

Reviving Republicanism

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American constitutional law, as seen from the academy, seems to be in serious disarray. The liberal mainstream of academic thought is divided and increasingly unsure of its theoretical underpinnings as well as of its influence on the courts. From without, the mainstream is beset by strident and sometimes telling criticism from left and right. In particular, recent constitutional scholarship shows a disturbing tendency to adopt by default a sort of division of labor, with right-wing writers appropriating traditional concerns with history, left-wing scholars dominating discussion of the role of communitarian values, and liberals defending a diminished hegemony over academic doctrine. In "Beyond the Republican Revival" Professor Sunstein proposes that we address our problems in much the same way that earlier constitutionalists wished their contemporaries to resolve theirs—by reviving and rethinking a republican tradition that lies, sometimes forgotten, at the foundation of the constitutional system. Indeed, one of the truly brilliant aspects of Professor Sunstein's work on republicanism has been his success in offering what is often quite a far-reaching critique of current thought on apparently traditional grounds.

Revived republicanism promises to address and reintegrate constitutional themes that recent scholarship has ignored or separated. Contemporary American law, and constitutional law in particular, has been severely criticized for its inability to make sense of communitarian values and concerns, and its underlying insistence on interpreting society as a collection of atomized individuals.¹ Modern republicanism, in contrast, insists that "the motivating force of political behavior should not be self-interest, narrowly defined, and that civic virtue should play a role in political life";² the specific role of constitutional law will be to protect and undergird these communitarian elements in politics.

Contemporary constitutionalism's inability to recognize or foster community is accompanied by confusion and disagreement over the appropriate role of tradition in constitutional interpretation. The school of thought of which Chief Justice Rehnquist is the most prominent adherent would

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1. In a huge and often brilliant literature, see, for example, R. UNGER, *KNOWLEDGE AND POLITICS* (1975); E. WOLGAST, *THE GRAMMAR OF JUSTICE* (1987). Powerful arguments that atomistic individualism is a defining characteristic of late Western civilization are A. MACINTYRE, *AFTER VIRTUE* (2d ed. 1984); S. HAUERWAS, *A COMMUNITY OF CHARACTER* (1981).

2. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1550 (1988).

deny for the most part the validity of any tradition except that already frozen in the founding events, while other scholars and judges seem so unconcerned with history as to have no concept of tradition at all. Professor Sunstein's republicanism, on the other hand, lays claim to deep continuity with a tradition embedded in the founding events, and yet possessed of a capacity for change and development.

Another area of current constitutional disarray concerns the nature and propriety of moral discourse in constitutional law. Much of the liberal mainstream seems committed to an almost completely process-oriented account of the moral commitments legitimately to be found within American law,³ while contemporary "conservative" constitutionalists tend either to identify moral value with wealth-maximization⁴ or to adopt moral relativism in the public sphere.⁵ Modern republicanism, however, proclaims its "belief in the possibility of settling at least some normative disputes with substantively right answers."⁶

In this comment I shall raise three questions about Professor Sunstein's republican revival. First, in what way is it genuinely a revival of an earlier political tradition? Second, what is the nature of the "deliberation" that Professor Sunstein sees as the heart of republican community? Finally, does his modern republicanism offer a genuine escape from the proceduralism and skepticism that constitute the ethical core of much of contemporary constitutional theory?

I. THE HISTORICAL CONNECTION

A prominent feature of Professor Sunstein's republicanism is his claim to be reviving a very old tradition in American political thought (even if, as his article carefully points out, revival must be accomplished by rethinking). But what does it mean to "revive" a tradition the very existence of which was and is—contested?⁷ Professor Sunstein begins his article with a careful description of the difficulties with "revival":

History does not supply conceptions of political life that can be applied mechanically to current problems. Circumstances change; theoretical commitments cannot be wrenched out of context without great risk of distortion; contemporary social and legal issues can never be resolved merely through recovery of features, however important and attractive, of the distant past.⁸

3. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* (1980).

4. See e.g., R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

5. See, e.g., Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693 (1976).

6. Sunstein, *supra* note 2, at 1541.

7. There is an enormous literature on the subject. For an insightful guide, see Kerber, *The Republican Ideology of the Revolutionary Generation*, 37 *AM. Q.* 474 (1985).

