world entities of ethnic groups.

5.1.4 Toleration

All political theories which claim to accommodate diversity have to grapple with how to respond to groups within the midst of a polity that do not embrace the values that the polity espouses. A theory that advocates toleration will need to decide what it can not tolerate, a theory that advocates autonomy will need to decide how to treat groups that do not permit their members to exercise autonomy, and a theory that advocates a particular type of freedom, such as freedom as non-domination, will need to consider how to respond to groups that dominate their members. Some theories, for example, Chandran Kukathas's liberalism, urge that each group should be left alone to decide what values they will promote, or enforce, amongst their members (see section 5.2.8); others, such as David Miller's nationalism, urge that all groups should be required to adopt the particular key values that the polity espouses (see section 5.3.1).

Both Kymlicka's liberal theory, and the republican theory developed in this thesis steer a moderate path between these extremes. As discussed above, Kymlicka argues that a liberal polity should extend to non-liberal groups within its borders the same sorts of protocols as those that operate in the international arena. Force should not be used to initiate change, but a liberal polity can use education, persuasion and
financial incentives. A liberal polity should intervene when the basic political and civil rights of members of a group are being infringed. Kymlicka claims that there is a difference between identifying a liberal theory of minority rights, and imposing that theory (Kymlicka’s emphasis). Coercion should not be used to impose liberal values on minorities who do not wish to embrace those values, and whose ways of life may even preclude those values. Instead, as happens in the international arena, by and large, relationships between liberal majorities, and non-liberal minorities should be negotiated peacefully. If no agreement on basic values can be reached, then at least some kind of modus vivendi could be established. Kymlicka suggests that even if non-liberal minorities refuse to be bound by the constitution and values of the larger group, in many cases, the conquerors of the minorities, then perhaps all parties might agree to abide by international treaties. Above all, liberal polities should be committed to dialogue rather than coercion.

In discussing the republican response to ethnic group claims in Chapter 4, I have not specifically addressed the issue of toleration. I have however addressed it with respect to internal rules. Internal rules are rules imposed by groups on its members; some internal rules impose special burdens on particular members of a groups, other internal rules weigh the costs of leaving a group heavily against an individual. On the other hand, without some internal rules, some groups may eventually disappear entirely, thus restricting the range of choices available to the last few members of the group. The issue then becomes one of balancing the needs of an individual against the needs of the many individuals who make up the group. I argued that a republican polity could use a yardstick of freedom as non-domination to make judgements on a case by case basis, given that it is unlikely that there will be any way to judge in advance whether the needs of a particular individual, or the needs of many individuals, ought to prevail. (See section 4.3.1.)

This differs from Kymlicka’s response to internal rules, in that Kymlicka suggests in general, a liberal polity can not offer support for internal rules. A minority group can not expect that the government of a liberal polity will use its

resources to enforce a group's rules against individual members of that group. However neither will a liberal government intervene to prevent the rules being enforced by members of the group, provided that those rules do not infringe against basic political and civil rights. In general then, Kymlicka adopts a laissez-faire approach to the imposition of internal rules on individual group members, unlike the republican theory developed in this thesis, which advocates a case by case approach, based on the standard of freedom as non-domination. In contrast, a republican polity can take actions with respect to dominating practices within a group when a member of that groups appeals for help, using the usual republican system of appeals and reviews.

This is however in some senses an easy case. Harder cases arise when an non-republican group within a polity wishes to persist with practices that promote domination, and no individual within that group wishes to make any change. I have discussed this with reference to the practice of clitoridectomy (see section 4.3.1), reaching the conclusion that in such cases, intervention is justified because the practices employed create domination. The intervention however, must not itself constitute another act of domination. In effect, the answer in this type of case is similar to the answer given in the case of one individual opposing the practices of a group to which he or she belongs. A republican polity can intervene, but only if it does not cause greater domination than would have otherwise been the case. And as discussed in Chapter 4, all such interventions must be subject to checks and balances. It is likely however, that such interventions would be very similar to those proposed by Kymlicka, that is, education, persuasion, and financial incentives. However a republican polity could take stronger measures, such as penalising individuals who engage in dominating practices, provided of course, that the intervention does not itself constitute domination. That is, it must have passed all the standard republican

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28 Ayelet Shachar sees some particular dangers in a laissez-faire approach; "well-meaning accommodation by the state may leave members of minority groups vulnerable to severe injustice within the group." Shachar (2000b), pp. 199 - 200. Shachar analyses family law, which is of great significance in transmitting cultural values, but which can nevertheless reinforce patriarchal and hierarchical elements in a culture. The cost of extending tolerance to a group may be extreme domination of women within that group. She suggests some form of joint governance with respect to family law, with input from both cultural groups and the overarching polity. This would not “force women into an unjust zero-sum choice; your rights or your culture.” Shachar (2000b), p. 223.
tests of being subject to the rule of law, and the system of checks and balances, and so on.

The differences between Kymlicka's approach to tolerating the intolerable, and the approach outlined in this thesis are matters of degree rather than kind. Republicanism allows more intervention than Kymlicka does, but it is subject to greater restraints in doing so. Kymlicka however, makes one major exception to his policy of education, persuasion and financial incentives rather than intervention; intervention is justified when basic civil and political rights are threatened or denied. This seems to me to be a rather large exception. If for example, a group imposes a particular religion on its members, then it would seem that the basic civil liberty of freedom of worship is being contravened, and intervention is justified. If a group wishes to restrict the education of its children, then the right of those children to an education is denied, again an infringement of a basic civil right, one which is moreover, listed by Kymlicka as one of the foundational rights of liberalism.29 Similarly, many groups restrict the freedom of their members to speak in certain circumstances,30 or even to speak at all in public, an infringement of freedom of expression. Kymlicka's seemingly small exception turns out to be a major and significant exception. Kymlicka however offers no way of deciding when intervention in such cases is justified, nor does he offer any means of judging whether the intervention is worse than the original transgression, nor does he offer any suggestions as to how a liberal polity might go about such intervention. Presumably, a liberal polity could use the same tools discussed above, that is, education, persuasion and financial incentives, but given that this is an exception to the general rule about liberal polities avoiding intervention in non-liberal cultures, perhaps stronger tools are needed, such as legislation. Given this indeterminacy in Kymlicka's account, and given the development of a standard for assessing the need for intervention and for assessing the intervention itself, I think that the republican account is to be preferred.

30 For example, Maori women are not allowed to speak on many maraes (meeting houses), but maraes are key political institutions within Maoridom.
5.1.5 National minorities and immigrant groups

Kymlicka's account distinguishes between national minorities and immigrant groups, arguing that people in the latter group, because they are largely volunteers and have chosen to move to a new polity, should be prepared to make a much greater effort to fit in with the ways of a liberal majority. They should not attempt to recreate their societal cultures in the new land; they should become part of a new societal culture. As such, they can not ask for support for their 'old' societal culture. The republican analysis of multiculturalism makes no such distinction.

Kymlicka's claim that immigrant groups are largely migrant groups is an empirical matter. I think that it is a matter that could be disputed. Clearly, at least some migration is voluntary; it is hard to understand how an Australian moving to New Zealand, or a Canadian moving to Ireland, could claim that his migration was involuntary, unless he was fleeing the law. Family members who were compelled to go with the migrant might feel differently, and perhaps if the migrant was required to go for employment reasons, he might claim that his move was not voluntary. Nevertheless, given that in either case the move is from one comparatively wealthy liberal democracy to another, it is hard to see how any element of compulsion enters into it, other than as contingent personal matters. This is not so clearly the case when migrants flee oppressive regimes, wars, or terrible economic and social conditions. I think that a case could be made to argue that this type of migration is far more common than voluntary migration. Consider the number of refugees world wide. Consider also the enormous numbers of Indians who migrated to places such as Fiji and South Africa during the nineteenth century as indentured employees. The migration during the Irish potato famines could not be described as voluntary when the alternative was starving, nor could the exodus of Vietnamese from Vietnam in the late nineteen seventies be counted as voluntary. None of these migrations were forced, as it were, but neither were they strictly voluntary. Nevertheless, this is an empirical matter which can not be solved by armchair philosophising. Because Kymlicka does not think that involuntary migration is common, he does not address the issues surrounding it, except to say that even if immigration is not voluntary, the "sad fact is that the national rights of refugees are, in the first instance, rights against
their own government."³¹ Thus he treats the claims of all migrants as being the same. The claims that they can make against the governments of their new societies are to do with avoiding prejudice and discrimination, thus enabling integration into the mainstream culture.³²

Even if all immigration is voluntary, the republican response to issues of multiculturalism makes no distinction between immigrant groups and national minorities, except where there are issues of historical injustice. This exception is of course significant in polities where in the process of colonisation, indigenous people have been dispossessed. However the distinction really only comes into play in respect of land claims, which can sensibly be made only by those who have some sort of justifiable claim to land in the first place. It is highly unlikely that a migrant group could make a justifiable claim in respect of land.

Republicanism considers all claims made by ethnic minority groups, whether they are national minorities or immigrant groups, as issues of domination. If for example, a minority ethnic group wants state support in order to educate its children in its own language, then the issue is considered in terms of domination. Is it more likely that the members of the group will suffer domination because their language is dying out, or is it more likely that the children who are educated in the 'minority' language, and thus not given adequate schooling in the use of the majority language of the polity, will be vulnerable to domination in the wider society? If a migrant wishes to communicate with her political representatives, for example, Members of Parliament, is she more likely to be vulnerable to domination if she is required to communicate in a language with which she is not familiar, or if she and her representative are given access to translation services? In both cases, the issue is not whether or nor the person concerned is a member of a national minority or a migrant, but whether or not she is vulnerable to domination. What this means is that republican theory makes greater demands on a polity than Kymlicka's liberal theory; a republican polity can not dismiss the claims made by an immigrant group simply on the grounds that immigrant groups ought to integrate with the mainstream culture.

As a matter of fact, as Kymlicka argues, most immigrant groups do want to be integrated into the mainstream life of the polity, while at the same time retaining their distinctiveness without being subject to prejudice or discrimination. Both Kymlicka's analysis and the republican analysis of multiculturalism have the same response in this situation; both theories are concerned to ensure that immigrant groups are accepted, and this may require considerable effort on the part of the polity. In effect, although Kymlicka's theory uses the distinction between national minorities and immigrant groups, and republican theory does not, in most cases the net effect is the same. That is, immigrant groups are given assistance to integrate without losing their distinctiveness, while national minorities may be given extra assistance in order to maintain lifestyles and cultures which are maintained nowhere else in the world. Nevertheless, in this respect republicanism is more flexible than Kymlicka's liberalism.

5.1.6 Defending current practice or marking out new ground

As I said above, I take it that Kymlicka would have little objection to many of the institutional devices I propose; the difference between Kymlicka's liberal theory, and the republican theory developed in this thesis is more one of theoretical underpinnings than of substantive outcomes. Nevertheless, there is at least one significant difference between the outcomes described in this thesis (see Chapter 4) and the outcomes that Kymlicka proposes. Many of Kymlicka's arguments demonstrate that existing practices can be justified in liberal terms. He makes some concrete suggestions to do with national holidays and uniform requirements, but he does not address in detail the governmental institutional structures within liberal democracies that may create problems for minority ethnic groups. For example, he discusses some issues of representation, but he does not consider the myriad avenues through which government occurs, in addition to representation in parliament. This means that he does not offer any further suggestions about how to accommodate ethnic minority groups in governance over and above the sorts of things that are already being done within contemporary liberal democracies.

In contrast, the republican theory developed in this thesis offers extensive institutional changes in order to accommodate the claims made by minority ethnic groups. This is in some respects due to the institutional nature of republicanism; as discussed in Chapter 4, republicanism has long had a concern with institutional design, at least in part because the freedom it envisages comes into being through various institutions. Furthermore, Kymlicka does not set out to develop specific institutional recommendations, whereas that is one of the key objectives of this thesis. Nevertheless, given that increasing ethnic diversity within polities is cited by Kymlicka and many other writers as one of the most pressing challenges facing contemporary nation states, it seems to be appropriate to start to develop means of accommodating this diversity, instead of simply analysing its implications.

5.1.7 Summary

Kymlicka's liberal theory and republican political theory do not differ substantially in respect of their analyses of multiculturalism. Both advocate institutional change, although the possible institutional changes are described in much more detail in this thesis than in Kymlicka's Multicultural Citizenship. The differences between the two theories are much more pronounced at the theoretical level: Kymlicka's theory emphasises autonomy while republicanism is based on freedom as non-domination; republicanism takes a more proactive approach to issues of toleration, in particular advocating intervention in some cases where Kymlicka would suggest a laissez-faire approach; republicanism does not make any particular distinction between national minorities and immigrant groups. The choice between these two analyses will depend on whether autonomy is preferred as a central value for the polity, or freedom as non-domination is preferred. As I argued above, given the social nature of human beings, and the networks of relationships they form, I think that freedom as non-domination is preferable; consequently, the republican analysis is preferable, at the theoretical level at least, to Kymlicka's analysis.
5.2 Chandran Kukathas and *The Liberal Archipelago*

5.2.1 Kukathas' arguments

In contrast to Will Kymlicka, Chandran Kukathas would reject most, if not all, of the responses to multiculturalism suggested in this thesis, in addition to rejecting the theoretical underpinnings of republicanism. Kukathas advocates a very austere form of liberalism, in which the only value to be espoused in a liberal polity is freedom of association, and consequent on this, freedom of dissociation. Kukathas has set out his arguments in a number of articles and most recently in a book which takes as its title the image he uses to illustrate his ideas, *The Liberal Archipelago*.34 As discussed above, at issue between Kymlicka and Kukathas is not only what response should be made to the claims of minority ethnic groups, but also what liberalism consists in. Their positions in this latter dispute to a large extent determine their responses to issues of diversity. I do not wish to become an adjudicator in the debate over what liberalism consists in; instead I will simply compare Kukathas’ account of multiculturalism with my republican account.

Kukathas claims that the essence of liberalism is toleration. This is in fact how liberal theories first gained their prominence, as a way of dealing with religious diversity, and in particular, Protestant dissenters. Liberalism is the world’s response to pluralism.35 It is a response grounded in toleration of different beliefs and different ways of living. Toleration is important not just because it provides a way for divergent groups to live alongside each other, but also for independent reasons. Public reason is grounded in toleration. Reasoning about moral values can never be final and certain, so in order to assess the worth of our moral judgements, we must subject them to public reason. Differing views and practices introduce an element of doubt about our own views and practices, forcing us to think about and defend them, to question and revise our beliefs when necessary. Toleration is the condition that

34 Kukathas (forthcoming). I am very grateful to Dr Kukathas for sending me a copy of his as yet unfinished manuscript. The book draws together many of the arguments Dr Kukathas has made in other publications; however given that the manuscript will be subject to further revision and review before publication, I have chosen to avoid so far as is possible direct reference to it, instead using only his published work. Nevertheless, my summary of his arguments is based on the manuscript version of *The Liberal Archipelago*.

enables reason; it allows us to honour reason, rather than simply promote it.\(^{36}\) Thus Kukathas takes a Kantian or deontological approach to toleration rather than a consequentialist approach.

The public realm will not embody a particular standpoint with respect to particular values, such as autonomy, or presumably freedom as non-domination. Given that interaction between differing groups is inevitable, the public realm will be the product of these interactions; it will in fact be a realm of networks of agreements about how these interactions are to take place. The rules of interaction will be established through custom and precedent. Thus the public realm will not be subject to a sovereign power, but it will be governed by norms of behaviour.\(^{37}\) In Kukathas' words, it will be a *modus vivendi*, not a *modus credendi*.\(^{38}\) Nevertheless there will be some form of moral convergence, particularly with respect to modes of conduct that are regarded as being acceptable in particular contexts. What will always be open is the possibility of further reflection on these moral standards. By this means, the interaction of different cultures can turn out to be a source of moral insight.\(^{39}\)

If the public realm is thus conceived as having only a procedural function, then political society is:

\[\ldots\text{an association of individuals bound by rules of just conduct which, by specifying the terms of co-operation, regulate their behaviour and ensure peace; civil association has no purpose other than to preserve order so that the individual might pursue his own (private) ends, together with others or alone.}\(^{40}\)\]

Within that political society, a community is "an association of individuals who share an understanding of what is public and what is private within that association", and political society is no more than an association of such associations.\(^{41}\) These political associations come about by sheer chance; members of such political associations do not have any deep commitment to other members of

\(^{36}\) Kukathas (1997b), p. 79.
\(^{37}\) Kukathas (1997b), pp. 84 - 85.
\(^{38}\) Kukathas (forthcoming).
the political association, although they may have deep commitments to the members of the associations to which they belong.\textsuperscript{42} Associations only matter in so far as they matter to the individuals who comprise them. Associations have no right to be preserved; they are only of value in so far as the individuals who comprise them value them. If individuals choose to leave or to modify the terms of an association, then that association may in effect disappear, or at least be substantially changed. But that is of no concern in itself. Groups and associations have no ontological reality; only individuals do. Hence the lack of importance of groups and associations in themselves.

What matters most for individuals is being free to live according to their conscience. Kukathas claims that while individuals will have differing understandings of what right conduct consists in, "human beings are, in the end, profoundly attached to the idea of acting according to the dictates of their understanding."\textsuperscript{43} Kukathas offers a series of examples to reinforce this claim, drawing on great literature from various traditions, and iconic images such as a soldier throwing himself on a grenade in order to save his platoon. This last image is important; Kukathas claims that in many instances people prefer to die rather than be forced into acting against their will, or they live in intolerable mental anguish for having done so even when forced. He also claims that phenomenon is cross-cultural; it is "an interest shared by the remote Aborigines of Australia; the 15th century samurai; the Ibo tribesman; the Irish Catholic living in 20th century Dublin; the Hasidic Jew in New York; and the Branch Davidian in Texas." This does not mean that we may not be mistaken about what is right or wrong, nor that we may often knowingly act wrongly. However, "we attach the highest value to acting rightly." That is, acting in accord with the dictates of our conscience.

