



Reworking Sandel's Republicanism

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REVIEW ESSAYS

REWORKING SANDEL'S REPUBLICANISM*

Democracy's Discontent: America in Search of a Public Philosophy. MICHAEL SANDEL. Cambridge: Harvard University Press, 1996. 417 p. Cloth \$24.95.

In *Democracy's Discontent*, Michael Sandel describes "America in search of a public philosophy," as the book's subtitle puts it. He documents the commitment to liberalism that he finds in the public life of the United States today, and he sets up a contrast between this philosophy and the older American commitment to republicanism.

The aim of the book is to rekindle enthusiasm for republicanism and to dampen the contemporary ardor for liberalism: for liberalism, that is, in the broad sense in which liberals may be conservative as well as progressive (5). The book attempts to achieve this end by taking us through developments in constitutional law and political economy where we can see liberal ideals taking over from republican ones and where we can gain a palpable sense of the loss involved in the retreat from republicanism.

I find Sandel's claims engaging—in particular, for the wealth of detail with which he documents them—and, on the whole, congenial. But in one crucial respect they leave me unhappy. They are worryingly indeterminate about the precise nature of America's lost republican ideals, about what those ideals would require of us as citizens, and about where they would lead governmental policy. Whenever the book focuses on such matters, it fades out before achieving a sharp level of resolution.

I raise this complaint in a spirit of construction, however, not despair. It turns out that, if Sandel will only go along with the characterization of republicanism which I have defended elsewhere¹—and which, in broad outline, Quentin Skinner² pioneered—then he can escape such charges of indeterminacy and still uphold most of the themes that he parades. If he would allow us to rework his narrative a little, restructuring it around this account of republicanism, he would be able to tell a story that has a much greater claim on our attention—so, at any rate, I shall argue.

* My thanks, for comments, to Quentin Skinner and James Tully.

¹ *Republicanism: A Theory of Freedom and Government* (New York: Oxford, 1997).

² "The Paradoxes of Political Liberty," *The Tanner Lectures on Human Values*, Volume xv (Salt Lake City: Utah UP, 1985), pp. 227-50.

My argument is in three sections: (I) I summarize the salient points in Sandel's original narrative, identifying the indeterminacies that worry me; (II) I present the elements in my account of republicanism which are relevant to that narrative; and (III) I rework the narrative around those elements, showing how the worrying indeterminacies are thereby removed.

I. SANDEL'S ORIGINAL NARRATIVE

Neglecting his own order of exposition, I think we can identify five salient themes in Sandel's book. These are:

- (1) American constitutional law has become rights based in practice and therefore neutral in aspiration: it aspires to impose no particular values.
- (2) This neutralism shows up also elsewhere: for example, in a preference-based pattern of economic policy making;
- (3) and in an interest-based way of conceptualizing and organizing politics.
- (4) In making a concern for civic virtue irrelevant, such developments contrast with older, republican ways of thinking.
- (5) We would do well to adopt such ways of thinking in preference to contemporary liberalism.

(1) The first theme, bearing on a rights-based interpretation of constitutional law, is the main topic of the first half of Sandel's book. He thinks of the rights-based approach as one which abstracts away from particular accounts of what is good and valuable and which tries to argue, independently of any particular conception of the good, that certain rights are sacrosanct. They have a claim on state and society which is prior to the claim of any alleged good.

Sandel argues that such a concern for rights was not particularly prominent in discussions around the time of the American War of Independence and the constitutional convention. "Only in the final week of the convention, as the proposed constitution was being prepared for submission to Congress, did George Mason of Virginia rise to say he 'wished the plan had been prefaced with a Bill of Rights'" (33). Of course, it is true that the anti-Federalists used the absence of a bill of rights as an argument against the Constitution. But this did not come of a commitment to a rights-based way of thinking, according to Sandel. "In opposing the Constitution, they sought to limit national power, and they found in the bill of rights the most popular, though not necessarily the most effective, way of doing so" (35). When James Madison proposed a bill of rights, then—the proposal, somewhat amended, was adopted in 1791—he did not do so out of a personal commitment to a rights-based ap-

proach. "This reversal reflected shrewd political strategy and astute political science" (37).

It was only in the aftermath of the Civil War, according to Sandel's story, that the rights-based approach began to come into its own. The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution were designed to ensure the emancipation and equal status of slaves. But the second of those measures had a further, incidental effect. "The Fourteenth Amendment also imposed on the states certain restrictions that would transform the role of the Supreme Court in protecting individual rights. It established that no state may 'abridge the privileges or immunities of citizens of the United States' or 'deprive any person of life, liberty, or property, without due process of law' or deny to any person 'the equal protection of the laws'" (39).

Sandel goes on to argue that this amendment empowered the Supreme Court to protect individual rights from state infringement and that, in doing so, it led to the appearance, over a number of generations, of a distinctively rights-based approach. Thus, when the famous *Lochner-versus-New York* judgment (1905) struck down a law prohibiting the employment of bakery employees for more than sixty hours per week, the Supreme Court used the words: "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment" (41).

The *Lochner* approach was given up by the Supreme Court in the period of the New Deal. But the way of thinking that it encapsulated became ever more entrenched, according to Sandel's account. Perhaps there was no right of the kind alleged in the *Lochner* judgment; perhaps the will of the democratic majority should be given sway in such cases. But there were other rights that should be protected, and protected even against democratic majorities. Those rights enjoyed precisely the status of trumps that the *Lochner* Court had given to the right to make employment contracts.

Which rights had that trumping status? Well, the reason that the right to make employment contracts of any kind was not a protected right, according to critics of the *Lochner* Court like Oliver Wendell Holmes, was that its claim to be a right was predicated on the truth of a particular economic philosophy (43, 46). So the rights that should be protected naturally came to be depicted as rights of such a fundamental kind that their acceptance did not presuppose any particular conception of the good life or the good society. This approach was established after World War II, when the Supreme Court came to represent the constitution as a framework of rights that is neutral among different ends.