8. Sunstein, *supra* note 2, at 1539.

In addition to these conceptual difficulties with the enterprise of revival, Professor Sunstein notes the ethical undesirability of resuscitating much of the tradition: the attractive elements of eighteenth-century republicanism were closely intertwined with its elitism, racism, sexism, and militarism. But despite these problems he insists that modern republicanism can and ought to be a revival of the eighteenth-century tradition.

The first step in Professor Sunstein's argument for the significance of a historical connection between his jurisprudence and the politics of the founding era is to assert the importance of republican thought in the framing period. The particular "home" of republican thought in American constitutionalism on this view is "in the work of the antifederalists; and antifederalist thought has exerted a continuing influence on American public law."⁹ Professor Sunstein is as a result particularly interested in antifederalist views on such matters as equality, representation and deliberation.¹⁰

At this point in my representation of Professor Sunstein's historical argument, the reader well might be inclined to interpret him as making the perfectly cogent claim that his republican revival is in fact a recapturing of antifederalist thought, understood as an often submerged and even paradoxical, but nevertheless real, element in American constitutionalism.¹¹ But this claim is *not* what Professor Sunstein intends, for the republicanism he wishes to revive can be found in the antifederalists' bitter opponents as well.¹² Indeed, Professor Sunstein insists that the republican themes of contemporary interest were also prominent in federalist thought.¹³ While the federalists rejected "central features of traditional republicanism"¹⁴—and perhaps rightly so ("the basic program of the federalists was ultimately vindicated"¹⁵)—they retained and embodied in the Constitution crucial republican themes such as a belief in deliberation and civic virtue and a concern to permit creative disagreement and citizen involvement. The historical connection definitely does not consist of revivifying antifederalism as a distinct tradition.

If federalism in the historical sense is not the opposing political system against which Professor Sunstein's republican tradition is to be contrasted, then the obvious candidate is liberalism. Most recent historical scholarship on republicanism has wrestled with the liberal/republican dichotomy, and

9. *Id.* at 1547. See generally H. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981) (discussing antifederalist contributions to constitutionalism).

10. *Id.* at 1548–58.

11. Perhaps the most powerful and influential presentation of such a historical argument is L. BANNING, THE JEFFERSONIAN PERSUASION (1978), in which Banning identifies important antifederalist elements in the political thought of the Jeffersonian Republicans of the 1790's (who, far from rejecting the Constitution, vociferously asserted their allegiance to it).

12. Sunstein, *supra* note 2, at 1547.

13. *Id.* at 1559–62.

14. *Id.* at 1558.

15. *Id.* at 1566.

recent efforts to utilize the concept of republicanism in constitutional law often employ the concept as a basis for criticizing liberal constitutionalism.¹⁶ But Professor Sunstein's rejection of the liberal/republican dichotomy is if anything more unequivocal than his rejection of a federalist/antifederalist polarity: "The opposition between liberal and republican thought in the context of the framing is, however, largely a false one. Only through a caricature of the tradition can liberalism be thought the antonym to the species of republicanism that operated during the constitutional period."¹⁷

Despite occasional ambiguities, Professor Sunstein does *not* accept the chronological account of American political thought that sees an earlier republicanism giving way in the founding era to a triumphant liberalism.¹⁸ The republican revival, he insists, draws on a tradition that was both liberal and republican, a tradition in which liberal thought was receptive to the very themes that Professor Sunstein sees as quintessentially republican.¹⁹ While the "most collectivist forms" of republicanism contradict "the most atomistic versions of liberalism . . . [r]epublican thought, understood in a certain way, is a prominent aspect of the liberal tradition."²⁰ Even liberalism's characteristic concern with rights which, at one point Professor Sunstein seems to castigate as "entirely foreign to republicanism,"²¹ is, it turns out, historically compatible with the republican tradition.²²