Armed with these three ideas, that toleration is independently valuable, that associations matter only in so far as they are valued by the individuals who comprise them, and that what matters to individuals is that they should be free to live

\textsuperscript{41} Kukathas (1996), pp. 85 - 87.
\textsuperscript{42} Kukathas (1996), p. 103.
\textsuperscript{43} Kukathas (forthcoming).
according to their conscience, Kukathas develops a theory of minority rights. In essence, he makes two claims.

(1) The only right an individual has is a right of freedom of exit; he or she must be free to associate with, or dissociate from, any community or association. This arises through freedom of conscience. Being forced to join, or to exit from an association means being forced to act against conscience. Conversely, having freedom of association and dissociation means that an individual cannot be forced to act against her conscience.

(2) Cultural communities have no rights against other communities or associations, including political associations. There may be one limited exception to this in the case of historical injustice. This is because cultural associations carry no value in themselves. They are valuable only in so far as individuals value them.

These claims have the following implications.

(1) All that is needed for freedom of association and dissociation is a formal freedom of exit. An association is not obliged to provide the means of dissociation; doing so would presumably amount to forcing the remaining members of the association to act against their own wills.

(2) Minority groups have no claims against the wider political association of associations; if a minority group suffers the loss of its language or culture, then that is simply the way of the world.

(3) Political associations and cultural associations may not interfere in the affairs of another cultural association, even if that cultural association endorses practices that other groups find abhorrent.

This picture of associations interacting in a political association, but nevertheless continuing to be distinct groups who are able to retain their

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distinctiveness because no other association will interfere with them, is what gives rise to Kukathas' image of the liberal archipelago. Each cultural association is an island in a sea of tolerance.

5.2.2 Comparison to republicanism

I think that there are at least some points where Kukathas' account of multiculturalism and the republican account of multiculturalism developed in this thesis are consistent, or are at least not contradictory. Clearly the practical implications of each theory differ enormously; Kukathas rejects all assistance to ethnic minority groups, and all interference in ethnic minority groups, while the republican account in this thesis endorses both assistance and interference in various circumstances. However, I think that Kukathas' account of acting according to conscience, and Pettit's account of freedom as non-domination have considerable similarities, and that the republican emphasis on using precedent and case law to develop codes of conduct is a possible institutional framework for working out the norms of behaviour between groups that Kukathas thinks ought to be all that is contained within the public realm. While these similarities are not just superficial similarities, the differences between the accounts are nevertheless much more significant. They are:

- Even though acting according to conscience and freedom as non-domination are importantly similar, the conclusions reached in Kukathas' writings and this thesis are profoundly different. This seems to me to come about because Kukathas does not consider the power relationships between individuals.

- Both Kukathas' liberalism and contemporary republicanism focus on individuals as the primary unit of analysis. However in Kukathas' account groups are only important in so far as they are valued by individuals, whereas in republicanism, groups can play important roles in determining citizens' access to the good of freedom as non-domination.
• Kukathas conceives of the polity as being no more than an association of associations that embraces, or ought to embrace, no particular values. It has only a procedural role to play. Even though in places he argues that such political associations come about by chance, his characterisation of such associations having a procedural role only does not reflect our contemporary understanding of what polities consist in. It is an ideal theory.\(^{45}\) Contemporary republicanism, like the republican tradition, attempts to work with political structures in the existing world.

• As is shown by the detailed analysis in Chapter 4, contemporary republicanism generally supports the claims made by ethnic minority groups for assistance. Kukathas rejects all such claims.

• Contemporary republicanism takes account of the cost of exit from groups, and accordingly could not accept Kukathas' austere right of freedom of association (and dissociation) as being all that is needed to secure individual freedom of conscience.

• As discussed above, republicanism sets limits to toleration, based on freedom as non-domination. Kukathas focuses on toleration of different groups, and does not consider that the needs of individuals may at times outweigh the right of a group to toleration.

5.2.3 Acting according to conscience and freedom as non-domination

Recall that domination exists when one agent has the capacity to interfere, with impunity and at will, in the choices of another agent. The agent who suffers domination is thus forced to act in particular ways, perhaps because some choices have been removed from the set of possible choices she can make, or because some choices have been rendered so costly, or others so costless, that her choices are no longer free. In effect, she can be forced to act against her will. Republicanism

\(^{45}\) Or at least, if political theories can be arranged in a spectrum ranging from idealistic to realistic, Kukathas' theory falls much closer to the idealistic end than to the realistic end.
regards this as an evil to be guarded against, and accordingly devises structures to eliminate or ameliorate the effects of domination between individuals, between groups and individuals, and between the state and other agents. It does so because it recognises that one agent can have considerable power over another agent, and if steps are not taken to guard against the misuse of that power, then domination can result. It is concerned in particular with the power of the state to interfere with impunity and at will in the lives of individuals; hence the republican concern with institutions to check the powers of the state.

Kukathas believes that the most pressing concern of individuals is not being forced to act against their will. An individual's life goes well, or at least has the capacity to go well, when she is able to live according to her own choices, instead of the choices made for her and forced on her by another. These choices may sometimes be mistaken, or agents may at times knowingly choose to do wrong, that is, to do something that is wrong according to their own account of morality, but nevertheless, people most value being able to live in accordance with their own choices. Thus both the contemporary republican account of freedom as non-domination and Kukathas' account of living according to conscience emphasise the need for individuals to be able to live according to their own choices, instead of being constrained to act in particular ways. Kukathas emphasises that this is a universal value, shared by people as remote from each other as Aboriginal Australians, Japanese people and Irish people. Similarly, republicanism claims that freedom as non-domination is something that all, or at least nearly all, people aspire to, although possibly not in those particular terms.46

If it is the case, that the key values that republicanism and Kukathas' liberalism embrace, at least so far as individuals are concerned, are very similar, then why is it that the practical implications of each theory are so different? I think that the difference arises at least in part because of different understandings of what the state, or polity, consists in. However I think that the difference also arises because Kukathas ignores the dimension of power relationships between individuals, and between individuals and groups.

46 See the discussion in section 6.3.2 in particular.
Recall that Kukathas argues that so long as an individual has the freedom to associate with, and dissociate from, whomsoever she pleases, then she enjoys freedom of conscience. If she does not like the choices she is being forced to make, then she can, quite simply, leave. Kukathas says that the conditions that need to be fulfilled in order to be able to make this exit are that there must be a wider society that is open to individuals who wish to leave groups, and this wider society must be one which upholds freedom of association, that is, a liberal society.\textsuperscript{47} Although he discusses the possible costs of exit, he thinks that these are simply costs the individual must bear. I discuss this in more detail below. At present, I want to discuss the issue of power relations.

What is distinctive about freedom as non-domination is that it that it takes into account the nature of the power that one agent may have over another. Kukathas argues that just having the right to leave gives an individual considerable freedom. I can see several ways in which this freedom could be constrained. A powerful agent could withhold the knowledge that the right to leave exists. She could use physical, emotional and financial threats to ensure that another agent remains. She could threaten the other agent with retaliation if he does leave; consider the way in which some religious groups threaten apostates with eternal punishment in an after life. All of these possibilities exist because there is a power relationship between the agents, where one agent has dominating power over another. The effect is to ensure that the dominated agent is not free to live his life according to his conscience.

Republicanism recognises these power relations; Kukathas' account does not. In Kukathas' account, as long as there is a wider, liberal society for the agent to move into, then the agent is free to live her life according to her conscience.\textsuperscript{48} Hence republicanism puts in place institutions to ensure that the application of such power is at least limited, if not entirely eliminated.

\textsuperscript{47} Kukathas (1992a), p. 134. Kukathas claims that these are only necessary conditions, not sufficient conditions. However he does not say what he thinks the sufficient conditions of freedom of exit consist in.

\textsuperscript{48} See note 47. Given that Kukathas does not tell us what other conditions need to be fulfilled in order for an agent to have freedom of exit, I am limited to discussing the conditions he has actually given us.
Kukathas might argue that the type of threats I refer to amount to active interference with the right to leave, because they are a form of coercion. Thus his account can deal with this particular problem. Given the austere nature of his right of exit clause, I think he would be hard put to make this claim. Even so, if he could make this claim, his account still cannot deal with situations where the weaker person must act in such a way that she keeps the stronger person on her side, as it were. She ingratiates herself, and employs Mary Wollstonecraft's 'low tricks and cunning' in order to minimise interference. This happens in the international arena; weaker nations kowtow to stronger nations in order to win favours or to minimise interference. In the months before Beijing effected the take over of Hong Kong, the judiciary and press in Hong Kong suddenly became very respectful of, and positive towards Beijing. In a situation like this, there might be no apparent interference, and thus nothing that Kukathas' account can condemn, but the weaker person cannot stand tall, and look the other in the eye. Republicanism recognises and condemns such power games; Kukathas' liberalism does not.

Republicanism also recognises that not only individuals can hold power over each other. The state has considerable capacity to wield power, and often does so. For example, it may detain some people if they are deemed to be a threat to others; tuberculosis and AIDS sufferers who refuse to take appropriate precautions may be subject to constant supervision, and some violent criminals who are judged to have a serious capacity to reoffend are subject to preventative detention. People like this are clearly being forced to live against their will, even though other people may judge their will to be defective. There are clearly good arguments to be made for detaining such people. However where the state has the capacity to exercise power over such people, it may also have the power to detain other, innocent people. Hence the need to constrain the state, so that the power it wields is not abused.

In Kukathas' account, the state is simply the public realm of a political association, that is, an association of associations, and it is confined to procedural matters that regulate the interaction between groups. However the associations within a state will have their own internal administration. Presumably this internal administration can wield much the same sorts of powers as the internal administration of existing liberal states, or even more power, given that the types of
groups in question are supposedly illiberal groups. If authorities within groups can wield such power, then they have the capacity to force people to live against their will, even though there might be good cause for so doing. What this points to then is a need to constrain the power of administrators. Kukathas will reply that simply giving an agent freedom of association will constrain the power of the group. The point is, however, that in circumstances like these, the state, that is, the administration of the group, can exercise its power so as to negate this freedom. Kukathas does say that cultural communities should not be free to take any action they like to enforce loyalty to the group. He outlaws slavery and physical coercion, and says that groups would be bound by standard liberal norms against cruel, inhuman or degrading treatment. These are not the only ways in which a group can coerce its members. Withholding privileges or knowledge, or threatening punishment can also create circumstances where an individual may be unable to exercise her right to leave a group. I think that it is this failure to recognise the differing ways in which individuals and groups may wield power that leads Kukathas to his minimalist response to the issues of multiculturalism.

5.2.4 The importance of groups

Kukathas denies that groups have any significance beyond the value that individuals ascribe to them. All value attaches to individual human beings; none attaches to groups. This is in part due to the ephemeral nature of groups; they are "mutable social formations that change shape, size, and character as society and circumstances vary." Similarly, republicanism, like liberalism, is an individualistic theory; value attaches to individual citizens, not to particular social arrangements. In contrast to Kukathas' theory, republicanism makes considerable use of the nature of groups in its analysis of issues of diversity, using in particular the account of vulnerability groups. In republican theory, membership of groups can be important, and groups can play an important role, over and above the value attached by individuals to groups.

52 See Chapter 2, especially section 2.5.
I think that the republican account of the importance of groups is a more realistic description of the way the world is. I think that Kukathas is right about the moral significance of groups, that is, that they do not have value in themselves, but this is a straight forward consequence of any individualistic political theory. Where value attaches only to individuals, then groups cannot have value in themselves. Moreover Kukathas' description of the nature of groups as ephemeral entities seems to me to be correct. Nevertheless, there is a difference between saying that groups have no value in themselves, and that groups have no importance within an account of political theory. While Kukathas does not say that groups have no importance, he does not acknowledge the significance that they may have in determining an individual's access to the good that he thinks is the only one of significance for individuals, that is, the freedom to live according to conscience.

I think that there is another, more serious mistake that Kukathas makes with respect to his analysis of groups and individuals. Kukathas characterises a group or community as an voluntary association where members understand what is private and what is public. Thus he employs the notion that some things belong in the public sphere, and some in the private. This seems to me to be dangerous; historically, as feminist analyses have shown, this notion has been employed to exclude women and women's concerns from 'public' life. It is only in recent years that for example, domestic violence has stopped being treated as a private matter, and started to be treated as what it is, an assault by one person on another. If such assaults are regarded as private matters, then the victim of the assault has no recourse in law to ensure that he or she is protected from further assaults. It is commonplace in political philosophy, not just feminist political philosophy, to reject the notion of public and private, precisely because it can be used to exclude some issues from analysis.\textsuperscript{53} So for example, the distinction is not used in the republican analysis of issues of multiculturalism, because the republican analysis recognises that what matters is freedom from domination, not whether domination occurs in the 'private' or the 'public' realm. Furthermore, given that Kukathas makes no particular use of

\textsuperscript{53} See for example, Shachar (2000b) for an analysis of the interaction between family law and the law of liberal polities.
the distinction between public and private in his analysis of the claims made by ethnic minority groups, I do not see why he needs to use it at all.

5.2.5 The nature of the polity

Kukathas describes the state, or the polity, as an association of associations, which has only a procedural role to play. It does not, or ought not, embrace any particular values. Its procedural rules develop as a result of interactions between groups; they are norms of behaviour defined by custom and precedent. As such, they are flexible and subject to change. Kukathas acknowledges that political institutions should be designed with a view to guarding against the vagaries of group power, but he does not discuss how this is to be done. 54 He also describes existing polities, that is, associations of associations, as happenstance affairs that have come into being through chance, thus creating situations where groups within those associations must simply find ways to live together, because they have no choice about the matter. Despite these concessions to the real world, Kukathas' discussion of states is an ideal theory, that is, a representation of the way the world should be, rather than a description of the way the world is. In contrast, republican theory works within the existing world. This is consistent with the republican tradition, but it is also an acknowledgment of the need for political theories to deal with real world problems. 55 Accordingly it focuses on the types of polities that are in existence. This is not to say that the world system of nation states which brook no interference with what they deem to be their internal affairs is perfect. Nevertheless, it is the system within which we are working. Even if Kukathas' system of associations of associations, and groups existing as separate associations in a sea of toleration is theoretically sound, it seems unlikely that it will ever take effect in the near future. One of the things that makes me doubt this is the analogy Kukathas uses, comparing his account of how associations should interact with the international system. Kukathas claims that we already have such a system of associations in a sea of tolerance in place with respect to nation states; each nation state has its own systems of governance, and nation states do not interfere with each other's internal affairs. This is straight forwardly

54 Kukathas (1992a), p. 132. This may be something that he intends to address in *The Liberal Archipelago*. It is not however, the focus of his published work on multiculturalism.
55 See the introduction to this thesis for a brief discussion of the role of political theory.
incorrect. Some nation states choose to submit themselves to a degree of external rule; consider the growth in supra national organisations such as the European Union, and ASEAN. At other times, nations do interfere in the workings of other nations; for example, the United States was prepared to commit itself to war in Vietnam, and the United Soviet Socialist Republic to war in Afghanistan. Commonwealth and other nations excluded South Africa from sporting contacts until the apartheid regime eventually crumbled. Most recently, NATO intervened in Serbia to prevent the expulsion of ethnic Albanians from Kosovo. The international system is simply not a series of associations in a sea of toleration. Kukathas can not demonstrate that his system might work in practice. This is of particular importance when his theory sets out to address one of the most pressing problems that we are facing, that is, how to deal with ethnic diversity.  

The problem with using ideal theory is that it may not take sufficient account of human nature. Kukathas acknowledges that absolute power corrupts absolutely, but he does not consider the myriad subtle ways in which procedural matters can be manipulated by those who administer the state. Agendas can be rigged, questions ignored, varying ways of taking part in discussions disallowed, and greater resources of wealth and physical might deployed so as to threaten some groups. If the power of those who administer procedures is not constrained, then there is no neutral ground on which interactions between groups can take place. Moreover, Kukathas acknowledges the need to guard against group power, but not against the power that inevitably comes to reside in the administrators of the state. Republican theory is more realistic in this regard.

56 Making a statement like this begs the question of what other pressing problems we may be facing; I suggest that a list of such problems would include, as a minimum, the world wide distribution of wealth, global warming, and the working of the international system. This latter area is one that has not yet been addressed using a republican framework; it would be interesting to consider whether republican approaches might add anything useful to our understanding of how the international system works, and how it ought to work. This is however, a separate research project.  

57 See Chapter 6 for more discussion of this. See also Young (1997) for an extended discussion of the ways in which some voices can be excluded from discussion because their modes of address do not conform to predetermined standards.
5.2.6 Assistance to minority groups

Kukathas does not think that there should be any assistance to minority groups. Cultural communities are voluntary associations; hence the costs of belonging to such groups should belong to those who choose to belong to the group. People who voluntarily choose membership thus have no claim against those who do not choose to belong to the group. This means that the group can not expect the wider polity to, for example, enforce the group’s norms against dissenting members of the group, nor to support its language, nor in fact to respond to any of the myriad claims that minority ethnic groups make. If this means that over time, some groups disappear because their members elect to leave and join the wider society, then so be it. Groups have always changed over time, and the fact that some groups disappear is just the way of the world. Moreover, because it is just the way of the world, rather than the outcome of the wider society choosing to support one group rather than another, or choosing to base their judgements on a particular account of justice, then at least those whose culture has disappeared or is under threat need not feel that they have also been judged unworthy. They may have lost, but only in a lottery, not in a judgement of the worth of their way of life. Hence they are much less likely to feel aggrieved. Kukathas thus embraces benign neglect, rather than intervention.

While a liberal polity will do nothing to hasten the demise of cultural groups, it will also do nothing to ensure that cultural groups are sustained.

