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## A SKEPTICAL LOOK AT CONTEMPORARY REPUBLICANISM

*Terrance Sandalow\**

Liberal garb has become as unfashionable in academic circles as it has in political life. A generation of historians has worked to undermine Louis Hartz's thesis that American political thought is rooted in a Lockean consensus. Philosophers challenge the premises of liberalism and its coherence. Sociologists decry liberalism's influence on individual character and the quality of public life. Feminist theorists condemn the liberal conception of equality and the distinction liberalism draws between public and private life. And legal scholars, drawing on all these and more, seek alternatives to liberalism on which to ground the legal order.

The moving force behind this flight from liberalism is antipathy toward its emphasis upon the individual, its asserted failure to recognize the ties that bind humans to one another. Liberals, its critics complain, conceive of society as atomistic and thereby reduce political life to "a set of instrumental and strategic interactions among otherwise unconnected individuals."<sup>1</sup> A more sympathetic reading, one more sensitive to the full range of views within the liberal tradition, might yield a very different account of the presuppositions of liberalism.<sup>2</sup> Contemporary American pluralism, for example, rests upon the understanding that individuals are bound together not merely by ties of interest, but by affinities of experience and shared ideals. From the perspective of the critics, however, pluralism is indistinguishable from other, more individualistic strands of liberal thought, for it merely substitutes a molecular for an atomistic conception of political life.

What the critics seek is a more embracing unity, a political theory that embodies the ideal that was once called "fraternity" and is now more commonly referred to as "community." A similar quest led earlier generations of intellectuals to socialism, but the twentieth century has

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1. W. SULLIVAN, RECONSTRUCTING PUBLIC PHILOSOPHY 103 (1982).

2. For brief critiques of the communitarian understanding of liberalism, see Epstein, *Modern Republicanism — Or the Flight From Substance*, 97 YALE L.J. 1633, 1636-39 (1988); Herzog, *Some Questions for Republicans*, 14 POL. THEORY 473, 480 (1986); Simon, *The New Republicanism: Generosity of Spirit in Search of Something to Say*, 29 WM. & MARY L. REV. 83, 86-90 (1987); see also *infra* text accompanying notes 45-46;

not been kind to socialist theories, and as it draws to a close, their attractive power is greatly diminished. Still, the underlying impulse, the felt need for a theory that adequately expresses human "connectedness," remains. A growing number of scholars have been led by that impulse to an interest in "the republican tradition," arguing that it offers resources for correcting the deformities they perceive in contemporary life and for which they hold liberalism responsible.

Republicanism is a mansion with many rooms, and its modern interpreters emphasize varying possibilities within it, but common to all is the vision of a politics that recognizes and seeks to strengthen the social bonds within a political community. Within the limits set by that vision differences abound, just as differences exist among liberals concerning appropriate political foundations for individual freedom. Republican thought thus functions, as Professor Michelman has written, "less as canon than [as] ethos, less as blueprint than as conceptual grid, less as settled institutional fact than as semantic field for normative debate and constructive imagination."<sup>3</sup>

The breadth and intensity of contemporary interest in republican ideas reflect a deep desire for a greater sense of community than currently exists in the United States. Still, a deeply felt need does not necessarily translate into a political theory of contemporary relevance or even a useful way of talking about current issues. Despite the importance of republicanism in the history of Western political thought, the effort to find within it resources for addressing issues of contemporary life seems a bit odd — or, to be more precise, anachronistic. Republicanism was rooted in an intellectual and social milieu vastly different from our own. It was premised upon a moral epistemology and an organic conception of society that few moderns can accept. Its expositors assumed — indeed, often insisted — that it was suited only to small, homogenous populations occupying a limited territory. Republican thought was generally anticommercial, often hierarchical, and in some versions depended upon a martial citizenry as well. Its intellectual and social presuppositions were, in brief, precisely the conditions of life and thought that separate modern and premodern times.

My purpose in this brief essay is to raise a number of questions about the contemporary relevance of political ideas rooted in a world so different from the one we inhabit. Although the turn to republicanism represents an effort to redirect the course of American life, limits exist beyond which change is implausible. We are not about to

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3. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17 (1986) [hereinafter Michelman, *Traces*].

reestablish the Greek *polis* or the Italian city-state. The commercial republic that the federalists foresaw has existed for well over a century, and though many changes in the economic order are within the realm of plausible proposals for reform, the abandonment of a commercial economy is not among them. Similarly, individualism — understood, minimally, to mean freedom to transcend social roles in pursuit of individually determined ends — is so deeply embedded in the American character and national ideals that it must be recognized as a constraint upon proposals to refashion political life within a republican mold. Among the questions the new republicans must confront is whether republicanism can find a place within the constraints imposed by these and other circumstances and commitments associated with modernity.

To ask questions about the contemporary relevance of republican ideas is, inevitably, to suggest skepticism that affirmative answers can be given to those questions. Skepticism is not proof, however, and I shall not try to demonstrate that affirmative answers cannot be developed. My purpose is merely to draw attention to a number of issues that, though they have perhaps been noticed by republican writers, have as yet received inadequate attention. The questions are not equally relevant to all the arguments recently made in the name of republicanism,<sup>4</sup> but because my concerns are with the broad themes of a movement, I shall not pause for the qualifications that would be necessary were I attempting a more comprehensive and detailed survey of neo-republican arguments.

## I.

The central term in the lexicon of the new republicans is “the public interest,” a term apparently synonymous with “the common good,” “the general welfare,” and a number of other phrases that are at times employed as substitutes.<sup>5</sup> Despite its importance, republican theorists have given scant attention to defining the concept. The reason for the neglect cannot be that “the public interest” has a well understood meaning. The literature of political theory is replete with variant

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4. Whether, or to what extent, these arguments can be brought within the tradition of republican thought is a distinct issue that I leave to political theorists and historians of political thought.