Professor Sunstein's unwillingness to posit any strong distinction between the liberalism and republicanism of the founders is crucial to his constructive project, which he labels "liberal republicanism." But his concern to join and even equate the liberal and republican themes leaves his search for a historical connection in some confusion. Professor Sunstein asserts that "[t]he fact that the American constitutional regime at its outset owed a great deal to republican thought is an important corrective to approaches that purport to speak for the American constitutional tradition, but proceed from pluralist premises or invoke prepolitical rights."²³ But he clearly portrays the founders' thought as a synthesis of republicanism with early forms of pluralism and interest-group politics. He simply does

16. See, e.g., Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987).

17. Sunstein, *supra* note 2, at 1567.

18. The classic presentation of this view is G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

19. See, e.g., Sunstein, *supra* note 2, at 1566-71 (liberalism incorporates concern over deliberation and equality and the rejection of sheer self-interest as an acceptable justification for political decisions).

20. *Id.* at 1569.

21. *Id.* at 1551. Professor Sunstein presumably means that the concept of prepolitical rights is "entirely foreign" to his modern republicanism; the idea and rhetoric of natural or propolitical rights certainly was not foreign to many of the historical figures whom he would regard as "republican."

22. *Id.* at 1561-63.

23. *Id.* at 1563.

not see a republican tradition, as distinct from liberalism, in the founding era. Professor Sunstein well may be right to reject such a sharp historical distinction (indeed, I think he is), but by doing so he makes it very difficult to imagine how founding era thought might serve as a corrective to concepts that it already embodied.

In any event, the historical meaning of republicanism, I suggest, does not matter in any crucial way for Professor Sunstein. Historic republicanism, he freely admits, is relevant for contemporary constitutionalism only insofar as it possesses "contemporary relevance or appeal."²⁴ This "relevance or appeal" clearly is not a function of historical meaning and is not subject to correction by historical tradition. If historical republicans believed in deliberation and sexism, Professor Sunstein will endorse the former and reject the latter for reasons that have nothing to do with history. Modern republicanism, it seems, is interested only in those parts of the language of the past that it can appropriate. Professor Sunstein does not offer us historical republicanism and commend its virtues to us; he offers us a contemporary political theory and notes that at times the founders said similar things.

II. THE MEANING OF DELIBERATION

The core of republicanism for Professor Sunstein is the "characteristically republican belief in deliberative democracy."²⁵ Interest-group pluralism regards politics as a system "of aggregating citizen preferences" and the task of constitutional theory as insuring that the prepolitical wants, needs and ideas that citizens bring to politics are "reflected accurately" in the political process. In contrast, republicans "treat politics as above all deliberative; and deliberation is to cover ends as well as means."²⁶ A republican politics of deliberation therefore has a "transformative dimension" in that it requires political actors to reflect critically on their own preferences, and to modify or reject those preferences in accordance with a deliberative process which brings "new information and different perspectives to bear" on one's own choices.²⁷

Deliberative criticism requires distance: Decision-makers must be able to scrutinize their own and their constituents' preferences and predispositions. Public decisions (paradigmatically, the passage of legislation, but Professor Sunstein recognizes the public nature of much that is nominally "private") therefore cannot legitimately be the product of the interest-group brokering of discordant private goals; "instead they require public-regarding justifications offered after multiple points of view have been

24. *Id.* at 1563.

25. *Id.* at 1540.

26. *Id.* at 1548.

27. *Id.* at 1544.

consulted and (to the extent possible) genuinely understood."²⁸ Such a deliberative politics can only be "made possible by what is sometimes described as 'civic virtue,'"²⁹ by which Professor Sunstein means the capacity of political actors "to ask not only what is in their private interest, but also what will best serve the community in general."³⁰ The effect of this "requirement of deliberation" will be to produce, at least at times, "uniquely correct outcomes" that are supported by "a consensus (or at least broad agreement) among political equals."³¹

"Deliberative democracy," as Professor Sunstein presents it, is an attractive but, I believe, flawed concept. In the first place, it is unclear to what extent the concept of deliberation is consistent with Professor Sunstein's concern for broad participation in the political process. Republicans, we are told, "will attempt to design political institutions that promote discussion and debate among the citizenry," but they will also "attempt to insulate political actors from private pressure."³² How are these two goals to be combined? Professor Sunstein discusses with apparent approval the founders' efforts to foster "deliberative government" through indirect elections, legislative autonomy, and the rejection of a constituent right to instruct representatives. Such institutional arrangements, however, are premised on assumptions that contradict a belief in participatory or "strong" democracy:³³ a distrust in at least the wisdom of the citizen body generally, and a corresponding confidence that a select and autonomous body of representatives are more likely to make intelligent and virtuous decisions for the public good than is the public itself.³⁴ Professor Sunstein's argument for deliberative politics unintentionally sounds very much like an argument for government by an independent judiciary, which is scarcely a program for broad political participation.