Sandel goes on to illustrate the neutralism—the no-value neutralism, as he views it—that he finds in judgments of the Supreme Court over the past few decades. He sees it in the tendency to think of religious liberty, for example, not as freedom of conscience in an area of agreed and special importance for human beings, but as the freedom to choose on matters of personal preference: on matters about the importance of which the Court has no opinion (70). He sees it in development of the doctrine that the content of a given sort of speech is irrelevant to the question of whether the Court ought to protect the freedom of that kind of speech: there is no distinction that the Court is entitled to make between low-value and high-value expression (73, 90). He sees it in the shift from a civic to a voluntarist way of defending privacy. Under the civic defense, privacy should be protected insofar as it fosters social institutions—say, the institution of marriage—that are of agreed importance; under the voluntarist defense, privacy should be protected insofar as it enables individuals to exercise their autonomy in a way that, however unimportant or even obnoxious it may seem to most of us, is consistent with a similar exercise of autonomy on the part of others (94-100).

(2) I have given a lot of attention to the first theme in Sandel's book—that American constitutional law has become rights based and neutralist—mainly because he himself devotes all of the first part of his book to it. His second theme, asserting the presence of a similar no-value neutralism in American economic thinking, emerges in the second part of the book. But it emerges only at the end of a detailed historical discussion of how thinking about political economy developed in the United States over the past two hundred years. When it appears, it does not receive the same sort of documentation he gives to the first.

Sandel's historical discussion of the development of thinking about political economy is the most riveting part of the book. He documents a continuing concern, from the period of the Constitution down to the New Deal, with the effect of economic arrangements on the citizenry. The fear throughout this period is that such arrangements can subjugate workers and render them incapable of achieving the independence and civic virtue that republicanism has always looked for in citizens.

Should there be widespread manufacturing industry in America—this, as distinct from an economy of independent farmers—given the subject status of industrial workers? No, thought Jefferson in the early days of the republic: "Dependence begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the de-

signs of ambition" (144). But did not the Lowell industrial model of the Jacksonian era offer some hope? Not according to protestors in 1834 who objected to "that haughty, overbearing disposition, that purse-proud insolence" that they found in their employers (153). The position of industrial workers, as it was seen by artisan republicans, was often no better than that of southern slaves: they were "wage slaves" rather than "chattel slaves" but the dependence they suffered was nonetheless real for that (172-74).

Still, was there not a basis for consolation in the fact that industrial workers, as free laborers, could aspire to owning and working land of their own in an expanding America? There was, according to the proponents of the free-labor movement in the 1850s and 1860s. But, alas, the free soil rapidly ran out, and, by 1870, two thirds of productively engaged Americans were wage earners (183-84). The Knights of Labor articulated a widely felt discontent about the standing of wage earners but the failure of their own attempts to establish cooperatives meant that the discontent was unrelieved. As they saw it, workers could never become self-supporting and could not hope to enjoy the proper status of a citizen: "no man whose bread and that of his children are dependent on the will of any other man, or who has no interest in his work except to please an employer, fulfills these conditions; a farmer of his own land does fulfill them" (187).

The upshot, as Sandel tells his story, is that with no hope of a republican reconciliation with the nature and conditions of industrial employment, people generally moved over to a different conception of economic arrangements. They ceased to worry in the name of republican values about the effects of such arrangements. They consoled themselves with the thought—ultimately, the value-neutral thought—that, if workers voluntarily enter into employment relations then, however demeaning those relations may be, they presumably answer to the preferences of the workers. This neutralism in economic thinking reached its apogee in the rise of consumerism. The best economic arrangements are not those which satisfy some pre-given conception of the good, such as that which republicanism offers; according to the consumerist credo, they are the arrangements that best answer to the preferences that people reveal in their consumption choices, including their choice of job. "Instead of asking how to elevate or improve or restrain people's preferences, it asks how best—most fully, or fairly, or efficiently—to satisfy them" (225). The lesson is that "government should not form or revise, or for that matter even judge, the interests and ends its citizens espouse; rather, it should enable them to pursue these interests and

ends, whatever they may be, consistent with a similar liberty for others" (267).

(3) So much for the no-value neutralism that Sandel finds in contemporary American thinking about constitutional law and the political economy. His third theme is very closely related, as I see it; indeed, it is so closely related that it barely receives separate mention. Not only is America neutralist in its attitude to constitutional law and the political economy, according to this third theme, it is also neutralist in its attitude to politics. There is no longer an assumption, as there used to be in republican days (5, 166), that politics is about the deliberative identification and cooperative pursuit of certain common goods: the plural reference to "common goods" is appropriate, because people may not agree on any unitary account of the common good (320). Rather, politics is conceptualized as a process of competitive bargaining among different interest groups, which involves no attempt to evaluate the propriety of any of the interests represented.

This theme is very prominent in the work of another self-described republican, Cass R. Sunstein,³ and it is remarkable that Sandel makes no reference to this fact. But it is clear that he shares Sunstein's sense that interest-group politics represents a betrayal of American republican ideals, one that parallels the betrayal that he documents in rights-based constitutional law and in a preference-based political economy. Thus, he rightly castigates "modern-day interest-group pluralists" for invoking the name of Madison. "For Madison, the reason for admitting interests into the system was not to govern by them but to disempower them, to play them to a draw, so that disinterested statesmen might govern unhindered by them" (131).

(4) We come finally to the theme in regard to which I find fault with Sandel's book and believe that his narrative needs reworking. He counterpoints the neutralist tradition described in his first three themes with the republican approach that he takes—surely rightly—to have marked earlier stages, in particular the founding stage, of American public life. The main point of contrast is predictable. The public philosophy of today—"the assumptions about citizenship and freedom that inform our public life" (4)—eschews all values in favor of a no-value neutralism. The earlier public philosophy looked

³ *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge: Harvard, 1990); *The Partial Constitution* (Cambridge: Harvard, 1993); *Democracy and the Problem of Free Speech* (New York: Free Press, 1993); "The Enduring Legacy of Republicanism," in S.E. Elkin and K.E. Soltan, eds., *A New Constitutionalism: Designing Political Institutions for a Good Society* (Chicago: University Press, 1993).

unashamedly for a certain sort of virtuous citizenry and insisted that social and political institutions should be designed so as to form people in that virtuous mould: it ascribed a committed, formative role to those institutions, not the role of a neutral referee (6).