In contrast, republicanism generally supports providing assistance to minority groups, in order to prevent domination. Like both Kukathas' liberalism and Kymlicka's liberalism, it does not support using force to enable groups to enforce their own internal rules against members, but otherwise, it is generally supportive of the claims that minority ethnic groups make. Thus republicanism does not adopt an attitude of benign neglect. Given a commitment to a particular account of freedom, it could not adopt such an attitude. Pettit's republicanism is a consequentialist theory; it espouses a key value which the state ought to maximise, or promote. As we have seen in respect of toleration, Kukathas' liberalism is more deontological in

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61 The republican reasoning for doing so is set out in detail in Chapter 4 of this thesis.
its approach. Kukathas' emphasis on the absolute right of freedom of association and dissociation has the same deontological cast. Given this commitment to deontological approaches, he is not then able to make exceptions, or to weigh possible outcomes before deciding on how to approach particular issues. He must be committed to intervention, or not. The weight he places on the power of freedom of association and dissociation to enable an individual to live according to conscience means that he can not at the same time support intervention.

Where I find his policy of benign neglect most puzzling is in respect of simply allowing one group to dominate others, because that is the way of the world. It is inevitable, Kukathas says, for a polity to have to use one language or another in its daily business, and accordingly, languages which are not used in the daily language of a polity will over time, die out. This is not an embarrassment for the benign neglect view; it may be controversial, but it is not incoherent. If a particular group ends up bearing the costs for this policy, then so much the worse for that group.\(^6\) Hence ethnic minority groups should not receive subsidies in order to support their cultures. What is puzzling about Kukathas' approach to language is that by espousing benign neglect, he effectively ignores that fact that simply by using one language or another in its daily business, the polity gives an enormous subsidy to that language. This is a point made by Kymlicka, but it is a point that is equally consistent with republican theory.\(^6\) In republican terms benign neglect means that some minority ethnic groups may be subject to domination because they cannot use their own language in their day to day dealings with the polity. In Kukathas' own terms, at the very least this means that some members of the group will not be able to live according to their conscience; they will be forced into using a language they do choose to use simply in order to lead their daily lives. This is of course, one of the costs that is associated with immigration, but where immigration is not voluntary, or where the group concerned is an indigenous group that has been involuntarily incorporated into the polity, then it seems odd to think that they should simply bear the cost of choosing to continue to belong to the group. Furthermore, if a group does disappear because its members are forced to make hard choices about whether to


\(^{63}\) Kymlicka (1995) passim, especially pp. 108 - 115. See also Chapter 4 of this thesis, especially section 4.4.2.
persist with the ways of the group, or to integrate into the wider society, then it is clear that at least some people in that group will be forced to live against their conscience as the group disappears. It is very hard to maintain a group culture where there are only a few members of the group. Kukathas might say that as a group finally disappears, then the costs to the remaining members are far outweighed by the benefits that those who have left have gained, but given his deontological approach to many issues, this consequentialist argument may not be one that he is willing, or indeed is even able to make.

I also think that the diminishing or disappearance of some minority ethnic groups is not just the way of the world, or perhaps it is the way of the world only in so far as it is a description of the way that some groups can wield power over other groups. To claim that it is just the way of the world ignores the power relationships between groups. Where one group has in effect become the wider society within which other, possibly non-liberal groups are located, then it has enormous power over how those groups are able to conduct their interactions in the wider society. It can do this with great ease simply by making one language rather than another the official language of the polity. The wider society can thus determine whether or not some groups disappear, simply by deciding procedural matters in favour of one group or another. The toleration of such an exercise of power is one of the puzzling aspects of Kukathas' account.

Kukathas does raise one very real concern that my republican account of multiculturalism has not addressed. By giving rights and resources to a group, we may entrench that group, and extend its lifetime far beyond what would otherwise have been the case.64 We may also create incentives for people to join that group, as more resources are attached to group membership. This has proved to be the case in New Zealand; following the multi-million dollar payment to Tainui in settlement of claims under the Treaty of Waitangi claims, the number of people claiming Tainui descent has increased dramatically. I think Kukathas' concerns are valid. Nevertheless, I think these concerns should be balanced against the alternative; if a group is denied resources through the benign neglect of a dominant majority, then its

life may be cut much shorter than would otherwise have been the case, and we may also create incentives for people to leave the group, perhaps at great personal cost, when they otherwise would not have done so were the costs of continued membership not so high. This may be an empirical matter, beyond the scope of this thesis. There is some evidence that groups do not always persist in claiming resources once the need for them has passed; recently in New Zealand there have been calls for the Maori parliamentary seats to be abolished, now that Maori are gaining adequate representation through both electorate and list seats.

5.2.7 Capacity to exit

There is one issue which I have touched on in passing, given that it is relevant to many of the issues discussed above, that is, the capacity to exit from minority groups. This is a pivotal freedom in Kukathas’ account; without it, associations are no longer voluntary, and thus individuals in associations are no longer free to order their lives in accordance with their own wishes. Kukathas however rejects the idea that the costs associated with exit may in practice render the right meaningless. As long as an individual has a formal right of exit, then any costs she may incur in doing so are not relevant. Kukathas says that while it may be very costly and risky for an Aboriginal person who is brought up speaking only Pitjanjara to exit from his community and enter mainstream Australian society, it is nevertheless not impossible. These are simply costs and risks that the person must bear.65 Given Kukathas’ deontological approach, he must say this; he cannot engage in a consequentialist style weighing up of costs and benefits.

The republican approach to freedom of choice, in this case, the freedom to choose to leave, is different. Recall that domination consists in interference, at will and with impunity, in the choices or range of choices that another person may make. This may come about through a variety of means, including weighting some choices so heavily that they cease to become valid options, or are effectively removed from a person’s choice set. This is exactly what happens in the case of the Pitjanjara-speaking Aboriginal person who wishes to leave his community. He may not be able

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to make that choice because the heavy costs associated with it effectively remove it from his choice set. Thus he does not enjoy freedom of association and dissociation.

I think that this is a major problem with Kukathas' account. There is a point at which the costs associated with a particular freedom effectively render that freedom meaningless. The freedom becomes a mere formal freedom, instead of a substantive one. The fact is that human beings do routinely take costs into account. Trivially, we choose to buy a smaller car even though a larger one might suit us better, because the smaller car costs less and is less expensive to run. We choose to take a job and earn an income instead of spending our time surfing at the beach, because the costs associated with having no income are too high. An English speaking person might choose to live only in English speaking countries, because living as a foreign language speaker is just too difficult. The point is that we continually weigh costs, and when the costs are too high, we abandon the particular project. It is only people with a passionate commitment to a particular goal who seem to be able to ignore the costs involved when making a decision. Thus we might expect that a Pitjanjajara-speaking Aboriginal person might elect not to leave his community, because the costs are too high. That means that in effect, the choice to leave has been removed from him, and he has no freedom of association. 66 By analogy, imagine if the right to freedom of speech, a right that is commonly acknowledged in liberal polities, incurred substantial costs. Imagine if every time we chose to exercise this right, we had to pay a certain percentage of our wealth to some central fund, say to a government Department of Propaganda, to add insult to injury. We can imagine that given that most of us have to feed and house and clothe ourselves, and many of us feed and house and clothe others, including dependent children, we would use that right very sparingly, if at all, for fear of going hungry, or even worse, seeing our children go hungry. The right would in that case, become almost meaningless, because the costs associated with exercising it would be too high. Kukathas claims that nevertheless, the right of exit will temper possible injustices in the community. 67 However, if the right of exit is not a meaningful option, because the costs associated with it are simply too high, then it is hard to see how possible injustices in the community can be tempered. Ayelet Shachar makes

66 See also Levy (2000), pp. 112 - 113 on this point.
exactly this point in analysing family law. She argues that women should not have to
give up their citizenship rights in order to retain their culture, and neither should they
have to give up their culture in order to retain their citizenship rights. "...the right of
exit solution ... resembles the nineteenth century legal rhetoric that interpreted a
woman's consent to marriage as implied consent to atrocities such as rape and
battering by her spouse."68

There is another way in which a person might not have the capacity to leave a
community, but here I think that Kukathas is on more solid ground. Where a person
has been steeped in the ways of a community, so that she cannot imagine life outside
the community, then effectively, she has no freedom of association and dissociation.
For better or worse, she has been born and bred within the community, and there she
will remain. However if this is what she prefers, then it is hard to see that there is a
problem. Such a person has not rejected her life, and does not want to try to live
another way. She is therefore free to live according to the dictates of her
conscience.69 In republican terms, this woman has a very limited choice set but
given that this is a chosen way of life, it is difficult to see why a republican would be
unhappy with it. If on the other hand, the woman was aware of the possibility of
other ways of life, and wanted to find out more about them but was prevented from
doing so, then a republican would be concerned. Provided that the woman is not
subject to domination, that she is secure in her standing with respect to others in the
community, and can look others in the eye, then there is no problem. Even if she has
been reared to submit to her husband, trusting that her husband will keep her interests
in mind at all times, she ought to have no complaint, if this is how she chooses to
live. The moment however, she resents her subordinate status, then a republican is
concerned about her standing and status.70

69 Kukathas (1992b), p. 678. See also Kukathas (forthcoming) for a fuller account of this point,
particularly the example of Fatima, the Malay woman living in a village in the state of KeIantan in
Malaysia.
70 See Chapter 4, section 4.3.1 of this thesis for a further discussion of this point. Interestingly, even
in faiths where women are taught to be subordinate, men usually have duties to women that preserve
women's standing. The Koran is notable for the increase in freedom it gives to women; the most
repressive forms of Islam seem to endorse behaviour that is directly contradictory to the Koran.
5.2.8 Tolerance

Kukathas' account of the extent to which a polity, or association of associations, may intervene in the affairs of a minority ethnic group is directly opposed to the account in this thesis. Kukathas says that there may be no intervention, although as Walzer notes, presumably he would intervene in order to prevent a massacre.\(^1\) Republicanism supports intervention in order to prevent domination, provided that such intervention is itself regulated by the ideal of freedom as non-domination. Again, this difference between Kukathas' account of toleration and the account of toleration in this thesis is driven by the deontological approach favoured by Kukathas compared to the consequentialist approach used by Pettit, and employed in this thesis.

The problem with Kukathas' account of toleration, or more specifically, what is to be tolerated, is that it would leave in place behaviours that are generally regarded as intolerable.\(^2\) If cultural groups can impose what standards of behaviour they wish, provided as always, that they leave freedom of association and dissociation in place, then practices such as clitoridectomy can be carried out at will and with impunity. As Amy Gutmann has argued, and as Kukathas acknowledges, clitoridectomy can in many cases amount to torture. The torture is made worse because it is sometimes carried out on babies and little girls, who can have no understanding of what is happening to them.\(^3\) Kukathas acknowledges that this is a case of oppression. However he argues that there are worse dangers in intervening to stop such oppression. There is no assurance that the power to intervene will not be abused, and the threat of oppression is just as likely to come from without the group as from within. That is, the risks associated with intervening are just as high, if not higher than the risks of not intervening. Like Kymlicka, Kukathas advocates persuasion rather than the use of force to effect change, partly because persuading

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\(^1\) Walzer (1997), p. 107. I also think that Kukathas would intervene in such circumstances; being killed presumably removes one's freedom of association and dissociation permanently.

\(^2\) Adeno Addis notes another problem with Kukathas' account of toleration, that it effectively reduces ethnic minority groups to the status of being mere voluntary associations. This robs them of their significance and robs the nature of the complaints they make about not being recognised. See Addis (1997), especially pp. 123 - 125. I think however, that while republicanism is sympathetic to Addis' argument, given that it brings in notions of respect and thus standing, the more obvious argument against Kukathas is simply that the kind of toleration he advocates can leave significant evils in place.

people to change their ways is much less likely to meet with resistance, and partly because persuasion is always straightforwardly preferable to the use of force. Finally, persuasion does not dislocate group life in the way that the use of force can.\textsuperscript{74}

I find Kukathas' points with respect to persuasion compelling. It does seem however, that persuasion is itself a form of intervention. But it is a comparatively low level of intervention; attempts at persuasion can be ignored, but a man with a gun cannot. However I am not convinced that intervention by authorities must always be accompanied by the risk that the power to intervene will be abused. The republican approach to intervention is, I think, preferable. It acknowledges that such powers can be abused, and accordingly tries to devise institutions to minimise and hopefully eliminate the risk of abuse. I think this is preferable to leaving torture in place. Moreover, we must weigh the actuality of the torture against the possibility of abuse of power. If we can guard against the abuse of power, then there should be no reason not to intervene in situations such as clitoridectomy. However, as I have said above, clitoridectomy is in some senses an easy case. Whatever the possibilities with respect to clitoridectomy with informed consent, the actual practice is usually abhorrent, for the sorts of reasons I discussed in Chapter 4.\textsuperscript{75} In most other situations, a case by case analysis must be made.

Finally, I take it that Kukathas would have no problem if one group offered another group assistance, and that other group accepted it. For example, if a liberal polity was persuaded of the justice of claims with respect to language, and accordingly offered assistance in the form of say, sponsorship of publications and education in a minority group's language, then that intervention would simply be a decision made by the members of the dominant group. However it would be intervention as a freely given gift, rather than a necessary response to a claim made by the minority group.

\textsuperscript{74} Kukathas (1997b), pp. 88 - 89.
\textsuperscript{75} See section 4.3.1 in particular.
5.2.9 Summary

There are a few areas where Kukathas' account of the issues of multiculturalism, and the account developed in this thesis agree. In particular, they are not too disparate with respect to what individuals cherish most; freedom from domination means being able to make choices about how to live, and being able to live in accordance with those choices. Kukathas' use of customs and precedent to establish rules of procedure in the public realm is consistent with the republican emphasis on developing understandings of how to proceed in particular situations through precedent and case law. However Kukathas does not analyse the power relationships between individuals and groups; hence he does not discuss the need to restrain the state, nor does he acknowledge the role that groups can play in determining an individual's access to the good of living according to conscience. His failure to recognise the power of groups also leads him to endorse benign neglect, even though benign neglect can result in individuals being unable to live according to conscience. The other important difference between the republican account of multiculturalism developed in this thesis, and Kukathas' account is that the former is consequentialist, while the latter is deontological. Once Kukathas adopts a deontological approach, he is unable to weigh costs against benefits, and thus he discounts the costs of exit; he does not recognise that the high costs associated with some choices may make those choices unavailable to an individual. Finally, his deontological approach to toleration means that he may choose to tolerate the intolerable. In contrast, republicanism adopts a consequentialist approach, which means that it avoids many of these difficulties. This raises the issue of whether consequentialist or deontological approaches are preferable with respect to ethical and political issues. This problem is beyond the scope of this thesis. Nevertheless, most political decision making seems to be driven by consequentialism, with the consequences being assessed by reference to the number of people who will be better off.\textsuperscript{76} Even if deontological approaches are more defensible, consequentialist approaches may be more politically viable. If we hope to effect any change with respect to the treatment of minority groups, perhaps we should prefer the latter. For these reasons, I think that the republican approach is to be preferred. Finally, if we are simply seeking ways of living together, rather than trying to reach a meeting of
minds, or as Kukathas puts it, a *modus vivendi* rather than a *modus credendi*, a more pragmatic approach may simply be to consider the consequences of doing things one way rather than another, rather than trying to find values on which we can all agree.

5.3 **Other theorists**

As noted above, the literature in the area of multiculturalism is large and growing. I have considered three of the major accounts in the area, Will Kymlicka's *Multicultural Citizenship*, Chandran Kukathas's *The Liberal Archipelago* and James Tully's *Strange Multiplicity*. I want now to consider one other, very recent account of multiculturalism, David Miller's *Citizenship and National Identity*, which draws explicitly on republican themes. I also want to consider another view of republicanism, Richard Dagger's *Civic Virtues*, which generates a different response to the problems of diversity.

5.3.1 **David Miller and Citizenship and National Identity**

David Miller is known for his work on nationalism, and his commitment to national identity. In *On Nationality*, he argues for political communities based on common national identities. These national identities are somewhat thin; they must allow for members' diverse private and group identities. Nevertheless, "every citizen should think of himself as sharing a national identity with the others, where ... this means belonging to a community that is constituted by shared beliefs and mutual commitment, that extends over historical time, that acts collectively as its members determine, that has an identifiable homeland, and that possesses a distinct public culture that marks it off from its neighbours." This will allow cultural pluralism, while at the same time retaining the strengths of nations and nationality. He defends this commitment to nationalism in *Citizenship and National Identity*, by arguing that:

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76 Or perhaps by the number of votes gained and lost.
77 See Chapter 6 for James Tully and *Strange Multiplicity*.
80 Miller (1995), p. 188
... nationality answers one of the most pressing needs of the modern world, namely how to maintain solidarity amongst the populations of states that are large and anonymous, such that their citizens cannot possibly enjoy the kind of community that relies on kinship or face-to-face interaction. 81

Miller proposes this (re)commitment to nationalism in the light of three recent developments: economic and cultural globalisation; sub-state nationalism or 'Balkanisation'; and the fragmentation of identity into groups based on shared ethnicity, religion, gender or sexuality, so that identities are often shared not within a nation, but with others with similar identities across the nation's borders. 82 He argues that we should reforge the commitment of citizens to national identities through adopting the republican conception of citizenship. He sees a republican citizen as one who plays an active part in her society through participating at some level in political discussion and decision making. Differing group identities can be recognised in the sense that all groups are given access to decision making, but there is no guarantee that a group's demands will be met. However the process of taking part in political debate means that the laws and policies of the state will not be impositions, but will be seen as the outcome of a reasonable agreement to which the citizen has been party. Being engaged in political debate at some level is part of each person's good. 83 Republican citizens must participate in the public realm, but in order to do this citizens must have some shared identity as a nation. 84

Participation in political debate is achieved through civic virtue, and civic virtue is motivated through nationalism. A citizen who identifies with the nation will want some say in how it operates, and will also want to reach agreement with other citizens. Thus the nation becomes a focus of identity and allegiance. 85 Where people share this common identity of belonging to a nation, they will be more likely

to be able to engage in democratic deliberation that serves the cause of social
justice. 86

There are obvious parallels between Pettit's account of republicanism, and
Miller's account. They both discuss civic virtue, and they both see the need for
citizens to be able to own the decisions that are made. However they differ,
substantially, in what motivates a republican citizen; Pettit argues that it is a shared
commitment to the good of freedom as non-domination, whereas Miller argues that it
is the shared identity of common nationality. The two accounts also differ in the
degree to which they can genuinely accommodate cultural diversity. As I have
argued in Chapters 4 to 6 of this thesis, the type of republicanism that Pettit discusses
is sufficiently flexible to accommodate cultural diversity. Miller's republicanism
however, demands that all citizens have a shared commitment to a particular good,
nationalism. His nationalism, for all that it may be pared down to a shared identity
as members of a particular nation, is a thick account of the good. He does not seem
to acknowledge that ethnic minority groups that have a long-standing, historical
connection with the physical territory of a nation (state), such as indigenous groups
in colonised countries, may not share an identity with their colonisers, even when the
colonisation took place many centuries ago. For example, in On Nationality he
mentions the shared pride that Australians have in their convict origins, 87 but he does
not consider whether Aboriginal people share that identity. He discusses the
presence of differing 'nested nationalities' and ethnic groups within nations in
Citizenship and National Identity, but his none of his examples include recently
colonised indigenous ethnic minority groups within larger nations. It is only by
ignoring these groups who have not chosen to join the nation that he seems to be able
to adopt the idea of a nation possibly including diverse groups who nevertheless
share an overarching identity. This seems to me to be a flaw in his account of the
shared conception of the good that citizens should have. Given this flaw, it is hard to
see how his account of republican citizenship can genuinely accommodate cultural
diversity.