My second concern with the concept of deliberation involves the consistency with which Professor Sunstein rejects "prepolitical and exogenous"

28. *Id.* at 1575. Professor Sunstein goes on immediately to describe this account of deliberative decision-making as "the foundation of contemporary republicanism." *Id.*

29. *Id.* at 1541.

30. *Id.* at 1550.

31. *Id.*

32. *Id.* at 1549.

33. See B. BARBER, *STRONG DEMOCRACY* (1984).

34. This combination of an asserted belief in broad political participation with a desire to create a distance between the public and its governors is, of course, a common theme in the thought of historical figures we might call republican. See e.g., Letter from Jefferson to Pierre S. Dupont de Nemours (April 24, 1816), in *THE POLITICAL WRITINGS OF THOMAS JEFFERSON* 49 (E. Dumbauld ed. 1955) ("the people by which is meant the mass of individuals composing the society . . . being unqualified for the management of affairs requiring intelligence above the common level, yet competent judges of human character, they choose, for their management, representatives . . ."); see also *id.* at 38 n.112 (Jefferson's concern for the state senate was "to get the wisest men chosen, and to make them perfectly independent when chosen"). The latter remark is quoted by Professor Sunstein in connection with a discussion of "the traditional republican faith in the value of virtue and deliberation" Sunstein, *supra* note 2, at 1560.

rights and interests.³⁵ He repeatedly insists that a “central point” of republican deliberation is its capacity to question and modify pre-existing values, and its unwillingness to rule out discussion and debate over the same set of “prepolitical concerns.” But this description of deliberation does not seem to me to be consistently maintained. Professor Sunstein is not willing in fact to open all private preferences to public examination. The clearest example of this unacknowledged limit on deliberation is religion. Professor Sunstein stresses that “some issues—religion is a familiar example—should be entirely off-limits to politics”;³⁶ “certain considerations—like religion or political affiliation” should not be taken into account.”³⁷

At first glance such an exclusionary rule seems inexplicable. If, for example, the present distribution of wealth is open for deliberative debate, why must we *not* discuss present-day secularism (or civic religion) as well? Professor Sunstein’s response is twofold: “This exclusion of religion from politics has been based both on the notion that religious conviction is a matter of private right and on the view that removal of religion from the political agenda protects republican politics by ensuring against stalemate and factionalism.”³⁸ Neither of these rationales for excluding religion from public discourse is reconcilable with Professor Sunstein’s general account of deliberation. The notion of religion as “a matter of private right” is in direct contradiction to his assertion that the concept of prepolitical rights is “entirely foreign to republicanism,” and thus can only be justified on grounds that he himself would label anti-republican. The argument that religion must be excluded in order to prevent “stalemate and factionalism” is, if anything, even more deeply contradictory, for it suggests a fundamental limit on the capacity of civic virtue to guide political debate. If religion is so disruptive that it must be excluded from discussion, why can not the same be said of property rights (and indeed at least part of the founders’ concern over property was a concern over the social unrest that wealth redistribution might inspire³⁹).

A third problem with the concept of deliberation lies in the claim that it can settle “at least some normative disputes with substantively right answers”⁴⁰ or “uniquely correct outcomes.”⁴¹ While Professor Sunstein is careful not to make grandiose claims about deliberation’s capacity generally to transcend interest-group brokering and moral relativism, he does insist that at least “in some settings” political decisions can be made that

35. *Id.* at 1541.

36. *Id.* at 1555.

37. *Id.* at 1568; *see also id.* at 1563, where Professor Sunstein states that the founders’ “incorporation of Calvinism” into their thought “should not be revived.”