At this point, we naturally wait on more: we want to be told exactly why the republican philosophy required a virtuous citizenry; exactly what sort of virtue it recommended; and exactly how the institutions of government were supposed to facilitate that civic virtue and advance republican ideals. We want to be told more, in other words, on three crucial issues: first, the nature of the republican ideals that mandate civic virtue; second, the nature of the virtue that they mandate; and third, the nature of the institutions and programs whereby that virtue is to be encouraged and those ideals promoted. Sandel does tell us something more about these things, though only in a series of short comments that are distributed throughout the book. But what he tells us falls well short of a satisfying account.

What, according to Sandel, are the central republican ideals? The ultimate ideal, we are told, is republican freedom or liberty as distinct from liberal freedom or liberty (4). So what is this republican freedom? In most of his utterances, Sandel suggests that he follows the “strong version of the republican ideal” (26), according to which being free essentially—he would say, “intrinsically”—involves “sharing in self-government” (9). “Republican political theory teaches that to be free is to share in governing a political community that controls its own fate” (274). He distinguishes this strong version from “more modest versions of the republican ideal,” according to which the relation between self-government and freedom is instrumental rather than definitional. He appears to be well disposed to such versions of the ideal insofar as they agree with the strong version that, even if instrumental, the relationship between self-government and liberty is nonetheless “internal,” but he does not explain what an internal connection involves (26). I shall return to this theme later, but for the moment I simply note that his own way of speaking clearly suggests that he thinks of liberty, in the “strong” republican manner, as being definitionally tied up with participation in government.

To move to the second issue, what sort of virtue does liberty in this sense mandate? What does the republican “conception of the good society” as a self-governing republic require of its members (25)? The answer given, at its most explicit, is this: “republican theory does not take people’s existing preferences, whatever they may be, and try to satisfy them. It seeks instead to cultivate in citizens the qualities of

character necessary to the common good of self-government. Insofar as certain dispositions, attachments, and commitments are essential to the realization of self-government, republican politics regards moral character as a public, not a private, concern" (25). What qualities of character are to be cultivated? Those which are necessary for people to be able to deliberate fruitfully about the common good and to help shape the society's destiny. We are told that they include "a knowledge of public affairs and also a sense of belonging, a concern for the whole, a moral bond with the community" (5).

So much for the nature of the republican ideal, according to Sandel, and the nature of the civic virtue it requires. What, finally, of the institutions and programs whereby such virtue is to be facilitated and the republican ideal promoted? The institutions are not to be exclusive of the nonmainstream, the nonmale, and the nonpropertied, in the manner of premodern republics (318-19); and they are not to be invasive and homogenizing, for Sandel's republican hero is Alexis de Tocqueville, not Jean-Jacques Rousseau. "Unlike Rousseau's unitary vision, the republican politics Tocqueville describes is more clamorous than consensual. It does not despise differentiation. Instead of collapsing the space between persons, it fills this space with public institutions that gather people together in various capacities, that both separate and relate them. These institutions include the townships, schools, religions, and virtue-sustaining occupations that form the 'character of mind' and 'habits of the heart' a democratic republic requires" (320-21).

These remarks on the sorts of republican institutions he seeks do not yet tell us in which direction Sandel thinks his ideal state will go in important matters of public policy. But he offers a number of comments, often in passing, that indicate the drift of his expectations. Thus, he is in favor of greater equality: "The republican tradition teaches that severe inequality undermines freedom by corrupting the character of both rich and poor and destroying the commonality necessary to self-government" (330). While he has sympathy for those communal conservatives who see a greater role for morals in public life (309), he clearly thinks that bringing issues of morality into politics will not necessarily turn back the clock on a range of social issues. He suggests that what is wrong with the liberal tolerance of homosexuality, for example, is not that it runs counter to the moralistic views of many and is indeed a form of tolerance, but that it does not directly challenge those moralistic views, as presumably a republican approach would do: "unless those views can be plausibly addressed, even a court ruling in their favor is unlikely to win for ho-

mosexuals more than a thin and fragile toleration" (107). More generally, he argues that going republican does not mean giving up on individual rights; it means providing them with a new foundation: "Rights can be defended on a number of grounds, including the grounds that respecting certain rights is a way of cultivating civic virtue or of encouraging among citizens certain worthy practices or beliefs or qualities of character" (290).

I am unhappy, as I said, with Sandel's comments on these three issues: the nature of the ideal that republicans espouse, the nature of the civic virtue it requires, and the nature of the public institutions and programs that it would support. Apart from leaving the connection between self-government and liberty underspecified—talk of an internal connection is just not good enough—he fails to explain how self-government is supposed to be implemented, especially in a society as complex and large as the United States today; and he fails to say anything about how self-government is going to be made proof against what Jefferson himself described as the tyranny of the majority. When he goes on to say that republican liberty and self-government require civic virtue in the citizenry, he remains studiously uncommitted on what the content of that virtue is supposed to be; we are referred, vaguely, to the qualities essential for participants in self-government. This worrying indeterminacy about republican freedom and republican virtue carries over into a similar, breezy vagueness about the institutions and programs that such freedom and virtue are going to support or, when examples are given, about why they are going to support them. How can Sandel be sure, for example, that the virtuous citizens of his self-governing republic will really be tolerant of homosexuality? We are never told.