88 Say, within the last 300 years.
The two accounts also differ in the type of democracy they embrace; Miller favours deliberative democracy, whereas Pettit argues for contestatory democracy. Miller rejects the arguments against deliberative democracy made by Iris Marion Young, arguing that deliberation has particular virtues that should not be readily abandoned, in particular the appeal to reason. Miller also argues that we should engage in the process of deliberation to seek agreement on terms that respect the convictions of all engaged in the deliberations. He does not however, say what these terms might consist in. It is this process however, that is supposed to enable a citizen to feel that she owns a decision. I find it hard to understand how someone who has perhaps been forced to argue in forms that are not her own, and to respect convictions that she does not hold, would feel ownership of a decision. Contrast this with Pettit's contestatory democracy, where ideally, citizens have had a chance to be heard, to offer their own reasons and stories and evidence, and to appeal and counter appeal as necessary. Furthermore, the forums which are used to implement contestation can be adapted to suit the norms of the diverse groups who use them (see Chapter 4). Even if a decision goes against a minority group, if it has been debated and has been open to contestation in this manner, then the members of that group have a good chance of at least feeling that the process they engaged in was fair, and that the resultant decision was a fair one, because their voices had been heard at all stages throughout the decision making process. I think that this is a more realistic ideal for decision making, that is, acceptance of the decision rather than ownership of the decision, and it is in addition, an ideal that does not involve convincing people that their reasons are wrong or mistaken.

I suspect that the reasons for the differences between Miller's use of republicanism to resolve issues of multiculturalism, and the use to which it has been put in this thesis, lie in the underlying accounts of republicanism. Miller discusses only one part of the traditional tripartite structure of republicanism, that is, civic virtue. He does not consider the notion of an empire of laws, nor a system of checks and balances. He also does not consider what value ought to lie at the heart of republicanism, opting instead to simply promote nationalism as that value because it

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can, in his account, generate civic virtue. As an account of how nationalism might be used to hold together a nation, it might be plausible. However it is not plausible within the republican tradition, nor is it plausible when considered in the contemporary context of increasing multiculturalism, particularly with respect to the (re)emergence of indigenous ethnic identity.

5.3.2 Richard Dagger and Civic Virtues

Richard Dagger does not set out to look at issues of diversity. He is interested primarily in republicanism, and like Pettit, he has only a brief discussion of diversity. Dagger's account of republicanism differs in several ways from Pettit's account. He refers to his theory as republican liberalism; that is, he conceives of it as a form a liberalism which draws on the republican tradition. He emphasises in particular ideas of citizenship and civic virtue, and one of his key concerns is to work out how to foster civic virtue. The most interesting difference however, lies in the theoretical underpinnings he uses to develop a republican theory. Unlike Pettit, he uses three theoretical constructs, the value of autonomy, civic virtue, and rights. Autonomy, for Dagger, means being a self-governing person. This does not mean being an isolated individual; an autonomous person is one who is independent, but nevertheless is also interdependent on others in various ways. This is similar to Pettit's phrase describing republican freedom being the freedom of the hearth, not the freedom of the heath. This autonomy is only possible, however, when living in a self-governing community. We cannot govern ourselves without relying on other people, so if autonomy is to be realised, it must be realised in a self-governing community of other autonomous human beings. This emphasis on autonomy has two implications. (1) If people are to be truly self-governing, that is, autonomous, then they must be able to be aware of the ends of their life, and of the alternative ends that they might choose. They must be able to think critically about the principles they live by. (2) Membership of a community requires active citizenship. Citizens must participate in public life, and participate with the ideal of the common good in

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mind. Hence the need for civic virtue. However autonomy is not just a good that the polity should aim for; it is a fundamental human right. If one citizen is to be autonomous, then so must other citizens. Moreover all citizens must ensure that each other citizen can enjoy autonomy. Thus a republican citizen is one who:

... respects individual rights, values autonomy, tolerates different opinions and beliefs, plays fair, cherishes civic memory, and takes an active part in the life of the community.

What are the implications of this for pluralism? Dagger approaches this question by analysing Iris Marion Young's *Justice and the Politics of Difference*. He rejects Young's politics of difference, arguing that the politics of difference does not allow for the development of some common ground of sharing the benefits and burdens of a common endeavour. Thus we must try to integrate diversity into the polity, in order to find some way of agreeing with each other despite difference. However republicans will respect difference if doing so helps to enhance a sense of fair play and co-operation in citizens. Nevertheless, there is a balance to be struck between respecting diversity, and seeking unity, before "the centrifugal tendency of pluralism ceases to add a healthy measure of diversity to the polity and begins to pull it apart."

In essence then, this account of republicanism subordinates diversity to a notion of citizenship. Like Miller's nationalism, it advocates a central identity for all citizens as citizens. Presumably, if the diverse identities of citizens threaten this central identity, then a republican polity will take measures to reinforce the central identity. Thus Dagger uses the value of autonomy to reach profoundly different conclusions from Kymlicka, who also espouses autonomy as the key value for liberal polities to pursue, and he reaches profoundly different conclusions from the republican account of ethnic diversity (in Dagger's terminology, pluralism) in this thesis. The difference with this thesis stems from both the different account of the

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key value that a polity ought to embrace, that is, autonomy instead of freedom as non-domination, and from Dagger's emphasis on civic virtue as an end equal with autonomy, rather than as an institution that helps to develop the conditions in which autonomy can flourish. Once Dagger embraces civic virtue, that is, a series of norms with which citizens must comply, then he runs the risk of suppressing diversity, in order to support civic virtue. I think that because the account of republicanism developed in this thesis does not suppress diversity in order to foster civic virtue,\textsuperscript{102} it is to be preferred to Dagger's account. This does not mean that diversity need be valued as an end in itself, but given that human societies seem to be incorrigibly diverse, accounts that work with this diversity rather than suppress it are to be preferred, simply because they are more realistic.

\textsuperscript{102} See the discussion in Chapter 6.
CHAPTER 6 – DEFENDING THE REPUBLICAN RESPONSE TO ISSUES OF MULTICULTURALISM - THE VIEW FROM BELOW

"Democracy is a foreign flower in Fiji." George Speight, leader of the May 2000 attempted coup in Fiji

In the previous chapter I defended the republican response to issues of multiculturalism against critiques from other theory driven responses to issues of multiculturalism. In this chapter, I change my approach. Instead of critiquing republican theory from the perspective of other theories, I want to attempt to critique it from the point of view of those with whom this thesis is concerned, that is, ethnic minority groups. One of the difficulties in considering issues of multiculturalism is that all too often the solutions proposed are solutions developed by a majority culture, and they may not be appropriate from the point of view of minority ethnic groups. Moreover, they may be rejected simply because they are the solutions of a dominant group. I can imagine Maori saying of the republican response to issues of multiculturalism, "Hey. That's just a pakeha solution. Where is the Maori solution?"

What is needed then, is a critique of the republican response, and of course other responses, from minority ethnic groups. We need, as it were, a bottom up or grass roots criticism, in addition to a top down, or theory driven criticism. The difficulty is that such responses are not readily available. Moreover, they are likely to be contingent, driven by a particular ethnic group, rather than generalisable.

One such possible criticism of the republican response to issues of multiculturalism may be available in James Tully's Strange Multiplicity: Constitutionalism in an Age of Diversity.¹ Tully rejects grand theorising, and draws instead on the practices of interaction between indigenous ethnic groups and colonising cultures to develop a new approach to constitutionalism. He see constitutionalism as a means of continuously negotiating the relationships between minority ethnic groups and dominant cultures. Tully's account approaches issues of

¹ Tully (1995).
multiculturalism from the perspective of indigenous groups. That is, it is the sort of response that could be characterised as a bottom up criticism rather than a top down criticism. By using Tully's account, I avail myself of a critique that starts from a different perspective from Kymlicka and Kukathas.

6.1 James Tully and Strange Multiplicity

Strange Multiplicity: Constitutionalism in an Age of Diversity provides a telling critique of modern constitutionalism. The central theme of the book is that modern constitutionalism is hopelessly inadequate when faced with cultural diversity. Moreover, by enforcing what Tully calls the seven features of the language of modern constitutionalism, cultural diversity is suppressed, through diverse groups being assimilated into mainstream culture, or excluded from participation in the life of a polity.

Tully's critique is framed in terms of what he says are the three major traditions of interpreting constitutionalism, liberalism, nationalism and communitarianism. Each of these traditions interprets constitutionalism in different ways, but they have basic similarities. Among the similarities are the features of constitutional language that serve to stifle cultural diversity in constitutionalism. Tully believes however, that although modern constitutionalism does not recognise cultural diversity, there are resources within the language of constitutionalism to do so. His project is in part a project of recovery of a forgotten language, which if recovered could serve to accommodate cultural diversity within constitutionalism.

Constitutionalism is generally taken to mean the practice, common in Western liberal democracies, of governing in accordance with a constitution, written or unwritten. It usually refers to specific constitutional devices and procedures such as the separation of powers and due process, which are partly constitutive of the liberal democratic system of government. Tully tells us that modern constitutionalism developed around two main forms of recognition, recognition of

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the equality of independent, self-governing states and recognition of the equality of individual citizens. It began in Europe, when constitutional nation states first started to define themselves in opposition to the imperium of the papacy and the Holy Roman Empire. Within these nation states, individuals started to define themselves in opposition to the feudal and absolutist society of ranks. Constitutionalism came into prominence in the nineteenth and twentieth centuries, when imperial structures were overthrown and self-governing structures devised. The most recent manifestation of this anti-imperialism leading to constitutionalism is in the overthrow of the Soviet system, and the toppling of the apartheid regime in South Africa.³

Tully gives a outline of what modern constitutions look like.

The picture is of a culturally homogeneous and sovereign people establishing a constitution by a form of critical negotiation. The sovereign people are culturally homogeneous in one of the three ways: as a society of undifferentiated individuals, a community held together by the common good or a culturally defined nation. The constitution founds an independent and self-governing nation state with a set of uniform legal and representative political institutions in which all citizens are treated equally, whether their association is considered to be a society of individuals, a nation or a community.⁴

Tully's central claim is that the language of modern constitutionalism which has come to be authoritative functions in a way that excludes or assimilates cultural diversity and in a way that justifies its own uniformity. He describes seven features of the language of modern constitutionalism which serve this purpose.⁵

(1) The language of modern constitutionalism employs concepts of popular sovereignty which eliminate diversity. Tully identifies three concepts of popular sovereignty which do this. 1. Modern constitutionalism assumes that people are sovereign or culturally homogenous in the sense that culture is irrelevant, or capable of being transcended, or uniform. Prior to forming a

constitution, the people are taken to be equals in a state of nature, who come together to form a constitutional association. 2. The people are taken to be a society of equal individuals who exist at some modern stage of development, recognising a set of European institutions and traditions as authoritative, within which they deliberate and reach agreement on a constitution. 3. From a communitarian perspective, the people are seen as a community bound together by an implicit and substantive common good, and a shared set of institutions and traditions, within which they articulate the common good and express it in a constitution.

(2) Modern constitutions are defined in contrast to an ancient or historically earlier constitution. European states are at the highest level of development, in comparison to the non-European other. The ancient constitution is one of habit and custom; what distinguishes the modern constitution is the self-conscious critical reflection upon habit and customs that gives rise to the most modern and developed and improved institutions.

(3) Uniform, modern constitutions are contrasted with the multiform irregularity of ancient constitutions. The conflicting jurisdictions and competing authorities of ancient constitutions are seen as the cause of war.

(4) Modern constitutionalism embodies a theory of progress. The unintended historical progress of economic and social conditions gradually undermines the ancient constitution of customs and ranks and creates a society of one 'estate'.

(5) Modern constitutions are identified with a specific set of European institutions, and with a republican constitution. These institutions include representative government, the separation of powers, the rule of law, individual liberty, standing armies, and a public sphere. All of these compose the modern state, marking it off from lower, stateless, irregular and ancient societies.
A constitutional state possesses an identity as a nation, an imaginary community to which all citizens belong, and in which they enjoy equal status. Each citizen is formally equal to every other citizen, and each nation is formally equal with every other nation.

A modern constitution comes into being at some founding moment, creating the capacity and rules for democratic politics. The founding moment is the point at which all citizens agree, for all time, to the constitution. In the liberal tradition, the constitution is the original or hypothetical contract to which all citizens would consent if they were rational; in the republican tradition, the founding moment is the point at which the mythical lawgiver lays down his laws; in the nationalist tradition, it is the original consensus of the community or nation.

These authoritative features of modern constitutional language are held in place by the accoutrements of modern society: parliament, voting, bureaucracy, police, dissent, protest, international war, even revolutions. All these activities and institutions function in conventional ways within the bounds of the power structures of modern societies. Tully employs a Foucaultian description here; he claims that the language of constitutionalism is held in place in spite of, and even as a result of, the continual challenges to aspects of it, by customary linguistic usage, normal activity and institutionalisation.6

Even though the language of modern constitutionalism has stifled diversity, underneath its uniformity, a hidden language of 'common' constitutionalism survives. This is common constitutionalism in the sense of 'common' law; it has grown up through precedent and practice. It has three conventions: mutual recognition, continuity, and consent. They are conventions in the sense that they are "norms that come into being and come to be accepted as authoritative in the course of constitutional practice, including criticism and contestation of that practice."7 Tully defines these conventions through examples of them in action. Mutual recognition is shown when Aboriginal peoples and new comers, such as the British Crown in

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seventeenth century America, enter into agreements and treaties, in the process each treating the other as sovereign entities. Consent is shown by the parties entering into discussions and treaties in the first instance, and by their continuing to do so. Continuity implies that the customs of a people stand unless they are expressly overturned; once they have been accepted, for example by their continued practice without objection, then they can't be overturned. This creates a diversity of practice, which is ignored by the three authoritative schools of modern constitutionalism. What emerges is a flexible mode of 'doing' constitutionalism; constitutionalism becomes a series of renegotiated agreements that are links in an ongoing chain of constitution. The structure within which all of this can happen is a federal structure. However it is not a federation in which provinces or states are subordinated to a sovereign federal government; it is a federation in which states or provinces retain their own varying constitutional structures and autonomy, but elect to delegate some powers to a federal structure. The resulting federation is an irregular and multiform assemblage, in which the powers that one member state or province delegates to the federal government may not be the same as the powers that another member state or province delegates to the same federal government.

What arises out of this discussion of common constitutionalism and federal constitutionalism is constitution as a form of activity. It is a process of ongoing negotiation and renegotiation of relationships between peoples. Moreover, it is just, because "it rests on the three venerable conventions of justice", viz. consent, continuity and mutual recognition. It is constitution as dialogue, and constitution as procedure. This mode of doing constitutionalism results in two public goods, the critical freedom to challenge in practice and question in thought one's inherited cultural ways, and the aspiration to belong to a culture or place, and so be at home in the world. It might seem that such a fragmentary approach to constitutionalism would lead to disunity, but Tully argues that:

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11 The use of the singular case here is deliberate; it is my usage, not Tully's.
The mutual recognition of the cultures of citizens engenders allegiance and unity for two reasons. Citizens have a sense of belonging to, and identification with, a constitutional association in so far as first, they have a say in the formation and governing of the association and, second, they see their own cultural ways publicly acknowledged and affirmed in the basic institutions of their society.14

6.2 Application to republicanism

Tully explicitly rejects grand theorising. Drawing on Wittgenstein, he advocates understanding constitutionalism as a process of description and redescription, and intercultural dialogue which occurs in a world of cultural diversity.15 It is a matter of practice rather than agreements resting on universal principles and norms.16 Consequently, although it would be possible to draw distinctions of principle between Tully's arguments in Strange Multiplicity, and republican arguments, this seems to force Tully's work into a framework that he would reject. Moreover, the point of considering Tully's arguments is to attempt to access a 'bottom up' critique of republicanism. What I propose to do then, is to consider (1) to what extent the criticisms Tully makes in respect of modern constitutionalism apply to republicanism, in particular looking at the seven features of constitutional language that Tully claims stifle diversity, and (2) whether the proposals he makes could be comprehended within republicanism, without unduly distorting them.