38. *Id.* at 1555 n.85.

39. *See, e.g.*, THE FEDERALIST No. 10 (J. Madison).

40. Sunstein, *supra* note 2, at 1541.

41. *Id.* at 1550.

are “substantively correct” implementations of the common good.⁴² This is an ambitious assertion, for a vision of politics that could deliver on this claim would be able thereby to resolve one of the thorniest questions of contemporary American political and constitutional theory.

Constitutional deliberation as described by Professor Sunstein unfortunately fails to escape the “thin” morality of process that characterizes most mainstream liberal constitutionalism. “[S]ubstantively correct outcomes,” for the modern republican, are “understood as such through the ultimate criterion of agreement among political equals”, and the “common good” is defined as the outcome of a “well-functioning deliberative process.”⁴³ The correctness of a specific political decision is to be judged by the legitimacy of its claim to rest on a “a consensus (or at least broad agreement) among political equals” after deliberation. These stringently procedural definitions of “correct” and “good” are complemented by a strict process definition of “objectionable” or “unjustified” political outcomes: “certain results could not be the product of a genuine deliberative process.”⁴⁴ Republicanism’s common good is scarcely distinguishable from pluralism’s aggregation and balancing of interests, for Professor Sunstein gives us no criterion for determining the justice of “deliberative” political decisions other than the requirement that political actors articulate a public rationale for their positions.⁴⁵ That is a requirement that the histories of legislation and of minimal rationality review would suggest is formal and empty.

My most fundamental concern with the concept of deliberation has to do not with its internal inconsistencies but with its underlying premises. The claim that free and equal deliberation among political equals will lead to “uniquely correct” political decisions is an assertion of faith. Professor Sunstein seems to reject “character formation”—the transformation of persons and personal relationships—as a legitimate object of public deliberation and decision, but he never explains how untransformed persons, culturally molded by the modern West’s atomistic individualism, will be capable of conducting a deliberative and transformative politics.⁴⁶ Professor Sunstein does not offer us the “credible theory of social transforma-

42. *Id.* at 1550, 1554.

43. *Id.* at 1554.

44. *Id.* at 1550 n.54.

45. Modern theorists of ethics disagree sharply over the possibility of constructing a substantive morality from a set of liberal process constraints on political discussion. Compare B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980) (arguing in the affirmative) with A. MACINTYRE, *supra* note 1 (arguing the contrary).

46. Eighteenth century republicanism was ultimately linked to a particular vision of human personality involving notions of fame, honor and virtue that simply are absent from our culture. See R. WIEBE, *THE OPENING OF AMERICAN SOCIETY* 7-66 (1984). It is not self-evident that we can appropriate or sustain the one without the other.

tion” and the “vision of transformed personal relations”⁴⁷ necessary to render plausible his optimistic evaluation of the effects of deliberation.

III. CONCLUSION

Professor Sunstein is one of the most creative constitutional scholars of the contemporary academy. It is wholly unsurprising, therefore, that “Beyond the Republican Revival” articulates a variety of important and innovative legal and constitutional arguments. His suggestions regarding statutory construction and group representation, in particular, deserve careful consideration by academics, judges and politicians. It is, ironically, those elements in his project that give it its title of republican *revival* that seem to me most problematic. Professor Sunstein identifies only a quite attenuated relationship between his ideas and specific schools of thought in the founding era. This need not be a disadvantage, for as Professor Sunstein is well aware, eighteenth-century republicanism was by no means an entirely attractive phenomenon. Indeed the claim that his constitutional theory is a revival of an earlier tradition does little to clarify or support crucial concepts such as deliberation and common good. The meaning and value of those concepts should be addressed “straightforwardly as issues of political theory” and, I would add, of constitutional law for, as Professor Sunstein himself notes, “[c]ontemporary republicanism is more to be made than found.”⁴⁸

47. R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 22, 25 (1986). One of the many strengths of Professor Unger’s work is his recognition that a transformative politics requires a transformative account of personality. See also R. UNGER, *PASSION* (1984); R. UNGER, *POLITICS* (1987-).

48. Sunstein, *supra* note 2, at 1589.