5. Another frequently used term, “public value,” appears to be derivative, denoting a value that (legitimately) may be regarded as a constituent of the public interest. Republican writers seem to use the term as a way of conveying that the public interest (1) is not necessarily unitary and (2) that its content may be contested.

meanings; indeed, doubt has often been expressed that the concept has or can be given coherent meaning.<sup>6</sup> Until it is given some coherent meaning, however, we cannot know what republican politics are supposed to be about or what considerations would legitimately enter into political decisions in a republican regime. The need is especially pressing for those who, like Professor Sunstein, propose to invest the concept with constitutional significance.<sup>7</sup>

In suggesting the need for a definition of "the public interest," I do not mean that republicans owe us an account of its content. Republican theorists generally agree that the content of the public interest emerges from an appropriately constituted public process, and they are entitled to maintain that they are no more able than the rest of us to give substantive meaning to it before such a process occurs. What they do owe us is a definition that will enable us to recognize "the public interest" when we see it, one that will permit us to ascertain what kinds of arguments they would permit in the political arena and what kind of justification they would require for legislation. Providing such a definition is, I think, more difficult than republicans have acknowledged.

A definition advanced by Professor Sunstein provides a useful introduction to the difficulties. A "public value,"<sup>8</sup> Sunstein has written, "can be defined as any justification for governmental action that goes beyond the exercise of raw political power."<sup>9</sup> But that definition is inadequate for republican purposes. It would permit legislation to be justified on the ground that the legislation maximizes the sum of affected private interests. Familiar difficulties stand in the way of making any such determination, but we need not pause over them because the possibility of such a justification poses a more significant problem for Sunstein's definition. A central ground for differentiating liberal from republican thought, as Professor Michelman writes in his Dunwoody lecture, is that "republicanism does, while liberalism does not, take seriously the idea of a common, a truly *common*, interest or good — an 'autonomous public interest independent of the sum of individual interests'."<sup>10</sup> A definition of the public interest that can be

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6. See, e.g., D. TRUMAN, *THE GOVERNMENTAL PROCESS*, 50-51 (1951); Sorauf, *The Conceptual Muddle*, in *NOMOS V: THE PUBLIC INTEREST* 183 (1962).

7. See Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

8. See *supra* note 5.

9. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1694 (1984).

10. See Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 445 (1989) [hereinafter Michelman, *Voting Rights*] (quoting from Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 67 (1987)).

satisfied by a utilitarian calculation thus sacrifices a central republican claim, that there are social interests to which politics should attend that transcend the sum of individual interests. Moreover, if “the public interest” is merely shorthand for “the aggregation of private interests,” then it may be that bargaining — whether in the market or in the political arena — is at times the best way of achieving it. Republicans have, however, been insistent that the public interest, as they conceive it, is not the consequence of private bargains, but the subject of public deliberation.

A quite different conception of the public interest, one that on the surface seems closer to what republicans have in mind, is suggested by President Kennedy’s famous inaugural plea: “ask not what your country can do for you — ask what you can do for your country.”<sup>11</sup> Kennedy did not, it is worth noting, ask that citizens consider what they might do for each other — he was not, in other words, making a plea for altruism<sup>12</sup> — but what they might do for their country, as though it has interests that in some sense exist independently of theirs. A similar idea seems implicit in the recurrent suggestion that the interests of individuals should at times be sacrificed to the interests of the nation. But on the assumption that “the interests of the nation” is not merely a way of referring to the sum of its citizens’ private interests, a conception of the public interest that has already been ruled out, what can it mean? A nation is a collectivity. It cannot have purposes — and, therefore, interests — in the same sense that individuals do.

In some settings, to be sure, we have no difficulty *attributing* to a corporate body or other collectivity interests distinct from those of its members. It is, for example, perfectly intelligible to say that the best interests of a university would be served by eliminating several departments and employing the savings to provide added support for other departments. Such a claim might rest on a calculation that the reallocation would serve the interests of affected faculty and students, taken one by one. But it might also and more pertinently rest on the ground that the objects of the university, conceived independently of

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11. See A. SCHLESINGER, JR., *A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE* 6 (1965).

12. Republicans at times seem to object to liberalism on the ground that it breeds and perhaps calls for selfishness, as though all liberals are disciples of Mandeville. See B. MANDEVILLE, *THE FABLE OF THE BEES* (1729). It should be apparent, however, that altruism is entirely consistent with liberal principles. Even the most hard-boiled welfare economist appreciates that an individual’s utility function may include the welfare of another. If altruism is the goal, republicanism need not be the path. See Simon, *supra* note 2, at 87-89.

faculty and students, would be promoted by the reallocation. One might, for example, believe that universities exist to advance knowledge and, therefore, that it would be in best interests of the university to direct its resources to those disciplines in which the most important advances are to be anticipated. On such a view, the university has interests genuinely independent of the interests of its faculty and students; indeed, the latter appear to be merely instruments for furthering its ends.<sup>13</sup>

It is difficult to conceive of the relationships between a nation and its citizens in the same way — difficult, but regrettably, not impossible. Conceptions of an autonomous national purpose and the idea that citizens achieve fulfillment as individuals in contributing to that purpose are not unknown to history. The examples are, however, not of a kind likely to inspire emulation by republicans any more than by the rest of us. The idea that citizens are merely instruments in the service of an overriding national purpose that exists independently of their interests is, in any event, so alien to American history and ideals that those recently attracted to republicanism are unlikely to have any such purpose in mind when they refer to “the public interest.”<sup>14</sup>

13. As the illustration suggests, the attribution of any such purpose to the university would be contestable. Competing conceptions of its proper goals might also be advanced, and deliberation would presumably be required to choose, or achieve an accommodation, among them. An interesting question arises at this point: Who is entitled to participate in the deliberations? If students and faculty are merely instruments of the university's purposes, it seems odd to permit them to deliberate about those purposes. A debate among instruments about which can best serve given ends is potentially fruitful, but there seems no reason to suppose that it can contribute to a determination of what the ends should be.

The question is, of course, rather more significant if the public interest is defined in terms of analogous national purposes. If citizens are merely instruments of such purposes, who is entitled to participate in decisions concerning rival conceptions?

14. *But see* Horwitz, *supra* note 10. Although Professor Horwitz's discussion is explicitly directed only to the place of republican ideas in American legal history, the obvious enthusiasm with which he refers to “an autonomous public interest,” *see id.* at 68, and “a substantive conception of the public interest,” *see id.* at 64, suggests that he may be attracted to a conception of the public interest that I have perhaps dismissed too casually in the text. Without some elaboration of the idea, however, it is difficult to know what Horwitz has in mind.