Tully claims that the language of the three major traditions of constitutionalism, liberalism, communitarianism, and nationalism, stifles diversity. In some places, he includes republicanism in this indictment, in particular with respect to a specific set of European institutions and the tradition of the founding moment or founding father.17 This connection that Tully makes with republicanism

arises however, in reference to Kant's and Paine's versions of republican constitutions. That is, it is in reference to the history of republican ideas, rather than to a revivified and retheorised contemporary political theory. In the first instance therefore, I want to consider whether each feature is relevant to contemporary republicanism.

Recall that the seven features are: 1. concepts of popular sovereignty; 2. historical comparison; 3. uniformity; 4. progressivism; 5. European institutions; 6. identity and equality; 7. founding moment. I think that of these seven features, 2. historical comparison, 3. uniformity and 7. founding moment, are prima facie not relevant to an analysis of contemporary republicanism. Contemporary republicanism makes no historical comparisons; it is presented as a political theory that stands on its own, albeit drawing inspiration from the history of republican thought. The arguments in support of contemporary republicanism are not based on making comparisons with earlier constitutional structures, but with other political theories. Similarly, because republicanism does not rely on an historical account of the founding of the polity, there is no role within the theory for a founding father, or a founding moment.

To show that contemporary republicanism is implicated in Tully's critique of constitutionalism, it is not sufficient simply to show that it makes passing reference to the remaining four features, or makes use of them in a trivial fashion. I need to show that contemporary republicanism in some sense relies on them, either as part of the theoretical foundations of the theory, or as part of the working out of the implications of the theory. For example, many of the institutions discussed in Chapter 4 of this thesis come from European traditions, so prima facie it seems that there is a commitment to European institutions and traditions. Nevertheless, what matters is not whether or not republicanism employs these institutions, but whether it is sufficiently flexible to modify or even reject these institutions in favour of institutions and traditions from other cultures. I discuss each of the four relevant features below.

Tully makes two major proposals in respect of constitutional structures, drawing on what he calls common constitutionalism. The first major proposal is to
embrace a form of federalism, in which differing groups may have differing relationships with the federal government. The second is to encourage an approach to negotiating relationships, both with a federal or overarching government, and with other groups within a polity, that does not attempt to create a constitutional agreement that will persist for all time, but that sees the on-going process of negotiation and re-negotiation as the constitution. In some places, Tully describes this as treaty constitutionalism. Thus constitutionalism is a process and a way of doing things, not an inviolable contract. I discuss both federalism and constitution as process below.

6.3 Concepts of popular sovereignty

Recall that Tully claims that there are three versions of popular sovereignty that suppress or eliminate diversity. 1. People are culturally homogenous equals who choose to form a constitution. 2. People are a society of equals who debate their association together within a framework of European institutions and traditions. 3. People are bound together by a shared understanding of the good, expressed in a (European style) constitution. The first two are clearly aligned to liberal modes of analysis, the third to communitarian ways of thinking. For my present purposes, I want to take two basic ideas out of this: the assumption of cultural homogeneity and the shared understanding of the good. I will discuss European institutions and traditions in more detail below, and I think that the assumption of equality can be better discussed in the context of the equality of nations and citizens. 18

Does contemporary republicanism assume cultural homogeneity, or a shared understanding of the good? I think that there are several aspects of contemporary republicanism which are open to being described as manifestations of these aspects of popular sovereignty. The features of contemporary republicanism which seem most obviously to attract this criticism are: shared deliberation; shared understanding of the good; common knowledge of domination; civic virtue.

18 Some of Tully's features seem to cover the same ground - they are not as distinct as Tully's discussion of the features, or my abbreviated description of them above makes them seem.
6.3.1 Shared deliberation

In discussing shared deliberation, Pettit claims that in the mode of decision making required by republicanism, that is, debate based decision making, in order to engage in the debate, there must be enough common ground between participants for the conversation not to reach stalemate. Pettit does not make it clear whether he thinks that all groups participating in a debate need to share the same common ground, or whether it is enough that each group shares some common ground with another group, which is in turn linked to other groups. In either case, in order for decision making to proceed in a republic, the participants must share some common ground. What if it is the case that there is in fact no common ground which a particular group shares with other participants in political process? Is that group then excluded from debate? Pettit's answer is yes: if there is no common ground, perhaps the only available solution is secession. That is, a particular group is removed from on going discussion, thus reducing diversity.

Before I conclude that Pettit's republicanism does invite the criticism of stifling diversity through the assumption of a common ground, I want to consider what this common ground consists in, and whether it does in fact assume a certain degree of cultural homogeneity. The requirement for common ground comes about in this fashion. In order for a republic to function, decision making should be based in deliberative debate, not in bargaining. The bargaining model of decision making results only in the group with the most resources dominating decision making. Moreover it does not result in any rapprochement between groups, as each group concedes only the minimum possible in order to obtain their ends. The alternative is debate based, or deliberative decision making. In this mode, participants try to listen to each other's reasons, having recognised what relevant considerations they hold in common, moving towards an agreement by interrogating and understanding each others' considerations, and thus determining what answer the varying

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21 This is similar to problems with resource based vs constitutional means of instantiating freedom as non-domination.
considerations support. What is required for this to happen however, is that the differing groups begin from some common basis of understanding, some common ground, and that from the beginning they hold at least some considerations in common. That is, there is a degree of commonality of understandings and reasons among the participants in deliberative decision making, before the debate begins. So the common ground that Pettit is talking about consists in some shared understandings and some shared considerations. This seems to me to require a certain degree of cultural homogeneity, in the sense that Tully uses cultural homogeneity. That is, people are seen as culturally homogeneous in the sense that culture is irrelevant, capable of being transcended, or uniform. Other writers are concerned about the capacity of deliberative decision making, or deliberative democracy, to accommodate diverse groups. In particular, they are concerned about the ideal of impartiality in deliberative democracy, claiming that it stifles difference.

Even though Pettit's republicanism seems to invite this criticism, that is, that the shared ground and shared considerations needed for deliberative decision making stifle diversity, I want to set out Tully's vision of how deliberation and negotiation can be carried out within diverse societies. If it turns out that Tully's vision of deliberation can be accommodated within the structures and institutions set out in Chapter 4 of this thesis, then this criticism would lose its force.

In Chapter 4 of Strange Multiplicity, Tully describes the Charlottetown constitutional negotiations that took place in Canada in 1992, involving Aboriginal negotiators, provincial premiers and territorial leaders, and the Prime Minister. Negotiations between these individuals were only the beginning of the dialogue, Tully says. Each negotiator had then to explain what had happened during each day's negotiations to their constituents, and reach some agreement on what response to return to the formal negotiations with. Differing modes of negotiation and communication and agreement were used by each of the participants as they spoke with their own communities. Tully goes on to describe other treaty negotiations.

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22 Pettit (1997b), p. 188.
proceeding in much the same fashion, with negotiation between formal leaders, then redescription and renegotiation with the leader's communities, and so on. From this description of the actual practice of treaty negotiation, Tully goes on to describe how cross-cultural dialogues can take place as a process of description and redescription.

The dialogue in such constitutional negotiations usually consists in the back and forth exchange of speech acts of the form, 'let me see if I understand what you said', let me rephrase what you said and see if you agree', 'is what you said analogous to this example in my culture', or 'I am sorry, let me try another intermediate example that is closer', or 'can you acknowledge this analogy?' 'Now I think I see what you are saying - let me put it this way for I now see that it complements my view.' The participants are gradually able to see the association from the points of view of each other and cobble together an acceptable intercultural language capable of accommodating the truth in each of their limited and complementary views and of setting aside the incompatible ones.25

He then goes on to argue that participants in such dialogue reach understanding not by transcending their human cultural conditions, but by understanding difference.

Understanding it consists in being able to move about within the dialogue, passing from one neighbourhood to the next, exchanging stories and noticing our similarities and differences en passant, not by transcending the human condition.26

Tully claims that such intercultural dialogue enables people from differing cultures to engage in deliberation. The problem for the republican account of multiculturalism then, is whether the shared deliberation it envisages is deliberation in the mode that eventually transcends group difference to create common ground and common understandings, or whether it is deliberation in the mode of finding agreement while retaining difference. To determine this, I want to examine Pettit's notion of deliberative democracy more closely.

The only common ground that Pettit wants individuals to share before entering deliberations is a shared goal of reaching agreement, and a common language of debate. I want to discuss the issue of a common language of debate in more detail with respect to the shared concept of the good (see section 6.3.3). At present I will simply note that Pettit argues that the language of freedom as non-domination is a common language that allows people to voice their grievances in a way that freedom as non-interference does not. The end that Pettit has in mind with respect to deliberation is not that all citizens agree to what is being done, but that "they can be in a position where there is still room for arguments that are recognised as relevant on all sides." 27

There is however, an institutional dimension to Pettit's vision of deliberative democracy. Pettit explicitly rejects bargain-based decision making, "where people come to the table with predefined interests and ideas - their hearts and minds are closed - and they hammer out an agreed arrangement by trading concessions with one another." He favours debate based decision making, which connects with Cass Sunstein's 'republic of ideas', and with Quentin Skinner's reading of the history of republicanism and in particular the belief in dialogical reason 28 This deliberation is manifested in the representative bodies of the republic, but also in the contestatory dimension of decision making. The contestatory model allows citizens to judge whether the decisions made really do track their interests, and whether the considerations which determined the outcome were the relevant considerations. However, the relevant considerations must be neutral, so as not to favour any one group over another. "In legislative decisions, the considerations relevant are likely to be whatever considerations can be brought forward as reasons that all have to countenance as pertinent, under accepted canons of reasoning. In administrative and judicial decisions, they will be the more specific considerations that are established as relevant under the laws that govern the operation of those arms of government..." 29

29 Pettit (1997b), p. 188.
The contestatory nature of republican democracy means that government is not based on an assumption of consensus. Neither the governors nor the governed pretend that all have agreed to a decision, and the governors do not attempt to force the governed into agreement. Instead the government recognises that the governed may not consent, and facilitates procedures for review and appeal. However the presumption is that once these avenues of review and appeal have been exhausted, then the governed, even if a decision goes against them, will at least feel that they have had a fair chance to express their views, to make whatever changes can be made, and at least to reach some sort of modus vivendi. This is precisely what the institutions described in Chapter 4 are designed to do. That is, they provide exactly the sort of flexibility that Tully wants. The institutions are designed to enable differing groups to use differing modes of discussion and debate in order to reach, if not an agreement that lasts for all time, at least a way of co-existing with other groups within a polity. Moreover, the only requirements for this type of system to work are a shared commitment to reaching some form of agreement and a shared language of debate, requirements that would be needed even within the model of discussion, description and redescription that Tully advocates. The republican approach to shared deliberation, and the institutions that facilitate shared deliberation, do not stifle diversity. 30,31

6.3.2 Shared understanding of the good

In addition to emphasising the need for some common ground, Pettit's republicanism demands a common language of debate, in order to facilitate political conversation. Pettit acknowledges that this may impose on different groups a language which does not serve to express their experience and situation but he argues that unless differing groups can find a common language, the utterances of each group will be nothing but noise in the ears of the others. He claims that the language

30 Jeremy Waldron argues that we must not approach deliberative democracy with some idea of public reason, but instead that "our first responsibility... is to make whatever effort we can to converse with others on their own terms, as they attempt to converse with us on ours, to see what we can understand of their reasons, and to present our reasons as well as we can to them." (Waldron (2000), p. 163.) this seems to me to be sympathetic to both Tully's ideal of ongoing description and redescription, and to the approach to deliberation outlined in this thesis.

31 Pettit discusses the desirability of contestatory democracy with respect to minority ethnic groups at length in Pettit (2000a).
of freedom as non-domination is just such a common language; the ideal of freedom as non-domination is one that appeals, or ought to appeal, across cultures and lifestyles. Pettit is right about the need for a common language. However the question is whether adopting this account of the good, that is, freedom as non-domination, and then using it as the common language of debate, could impose a foreign ideal on diverse groups within a polity, and thus stifle diversity. The concern is similar to that expressed by those who reject the account of good that lies at the heart of liberalism, usually freedom as non-interference, or autonomy, or toleration. The usual example that is given is that of certain religious groups who see the integration of church and state as fundamental to their way of life; living in a secular state where each group and each individual is free to embrace any or no religion is not a possible option for such groups. Hence even though freedom as non-interference might seem to be a plausible ideal for a state to pursue, because it in effect allows and encourages people to live and let live, and to choose their own way of living, it is not an acceptable ideal for all groups.

Pettit claims that the ideal of freedom as non-domination is an ideal that everyone in a pluralistic society will want to embrace, no matter what their other commitments. Moreover, this ideal is capable of commanding the allegiance of the citizens of developed, multicultural societies, regardless of their more particular conceptions of the good. In effect, he claims that it is a universal ideal.

There are two ways in which something could be a universal ideal. The first is that as a matter of fact, it is an ideal which even if not enunciated, everyone embraces, at least for themselves, if not for those surrounding them. The other possible means for an ideal to be universal is for everyone, after reflection, to decide that it is an ideal worth pursuing. It is a way of ordering life, both in the quotidian round and in interactions with governing institutions and with other, differing groups of people, that enables individuals to flourish. The stronger way to assert freedom as non-domination as a universal ideal seems to me to be to assert it as an ideal which

35 The only people who might not embrace this ideal might be those who were suffering from psychiatric illnesses, or had peculiar fetishes.
as a matter of fact, everyone embraces. That is, the first route is the stronger route. The second route might be preferable to thinkers in the Western tradition, who are used to working within a reflective equilibrium in which ideas are assessed. It may not suit non-Western thinkers.

Empirical investigation of the claim that as a matter of fact, everyone embraces the ideal of freedom as non-domination is beyond the scope of this thesis. Nevertheless, I want to offer a series of examples that might demonstrate that this claim is not unreasonable. What I want to do is to show that people do resent having their lives ordered by forces beyond their control, that they do resent having to accede to another person’s whims because they lack the power to resist them, that they do mind if someone wields power over them when they have not agreed to allow that intervention as part of the ordering of the polity in which they live.

(1) The first example comes from the preface of Philip Pettit's book, where he describes the process of indoctrination he and other young men went through in the seminary.

[The idea of freedom as non-domination] made sense of my experience when, intending to be a priest, I had spent years in establishments that I learned later to describe, in Erving Goffman's phrase, as total institutions. While such schools and seminaries offered wonderful opportunities for study and comradeship, they certainly did not teach us to look the authorities in the eye, confident of knowing where we stood and of not being subject to capricious judgement. On the contrary, they communicated a sense of systematic vulnerability and exposure to the governing will, sometimes even making a virtue of the practice. I had come to rail against the subordination inherent in such training, and the notion of freedom as non-domination offered a satisfying way of explaining what was wrong with it. Our formation had tried to cultivate unfreedom; it was designed to make students passive, unassertive, unsure of where they stood. Mary Wollstonecraft wrote in the 1790s of the way that women's subordination turned

36 An investigation of the psychological literature relating to resentment might answer this question.
them into creatures who learned to bow and scrape, and to achieve their ends by ingratiation. She might have been writing of us.37

(2) Small children quickly learn the refrain, "But that's not fair." The chorus rises when one child is given a treat, and another is not, when an adult is allowed to do something but a child is not, when adults refuse to allow a child to engage in some seemingly harmless activity. It is the child's way of protesting at the power wielded over her, even when that power is exercised for her benefit.

(3) Imagine being involved in a relationship where your partner from time to time hits you, painfully, so that you live in fear of being hit again. This will lead you to try to avoid the behaviours that you think provoked the attack, to ingratiate yourself with your partner, to employ whatever stratagems you can to avoid further physical injury. It is hard to imagine that you do not feel either resentment towards or fear of your partner, and that you do not long for escape from this pattern of behaviour.

(4) Imagine a student in a university, who receives a poor grade for an essay. She knows that the person who gave her the poor grade will be marking further essays, as well as the final exam. She knows that if she 'gets on the wrong side' of her marker, she will be much more likely to fail the course or paper overall. So she chooses not to query her essay grade, even though she does not believe that it is a fair grade.

(5) Jacob Levy discusses arranged marriages, and particular cases where women have refused the marriages that have been arranged for them. The issue for Levy is one of consent. In the cases he describes, despite having been reared in cultures that promote the subordination of women to men, at least some women have

refused to allow someone else to make choices for them. They have claimed the freedom to make their own choices.\textsuperscript{38}

The unifying theme in these examples is that in each case, one person is subject to another. It is hard to believe that these people would not resent their position, or would not at least want to be free of the capricious interference they are subject to.