(5) The fifth and final theme that I mentioned in describing Sandel's book is that we should give up the liberalism that constitutes America's current public philosophy and endorse instead the republicanism that emerges in his narrative. I shall not say much about this claim except to note that it is advanced, not by showing the merits of republicanism, but rather by displaying the weakness of the liberal alternative. In his opening chapter, Sandel considers three defenses of contemporary liberalism: a utilitarian defense; a Kantian defense; and a defense on minimal, pragmatic grounds. He argues against utilitarianism that it does not respect differences among persons; against Kantianism, that it does not enable us to vindicate particularistic, communal attachments; and against minimalism, that pragmatic resolutions are often just not available: moral and religious convictions cannot always be put aside, as in the abor-

tion debate, and putting them aside in other cases may erode “the moral and civic resources necessary to self-government” (23).

You cannot beat something with nothing and what worries me about this way of arguing for republicanism is that it is essentially negative. Perhaps that is as it has to be, given the vagueness that I have alleged in Sandel’s characterization of republicanism. But it would have been much more satisfying had we been given a less elusive account of the approach and a more positive argument in its favor.

II. ELEMENTS FOR A REWORKING OF THE NARRATIVE

I am going to present three elements in my own account of republicanism and then show, in the section following, how Sandel’s story can be reworked around those elements and how the problems raised for the story can be thereby removed or at least diminished. The first of my three elements bears on the definition of republican liberty, the second on the relationship between liberty in that sense and the institutions—including institutions of self-government—that support it, and the third on the relationship between those institutions and civic norms and virtues.

(1) *The definition of republican liberty.* When Sandel goes along with the view of republican liberty which holds that “to be free to share in governing a political community that controls its own fate” (202, 274), then he follows the neo-Athenian reading of republicanism popularized in recent times by Hannah Arendt; indeed, he refers to Aristotle and Arendt as the sources of the view (355). That reading associates republicanism with what Benjamin Constant,⁴ early in the last century, called the liberty of the ancients and it lets liberalism claim the liberty of the moderns: this is liberty in the sense of being let alone, liberty as noninterference. Where liberalism would allow each person full control over her own domain of action, within limits dictated by the need for social coordination, republicanism on this account would allow each person partial control over the domain of everyone’s action: the sort of control allegedly exercised by the citizens of classical Athens. Where liberal freedom consists in having nearly global control over a small domain, republican freedom would consist in having a small degree of control over a global domain: that of what everybody does.

Sandel allows that for Niccolò Machiavelli, as Skinner⁵ has argued, most people pursue freedom in a sense that does not give them a share in government: “A small part of them wishes to be free in or-

⁴ *Constant: Political Writings*, B. Fontana, ed. (New York: Cambridge, 1988).

⁵ “Machiavelli on the Maintenance of Liberty,” *Politics*, xviii (1983): 3-15.

der to rule; but all the others, who are countless, wish freedom in order to live in security.”⁶ He happily concedes that Madison was primarily concerned to guard against “elective despotism” (36)—hardly the concern of someone who thought of freedom as sharing in self-government—and that he and the other framers of the Constitution pursued a “revision of classical republican assumptions” (130), as Sandel thinks of those assumptions. But when he suggests that the doctrines of Machiavelli and Madison are just variations on his own neo-Athenian themes, then I think he is quite wrong. What we find in Machiavelli and Madison—and what we will find in the long tradition of republicanism in the period in between⁷—is a distinct neo-Roman republicanism, Ciceronian rather than Aristotelian in inspiration. This is the account of republicanism, in particular of republican freedom, which I wish to introduce as the first element in a reworking of Sandel’s story.

The republican tradition from Machiavelli to Madison saw the Roman constitution through the eyes of Polybius and saw the practice of Roman politics through the eyes of Livy, Plutarch, Sallust, Tacitus, and, of course, Cicero himself. These republicans pictured Athens, rightly or wrongly, in the critical terms suggested by Polybius: as a ship without a captain, buffeted by the storms of popular opinion. They traced the Athenian problem to excessive reliance on pure democracy and saw the Roman republic, by contrast, as a constitution in which government was built on a democratic foundation but was better devised to guard against problems of faction and demagoguery and tyranny. The principal devices they celebrated in Rome were the dispersion of democratic power across different assemblies, adherence to a more or less strict rule of law, election to public office, limitation on the tenure of public office, rotation of offices among the citizenry, and the like. These devices provided the checks and balances whereby a republic might hope to constitute a government that was at once popular and stable.⁸

The key idea in this neo-Roman tradition is republican freedom, for it is the freedom ideal that provides the argument, ultimately, for recourse to such institutions. Republican freedom, however, is distinct both from liberty as noninterference and, Constant notwith-

⁶ Machiavelli, *The Chief Works and Others*, Allan Gilbert, trans. (Durham, NC: Duke, 1965), p. 204.

⁷ See M.N.S. Sellers, *American Republicanism: Roman Ideology in the United States Constitution* (New York: University Press, 1994); Skinner, *Liberty before Liberalism* (New York: Cambridge, 1997); and my *Republicanism*.

⁸ See Sellers on the themes of this paragraph.

standing, from liberty as democratic participation.⁹ It is a negative form of liberty, like the liberal ideal. But it requires something other than the absence of interference. It requires the absence of dependency upon the will of another and the absence of vulnerability to interference at the will of that other: it requires the absence of mastery or domination by any other. The antonym of freedom for the republican conception is not restraint as such but rather slavery and, more generally, any position of subjection. A person is free, and a person acts freely, just to the extent that she is not exposed, in the way a slave is exposed, to the arbitrary interference of another: to the sort of interference that only has to track the *arbitrium*—the will or judgment—of the interfering power.

Freedom as nondomination differs in two striking ways from freedom as noninterference. The conceptions will agree that someone who is subject both to domination and to interference is unfree and that someone who is subject to neither domination nor interference is free. Where they differ is in the judgments made about those who are dominated but not actually interfered with—say, the subjects of a kindly master—and about those who are not dominated but are interfered with—say, the citizens who are bound by a regime of law that, as they themselves see it, tracks their common interests and ideas and is the contrary of arbitrary interference.