The idea that a nation has needs or purposes distinct from those of its citizens as individuals has an analogue in the recurrent references to a “general will” distinct from the particular wills of individuals. As I write, election returns from Poland reveal a stunning defeat for the ruling Communists. A spokesman for the government commented that, “[t]he question remains open whether the sum of these individual decisions is an expression of the real collective will of the society. I think not.” *N.Y. Times*, June 7, 1989, at A13, col. 1. Just what is meant by such invocations of the “general will” remains as mysterious today as it was when Rousseau first proposed the idea in *The Social Contract*. *See generally* J. ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* (New Amer. ed. 1950) (1762).

Within the American political tradition, no account of the public interest is likely to prove acceptable unless it counts the interests of individuals among its defining characteristics or in some other way recognizes those interests as ends worthy of achievement in their own right. One candidate for such an account is the argument advanced by Robert Paul Wolff some years ago in *The Poverty of Liberalism*.<sup>15</sup> Among the interests that individuals can have, Wolff argued, are those he labeled “affective,” “productive,” and “rational” community.<sup>16</sup> At the heart of each is a desire for shared experience. “Affective community,” as Wolff explains, “is the reciprocal consciousness of a shared culture . . . it is the mutual awareness on the part of each that there are others sharing that culture, and that through such mutuality we are many together rather than many alone.”<sup>17</sup> Similarly, “productive community” is mutual awareness of “the satisfaction which comes specifically from working *with* others in the pursuit of a common goal . . . .”<sup>18</sup> And “rational community” is “a reciprocity of consciousness among morally and politically equal rational agents who freely come together and deliberate with one another for the purpose of concerting their wills in the positing of collective goals and in the performance of common action[s].”<sup>19</sup> Because the interests he describes are not merely in the products of culture, work, or deliberation, but in the experience of sharing, it seems fair to conclude, as Wolff does, that he has given content to the idea of a common good, one that individuals cannot achieve except in concert.

Wolff’s purpose in describing these aspects of community is to demonstrate that the idea of a “collective goal,” and, therefore, of the public interest, can be given coherent meaning. He does not attempt to establish that individuals should pursue such goals, only that it is possible for them to do so. But whether or not they should, the experience of everyday life reveals that many, perhaps all, people do. Nevertheless, Wolff’s argument fails to provide an account of the public interest adequate for republican purposes.

For republicans, it should be recalled, the domain of politics is limited to the public interest. Civic virtue requires that citizens put aside their private interests when they enter the political arena. However, nothing in Wolff’s account supports these restrictions. He offers

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15. R. WOLFF, *THE POVERTY OF LIBERALISM* 185 (1968).

16. *Id.* at 185.

17. *Id.* at 187.

18. *Id.* at 190.

19. *Id.* at 192.



no reason to suppose that the public interest — which on his account, is merely the interest (some) people have in certain kinds of shared experience — is more worthy or more important than other interests individuals may have. Nor does he suggest that it alone is a proper subject of politics. Individuals do — at times and with differing intensities — have an interest in shared experiences, but there is no apparent justification for concluding that that interest is, as republicans conceive the public interest to be, of overriding importance. As republicans employ it, to put the point somewhat differently, “the public interest” is an evaluative concept. A purely descriptive account cannot be adequate to explain what they mean by it.<sup>20</sup>

The various accounts of the public interest considered thus far — the aggregation of private interests, an autonomous national purpose, and Wolff’s “interest in the shared experience of community” — are substantive. Each looks to an end valued for itself. Contemporary republican arguments often seem to point, instead, to a procedural account, one that defines the public interest in terms of the rules and institutions that govern public life. Even liberals, who have traditionally been skeptical of the concept, might find some versions of such an account congenial. The public interest, a liberal might say, consists of the set of rules and institutions that will maximize freedom, i.e., that will best enable individuals to achieve their ends. Those rules and institutions are appropriately regarded as in the public interest because the interest in them is common to all: they provide the background conditions everyone requires to pursue his or her particular interests.<sup>21</sup>

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20. Joseph Sax has advanced a position similar to Wolff’s, arguing that individuals often reveal a preference for collective decisions even when those decisions differ from the ones they would have made as individuals. Like Wolff, Sax makes no claim that such preferences (or the decisions made by collectivities) are in any way more worthy than other preferences individuals may have. His sole purpose is to contend against the atomistic assumptions of those who argue against collective decisions on efficiency grounds. See Sax, *The Legitimacy of Collective Values: The Case of the Public Lands*, 5 U. COLO. L. REV. 537 (1985).

21. Thus, even the most extreme anti-statist welfare economist recognizes the need for public definition and enforcement of property rights if individuals are to be able to pursue their interests through the market. Liberal democrats, similarly, recognize that freedom of speech and the franchise must be defined and protected if the political system is to operate properly. Even David Truman, whose denial that there exists any “totally inclusive interest” is notorious in the literature of republicanism, found it necessary to introduce the concept of a “potential interest group” to account for the common interest in defining and maintaining the “rules of the game.” See Truman, *supra* note 6, at 51-52, 510-24.

Nevertheless, Truman seems correct in denying that there is a “totally inclusive” interest, one that is common to all. The “rules of the game,” as the critics of liberalism have rightly insisted, are not neutral. Any set of rules and institutions will advantage some interests and

The cognate republican account would focus on the rules and institutions necessary to permit individuals to act as citizens: the public interest, a modern republican might say, consists of the set of background conditions required if individuals are to participate fully in public life.<sup>22</sup> Because even civically virtuous citizens may disagree about which rules and institutions best serve that goal, the initial question that arises under this definition is how they are to resolve their differences. Of course, citizens of a liberal state may also disagree, but for them the standard of decision is built into the liberal definition of the public interest. Disputes about which rules and institutions are in the public interest may be resolved by ascertaining which best promotes the capacity of individuals to achieve their ends. Republicans cannot resolve their differences in the same way because the cognate republican account, depending as it does on the idea of citizenship, is not similarly complete. Citizenship defines a relationship to a polity. Without some idea of the objects of the polity it seems impossible to say what rules and institutions would best enable citizens to participate fully in its life.<sup>23</sup>

To say that the polity exists to serve the public interest merely introduces a circularity. Although the circularity is not entirely vicious — it might be regarded as a way of saying the polity exists, at least in part, to satisfy the desire for what Wolff called “rational community”<sup>24</sup> — without further elaboration of the objects of the polity, we have at best a very thin account of the public interest, one that fails to suggest an adequate motive for individuals to put aside their private interests in pursuit of the common good.<sup>25</sup> A procedural account, one that defines the public interest solely in terms of the background conditions necessary to permit individuals to participate fully in public

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disadvantage others. A choice among them does not depend upon which serves the public interest — i.e., an interest that in some sense is common to all — but upon their justifiability under some moral theory. Cf. Sax, *supra* note 20, at 554.