Consider also the sorts of claims that are made by minority ethnic groups, discussed in detail in Chapters 2 and 5 of this thesis. These claims are discussed at length by Jacob Levy, not just in order to classify them but to understand the sorts of reasons that minority ethnic groups give in order to justify the claims. Levy says that minority ethnic groups talk about 'the unfairness of ... inequality'.\textsuperscript{39} Drawing on Judith Shklar's liberalism of fear, he talks of the need to avoid humiliation, that humiliating someone is a pernicious form of cruelty.\textsuperscript{40} Other writers employ much the same sort of language: Avishai Margalit and Joseph Raz talk of the need for individual dignity and self-respect\textsuperscript{41}; Jeremy Waldron talks of how indigenous communities lament being at the mercy of larger polities\textsuperscript{42}; Iris Marion Young describes the struggles of indigenous peoples as being about self-determination and self-government and autonomy.\textsuperscript{43} Sawitri Saharso describes tragic cases of women who have killed their abusive husbands, despite heavily ingrained cultural norms of submission and limited cultural autonomy. Saharso argues that despite limited cultural autonomy, these women nevertheless express high capacity for autonomy.\textsuperscript{44} Tully himself, in discussing the hidden language of common constitutionalism, talks of how Aboriginal peoples want to co-operate in various ways with other peoples, but always to retain their status as equal and co-existing nations,\textsuperscript{45} and they have a commitment to autonomy, for the group at least.\textsuperscript{46} He refers to the 'liberty of self-rule',\textsuperscript{47} and the authority of peoples to govern themselves.\textsuperscript{48} In recent work he talks

\textsuperscript{40} Levy (2000), pp. 24 - 27.
\textsuperscript{41} Margalit and Raz (1995), p. 87.
\textsuperscript{42} Waldron (1995), p. 103.
\textsuperscript{43} Young (2000), p. 252.
\textsuperscript{44} Saharso (2000), p. 235.
\textsuperscript{46} Tully (1995), p. 141.
of the ways in which indigenous citizens demand participation in ways that recognize and respect, rather than assimilate and demean, their diverse forms of identity-related conduct... such as ... languages, cultures, religions, nationalities and indigeneity."49 He describes indigenous peoples as struggling "against the structure of domination as a whole and for the sake of their freedom as peoples."50 I do not wish to imply that Tully himself adopts the language of republican freedom with respect to indigenous peoples. Nevertheless, the language used is language that is at least consistent with the ideal of freedom as non-domination. This is what I find revealing about the language used by theorists from across the political spectrum, from those who eschew group rights and group identities, to those who embrace them. They all acknowledge that the claims that indigenous people make are to do with being powerless, and with finding ways to overcome that state of being powerless, particularly through self-government. What this suggests to me is that the language of power and freedom, and in particular, the language of freedom from unconstrained and arbitrary power, is ubiquitous. Thus it may not be unreasonable to adopt freedom as non-domination as an ideal, without at the same time suppressing cultural diversity. Furthermore, given the ubiquity of the complaint about lacking freedom from the exercise of unconstrained and arbitrary power, it seems odd to then argue that republicanism imposes an alien concern on ethnic minority groups. I take it that those who make such claims are not making a theoretical claim, that is that they do not think that ethnic minority groups are conceptually barred from having any complaint about domination. Their claim must then be an empirical claim, but the evidence to support the claim is just not available. As a matter of fact, ethnic minority groups from "...Quebec to KwaZulu, from Eritrea to Tibet; Slovakia, Scotland, Kurdistan, Catalonia, Brittany, Kashmir, the Basque lands, and the Jura canton in Switzerland do not begin to exhaust the list of places where self-government has been demanded or granted. The normative claims are similar in all of these cases.... They should not be ruled by aliens. Borders ought to be drawn, and institutions arranged, to allow the group political freedom from domination by other groups."51 Given the ubiquity of the complaint, it seems reasonable to suppose

that the language of freedom as non-domination may be a viable common political language.

I have another concern to note. Tully tells us that cultures are not internally homogenous, that they are aspectival, and depending on where we stand they reveal different things about themselves. Tully does not mean by this something as trite as the idea that different people within a culture understand the culture differently. I think however, that we should consider another possibility of difference within cultures. Some people from some cultures claim that their culture does not value say, autonomy, or individual freedom, and that these are Western ideas that distort the values of the culture. I think that it would be interesting to find out who makes these claims. If it is the people within a cultural group who hold positions of power, then we should be at least somewhat dubious about the claims. Perhaps the culture might not be one that places value on individual autonomy and freedom for subordinate members of that culture. A example of this might be some Islamic cultures, where women are subordinated. Consider the Taleban in Afghanistan who have severely repressed women. The leaders of the Taleban claim that this is their culture; given however, that they are the ones who benefit from the subordination of women, it is hard to accept their claims at face value. There may be at least some cultures where all members value submission to a particular way of life, and plausibly, Aboriginal peoples in Australia, particularly prior to extensive contact with Europeans, were members of such cultures, where their way of life was set out by The Dreaming, and adherence to The Dreaming is considered to be the best way of living.\footnote{See Kukathas (forthcoming), Chapter 3, for a discussion of The Dreaming, and Australian Aboriginal peoples as members of a group that does not value individuality, in particular, the accounts of human beings as individual project pursuers.} Even so, in the early twenty first century, such groups are claiming the right to self-rule. My point is not to deny that at least some, and perhaps many, cultures place little or no value on Western style independence, or claim that they do not. However, I think that given the widespread incidence of claims for self-rule, these claims should not necessarily be taken at face value.

Finally, despite the commitment of republicanism, and in particular liberalism, to toleration, there is a point at which theorists in each of these traditions
say, "Enough." We see this in relation to practices such as slavery and clitoridectomy. That is, we do not accept extreme cultural relativism, even though we may be committed to allowing people to choose, so far as is possible, their own ways of living the good life. Like the liberal goods of toleration, autonomy, and freedom from interference, freedom from domination is a minimal account of the good, and it may support many modes of life, not just one, Western way of life. It is not an all-encompassing account of the good which drowns out other values. In summary then, although republicanism does have a shared understanding of the good, I think that it is reasonable to claim that this account of the good may be shared very widely, both as a value that individuals hold, and as a value that minority ethnic groups hold. Moreover, it is the sort of value that can leave other values held by minority ethnic groups intact. Hence I do not think that it is an account of the good that suppresses or eliminates diversity.

Nevertheless, this account of the good does leave one set of problems intact, and that is the set of problems associated with groups who find it intolerable to live within a secular society. This sort of problem is exemplified by the much discussed 'l'affaire des foulards' in France, where the laws that were designed to treat religious expression as a private affair, something not to be either supported or repressed by the state, meant that the Muslim girls at the centre of the case could not wear headscarves to their state school, and consequently were not able to comply with the tenets of their religion. Theorists such as Kymlicka might find no particular problem with the headscarves case; the girls were from migrant groups, and thus were required to find ways of accommodating themselves to the majority culture. By the same token however, given that Kymlicka thinks that we should make accommodations for minority cultures where possible, for example, making exceptions to motorcycle helmet regulations for turban wearing Sikhs, it might seem at least inconsistent to allow one exception, but not the other. The reason for the difference may lie in the nature of the law or rule to which the exception may need to be made; as Levy points out, Sikhs are caught by the motorcycle helmet regulations by accident, whereas the law in France was specifically designed to exclude religious

expression in state institutions. Making an exception to the law would negate the purpose of the law.\textsuperscript{54}

I do not see any easy way around this problem. It most often seems to arise in relation to Islam, where the tradition is that the state is a religious entity, as well as being a political entity. But even within Islam, there are varying practices. At one end lies the Taleban in Afghanistan, and post-revolutionary Iran, where religious leaders and political leaders are, or were, the same.\textsuperscript{55} At the other extreme are states such as Malaysia, where Islam is the official state religion, but other religions are tolerated, and those who do not embrace Islam are free to live more or less as they will. I suspect that no universal solution can be found, and case by case judgements must be made, where the extent to which freedom as non-domination is enhanced or compromised is used as the guide to what should be done.\textsuperscript{56} And ultimately, where no common ground can be found, perhaps secession is the answer, if secession is an available option (see section 4.2.4).

6.3.3 Common knowledge of domination

Recall that in order for domination to exist, three conditions must be met. There must be interference, or the capacity to interfere, arbitrarily, in the choices or ranges of choices of another agent. This is sufficient for domination to exist, but for it to achieve its full potency, typically a further condition is fulfilled. There is common knowledge of the domination; the agent who is dominated knows that she is subject to domination, those around her know that she is so dominated, the dominator knows that he can exercise his power, those around him know that he can so dominate the other. I know that you know that he knows.... and so on and so forth.

For this type of knowledge to be common, there must be some shared understanding of what domination and freedom as non-domination consist in. I will

\textsuperscript{54} Levy (2000), p. 130.
\textsuperscript{55} The case of the Taleban is much more extreme than that of post-revolutionary Iran. The exclusion of women from all aspects of life outside the home, except some medical practice, but including exclusion from education, and the very recent destruction of ancient monuments go well beyond what is taught in the Koran, and beyond what is accepted in other fundamentalist Islamic states.
discuss this further in respect of the shared understanding of the good; at present, I want to discuss the shared understanding of how to recognise domination, and those people who are in a position to dominate or be dominated. This shared recognition of domination could vary between cultures. Consider how the position of women varies from culture to culture. White women in some English speaking countries, where the dominant culture comes primarily from European, and in particular, British and Irish sources - I am thinking of white women in Australian, New Zealand, Canada, the United States of America, the United Kingdom and Ireland - enjoy a considerable degree of freedom, at least formally, if not substantively. Many may order their lives with little or no arbitrary interference, and they are secure in the knowledge that they may so order their lives. Contrast the position of women in these countries with the position of women in say, Bangladesh or India. Some women in these countries enjoy considerable freedom, and even reach the highest offices - both countries have or have had female Prime Ministers - but most women live within patriarchal structures, subject to domination, and recognised as being subject to domination. I do not want to draw this contrast for the sake of pressing Anglo-Saxon traditions and cultures onto non-Western peoples. However I do want to consider what might happen when a person from one of these groups of countries moves to the other group of countries. A Bangladeshi man might have expectations of white Anglo-Saxon women that these women do not share; he might expect, albeit unconsciously, to be in a position to dominate all women in virtue of their being women (see the discussion of vulnerability groups in Chapter 2), and be surprised and at least discomforted by his lack of power over women. A white woman might behave in ways that are not consistent with the way that men dominate women in India, perhaps venturing into 'no-go zones' because she does not recognise the potential dangers she is subject to in virtue of being a woman. Neither person would have the knowledge that would enable them to recognise domination. To the extent that the republican account of freedom, or more accurately, its account of the antithesis of freedom relies on common understandings of when domination can or is occurring, then it assumes a certain degree of cultural homogeneity.

56 It is interesting to speculate about what might happen in Bible Belt states in the United States were it not for the rigid separation of church and state.
Is this a serious objection to the republican account of freedom? I want to argue that it is not, for two sets of reasons, one empirical, and one theoretical. In practical terms, most individuals live within their own cultural communities, where patterns of behaviour are enculturated, so that they are known and recognised by most, if not all members of those communities. Thus the assumption of a certain degree of cultural homogeneity is not unreasonable. However, the situations in which patterns of behaviour are not known and recognised are precisely those that I have been discussing in this thesis, that is, situations where people from one culture live among people from another culture. Where people live in such proximity to other, different peoples, then cultural homogeneity does not exist, or at least, is considerably reduced. One way around this problem would be to point out that as a matter of fact, members of ethnic minority groups tend to learn how to operate within the context of the majority culture. They learn the signals that convey status within the majority culture, and learn to use those signals within that culture, and perhaps transfer them to their own cultural groups. However this is precisely the kind of cultural homogeneity that Tully is criticising, where members of a minority ethnic group are forced to adopt the understandings and patterns of behaviour of the majority group, thus reducing cultural diversity. If however, the assumption that most people can recognise patterns of domination across cultures is a reasonable one, then there would be no problem for the republican account of freedom.

There could be two sets of evidence to support the assumption. First, if it could be shown that the type of case I have described is in fact an extreme case of people not recognising the signs that operate within a society or culture, and that in more usual interactions, there is in fact a certain amount of commonality between all or most cultures, then an assumption of some degree of cultural homogeneity is not unreasonable. The type of commonality I have in mind is one of, as it were, body language and vocal intonations. If this type of commonality exists, then the assumption that people can recognise patterns of domination across cultures is reasonable. Second, if it could be shown that individuals can add cross cultural understanding to their understanding of their own culture, without losing their own cultural ways in doing so, then cultural diversity would not be stifled or eliminated. I

57 Of course, Quebecois women do not draw their culture from these sources, and speak French in preference to English. This is however, a special case.
believe that there is at least anecdotal evidence to support both of these claims. For example, anthropologists attest to the universality of facial expressions, such as smiles and frowns, and gestures such as pointing to indicate an object of interest, and nodding or shaking heads to indicate agreement or disagreement. In support of the additional learning claim, consider how Pacific Island peoples regard looking a superior in the eye as a mark of disrespect. Consequently Pacific Island children will not look their teachers in the eyes, and palangi (white) teachers have learned not to expect Pacific island children to do so, without losing this expectation in respect of white children. Further investigation of these claims is well beyond the scope of this thesis. Nevertheless, if the anecdotal evidence is an indicator of the possibility of cross cultural understanding, then the assumption of some degree of cultural homogeneity is reasonable.

There are however, theoretical reasons to suggest that this argument about cultural homogeneity is not fatal to the republican account of freedom, as least so far as accommodating cultural diversity is concerned. Consider the areas in which we expect domination to be able to occur. They concern situations where one person is in a position of power over another. This position of power may come about through the formal role a person occupies; for example, consider teachers, police officers, doctors and other professionals, employers, high level managers and so on. These are defined public roles, and they are exactly the roles where it is reasonable to expect that those who know of the role also understand its potential for the exercise of power. That is, there is no need of a large amount of cross-cultural understanding that has the effect of stifling diversity; all that is needed is an understanding of the (formal) nature of the role. The other roles where domination may be encountered are private roles. Consider the relationships between husband and wife, parent and child, friends, and so on. These are just those situations where we do not usually encounter cross cultural problems, because people tend to form these relationships within their own cultural groups, where it can be reasonably expected that they will understand and recognise patterns of domination. So it is reasonable to expect that with respect to public roles, the formal nature of the potential to exercise power can be recognised without having at the same time to acquire significant knowledge of other cultures, and with respect to private roles, the required cultural knowledge is already in place. For these reasons, although the republican account of freedom and
in particular, the common knowledge that is needed to enable the antithesis of freedom, relies on an assumption of a certain amount of cultural homogeneity, and even if we assume that Tully's claim that assumptions of cultural homogeneity stifle or eliminate diversity, I do not think that this is fatal to the republican account of freedom, because the assumption is a reasonable one.

6.3.4 Civic virtue

There is another aspect of Pettit's republicanism that seems to invite the criticism of cultural homogeneity, through commitment to a particular understanding of the good. Although the minimal account of the good in republicanism, that is, freedom as non-domination, does not seem to be an account of the good which stifles diversity, the ways in which that account of the good is expressed in the governance of the polity may do so. In particular, the republican commitment to civic virtue may stifle or eliminate diversity.

Both the republican tradition and contemporary republicanism rely on civic virtue. Republicanism relies on citizens taking an active role in the life of the polity. The republican tradition urges all free, propertied men to play their part in various ways, for example by serving in the army, or undertaking public office. This limitation of civic virtue to men is consistent with the limited extension of freedom in the tradition; freedom was limited to propertied men because they were the people who had the resources to withstand domination. Contemporary republicanism is much more inclusive; freedom as non-domination is a good to be enjoyed by all citizens. However in order to enjoy this good, all citizens must take part in the life of the polity. Pettit expresses this as a series of norms. He says that the institutions of republicanism cannot function on their own. In his words, "they are dead mechanical devices and will gain life and momentum only if they win a place in the habits of people's hearts."58 More than this, adopting these norms:

is not just a matter of denying the personal self. It is also a matter of letting other identities take over in your person. It is a matter of owning heritages of experience and belief and intention that
transcend your personal concerns, whether those be the heritages that bind you, say, to other women, or other members of your ethnic group, or, ultimately, other citizens. 59

A civil norm is a pattern of behaviour to which nearly every relevant party conforms. Moreover, nearly every party approves of conformity to the norm, and disapproves of deviation, and this approval or disapproval helps to promote the behaviour. The state fosters these norms firstly by being the sort of state that commands legitimacy, that is, a republican state, and secondly, by establishing systems whereby people who conform to the norms are honoured for doing so, rather than by setting up systems that treat every person as possible offenders. That is, the state creates an honour system, so that as a matter of being good citizens, people conform to the norms. 60 The norms encompass support for the laws, the behaviour of individual citizens, the behaviour of those who occupy certain public positions, and the behaviour of those in certain groups, such as members of disadvantaged minorities. 61 There are real advantages in society wide acceptance of these norms of behaviour; in particular, they support freedom as non-domination.

I think that the problem is obvious. Pettit seems to not only assume a certain amount of cultural homogeneity with respect to norms, but he also argues for the development of cultural homogeneity with respect to norms where none may exist. That is, he assumes that a certain pattern of behaviour should prevail, and if it does not, he argues that it must be developed, that is, imposed on those who do not espouse it in the first place. Moreover, he urges individuals to transcend their personal selves, something that Tully says explicitly rejects, arguing that the assumption that individuals can, do and ought to transcend cultural differences simply leads to cultural diversity being suppressed. 62 Tully instead offers the practice of intercultural dialogue. Within this intercultural dialogue, members of one culture learn to understand members of other cultures, but they do not in the process lose their own identities.

60 Pettit (1997b), pp. 242 - 257.
Pettit's account of civic virtue however, does not require individuals to lose their own identities, or even to impose another identity on top of their existing identities. He does ask individuals to step aside from their own personal and immediate concerns, but in favour of other identities and concerns that they may have, such as membership in a particular ethnic group. This type of commitment to a norm of behaviour ought not to concern Tully. However, Pettit also says that ultimately, people should also identify themselves as, or adopt the concerns of citizens. That is, there is an overall identity that they should take on, and norms of behaviour that they should adopt. I think that again, however, Tully ought not to be concerned. Throughout Strange Multiplicity, Tully makes use of a compelling image, that of the sculpture by Bill Reid, *The Spirit of Haida Gwaii*. The sculpture is a black canoe with various passengers, the mother bear and her cubs and their father, the beaver, the dogfish woman, the mouse woman, the playful wolf, the eagle, the frog, the raven, the ancient conscript, and the chief or exemplar, or as Tully finally characterises him, the mediator. These are diverse characters, but they are bound together, perhaps without having chosen to be so bound, by their joint occupancy of the canoe. Tully describes how this diversity can create a sense of belonging.