The sort of republicanism associated with the English commonwealthman tradition, ultimately the sort of republicanism shared by the American founders, was forthright on both of these themes. The commonwealthmen insisted, first of all, that being subject to another in the manner of a slave made a person unfree, even if the other was not disposed to interfere. Algernon Sydney¹⁰ could write in the late 1600s, for example, that “he is a slave who serves the best and gentlest man in the world, as well as he who serves the worst” (*ibid.*, p. 441). In the century following, Richard Price¹¹ could add: “Individuals in private life, while held under the power of masters, cannot be denominated free, however equitably and kindly they may be treated” (*ibid.*, pp. 77-78).

The commonwealthmen also insisted, to move to the second point of contrast with liberalism, that insofar as a rule of law was genuinely nonarbitrary—insofar as it tracked the interests and ideas of citi-

⁹ See my *Republicanism* and Skinner’s *Liberty before Liberalism*.

¹⁰ *Discourses concerning Government*, T.G. West, ed. (Indianapolis: Liberty Classics, 1990).

¹¹ *Political Writings*, D.O. Thomas, ed. (New York: Cambridge, 1991).

zens—to that extent it did not compromise their liberty. Not only did it protect people against a compromise of their liberty by others, it did not itself impose the sort of compromise that would have to be justified by such protection. John Locke,¹² the hero of eighteenth-century American republicans, is a good example of this attitude. He argues for a “freedom from Absolute, Arbitrary Power” as the essential thing, and the thing that marks the contrast with slavery. That leads him to represent law as in no way a restriction on freedom: “that ill deserves the Name of Confinement which serves to hedge us in only from Bogs and Precipices...the end of Law is not to abolish or restrain, but to preserve and enlarge Freedom” (*ibid.*, pp. 325, 348). Price again echoes this theme when he writes: “Just government...does not infringe liberty, but establishes it. It does not take away the rights of mankind but protect[s] and confirm[s] them” (*op. cit.*, p. 81).

(2) *Liberty and republican institutions.* So much for the first of the three elements I want to introduce. The second bears on the relationship between liberty in the sense of nondomination and those public institutions through which such liberty is secured for the citizens of an ideal republic. The institutions that were taken to be required for the promotion of republican liberty are various, though they are almost all of a Roman provenance. They include institutions like a rule of law that governs everyone alike—even a monarch, if there is a monarchy; a dispersion of the powers given to those who make and run the law among many hands; a restriction on the tenure with which public office is held; a dispensation that allows for public discussion of important issues, for public deliberation over how to resolve them, and for a degree of public participation in their resolution; an arrangement for the appointment of certain officers by a system of voting or lottery or a mixture of both; and so on. The second element I want to introduce bears on how such institutions, assuming that there is a uniquely appropriate set for any social situation, are going to relate to the freedom of the citizens whom they are meant to support. Since the institutions were usually taken to include some measures of participatory government, this element bears in part on how participatory institutions are going to relate to the freedom of participating citizens.

Sandel is right that in the republican, even in the neo-Roman republican, way of thinking there is an intimate connection envisaged between the institutions that support freedom—between the constitution of the free society—and the freedom that they support. It is

¹² *Two Treatises of Government*, Peter Laslett, ed. (New York: Mentor, 1965).

this connection, for example, that allows Charles de Secondat Montesquieu¹³—in many ways, a covert republican—to speak now of freedom in the constitution, now of freedom in the citizen. But the connection is not the definitional connection that relates freedom to participatory institutions when it is said, as Sandel says, that to be free is to share in the self-government of a community. It is also not the causal connection that relates freedom as noninterference to certain protective institutions: the connection whereby the presence of those institutions comes to inhibit potential offenders and thereby to have the causal effect of enhancing the freedom as noninterference of others. The connection between freedom as nondomination and relevant institutions is constitutive, as I have put it, and not definitional or causal (*op. cit.*, pp. 106-09).

Consider the connection between the antibodies that make someone immune to a certain disease and that immunity itself. The connection is not definitional, since immunity to the disease can be defined and understood without reference to the antibodies. But neither is the connection causal, for it is not as if the immunity is something distinct from the antibodies; being immune, for the person in question, comes to nothing more and nothing less than having those antibodies. The antibodies do not cause the immunity, as we say, they constitute it.

The relationship between people's freedom as nondomination and the institutions that would support that freedom in the ideal republic—assuming that an ideal republic is attainable—is going to be constitutive in the same sense. If freedom is nondomination, if freedom consists in the status of being more or less immune to arbitrary interference by others, then the institutions that ensure that immunity will relate to it neither in a definitional, nor in a causal way. Not in a definitional way, because the understanding and definition of nondomination will not require a reference to the precise institutions that work in the circumstances on hand; and not in a causal way, because the relationship between the institutions in question and the immunity to arbitrary interference that they confer will be exactly like the relationship between the antibodies in our earlier example and the immunity that they give against a certain disease. If freedom is noninterference, then freedom is causally brought about by suitably protective and empowering institutions: it is a result of the inhibiting effect of the protection and empowerment, now on

¹³ *The Spirit of the Laws*, A.M. Cohler, B.C. Miller, and H.S. Stone, eds. and trans. (New York: Cambridge, 1989), esp. p. 187.

this potential offender, now on that. If freedom is nondomination, then freedom just is the protected and empowered status—the invulnerability or nondomination—enjoyed in the presence of the institutions, and it exists prior to any potential offenders actually coming to be inhibited.

(3) *Liberty and republican virtue.* We have seen that republican freedom just is nondomination and that, if freedom in that sense is enjoyed by citizens, then it is constituted by the institutions that support it, not merely causally related to those institutions. The third element that I want to add is that, this being the case, we can also see a close connection between republican freedom and certain forms of civic virtue.