22. Such a conception of the public interest is, of course, markedly different from that postulated by earlier versions of republicanism in which participation in public life was not regarded as critical. Burke's defense of virtual representation, for example, is intelligible only upon the assumption that the public interest can be defined substantively. See H. PITKIN, *THE CONCEPT OF REPRESENTATION*, 168-89 (1967).

23. Because of continuing disagreement about what is meant by human freedom, the liberal definition of the public interest confronts a similar difficulty. Since liberals do not require a definition of the public interest, however, the difficulty does not pose the same problem for them as it does for republicans.

24. See Wolff, *supra* note 15, at 185; see also ARISTOTLE, *Politics*, bk. III, ch.6, in *INTRODUCTION TO ARISTOTLE* 549, 589 (McKeon, ed. 1947).

25. See *supra* text accompanying note 20.

life, merely shifts the inquiry to questions about the proper ends of government in the republican vision.

## II.

"The ultimate object of the state," according to the first republican, "is the good life."<sup>26</sup> Although Aristotle's arguments in support of that conclusion are unavailable to moderns, contemporary republicans generally seem to hold to the same idea. The object of republican politics, as described by Professor Sunstein and his coeditors, is to select "the values that ought to control public and private life."<sup>27</sup> Or, as another proponent recently put it in arguing the need for a revival of republican ideas, "[w]hat is ultimately at issue is the radical question of what is a worthwhile life."<sup>28</sup> Modern man, is, however, deeply committed to the view that there is not *a* worthwhile life toward which all must strive, but a multitude of worthwhile lives and that each individual should be free to fashion such a life for himself. Liberalism has to that extent taken hold and is not likely to be easily dislodged.

Among contemporary republicans, Professor Michelman has been especially sensitive to the deep-seated plurality of modern ideas about the good life and to the need for republicanism to accommodate that plurality if it is to be considered a serious alternative to liberalism. Although his efforts to formulate a version of republicanism acceptable to moderns are not explicitly cast in terms of the good life or the ends of government, they appear to provide a rationale for politics of just the kind that is needed to fill out a procedural account of the public interest.

At the center of Michelman's argument is the idea of human freedom, a prerequisite of individual capacity to shape a worthwhile life. Drawing on Kant, he maintains that "we are free only insofar as we are self-governing, directing our actions in accordance with law-like reasons that we adopt for ourselves, as proper to ourselves, upon conscious, critical reflection on our identities (or natures) and social situations."<sup>29</sup> Like other contemporary republicans, Michelman emphasizes that the constituents of freedom, so understood, cannot be located exclusively within individuals. Our knowledge of ourselves and our understanding of our interests are formed within a social matrix.

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26. ARISTOTLE, *supra* note 24, at 549.

27. G. STONE, L. SEIDMAN, C. SUNSTEIN, & M. TUSHNET, CONSTITUTIONAL LAW 5 (1986) [hereinafter CONSTITUTIONAL LAW].

28. W. SULLIVAN, *supra* note 1, at 10.

29. Michelman, *Traces*, *supra*, note 3, at 26.

Self-governance, i.e., the governance of the self in pursuit of one's own conception of the good life, thus requires engagement in the social processes within which individuals shape their identities. Only by participating in the constitution of the social matrix within which the self is formed can individuals be self-legislating. Moreover, "[n]ormative reason . . . cannot be a solitary activity. Its exercise requires knowledge, including self-knowledge, obtainable only by encounter with different outlooks in public argument."<sup>30</sup> These considerations lead Michelman to conclude that:

Kantianism implies republicanism — self-government implies citizenship — to all who conceive of the individual as in some degree socially situated or constituted. This view of the human condition implies that self-cognition and ensuing self-legislation must, to a like extent, be socially situated; norms must be formed through public dialogue and expressed as public law.<sup>31</sup>

Michelman thus offers a rationale for public life that is simultaneously responsive to modern individualism and to republican emphasis on the social bond. In doing so, he provides a motive not only for active citizenship, but for civic virtue. Willingness to put aside private interest is not abnegating, but self-constituting. Since the good life can be sought only in concert with others, to act in furtherance of the common good — understood as the set of rules and institutions necessary to permit all to participate fully in public life — is also to act in one's private interest — understood as the freedom to pursue a worthwhile life. Private interest, rightly understood, and the public interest are not separable, for the full participation of others in public life is a necessary condition of one's own freedom.

The striking feature of Michelman's argument is what one might call, were it not for the pejorative connotation the term has acquired, its "totalitarian" conception of politics. If, as he maintains, "self-government implies citizenship" and "norms . . . must be expressed as public law,"<sup>32</sup> it seems to follow that all of life must be politicized. In the end, therefore, Michelman joins other contemporary republicans in embracing a conception of politics that is pervasive and all-encompassing. In this respect, of course, republican arguments track a theme common to recent critics of liberalism: the denial of a divide between

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30. *Id.* at 27; see also Michelman, *Voting Rights*, *supra* note 10, at 447-48.