If we now view ourselves as members of the black canoe, the diversity of our fellow citizens evokes a sense of belonging in which one's own culture (or cultures) is recognised as a constituent and interrelated part of the justice of the whole association. This specific sense of belonging and civic pride would be lost if one's culture were excluded, identified in isolation from the others or imposed on all the members. The sense of belonging comes from being associated with the other cultures.

The sense of belonging and citizenship is gained when one's own culture is accepted and interwoven into the public association of the polity. Tully suggests that this is how the member nations of the United Kingdom might feel, although perhaps the Catholic citizens of Northern Ireland might disagree.

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64 Tully (1995), pp. 204 - 205.
If the types of institutions I have discussed in Chapter 4 will work to ensure that minority ethnic groups are included in the life of the polity, without at the same time having to lose their own distinctiveness, then this sense of belonging through diversity may be possible. This would meet both the republican need for citizens to participate in the affairs of the polity, precisely because each citizen identifies himself as a member of the polity, and Tully's sense of belonging through diversity. That is, even though the language used is different, both Tully's and Pettit's visions of belonging are consistent, or at least, not contradictory.

There is however, a problem remaining, in that Pettit's account of civic virtue may understate what is required of civic virtue, both within the republican tradition, and within Pettit's retheorised contemporary republicanism. Pettit casts civic virtue as norms of behaviour. He describes how these norms may be fostered, and the advantages that there are for a republic in a series of norms of behaviour. He does not however, describe just what a republican citizen should be expected to do. Civic virtue becomes important with respect to both the rule of law, and checks and balances. No rule of law can remain in place if citizens routinely ignore the law, or distrust the law, and checks and balances will not operate if citizens do not do their part. Contestatory democracy in particular will fail if citizens do not from time to time at least, contest the decisions made, or at least, review and consider the validity of decisions that have been made.

Pettit discusses the way that support for a rule of law can be fostered. It relies in particular on a widespread belief that the laws are legitimate, and that the institutions that are used to create and administer the law are legitimate. If the minority ethnic groups are satisfied with the institutions that allow them to participate in the process of making and contesting law, and with the institutions that are used to administer the law, then a norm of compliance with, and support for the law ought not to stifle diversity. It seems odd to think that this type of norm would create problems in the first place. Most ethnic groups have internal laws, or at least rules, with which compliance is expected. That is, the norm itself is not unfamiliar to minority ethnic groups, even if the content of the law with which compliance is expected varies from group to group. Aboriginal people have very specific rules about who may marry whom, Maori have rules about who may speak at certain times.
on marae,\textsuperscript{66} liberal democracies specify who may speak in Parliament, Iranian women are required to wear a chador, British people may not walk within the grounds of Buckingham Palace without permission, Italian citizens are required to vote in elections,\textsuperscript{67} and so on. Although the content of particular laws can, and very unsurprisingly does, vary between cultures, and from polity to polity, norms of compliance with the laws do not.

The systems of checks and balances required within republicanism in general, and employed extensively within Chapter 4 of this thesis, demand more than this however. Many cultures do not employ systems of checks and balances, nor do they expect participation in the affairs of the polity. Some groups specifically discourage participation in the affairs of the wider polity; members of the Baha'i faith eschew political involvement, instead simply accepting the government that is chosen for them by other members of the polity, and Aboriginal people submit themselves to The Dreaming. Moreover, many of the checks and balances require active citizens, that is, citizens who involve themselves in reviewing the affairs of the polity, checking that decisions made by various bodies are fair, making complaints to officials such as ombudsmen, appealing against poor decisions and so on. To a certain extent, the simple existence of the capacity for such review and appeal will be sufficient to ensure that the decisions made do not compromise citizens' standing, but in the longer term, if these capacities are not used, then the possibility of review and appeal will cease to be relevant to decision makers, and the security that citizens gain through their very existence will be lost. So there is a real need for citizens to participate in the life of the polity. At a minimum, a sufficient number of citizens need to cast a vote in elections to ensure that political leaders know that they must be responsive to the electorate. This is however, a very minimal position; in order for a republic to function effectively, citizens must be much more active, as discussed above.

There are two ways in which the norms which support this level of participation may stifle diversity. First, if a particular minority ethnic group has an ethos of keeping to itself, of not participating in the affairs of polity, then imposing a

\textsuperscript{66} Maori meeting places, in particular, meeting houses.
\textsuperscript{67} See section 3.5 for a list of polities that have compulsory voting.
norm of participation may stifle that aspect of the group's particular identity. Second, if a particular group must participate in the affairs of the polity in order to make its claims heard, and if the modes of participation in the polity are structured in ways that do not meet that group's needs, then they may be required to modify their own approaches to public life, or even to take on the modes of participation of the dominant culture.

I think that of these two dangers, the second is less likely, if the institutions of the polity are sufficiently flexible to meet the differing needs of differing groups. Most minority ethnic groups have a powerful incentive to involve themselves in the affairs of the polity, at least so far as their own needs are concerned. After all, that is the way that they can effect change in order to have their voices heard and their claims recognised. The types of institutions that republicanism can support in order to meet the needs of varying ethnic groups are set out in Chapter 4; in each case, what is important is not the particular form of an institution, but that institutions can be sufficiently flexible to meet the needs of minority ethnic groups, or can be eliminated entirely and replaced by more flexible institutions if necessary. In this case, a norm of participation need not carry with it assumptions about how that participation is to be expressed.

The more difficult case arises where a particular minority ethnic group avoids participation, but is required to participate, even just to have their own needs met. This type of group is one which keeps itself to itself, which does not want to concern itself with affairs beyond its bounds, and does not have any ambitions other than being left alone. In effect, it is like a form of secession, except that the group is happy enough to stay within the bounds of the polity. The Hutterites and Amish may be examples of such groups. Yet if these groups do not participate to at least some extent, they become free riders, enjoying the good of freedom as non-domination, but not playing their part in ensuring that the good is maintained for all citizens, including themselves.

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68 The Hutterites and the Amish may not be minority ethnic groups, but they are such distinct groups that many of the issues which concern groups that we would more naturally call ethnic groups also concern them.
Happily, such groups are not common; the members of most ethnic groups want to be included in the affairs of the polity, at the very least as far as they are affected themselves. Given the nature of vulnerability groups within republican theory, if one minority ethnic group is able to reduce the extent to which it is subject to domination in virtue of being a minority ethnic group, then the extent to which other minority ethnic groups are subject to domination may also be reduced. I do not think that there is an easy solution to the problem of free riding groups, which take the advantages of protections, special measures and assistance won by the hard work of other minority ethnic groups, but refuse to participate in that work. If such groups exist, they will be immune to the disdain of others; by definition, they are not interested in participating in the affairs of the polity anyway, so being held in contempt for adopting this stance will be irrelevant. Short of compelling such groups to participate in some way in public life, perhaps via penalties for say, not enrolling to vote and so on, I see no solution. And of course, the compulsion involved in imposing penalties would offend against Tully's aim of accommodating diversity. I think however, that this would be very rare behaviour; most groups do, after all, work to protect at least their own ways of life. Consider, for example, the ways in which the Amish have used the United States legal system to minimise the extent to which their children are exposed to other ways of life.

In conclusion then, although at first glance the ideals of civic virtue seem to demand a degree of cultural homogeneity, thus stifling or eliminating diversity, provided that the institutions of the polity are sufficiently versatile to allow minority ethnic groups to participate in ways that are consistent with their own cultures, I do not think that civic virtue must have this homogenising influence. Moreover, the evidence is that most groups do want to participate in the public life of the polity; the demands made by minority ethnic groups are typically for inclusion in culturally appropriate ways, rather than demands to be left alone.

6.3.5 Summary

Writers in the republican tradition simply assumed that they were writing about a small group of male, propertied citizens, and that these citizens more or less
shared the same values and customs. That is, they assumed that the citizens of a polity were culturally homogenous. Pettit's retheorised republicanism does not however, share this assumption. Although contemporary republicanism does assume a shared account of the good, it is a minimal account of the good which like liberal accounts of the good, is designed to allow citizens to choose their own ways of living. That is, it is an account of the good within which citizens can choose their own versions of the good life. Moreover, it seems from anecdotal evidence at least, that the account of good that lies at the heart of republicanism is an ideal that is widely shared amongst otherwise divergent ethnic groups. Hence it does not stifle or eliminate diversity. Similarly, at first glance some other aspects of republicanism might seem to stifle or eliminate diversity, in particular, the common knowledge requirement for domination to operate, shared deliberation, and civic virtue. In each case however, it turns out that republicanism accommodates diversity, or at least, does not compromise it. Hence although it might seem that the shared values and knowledge that underlie republicanism could contribute to understandings of popular sovereignty that stifle or eliminate diversity, they do not do so.

6.4 Progressivism

According to Tully, modern constitutionalism embraces ideas of progressivism, where the progress of economic and social conditions eventually, and unintentionally, brings about change from ancient societies of customs and hierarchical ranks, to modern societies where individuals are undifferentiated. They are legally and socially of one rank, and a modern constitution simply recognises this. It is not a matter of a modern constitution being used to stamp out the irregular customs of ancient customs; all that happened is that as citizens have become more and more similar socially and economically, the ancient customs have been replaced by the uniform institutions and practices of the modern constitution. The process is one of assimilation; as minority ethnic groups acquire the material goods and social habits of the dominant culture, or as in Tully's examples, the material goods and social habits of their conquerors or colonisers, these people will also take on the

constitutional ideals and practices of the dominant group. Thus diversity will be suppressed or eliminated.\textsuperscript{70}

Is republicanism bound to this uniformity? In one sense, it is. It embraces an ideal of each citizen enjoying the same sort of freedom, and to the same degree, as other citizens. It is an egalitarian ideal; if a citizen who is in a relevantly similar position to me is subject to domination, then the chances are that I will be subject to the same sort of domination. Conversely, if a citizen who is in a relevantly similar position to me enjoys freedom as non-domination, then so too will I enjoy freedom as non-domination. As discussed earlier (see Chapter 3), domination can be reduced or eliminated by ensuring that people have the resources to resist it, or by constitutional means. If we take the first option, that is, increasing peoples' resources, then pursuing social and economic equality will bring about a reduction in domination, but it may create exactly the problem that Tully emphasises. That is, progress towards social and economic equality may entail the loss of ancient customs and practices.

Pettit's republicanism takes the other route towards establishing freedom as non-domination, that is, the constitutional route. As one of the means of establishing freedom as non-domination, it may adopt policies normally associated with a welfare state, such as the provision of education and health care, as well as financial assistance for those with particular needs, such as people who are not able to work in paid employment. This is however, a contingent matter, based on the particular needs of the particular citizens of a polity, rather than a necessary connection with freedom as non-domination.\textsuperscript{71} Moreover, given the flexibility of republican institutions (see Chapter 4), it should be possible to design health, welfare and education systems that respond to the particular needs of particular groups of people, rather than assuming that one mode of material wealth is appropriate for all people. Consider the case of minority ethnic groups who hold their land in common. If the provision of welfare is means tested, perhaps by reference to an individual's holdings, then members of these minority ethnic groups may find support withheld, because they have 'shares' in, or rights to, land holdings, even though they may not

\textsuperscript{70} Tully (1995), p. 77, pp. 87 - 91.
\textsuperscript{71} Pettit (1997b), p. 119.
be able to dispose of their share of the holdings. I think however, that it is possible, and indeed desirable, for republican institutions to be designed so as to reflect this sort of diversity, without at the same time compromising freedom as non-domination.

The republican institutions discussed in Chapter 4 also have the effect of leaving the internal dynamics of minority ethnic groups intact, at least in so far as they do not cause, or contribute to, domination. This means that the customs and practices of such groups should not be lost, provided that the members of the groups want to retain them. As a matter of fact, where minority ethnic groups have been able to retain some degree of internal cohesion, and to resist assimilation into the dominant group(s) in a polity, they have been able to retain many of their practices and customs. For example, the Maori still hold *hui*\(^2\) as a means of discussion and debate, and in the late twentieth and early twenty first centuries, these *hui* play an increasingly important role in negotiations and discussions within and without Maoridom.\(^3\)

I suspect however, that there may still be a problem with respect to social egalitarianism within Pettit's republicanism. Pettit's goal is a polity where all citizens see themselves as fully enfranchised citizens of the state, where each may stand tall and look the other in the eye. Moreover, this is not a status to be enjoyed just in the public arena, but also in the private arena. Thus it extends not only to relationships between members of one group and members of another group, but to relationships within groups. Where a minority ethnic group has strong traditions of hierarchy, then the goal of each person standing tall and looking the other in the eye seems at least inconsistent with the group's ways of organising itself. I think that in such cases, the good of freedom as non-domination ought to prevail. However, there may be a way in which the group's internal structures can be preserved. If each member of the group knows that her position is assured, and knows that the 'higher' member of the group will not interfere with her arbitrarily, then her freedom is secure. She can trust the higher members of the group to treat her with respect, because she

\(^2\) Meetings, discussions, traditionally held on marae, or at least associated with a marae. At present, they are often not held on the physical grounds of a marae, in order that women may speak, although some formal proceedings, such as openings and closings may be held on the marae itself.

\(^3\) A disputed term, but none the less the one that is usually used to refer to Maori as a New Zealand wide grouping.
knows that the decisions they make will track her own interests. This means that even if a person enjoys high status within a group in virtue of, for example, their birth, then that status ought not to compromise the secure hold that other members have on freedom as non-domination. By analogy in Western liberal democracies, consider the way in which Americans know themselves to be the equal of the President, and Australians and New Zealanders address their political leaders by their given names rather than by titles. Even though these people enjoy high status, ordinary citizens of these countries know that they enjoy the same standing as citizens. With respect to customs and habits of minority ethnic groups that cause domination, the sorts of issues discussed in relation to tolerance come into play (see sections 5.1.4 and 5.2.8). Where the habits and customs of a minority ethnic group promote domination, then it ought not to be problematic if those particular customs and habits are lost; where they promote, or are at least consistent with freedom as non-domination, then there ought to be no attempt on the part of other groups to change those customs and habits, even as an unintended consequence of introducing a republican constitution. The institutions discussed in Chapter 4 are designed precisely to enable minority ethnic groups to retain what is distinctive and valuable, to that group, while still finding ways of living alongside and intermingled with other ethnic groups in modern multicultural societies.

Even so, simply as a result of on-going contact with other groups, the customs and habits of minority ethnic groups may change. I do not see how this is to be avoided, unless each group tries to live in splendid isolation. The real problem with respect to diversity is when a dominant or majority group expects the other to adopt its customs and behaviours, and furthermore expects that this will simply happen over time, as a matter of course, because the habits and customs of the dominant or majority group are superior. This is Tully's concern with respect to progressivism. However I think that the types of institutions discussed in Chapter 4, and the flexibility with which republicanism can approach issues of diversity, should mitigate this problem. Moreover republicanism does not assume that the habits and customs of one group are superior. Instead it assumes only that the habits and customs of each group should allow freedom as non-domination, or at least, not promote domination.
6.5 European institutions

Tully's claim with respect to European institutions is that modern constitutions are identified with a set of specific European institutions, including representative government, the separation of powers, the rule of law, individual liberty, standing armies, and a public sphere. This charge could succeed against contemporary republicanism in two ways, one stronger than the other. One way is to show that as a matter of fact, contemporary republicanism uses these specific European institutions. The other is to show that contemporary republicanism is necessarily committed to them. If this second claim is correct, and if Tully's claim that this commitment to European institutions suppresses diversity is correct, then republicanism instead of accommodating diversity, would suppress or eliminate diversity, at least in its governing institutions. The first version of the charge however, is not necessarily damning. If republicanism employs these institutions with sufficient flexibility to amend them to accommodate non-European cultures, and abandon them if necessary, and if it is prepared to employ institutions from non-European cultures, then its commitment to European institutions is not set in stone. Moreover, it would operate with exactly the sort of flexibility that is required to accommodate diversity.

Contemporary republicanism embraces all of these institutions, with the possible exception of standing armies and the idea of a public sphere (see section 5.2.5). The separation of powers and the rule of law are longstanding parts of the republican tradition, which Pettit carries into the contemporary articulation of republican theory.\(^74\) Freedom as non-domination is freedom for individuals, even though it may also apply to groups, and may be brought into being by eliminating domination of groups. Pettit uses representative government to ensure a voice for minorities,\(^75\) and he discusses the public life of the community, and the idea of civil society, both part of a public sphere.\(^76\) As a contingent matter, republicanism is clearly committed to these institutions.

\(^{75}\) Pettit (1997b), p. 191.
\(^{76}\) Pettit (1997b), pp. 165 - 170, pp. 241 - 270.
Is republicanism necessarily committed to any of these institutions? I think that the answer is yes. The goal of republican government is to bring into being freedom as non-domination. As discussed in Chapter 3, republicanism is thereby committed to the rule of law, and to systems of checks and balances. Republicanism is caught by the first version of Tully's charge. However there is another part to this charge that must be proved before it can be used to dismiss republicanism. Does the particular use of these institutions necessarily suppress diversity?

The short answer is that it does not. Recall the discussion of the rule of law in Chapter 4. I argued that the rule of law does not necessarily commit us to exactly the same law being applied to every individual, nor does it commit us to having only one system of law within a polity. In particular, by use of mechanisms such as appeal and cross appeal, systems of election to decide who is subject to which system of law, and so on, it is possible to run parallel legal systems. This offends against a strict interpretation of the rule of law entailing that there must be only one legal system, but it is a possible way of instituting the rule of law so that it accommodates diversity. Thus even though republicanism is necessarily committed to the rule of law, that commitment to the rule of law need not entail that it stifles or suppresses diversity.

This flexible approach to the rule of law however, does entail that there are robust systems of checks and balances, reinforcing the republican commitment to this particular European institution. These checks and balances are in place in order to ensure that power is not exercised capriciously. Within a flexible rule of law, with parallel legal systems, the capacity for the capricious use of power, either by individuals who occupy positions of authority, or by individuals who seek to move from one system to another in order to avoid the consequences of their actions, is considerably enhanced. If we are committed to freedom as non-domination, we need to constrain this capacity to be capricious.