The connection comes of the fact, recognized throughout the republican tradition, that while the effective rule of law may confer freedom in the sense of nondomination, the laws themselves will only be effective in a society where they are supported by actively sustained norms. Thus, Machiavelli says: “just as good morals, if they are to be maintained, have need of the laws, so the laws, if they are to be observed, have need of good morals” (*op. cit.*, p. 241).¹⁴ One argument for why the laws have need of good morals or customs—*buoni costumi*—comes in two stages. The first is that the laws will be effective in protecting and empowering each against others only insofar as the laws command universal allegiance, in particular allegiance among those in power. The second is that the laws will enjoy this command only insofar as people are normatively committed to the laws, not just committed to them for fear of the penalty attending noncompliance or underperformance.¹⁵ The background thought here, supported by contemporary criminology, is that fear of penalty is not a very effective motive, on its own, in binding people to the law.

A second argument why laws have need of morals—have need of civic virtue or civility—is that, if the laws are effectively to track people’s changing ideas and interests, and if they are to be guaranteed to remain nondominating, then there must be enough civic virtue in the society to ensure that those ideas and interests will be reliably represented in the forums of law making and the regime of law made to answer to them. Think of the civic virtue evident in the environmental movement, or the women’s movement, or the civil-rights

¹⁴ See also my *Republicanism*, ch. 8.

¹⁵ Jean-Fabien Spitz, *La Liberté Politique* (Paris: Presses Universitaires de France, 1995).

movement. Think of the virtue evident in people's being willing to give time to public affairs, to stand for office, and to exercise office punctiliously. Were such virtue not available in a society, then there would be no hope of keeping the law in line with people's attitudes and in ensuring that they remain the masters of the law, not just its subjects. Adam Ferguson¹⁶ was firmly of the view that the rule of law in Britain of the eighteenth century was a great force for republican freedom. But he emphasized the bedrock of virtue on which it must rest if it is to have that effect: "it requires a fabric no less than the whole political constitution of Great Britain, a spirit no less than the refractory and turbulent zeal of this fortunate people, to secure it" (*ibid.*, p. 167).

A third reason why the rule of law depends on a regime of civic virtue is that there is little hope of ensuring compliance among ordinary people, or among public officials, unless people generally are prepared to remain vigilant in their inspection of one another and in their readiness to rebuke or report offenses. The price of liberty, in the old adage, is eternal vigilance, in particular vigilance in looking at those in power and in challenging, where necessary, their claims and initiatives. A paradox worth noting is that the more people remain ready to rebuke and report in the manner envisaged, the less occasion there may be for their having to do that. To the extent that people know they are all disposed in this way, they each know that others will think badly of them for offending against the law and think well of them for complying with it. To that extent, they will become motivated toward compliance by the desire to avoid shame and win renown. Here is a familiar republican theme: where virtue fails, the saving vice may be a love of glory.

This case for the necessity of virtue in republicanism, it is worth mentioning, ought also to be available to liberals who think of freedom as noninterference, not as nondomination, and who see the institutions designed to support freedom as causally rather than constitutively related to it. But as a matter of fact, the emphasis on virtue does distinguish the republican from the liberal tradition. This is probably because the emphasis in liberalism on minimizing interference, including the interference of the state, has tended to argue against any moralistic interventions by the state as well as against interference proper. The ideal model of government for liberals has often been the government of the invisible hand that is al-

¹⁶ *An Essay on the History of Civil Society* (Edinburgh: Millar and Caddel, 1767; reprinted, New York: Garland, 1971).

legedly exercised by the free market. The market takes people's preferences as given—it is not designed to be formative, in Sandel's phrase—and arranges things so that, if people pursue their own individual preference satisfaction, there will still be a collectively satisfactory result: people will sell their services and their products at the competitive price. The holy grail of liberal politics has always been a mode of organizing government which would enable the state to be equally indifferent about the supply of virtue. The goal, to connect up with Sandel's main theme, has been a no-value neutralism.

III. SANDEL'S REWORKED NARRATIVE

Suppose we now go back to Sandel's narrative and read it under the assumption that the three ideas introduced in the last section are endorsed. What effect is this going to have on that narrative? I want to suggest that the reworking required will have little or no impact on the first three themes in Sandel's story and that, repairing the indeterminacies noted, it will make for a considerable improvement in the fourth and fifth. I shall first consider how it can make for that improvement in the last two themes and then go back to look at how it sustains the first three themes.

(1) *Sandel's fourth and fifth themes.* The indeterminacies that worried me in Sandel's account of America's lost republicanism bear on the nature of republican ideals, the nature of the civic virtue they require, and the nature of the institutions and programs that those ideals, and that virtue, would mandate. As for the nature of republican ideals, a reworking around the elements I introduced would say, first, that the ultimate ideal is freedom as nondomination for the citizens of the republic, where citizenship is an inclusive category; and, second, that the freedom of citizens is constitutively tied to those participatory and other institutions whereby it is supported: the invulnerability of citizens to arbitrary interference, insofar as that ideal has been achieved, is constituted by their being embedded in such protective and empowering practices. There is no secret about the nature or attraction of republican freedom, under this account, and there is no mystery about how it can be constituted for citizens by the public institutions under which they live. So far it should be manifest, then, that we have attained a clarity that is missing in Sandel's own formulations.

As for the nature of the civic virtue required by republican ideals, that also becomes unmysterious under the proposed reworking of Sandel's narrative. We saw in the last section that, as republican wisdom has it, there are many ways in which the participatory and other institutions required to support republican freedom are going to de-

pend for their existence and effectiveness on a supply of various sorts of virtue among the citizenry. Allegiance to and compliance with the practices in question; readiness to assume a public profile, even a public office, and to try and ensure that the practices continue to answer to the ideas or interests of relevant parts of the society; the vigilance and courage required to ensure that those who disrespect the practices, particularly those in power who do so, are called to account. These are salient examples of the sorts of civic virtue that republican institutions are bound to require—again, no vagueness, and no mystery.