31. See Michelman, *Traces*, *supra* note 3, at 27 (footnotes omitted).

32. *Id.*

public and private life. As Catharine MacKinnon succinctly puts it, "the private is the public . . . ."<sup>33</sup>

The common justification for this extension of the domain of politics is that individuals are socially constituted. However, just how the premise connects to the conclusion is unclear. The idea seems to be that because the self is socially constituted, individuals can be self-legislating only to the extent that they participate in the common project of shaping the social materials from which the self is constructed. Politics, however, is only one form of human association. Why, then, is it the form that participation must take? And even if "norms must be formed through public dialogue," as Michelman maintains, why must they be "expressed as public law,"<sup>34</sup> rather than as religious tenets or as ethical precepts whose origins lie in the multitude of other associations in which individuals participate? A possible answer is that only politics is sufficiently powerful and sufficiently open to all to provide a forum adequate to the task. Yet, surely the adequacy of a forum to play the role that Michelman assigns to politics depends upon the opportunities for meaningful participation that it realistically affords. Despite the potential reach of politics, therefore, one wonders whether citizenship in a nation of 250 million or even in a city of one hundred thousand offers possibilities for participation as meaningful for individuals as is membership in one or another or several of the many intermediate associations that exist in a pluralistic society.

The scale at which politics necessarily occurs in modern industrial societies is not the only reason that it is often less satisfactory than other forms of association as a vehicle for collective self-determination. The social matrix within which the self is formed is vast and multidimensional. None of us can explore more than a small fraction of the possibilities it offers, and if for no other reason than a finitude of time and talent, we are all required to take as given — as constraints we have had no part in creating and that often lie beyond our consciousness — a very large part of the cultural substance within which we shape our lives. If freedom requires more, we are to that extent unfree.

These limits upon our capacity for self-legislation are, of course, also limits upon our ability to join with others in fashioning the terms of social life. The possibilities for individual self-determination are, therefore, not to be measured against the theoretical opportunities that politics offers to join with others in constituting the entirety of social life, but are to be found within the narrower compass within

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33. C. MACKINNON, *FEMINISM UNMODIFIED* 100 (1987).

34. Michelman, *Traces*, *supra* note 3, at 27.

which actual lives are lived. Within those boundaries, other forms of association — familial, religious, social, educational, cultural, economic, and others that seem to naturally spring up in a pluralistic society — may provide greater opportunity to participate in forging the understandings and norms most important in a particular life. Though none may have the theoretical potential to reshape society, they do offer advantages such as accessibility, immediacy, and affinity that will often make them preferable to politics in the effort to acquire an understanding of and a measure of control over our lives.

Contemporary republicans are not unaware of the importance of intermediate structures. Indeed, calls for strengthening such structures are a staple of recent republican writing. What seems not to have been noticed, however, is the extent to which the existence of vital intermediate structures undermines the claim that politics must be pervasive and all-encompassing. A possible reason for that oversight is the tendency of republican writers to regard intermediate structures as merely auxiliary to politics, valuable because they “nurture citizenship” or because they play a role “in the cultivation of republican virtues.”<sup>35</sup> But it is not obvious why intermediate forms of association are relegated to so subsidiary a role. To the extent that they offer individuals an opportunity to participate in shaping that part of the social fabric that most concerns them, intermediate associations are a genuine alternative to politics. For that reason, the premise that the self is socially constituted does not self-evidently lead to the conclusion that politics must be pervasive and all-encompassing. Further argument is needed to establish that the domain of politics must be that extensive.

Whatever doubts may exist about the justification for conceiving of politics as republicans do, the objections to doing so are perfectly clear. A politics that can penetrate the lives of its citizens as deeply as republicans appear to contemplate can as readily be stifling and tyrannical as liberating. Indeed, on the evidence of history, one might think that the former is more likely. Republicans are more sanguine about the prospects, but the justification for their optimism is by no means evident.

Reliance seems to be placed chiefly on civic virtue. The idea that politics can be cleansed of private interest will seem to many a rather heroic assumption. Ancient republics were not notably successful in

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35. See W. SULLIVAN, *supra* note 1, at 223; Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1578 (1988); see also Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1530-32 (1988).

the effort, and it is not immediately apparent what grounds there might be for supposing that we are more likely to succeed. Moreover, as Don Herzog observes, it is unclear how we are to effect the transition from an unvirtuous citizenry to one devoted entirely to the common good.<sup>36</sup> Assume, however, that these difficulties can be overcome, that the problems of creating and sustaining a virtuous citizenry have been solved. What reason is there to suppose that republican politics will yield a tolerant society, one open to widely varying conceptions of the good life? The reliance placed upon civic virtue appears to rest upon the premise that private interest alone accounts for the abuse of politics. But as Madison argued in *The Federalist*,<sup>37</sup> the tendency to employ governmental power for oppressive purposes is rooted in other sources also: "A zeal for different opinions concerning religion, concerning Government, and many other points, as well of speculation as of practice, . . . [have] divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good."<sup>38</sup> Because these "passions," as Madison called them, do not appear to have diminished during the past two centuries, it would be helpful to know what resources republican politics would draw upon to control them.

Doubts about the adequacy of those resources are magnified by the uncertain status of intermediate associations in a republican regime. Vital intermediate associations, capable of standing between otherwise isolated individuals and a potentially overreaching state, have long been recognized as an important safeguard of individual freedom, in part because they provide information and support for ways of life and thought that differ from those preferred by whoever wields official power and in part because they offer an alternative to an enervating dependence on government.<sup>39</sup> Although contemporary republicans generally have been sensitive to the importance of intermediate associations, a question remains as to whether robust private associations can survive within the limitless politics of republicanism. An affirmative answer to that question depends upon more than good intentions. It also requires a willingness to accept the conditions under

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36. Herzog, *supra* note 2, at 484.

37. THE FEDERALIST No. 10 (J. Madison) (J. Cooke ed. 1961).

38. *Id.* at 58-59. For a more complete discussion of Madison's views on the sources of tyranny, see D. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 59-81 (1984); M. WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION 55-81 (1987).