I find it difficult to see just how a system of checks and balances can in itself, suppress diversity. If the checks and balances operate to reinforce the hegemony of one and only one legal system, then Tully's charge would be correct. Where
however, they operate to allow a flexible rule of law, then they are part of a system of accommodating diversity, rather than suppressing it. Given that the system of checks and balances envisaged in this thesis does operate in this second manner, then I do not think that it is fatal with respect to diversity. That is, even though republicanism is necessarily committed to this institution, and the commitment is reinforced within the rule of law envisaged in this thesis, its operation does not stifle diversity. In fact, it does exactly the opposite. So the first part of the strong charge against checks and balances succeeds, but the second part does not.

In summary, as a contingent matter, republicanism espouses various European institutions, and in addition, some of the European institutions that Tully identifies as suppressing or eliminating diversity are required by republicanism. Nevertheless, contemporary republicanism is sufficiently flexible to utilise these institutions without at the same time stifling diversity.

6.6 Identity and equality

Tully says that two ideas of equality, equality of citizens within a nation, and the equality of each nation with every other nation, stifle diversity. The first stifles diversity by insisting that every citizen is to be treated in the same way as every other citizen, particularly in respect of equal treatment under the laws. The second stifles diversity by allowing only states which possess certain characteristics, typically formal constitutional structures and European style institutions, to be recognised as being nations equal with other nations.

Pettit's republicanism rejects the idea of equal treatment necessarily entailing the same treatment for all citizens. However this tends to be in response to issues of material treatment, such as providing extra resources to ensure that for example, rural citizens enjoy the same capacity to access government services as city dwellers, but also so that members of minority groups can enjoy the same access to the good of freedom as non-domination.77 He does not consider in any detail the possibility that

different groups might enjoy differing treatment under the law, or that they might embrace differing modes of government according to their own desires and needs. Nevertheless, as I have discussed in Chapter 4, this second form of differing treatment is not only possible within republicanism, but it is one of the ways in which the claims made by ethnic minority groups can be addressed. While it may have been true of the republican tradition that it catered for white, property holding men, contemporary republicanism extends the status of being a citizen to all members of a polity. It does not define what a citizen should be like, other than to insist that all citizens should enjoy freedom as non-domination. Moreover, it allows differing treatment of citizens, according to their needs.

Contemporary republicanism is silent with respect to the recognition of one nation by other nations. Pettit's theory assumes that an existing polity can adopt republican aims and goals; it does not try to define what that existing polity might consist in. The republican response to issues of multiculturalism likewise does not attempt to define what a nation might consist in. In remaining silent, the danger is that assumptions can be made as to what groups are to be recognised as valid for the purposes of recognising claims, or devising differing modes of governance and so on, as set out in Chapter 4. However in Chapter 2 I attempt to develop means of recognising just what groups are valid groups for the purpose of recognising claims, and what groups are not. In no case is recognition tied to particular governmental forms, or particular institutions. This may be sufficient for avoiding the danger of making assumptions about what nations should look like.

There is however, one difficulty with Tully's concern with the assumed equality of nations. As I noted in Chapter 2 of this thesis, 'nation' is used in a particular way by Will Kymlicka in particular. Tully uses 'nation' differently. By 'nation', he means a self-governing group, such as a North American aboriginal tribe, or presumably, a Maori iwi, or an Aboriginal mob or band. He also uses it for entities that have been recognised at some stage as self-governing entities, such as Scotland and Ireland. Tully (1995), p. 205. Strange Multiplicity was published before Tony Blair's Labour government in the United Kingdom initiated the referendums that led to some devolution of power to newly (re)constituted parliaments in Scotland and Wales.
be recognised, or has been recognised, as a cohesive, self-determining group with its own customs and habits. This is consistent with the discussion of ethnic minority groups in Chapter 2 of this thesis. However, even if a republican polity is happy to adopt this type of recognition of ethnic minority groups, as it should be given the republican understanding of vulnerability groups, it is not necessarily a form of recognition that will hold sway in the international community of the early twenty-first century. In other words, Tully's ideals with respect to nations may only work within extant nation states. Nevertheless, I think that Tully's main point is correct, that we should not withhold recognition just because a minority ethnic group does not fit into the model of a nation state in the twenty-first century. The republican response to multiculturalism does not employ this sort of criterion with respect to recognition. Hence Tully should not be concerned that the presumed equality of nations will affect recognition within republican polities.

6.7 Federalism

Tully's first proposal in respect of accommodating diversity is to adopt a form of federalism. It is not, however, a form of federalism in which each state or province enjoys the same relationship with the federal government. It is instead what Tully calls 'diverse federalism', with the relationship of each entity carefully tailored to the needs of the members of that entity. Thus one state might choose to delegate education and health care to the federal government, another might delegate only education, while a third might choose to retain both. In all cases, the decisions about which powers to delegate and which powers to retain are negotiated between the state or province and the federal government, in what becomes an on-going series of negotiations. In this way, the particular needs of varying ethnic groups can be met within an overarching federal structure. This contrasts with the more usual forms of federation, where each state or province enjoys the same sort of relationship with the federal government.

Pettit only briefly discusses federal structures in his account of republicanism. His account of republicanism thus seems to envisage a polity where all groups are
governed in the same way, and by the same authorities. However federalism, as he acknowledges, is an important device within the republican tradition. It is a sturdy tool in dispersing the power of governments, preventing any one government from exercising too much power over its citizens. The dispersion of power also acts as a check on the powers of governments at each level; federal governments may need to negotiate with states in order to pass some legislation, for example, changes to constitutions, and state legislation may be subject to federal review. The republican response to multiculturalism (see Chapter 4 of this thesis) makes a great deal of use of federal structures. It also employs differing forms of self-government and self-determination, each negotiated as a response to the needs of particular ethnic groups, within particular polities. In this respect, it is more radical than either Pettit's and Tully's proposals. Pettit's federalism seems to imply uniformity of federal and state structures, thus not accommodating the particular needs of varying ethnic groups. Tully's diverse federalism does not provide appropriate structures where self-government is simply not possible. Consider for example, the Maori in New Zealand. Maori are spread throughout New Zealand; they are not concentrated in specified areas. Thus while it is possible to devise structures for a limited degree of self-government for some tribes and sub-tribes of Maori, it is simply not possible to create one state for Maori, and one or more states for other ethnic groups within New Zealand. Hence other forms of government are required, such as delegation of some areas of government to Maori.

The question is whether such diverse federalism can work. There seems to be some evidence that it can. Graham Smith argues that asymmetrical federalism, that is, federalism where not all sub-federal units have the same powers nor the same relationship to the federal polity, can work, and indeed, has worked better than uniform federalism because it caters better to the distinctive needs of minority ethnic groups.79 Rainer Bauböck urges a similar approach to federalism, refining federal solutions to the problems of multiculturalism buy adding "provisions of non-territorial cultural rights, federal protection, and special exemptions or powers for groups that cannot form a federal polity."80

79 Smith (2000).
The proposals for self-government and self-determination in Chapter 4 of this thesis are consistent with Tully's diverse federalism. What they allow is a variety of means of accommodating diversity, rather than allowing only one way of doing so. That is, republicanism is sympathetic to diverse federalism, and diverse federalism is sympathetic to the republican response to issues of multiculturalism.

6.8 Constitution as process

Tully's final plea is for modern states to see constitutionalism as an on-going process, that involves negotiation and renegotiation on a constant basis, not to define once and for all how one group may exist within a polity, but as a means of finding a modus vivendi for all groups within a polity. Thus a constitution must be flexible, and open to change. Moreover, it must be open to change being negotiated in differing ways, to suit the groups that are taking part in negotiations.

Republicanism is a constitutional theory. Its primary good, freedom as non-domination, is created through constitutional means, thus ensuring that citizens not only have freedom, but a secure hold on freedom. The problem is that instead of permitting on-going negotiation, constitutions are often not amenable to change. Most written constitutions have stringent procedures for allowing change; for example, any change to the Australian constitution must be approved by a majority of voters and a majority of states, and changes to the American constitution must be approved by two-thirds of state legislatures within a limited time frame. These types of rules guard against willy-nilly change, or change that comes about as a result of populist action, but they also seem to entrench the power of the dominant group in a polity. Unwritten constitutions may be more amenable to change; witness the recent devolution of power to the Scottish and Welsh parliaments in the United Kingdom and the removal of the power of hereditary peers in the House of Lords, and in New Zealand, the on-going discussions about the Treaty of Waitangi. By the same token, because such constitutions rely heavily on custom and habit, and in particular the customs and habits of majority groups, they can be very hard to change, in part because there are often no specified mechanisms for change.
The types of measures outlined in Chapter 4 may provide the means whereby minority ethnic groups can continue to negotiate and renegotiate with the dominant group, and with other minority ethnic groups. In particular, the mechanisms for participation in government, whether through representation, self-determination or self-government, should enable minority ethnic groups to negotiate with the dominant group without at the same time losing their particular identity, or being forced to take on the modes of behaviour of the dominant group. These mechanisms for participation should also provide avenues for effecting changes in a constitution when needed. This may provide the on-going discussion and rediscussion, negotiation and renegotiation, that Tully envisages as constitution. That is, a republican constitution may provide exactly the sort of constitution as process that is needed in order to accommodate diversity.

6.9 Summary

Although at first glance it might seem that republicanism is particularly vulnerable to Tully's charges of stifling diversity, closer examination shows that this is not the case. The republican tradition may have embraced the uniformity that Tully says is inimical to diversity, but contemporary republican theory does not. In particular it does not embrace ideals of popular sovereignty that assume cultural homogeneity, nor does it assume that all citizens and all nations are equal, nor that the customs and habits of minority groups will eventually be lost as members of minority groups gradually become more and more like members of dominant groups. Republicanism does make use of European institutions, but this is a contingent matter, not a necessary one. Moreover, it is amenable to changing those institutions, or abandoning them, or adding to them as may be needed. In keeping with the republican tradition, while contemporary republicanism is driven by the ideal of freedom as non-domination, it is also intensely pragmatic, looking for solutions to particular problems. In the case of the increasing multiculturalism within contemporary polities, it has the capacity to be sufficiently flexible to accommodate diversity.
I am concerned that having subjected contemporary republicanism to the "critique from below", using Tully's *Strange Multiplicity* as a means of accessing this critique, republicanism will seem to have been presented as the cure to all ills. It seems to have an answer for every problem that may be thrown at it. However recall that at the beginning of this thesis I argued that the republican understanding of vulnerability groups made it particularly amenable to addressing the problems that are faced by individuals in virtue of their membership of groups. One of the attractions of republican theory is that it does have the capacity to deal with groups, as well as with individuals. I think that this chapter of this thesis, in conjunction with Chapter 4, demonstrates that this is a realistic claim to make about republicanism.
CHAPTER 7 - CONCLUSION

This is a summary of the main points of the argument presented in this thesis. Note that this summary does not include a summary of republican political theory per se - this belongs to a defence of republicanism itself rather than to an extended application of republican theory - nor does it include a detailed summary of the arguments and recommendations made in Chapter 4.

- Ethnic groups are marked out by differing histories, geographies and cultures.

- The social importance of ethnic groups can be seen based on the extent to which they manifest certain characteristics: ease of entry and exit; visibility; resources; multitracking; projectability.

- The republican account of freedom as non-domination is especially relevant to minority ethnic groups, particularly with respect to the idea of vulnerability groups. Once we know a person's ethnicity, we can make a reasonable prediction about the extent to which that person will be subject to domination. That is, ethnic groups can be vulnerability groups.

- A republican polity has a prima facie case to respond to the claims made by vulnerability groups.

- The claims made by ethnic minority groups can be understood in terms of vulnerability groups and freedom as non-domination.

- Republicanism offers a variety of possible responses to the claims made by ethnic minority groups.

- The response to claims made by ethnic minority groups will depend on the factual circumstances surrounding the claims.
• The republican response to issues of multiculturalism withstands criticism from other political theories, represented by Will Kymlicka's *Multicultural Citizenship* and Chandran Kukathas' *The Liberal Archipelago*.

• The republican response to issues of multiculturalism is preferable because it is based on a social account of freedom, that is, freedom as non-domination.

• The republican response to issues of multiculturalism is preferable because its account of freedom is realistic about the power relations between individuals, between individuals and groups, and between individuals and the state.

• The republican response to issues of multiculturalism is more practical because it is based on a consequentialist approach to realising its key value, freedom as non-domination, rather than a deontological approach.

• The republican response to issues of multiculturalism withstands criticism from ethnic minority groups, represented by James Tully's *Strange Multiplicity*.

• Republicanism is both flexible and pragmatic; it can accommodate the claims of ethnic minority groups.

At the start of this thesis, I made several claims. I claimed that the republican account of freedom ought to have particular appeal to minority groups. I claimed that the institutions of republicanism had a peculiar capacity to accommodate minority group claims. I claimed that the republican response to issues of multiculturalism was a robust response; it would withstand criticism from both above and below, that is, criticism from the perspective of other political theories, and criticism from the perspective of ethnic minority groups. I argued that if this thesis met these three claims, then two ends would have been achieved. First republicanism would have a valuable contribution to make to the ongoing discussion in political theory about issues of multiculturalism. Second, the viability of republicanism as a political theory would have been enhanced because it would have
survived testing against one of the major issues confronting both political theory and politics in the real world.

Republicanism makes a distinctive contribution to the ongoing conversation about issues of multiculturalism in three ways. (1) It has a distinctive account of freedom that is couched in terms that have a particular resonance for ethnic minority groups. (2) The republican account of freedom is particularly amenable to discussing issues relating to groups of people, in addition to individuals. (3) The institutions that instantiate republican freedom are flexible; they can be adapted to accommodate the needs of ethnic minority groups.

The republican account of freedom cashes out freedom as freedom from domination. A person enjoys freedom as non-domination if she is not subject to arbitrary, unrestrained interference. She is able to stand tall and look the other in the eye, secure in her status as a citizen. The language of domination and oppression is commonly used by ethnic minority groups; the claims they make are about being free to rule themselves, about being recognised and understood as enjoying their own distinctive ways of life, about enjoying standing equal to dominant groups in polities. Thus the language of freedom as non-domination has an affinity for ethnic minority groups. In Chapter 4, I demonstrated that the claims that ethnic minority groups make can be understood in terms of freedom as non-domination. Moreover by analysing the claims in terms of freedom as non-domination, republicanism has a principled commitment to meeting minority group claims, instead of a merely contingent commitment to meeting those claims.

Notions of groups, group identity and group membership are hard to accommodate within political theories that emphasise individual freedom. Republicanism offers an account of how it is that individuals may be subject to domination as members of particular groups. A person who has once been dominated may be dominated again, provided that she bears the same relevant markers of identity that marked her out as vulnerable to domination. And another person who bears the same relevant markers of identity as the first person may also be so marked as vulnerable to domination. Thus if one member of an ethnic minority group is vulnerable to domination in virtue of being a member of that ethnic minority
group, so too may be other members of that ethnic minority group. They are vulnerable to domination \textit{qua} members of the group. This account of how it is that individuals may be subject to domination in virtue of group membership is unique to republicanism; moreover, it is particularly useful in understanding how it is that groups of people may be subject to domination. The account of domination in relation to groups and members of groups developed in this thesis adds substantially to Pettit's account of republicanism.

Contemporary republicanism has commitments to the rule of law, checks and balances, and civic virtue. It also embraces counter majoritarianism, and a particular account of democracy as contestatory democracy. The institutions used to embody these commitments are flexible; in particular they can be used to accommodate the needs of ethnic minority groups. In Chapter 4, I addressed the claims of ethnic minority groups, and showed how the claims they make can be accommodated within the institutions of a republican polity. The institutions of checks and balances, and contestatory democracy in particular can be used to ensure that minority ethnic group voices are heard and considered; they are not drowned out by the much greater voices of the majority. Moreover, as well as working to eliminate domination between citizens in a polity, these institutions work to minimise or eliminate the possibility that the most powerful agent in a polity, that is, the government, does not itself become an agent of domination.

Having met the first two claims I made by developing a republican understanding of and response to the claims made by ethnic minority groups, I subjected that understanding and response to criticism from other political theories, and criticism from ethnic minority groups. I looked at the accounts of multiculturalism devised by two liberal theorists, Will Kymlicka and Chandran Kukathas. In each case, I demonstrated that the republican response was distinctive, and that it was robust when compared to other theories. Although neither theorist might be expected to agree with my analysis, I do not think that my arguments can simply be dismissed. That is, the republican response to issues of multiculturalism is a worthy alternative account to the accounts developed by these theorists.
In order to access criticism of the republican account from ethnic minority groups, I applied James Tully's critique of constitutionalism to my response to multiculturalism. In doing so, I was able to demonstrate that contemporary republicanism has sufficient flexibility to meet the problems that may be raised by ethnic minority groups. Moreover, contemporary republicanism is consistent with the proposals that Tully makes for accommodating diversity in contemporary societies. Thus republicanism also meets the criticism from below. This attempt to criticise an analysis of the issues of multiculturalism by considering what ethnic minority groups might say themselves is so far as I know, unique. Most political theorists compare their responses to what other political theorists have to say. However if any response is to be viable, then it must be accepted by all those to whom it is to apply. It is not enough to find that a response is theoretically viable; if it is to be viable, it must work in the real world as well. Although James Tully's critique of constitutionalism is perhaps only part of the criticism that ethnic minority groups might make, it is nevertheless a starting point for considering whether the republican response could be acceptable to ethnic minority groups. The republican response to issues of multiculturalism does withstand the critique from James Tully; accordingly it can be accepted as a viable response in the real world. Thus the republican account of multiculturalism does make a valuable contribution to the ongoing discussion in political theory about issues of multiculturalism, and it is viable as a political theory.
**BIBLIOGRAPHY**