What, finally, of the direction in which republican ideals and republican virtue must be expected to take the state? What of the institutions and programs they would support? Under Sandel's original narrative, we are offered little or no reason to identify any particular direction as presumptively attractive. Sandel himself is clearly of a decentralist, a reformist, and a progressivist inclination: he favors Tocqueville's mediating institutions over Rousseau's single assembly; he thinks that inequality should be reduced; and he believes that a republic would be tolerant of homosexuality and, more generally, would be inclined to uphold individual rights. But his remarks on these matters of policy are few and far between and they often seem to come of independent commitments, not of any firm sense of what republicanism requires.

As with the other indeterminacies, I believe that this all changes utterly—but still, from Sandel's point of view, congenially—under the reworking I propose. When Sandel sets up republicanism against liberalism—that is, against no-value neutralism—then it appears that he espouses a nonneutralism, welcoming into the public forum all the discontented, moralistic voices that are currently marginalized; that is inherent in the prospect of a self-governing community where nothing is taken off the agenda in the name of neutrality. Thus, we are naturally left in some uncertainty about where republican government is likely to lead and in some doubt about Sandel's belief that it will lead in a decentralist, reformist, or progressivist direction. But such indeterminacy is banished once it is clear, as under the proposed reworking of Sandel, that while republicanism rejects no-value neutralism, it does this because of explicitly giving one overall value—freedom as nondomination—a guiding role for law and government, not because of wanting to let loose the dogs of moralistic enthusiasm.

If liberalism represents no-value neutralism, then republicanism represents what we might call a *shared-value neutralism*. The idea long

embraced in the republican tradition is that everyone is bound to cherish the prospect of freedom as nondomination for themselves and so, forced to universalize, are bound to embrace the neutral value of freedom as a very important good. But though it is a good that ought to appeal from almost every perspective, freedom as nondomination is something that can be promoted for all only on the basis of collective, political action. So the public institutions of a good society ought to be designed with a view to advancing this value, if necessary in the teeth of opposition from more sectarian or sectional commitments.¹⁷ What I think of as the republicanism of the commonwealthman tradition has been described, for this reason, as an old liberalism that stands in stark opposition to the new: as a shared-value, rather than a no-value, neutralism.¹⁸

Once we see republicanism as committed to the promotion of the ecumenical value of nondomination, but not independently associated with any particular value position, then it becomes possible, in the light of empirical assumptions, to work systematically at elaborating the direction in which a republican government ought to go. Domination is a threat in our society on two broad fronts: in virtue of the private power or *dominium* that some individuals or organizations or groups exercise over others; and in virtue of the public power or *imperium* assumed by those in government itself. We can investigate where republicanism is likely to lead by looking at the measures of protection, empowerment, redistribution, and recognition that are required for combatting *dominium*, and by reviewing the different controls, the different checks and balances, that are going to be necessary if the *imperium* of government itself is not to represent a dominating presence in our lives. There is a sensible research program here and, though the research clearly remains to be done, still there can be no serious complaint that the policy direction of republicanism lies shrouded in permanent mist.

So much for the way in which we can draw on the elements introduced in the last section and rework Sandel's narrative so that the indeterminacies I identified are repaired. This done, the fourth theme in that narrative assumes a new character: the republicanism to which he would direct us takes a firmer and somewhat different shape. The effect of the change is immediately apparent, as we turn to the fifth theme: the recommendation that we espouse republican-

¹⁷ See my *Republicanism*, ch. 3.

¹⁸ Christine Korsgaard, "Commentary on Cohen and Sen," in M.C. Nussbaum and A. Sen, eds., *The Quality of Life* (New York: Oxford, 1993).

ism as an alternative to our current liberalism. There is no longer any need, with the doctrine we now discern, to rest our case for embracing it on the revulsion that we should allegedly feel for the liberal alternative. There is clearly much to be said for the value of freedom as nondomination—much of it continuous with the things that are often said in support of liberalism—and there is room for exploring the advantages that argue for a republican as distinct from a liberal public philosophy.

(2) *Sandel's first three themes.* What I recommend is a reworking of Sandel's narrative, not, so I claim, a complete rewrite. But if I am to bear out that claim, then I need to show that the changes I have proposed in thinking about republicanism are consistent with the story that he tells in the first three themes identified earlier: in effect, with the story that most of his book is given to elaborating. I turn to that topic in concluding.

His first theme is that American constitutional law has become rights based in a way in which it was not originally so and in a way in which it would not remain so under a republican renaissance. There is nothing in my proposed account of republicanism that undermines the historical story that Sandel tells; for all that that account implies, the story may be fundamentally correct. But would my account of republicanism sustain his sense that the no-value neutralist mode of constitutional thinking represents an infidelity to America's founding republicanism?

I say that it would, for reasons that are many and manifest. Take his remarks on the civic as distinct from the voluntarist approach to religious freedom, to freedom of speech, and to privacy. The fact that religion is an area of presumptive importance in social life, giving people an identity that is significant for them, implies that the state should protect people in this area in a special way, not just by way of honoring personal preference; for any exposure in this area to arbitrary interference on the part of others is going to have a very serious effect on people's freedom as nondomination. Again, the fact that some speech is essential to making one's voice heard in the public forum, and essential to seeing that the public authorities continue to track the interests and ideas of those in one's quarter, means that that speech calls for protection on quite a different basis from other sorts of speech; indeed, other sorts of speech, such as that associated with pornography or even burning the flag, may be thought detrimental to others' freedom as nondomination, or to the infrastructure of that freedom, and may not call for protection at all. Or, finally, the fact that privacy in some matters is an essential pro-

tection against certain forms of domination, and privacy in other matters not so essential, means that privacy will not be defended on a blanket, voluntarist basis but in proportion to the way in which it serves the ultimate republican cause.