39. See generally R. NISBET, THE QUEST FOR COMMUNITY (1953).

which private associations can prosper. Whether that willingness would exist in a regime of republican politics seems doubtful at best, for the tendency of republicanism, especially prominent in recent interpretations, is to reinforce trends in modern society that threaten the conditions necessary to sustain private institutions as meaningful forms of association.<sup>40</sup>

One of the animating concerns of contemporary republicans is private power. It is, at least in part, responsible for their insistence that politics — i.e., public power — must be coextensive with social life. Power, however, is an inescapable incident of autonomy, and substantial autonomy, in turn, is necessary for intermediate institutions to thrive. The price of robust intermediate associations, then, is a willingness to permit them to behave in ways that differ from and are perhaps directly contrary to those that the political order might prefer. That is a price modern democracies are increasingly unwilling to pay, especially in the economic sphere, but certainly not there alone.<sup>41</sup> Contemporary republicanism, in equating the social and the political, eliminates an indispensable resource — a conception of the private — for limiting that trend. Without a conception of the private, a realm of

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40. On the forces responsible for these trends, see the classic and prescient analysis in A. DE TOCQUEVILLE, II DEMOCRACY IN AMERICA 287-333 (Bradley ed. 1945) (1840).

41. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding statute criminalizing consensual homosexual sodomy); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (upholding statute prohibiting civic organizations from excluding women); *Graves City College v. Bell*, 465 U.S. 555 (1984); and Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (colleges and universities whose students receive federal financial assistance subject to various federal anti-discrimination requirements); *Planned Parenthood Ass'n v. Danforth*, 462 U.S. 476 (1983) (minor's right to abortion may not be conditioned upon parental consent); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding denial of tax exempt status to university that, on religious grounds, prohibited interracial dating and marriage by students); *Terry v. Adams*, 345 U.S. 461 (1953) (dominant political organization may not exclude persons on racial grounds); *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (religious institution whose tenets forbid homosexual practices may not discriminate on the basis of sexual orientation); *Under 21 v. City of New York*, 108 A.D.2d 250, 488 N.Y.S.2d 669 (App. Div. 1985) (upholding mayor's executive order requiring municipal contractors, including religious organizations whose tenets forbid homosexual practices, to pledge they would not discriminate on the basis of sexual orientation); Labor Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 29 U.S.C. § 401 (1982) (extensive regulation of unions' internal affairs with consequences extending well beyond union's economic role); N.Y. Dom. Rel. Law §72 (McKinney 1977) and similar legislation in other states conferring visitation rights upon grandparents.

As these citations suggest, political interference in the internal affairs of private associations will always be justified in the name of a "higher" good — freedom, equality, fairness, or whatever. But if the political community's conception of the good is routinely to prevail, or is to prevail at all critical points, intermediate associations lose the capacity to generate and sustain alternative conceptions of the good.



autonomy from politics, it is not apparent what resources a republican regime might draw upon to avoid transforming intermediate associations into agents of state power.<sup>42</sup>

### III.

"Deliberation" is another important term in the republican lexicon, one employed both to describe the process by which political decisions ideally would be made in a republican regime and to differentiate republicanism from liberalism. As used by republicans, it denotes not merely thoughtful consideration, but a collective process by which free and equal individuals, in a spirit of mutual respect, join in a search for a reasoned decision, "one that all can accept as a good-faith resolution,"<sup>43</sup> concerning an issue posed for social choice.<sup>44</sup> Although the idea of deliberation is a good deal easier to understand than the republican conception of the public interest — every reader is bound to have had at least some experience with it — the extent to which republicans rely on it raises a number of questions. Before turning to those questions, it will be useful to consider briefly the recurrent claim that the commitment to deliberative politics distinguishes republicanism from liberalism. The stark terms in which the contrast is customarily drawn serve more to obfuscate than to clarify the real difference between the two approaches to politics. More significantly, it cloaks the issues that require attention in assessing whether republicanism offers a useful way of thinking about political life in the circumstances of modern societies.

Republican descriptions of liberalism customarily begin with the assertion that liberals regard individual interests as exogenous to politics. Individuals, that is, come to politics with interests that have been shaped outside the political process, seeking to employ it — just as they would employ the market — to further those interests. Interactions among individuals are, therefore, strategic: participants in the process negotiate, bargain, and compromise, but they act always to further the interests with which they entered the process. In a repub-

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42. As pluralists from de Tocqueville to the present have argued, liberalism faces a similar problem. To the extent that it focuses attention exclusively on individuals — whether in the name of freedom, equality, or fairness — it contains within itself the seeds of its own destruction, threatening the maintenance of social conditions necessary to sustain freedom. See A. DE TOCQUEVILLE, *supra* note 40; R. NISBET, *supra* note 39.

43. Michelman, *Voting Rights*, *supra* note 10, at 447.

44. It is worth recalling that in a republican regime the issues posed for social choice extend to "selecting the values that ought to control public and private life." CONSTITUTIONAL LAW, *supra* note 27, at 5.

lican regime, by contrast, individuals do not regard their interests as exogenous to politics. They recognize that as they search with their fellow citizens for the common good, they may come to perceive their interests quite differently from the way that they did at the outset. Participation in politics is, therefore, potentially a transforming experience. Its function is not merely to serve values, but to shape them.

To cast the difference between liberalism and republicanism in these terms is, however, merely to caricature the former. Nothing in liberal theory requires a denial of the obvious, that politics may be a process of collective deliberation in which the participants, through reasoned argument, attempt to persuade and are open to persuasion by one another. Nor does liberalism deny that collective deliberation may assist in locating common ground among individuals with differing interests or views. Nor, finally, is there any reason that liberals must deny that participation in politics may be transformative, leading individuals not merely to compromise, but to alter their initial objectives.<sup>45</sup> Liberalism's central commitments, individual freedom and (as a corollary) limited government, simply do not depend upon an assumption that all interests are exogenous to politics or upon a market model of the political process.<sup>46</sup> Indeed, to the extent that collective deliberation facilitates democratic government and enlarges the capacity for intelligent choice, liberals have every reason to prize it.

The real difference between liberals and republicans lies elsewhere, not in disagreement about the value of collective deliberation in politics, but in discrepant assessments of whether it can be counted upon to resolve all social conflict in modern industrial societies. Liberalism's insistence upon a restricted political sphere rests upon an assessment

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45. Although republicans at times appear to assume otherwise, see, e.g., Michelman, *Law's Republic*, *supra* note 35, at 1512, the possibility that collective deliberation may lead participants to uncover previously hidden common ground or to a new understanding of their interests does not depend upon their having entered the process in a search for their common good or even upon their becoming aware that they share one. The process may be educational even though all remain intent upon their private interests throughout. No more is required than open-mindedness.

46. A number of economists and political scientists have attempted to show that a market model explains a good deal of observed political behavior. See, e.g., A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957). But such efforts plainly have no bearing on the question whether liberalism as a political theory is committed to the view that politics is merely a process by which individuals act strategically to further exogenous interests. In their most recent writings, both Professors Michelman and Sunstein, the legal scholars most prominently identified with the effort to revive republican ideas, have come to accept that liberalism is open to a deliberative conception of the political process. See Michelman, *Voting Rights*, *supra* note 10, at 448-50; Sunstein, *supra* note 35, at 1567.

that might be considered pessimistic, but is more fundamentally only skeptical: given the stakes, it seems prudent to insist that some matters remain beyond the reach of government rather than to bet all on the success of deliberative politics. Limited government is a hedge against the breakdown of deliberative politics, insurance against the related risks that politics might be called upon to bear an excessive, potentially destabilizing load and that governmental power might come to be employed oppressively. The source of this skepticism is readily apparent. Liberalism arose in response to an erosion of the intellectual and social conditions that might at one time have made it plausible to look exclusively to collective deliberation to resolve social conflict.

Republican thought, as I observed earlier, was generally anticommercial and premised upon small, homogenous populations occupying a limited territory. It was closely associated with natural law. In one version or another it was aristocratic, exclusionary, or militaristic. Contemporary republican writers treat each of these elements of republican thought as excess baggage that can be discarded without affecting what they regard as attractive about republicanism and therefore take to be its core. The question, however, is not whether any one or two of the elements can be discarded, but whether collective deliberation can play the role republicans assign to it if all of them are.

Though each serves somewhat differently, the common tendency of all these now embarrassing elements of traditional republicanism is to facilitate collective deliberation and increase the prospects that the product of those deliberations will be widely, if not universally, accepted. They do so by narrowing the range of politically relevant interests and outlooks, by increasing the likelihood that participants will be bound by ties of family and friendship, and by fostering social stability, thereby enabling participants to deliberate within the settled ways of a community. An acceptance of natural law also plays a role, not only by encouraging the belief that there are right answers to the most fundamental questions, a belief that is itself an important instrument of social integration, but also by making it possible for participants, and perhaps even the excluded, to suppose that the former have arrived at those answers.

Extended argument is hardly necessary to make the point that the intellectual and social circumstances of modern life differ profoundly from those traditionally thought necessary to undergird republicanism's reliance upon collective deliberation. The capacity of language to communicate meaning, presumably a prerequisite to collective deliberation, has been put in doubt. Republican belief in natural law has, in important segments of the population, given way to the belief that truth is merely a matter of perspective and right only a synonym

of power.<sup>47</sup> The relative stability of a land-based economy has yielded to the perpetual motion of a commercial economy. The range of relevant interests and outlooks has greatly widened as a consequence of immigration and of political participation by previously subordinated segments of the population. And, most obviously, numbers have increased so dramatically that the small governmental units have populations well beyond that which might permit citizens to form the bonds on which republicanism was premised. At the same time, technology has both loosened the bonds once forged by geographic proximity and increased interdependence across vast distances.

Liberalism is often criticized for its alleged failure to recognize the social context of politics. It is somewhat surprising, therefore, that the critics have given so little attention to whether the intellectual and social circumstances of modern life will support a political regime of the kind they envisage. In raising that question, I do not mean to suggest that collective deliberation is not possible in the circumstances of contemporary life. A political community could not survive if its citizens could find no common language in which to discuss the issues they confront, if a sufficient number did not share at least some interests and ideals, and if civic virtue were entirely absent.<sup>48</sup> The issue is not whether these prerequisites for collective deliberation exist at all, but whether they are present in the full measure required to justify the limitless politics of republicanism.

Republican politics, as Professor Sunstein rightly emphasizes, is a politics of consensus.<sup>49</sup> It presupposes a society of sufficiently thick common understandings and sufficiently agreed upon fundamentals that sound judgment can be recognized and honored. Ours, however, is a society in which a representative member of an important segment of the intellectual community can employ the idea of "sound judgment" ironically, even mockingly.<sup>50</sup> Deep divisions mark our communal life, divisions of sufficient magnitude that at times even those who agree upon an outcome cannot find a common frame of intellectual reference for doing so.<sup>51</sup> What is required, therefore, is an account of how collective deliberation can overcome these divisions. Is the assumption

47. One need not embrace these positions to recognize that their widespread acceptance has important implications for the possibility of deliberative politics.

48. "Civic virtue," as used here, means something quite different from what it means to republicans, not single-minded devotion to the common good, but a disposition to act for other than narrowly selfish reasons and in accordance with moral principles.

49. Sunstein, *supra* note 35, at 1554.

50. See Parker, *In Memoriam: J. Skelly Wright*, 102 HARV. L. REV. 367 (1988).

51. See, e.g., C. MACKINNON, *supra* note 33, at 93.

that it will reveal objectively right answers to the questions on which citizens disagree?<sup>52</sup> Or is it that, at root, the differences do not reflect fundamental, irreconcilable cleavages of interest or moral belief? And if neither of these, on what grounds does the belief rest that republican politics will yield results that are both broadly accepted and adequately respectful of the differences among us?

Any account of how the divisions can be overcome must deal with a number of rather mundane concerns. The first is the problem of time. Politics can be viewed as a form of moral education,<sup>53</sup> a grand seminar enduring through time, but it is not only that. It is also a process through which decisions are made about the use of governmental power. Accordingly, even if collective deliberation is theoretically capable of surmounting the deep divisions within modern societies — whether by revealing objectively right answers, by disclosing that our interests and values are not irreconcilably divergent, or by some other means — the question remains whether it can do so within the time realistically available for making political decisions. In the long run, to be sure, no political decision is final. The discussion continues. But in the long run, as Keynes reminded us, we are all dead. From the perspective of the individual, what counts are the uses to which governmental power will be put here and now.