Take a particular issue like that which is raised by homosexuality, therefore, and consider the way in which the reworked version of Sandel's republicanism would support toleration. The support would not be of the liberal, neutralist kind that he criticizes: the kind that would say it is not the state's job to impose community values in a case like this and so that the neutral state has to stay its hand and respect the privacy of practicing homosexuals (106-07). The republican state would argue for toleration of homosexual practices on the basis of the shared value of freedom as nondomination and would argue with those of more moralistic views that their opposition is inconsistent with espousal of that central ideal. Thus, it would address those views, as Sandel requires, and would stand some chance of winning for homosexuals more than the "thin and fragile toleration" (107) which is all that liberalism can offer.

Take again an issue like that of whether abortion ought to be available to those women who request it. Sandel is forthright in his claim that the neutralist approach is just no good here as a basis for toleration: that in face of the religious values that people so passionately invoke on the other side, the case for toleration cannot be effectively made in a neutralist key; the only effective route will be to fight fire with fire, and to combat value with value (21). Sandel does not say where he thinks republicanism would lead on this issue—in my mind, a worrying silence—but it is worth noting that on the reworked republicanism I would have him endorse, the case for toleration can be defended in the manner he seeks. It is clear that making abortion unavailable would mean that women are dominated by the state—they are subject to a sort of interference that is not forced to track their interests and ideas—and it would clearly expose women to other forms of domination by partners and families and communities. What, however, of the fetus? Here, I must be controversial. I simply record that the most compelling view, as I see things, is that until the fetus is viable, it cannot assume the place of a citizen and cannot make a claim on the protection and empowerment that the republican state would offer to its citizens.

As the reworked republican narrative fits well with the first, major theme in Sandel's book, so it fits well—if anything, better—with the second. Sandel documents the concern of American republicans with industrial employment and the dependency that it introduces

for employees. He is forced, because of his emphasis on self-government and the virtue it requires, to argue that this concern stems from a worry that dependent workers will not develop the character necessary in the citizens of a self-governing republic. But this argument always seems strained in the account he offers and is never really substantiated by his many quotations from the speeches and pamphlets of earlier republicans. They complain about dependency as such: about the plight of the “man whose bread and that of his children are dependent on the will of any other man, or who has no interest in his work except to please an employer” (187). It seems artificial to construe the complaint as an expression of concern for the quality of the citizenry and the prospect for self-government.

There is no need to construe the complaint in this way, if we adopt my account of republicanism and take the concern with freedom as nondomination to have been at the heart of republican worries. On this account, the dependency of employee on employer is almost bound to give the employer a certain power of arbitrary interference in the life of the employee—if only the interference implicit in the power of firing without good cause—and so employees are going to assume the profile of unfree, dominated agents. They are going to seem no better than slaves in the extent to which they live at the mercy of employers and in the degree to which they have to bow and scrape to “that haughty, overbearing disposition, that purse-proud insolence” that the Lowell protestors found in their masters (153). They are going to be presented, as in fact they were recurrently described, as “wage slaves.”

Not only would the reworked version of Sandel’s narrative recast this concern with dependency in a more natural, more persuasive, manner; it would also enable us to sustain Sandel’s sense that consumerism betrays republicanism. If we are concerned about freedom as nondomination, then we are going to look to economic arrangements for much more than the satisfaction of whatever preferences consumers display. Conditions of production are going to be important, since, as we have just seen, they can reduce employees to the status of dominated dependents. Issues of poverty and inequality are going to be significant to the extent that they can, and clearly do, make people vulnerable to the evil of domination against which the republican state must set itself.

It is worth noting here, in passing, that the republican state that I envisage would not only have reason to concern itself with dependencies and vulnerabilities that the liberal state typically ignores. It would also be proof against the standard liberal or libertarian argu-

ment that when the state does anything about problems of private interference, it itself must interfere in people's lives—at the least it must tax people to fund its activities—and so everything depends on whether the interference perpetrated will be justified by the interference prevented. From the republican point of view, the danger to be eliminated is domination—exposure to arbitrary interference—but the means adopted by the state in the attempt to eliminate such domination need not be themselves dominating: they will not be, if the interference involved can be effectively made out to be nonarbitrary. There will be significant limits on what the republican state should attempt, since it is clear that an excessively powerful state can easily become dominating; and there will be a recognition of the fact that, even if law does not itself dominate, it does reduce the ease or range of choice in which people can enjoy nondomination: nonarbitrary law offends in a secondary way against nondomination¹⁹ But there will not be the same inhibition about state activity which libertarians would impose.

Finally, to the third theme in Sandel's narrative, which is implicit throughout his book but hardly gets any explicit mention. This is the idea that the interest-group pluralism that characterizes contemporary American politics is itself neutralist in having the stronger side win, regardless of the deliberative considerations or values that argue the other way. If freedom is nondomination, and if nondomination is not to be compromised by governmental activity, then there must be constraints in place helping to ensure that such activity will track the interests and ideas of every sector of the society: or, assuming that the sector wishes to belong to the society, at least those interests and ideas that are consistent with their wishing to live under a shared political arrangement with others. But it is surely clear that under interest-group pluralism, there is no hope of achieving this; such an arrangement would represent, not a nonarbitrary mode of decision making, but the rule of naked preference and crude power.²⁰ If it is to hold out any chance of avoiding domination, the political system must come to represent a rule of reasons, and the democracy come to display a deliberative rather than a bargaining character.²¹

As the reworked republicanism would set us against a purely rights-based law and a purely preference-based economics, so there-

¹⁹ See my *Republicanism*, pp. 76-77.

²⁰ See Sunstein, *Democracy and the Problem of Free Speech*.

²¹ Joshua Cohen, "Deliberation and Democratic Legitimacy," in A. Hamlin and P. Pettit, eds., *The Good Polity* (New York: Blackwell, 1989), pp. 17-34.

fore it would set us against the third, less salient of Sandel's demons: a purely interest-based politics. I conclude that the reworking proposed for *Democracy's Discontent* is indeed just that. While it would certainly make for changes in some quite central claims about republican freedom, republican virtue, and republican policy, it would sustain most of the themes that the book puts on parade. The themes might march to a different drum, but they would continue to march in the same direction.

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