Time poses still another problem for republican reliance upon collective deliberation, one that, like the first, exists even if it is assumed that collective deliberation is theoretically capable of enabling citizens to overcome their initial differences. Deliberative politics are open only to those who have the time to study issues and to engage in personal exchange with those who hold different views. Only time spent in these activities justifies hope that disagreements may be eliminated or narrowed by information, that reasoned argument may occur, and that, failing persuasion, citizens may be able to understand the reasonableness, if not the rightness, of positions taken by other citizens and the significance that the latter attach to those positions. Not surprisingly, therefore, traditional republicanism generally assumed that citizens who held political power would be able to devote

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52. On the possibility of objectively right answers absent reliance upon natural law, see Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1166-72 (1977).

53. Professor Michelman's continuing efforts to identify strands of republican thought relevant to contemporary life have led him to place increasing emphasis upon this aspect of politics. See Michelman, *Traces*, *supra*, note 3, at 31-33; Michelman, *Voting Rights*, *supra* note 10. Despite the force of his arguments, the question remains whether, in light of the considerations advanced in the text, wisdom might not require that we rely upon other sources for some part of our moral education.

substantial time to public affairs, often because it was also assumed that their material needs would be met by the labor of others.<sup>54</sup> A political theory for modern times plainly cannot rest upon any such assumption, most obviously because of the commitment to universal political rights, but no less significantly because of another commitment, the freedom of individuals to transcend social roles — including the role of citizen — in pursuit of individually determined ends.<sup>55</sup> Unless citizens devote adequate time to the process, however, it is difficult to see how collective deliberation can be expected to overcome the differences among them.

Time is not the only obstacle to widespread citizen participation in the process of collective deliberation. The range and complexity of issues posed by contemporary life and the practical and theoretical knowledge required to understand them also stand in the way. Republicanism implicitly assumes that the issues posed for social choice are comprehensible to those who wield political power. The problems of premodern life need not be minimized to appreciate that the scale at which they occurred and the tools available for understanding them tended to bring them within the range of human experience to a far greater degree than is possible today. But unless the issues that politics addresses are broadly understood, how is collective deliberation to achieve reconciliation of divergent views among the citizenry?<sup>56</sup>

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54. The Anti-Federalists are the most notable exception, but they were, in thought as well as in time, at a point of transition between republicanism and liberalism. Although their language and in some measure their ideas were drawn from republican sources, they were, as Herbert Storing observed, “liberals — reluctant and traditional, indeed — in the decisive sense that they see the end of government as the security of individual liberty, not the promotion of virtue or the fostering of some organic common good. The security of liberty does require, in the Anti-Federalist view, the promotion of civic virtue and the subordination . . . of individual interest to the common good; but virtue and the common good are instrumental to individual liberty, and the resemblance to preliberal thought is superficial.” H. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 83 n.7 (1981).

The liberalism of the Anti-Federalists is reflected also in their commitment to limited government. To quote Storing once again: “The Federalists and the Anti-Federalists agreed that government is properly directed to the pursuit of limited ends, namely the security of individual rights; and there was very little debate about limited government in this fundamental sense . . .” *Id.* at 53.

55. Unlike workers in a communist society, who we are told will “hunt in the morning, fish in the afternoon, rear cattle in the evening, [and] criticize after dinner,” *see* K. MARX & F. ENGELS, *THE GERMAN IDEOLOGY* 53 (C.J. Arthur, ed., 1973), the citizens of a republican regime would presumably raise funds for a “pro-choice” or “anti-abortion” campaign in the morning, debate trade policy in the afternoon, and study crime control in the evening. And that’s only on Monday.

56. A possible response to some, but by no means all, of the problems I have suggested is to shift the forum for collective deliberation from the citizenry at large to another institution.

There is, in brief, an impressive array of reasons to question whether collective deliberation can, in the circumstances of contemporary American life, overcome the many and deep differences among citizens about "the values that ought to control public and private life."<sup>57</sup> Perhaps those who seek a revival of republican ideas can answer those questions, but to the extent that they cannot, there appears to be no alternative to accepting that politics must be, not just occasionally but often, a process of negotiation, bargain, and compromise among citizens (and their representatives) unable to achieve accord on any other basis. More fundamentally, in the absence of such answers, a continuing need exists to address the problems of ensuring against a stability-threatening overload of the political system and of ensuring that neither the absence of civic virtue nor its excess leads to the oppressive use of governmental power. Liberalism represents an attempt to deal with both problems. It is not yet clear how a revival of republicanism would aid us in doing so.<sup>58</sup>

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The arguments advanced by both Professors Michelman and Sunstein tend toward such a conclusion, though each in a different way. Though Sunstein "[would] attempt to design political institutions that promote discussion and debate among the citizenry," Sunstein, *supra* note 35, at 1549, he appears mainly to contemplate that Congress, strongly disciplined by the Supreme Court, will be the most important forum for collective deliberation. See Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1708 (1988). Michelman looks more directly to the Supreme Court, calling upon it to represent to us — within the limits of constitutional tradition, but unembarrassed by its insulation from the processes of popular control — the possibility of collective deliberation. See Michelman, *Traces*, *supra* note 3, at 66-77. (Whatever differences Michelman and Sunstein may have with constitutional scholars writing in the liberal tradition, they clearly share with most of the latter an agenda that includes finding justifications for enhancing judicial power.).

Michelman's and Sunstein's arguments deserve more extended consideration than I can give them here. One point seems worth making, however. Collective deliberation cannot be a vicarious experience. Its transformative potential depends upon participation in the process. For Congress and the Supreme Court to behave as Michelman and Sunstein propose must, therefore, increasingly widen the distance between the governors and the governed.

57. See CONSTITUTIONAL LAW, *supra* note 44, at 5.

58. In his most recent exposition of the relevance of republicanism to contemporary American politics, Professor Sunstein writes, somewhat surprisingly, that "some issues — religion is a familiar example — should be entirely off-limits to politics. It would be fanciful to suggest that different conceptions of the good life can or should always be mediated through politics. The republican position is not that every issue is subject to political resolution; it is instead that some questions can yield general agreement through deliberation." Sunstein, *supra* note 35, at 1555.

This is a welcome recognition of the limits of politics in contemporary society, one that leaves Sunstein comfortably within the liberal camp, see *supra* text accompanying notes 45-46, but I am unable to reconcile it with his continuing assertion that "individual preferences should not be taken as exogenous to politics." Sunstein, *supra* note 35, at 1549; see Powell, *supra* note 56, at 1708-09.