Fordham Law Review

Volume 66 | Issue 1 Article 1

1997

The Order of the Coif Annual Lecture, Lecture, The Constituteion of the Procedural Republic: Liberal Rights and Civic Virtues

Michael J. Sandel

The Order of the Coif Annual Lecture, Lecture, The Constituteion of the Procedural Republic: Liberal Rights and Civic Virtues

Cover Page Footnote

This lecture draws upon my book Democracy's Discontent: America in Search of a Public Philosophy (1996). I would like to thank The Order of the Coif for sponsoring the lecture, and Dean John Feerick and the faculty of the Fordham University School of Law for thier warm hospitality and probing questions. I am especially grateful to Professor James E. Fleeming for his skillful arrangement and for leading the stimulating discussion that preceded and followed the lecture.

FORDHAM LAW REVIEW

Volume 66

1997-1998

FORDHAM LAW REVIEW

VOLUME LXVI OCTOBER 1997 NUMBER 1

CONTENTS

ORDER OF THE COIF ANNUAL LECTURE

THE CONSTITUTION OF THE PROCEDURAL REPUBLIC: LIBERAL RIGHTS AND CIVIC VIRTUES ..... *Michael J. Sandel* 1

ARTICLES

CONCEPTS OF CULPABILITY AND DEATHWORTHINESS: DIFFERENTIATING BETWEEN GUILT AND PUNISHMENT IN DEATH PENALTY CASES ..... *Phyllis L. Crocker* 21

BORDER PATROL: REFLECTIONS ON THE TURN TO HISTORY IN LEGAL SCHOLARSHIP ..... *Laura Kalman* 87

NOTES

"EVER BEEN IN A [FOREIGN] PRISON?": THE IMPLEMENTATION OF TRANSFER OF PENAL SANCTIONS TREATIES BY U.S. STATES ..... *David S. Finkelstein* 125

IN THE HOT BOX AND ON THE TUBE: WITNESSES' INTERESTS IN TELEVISED TRIALS ..... *Stacy R. Horth-Neubert* 165

THE APPLICABILITY OF THE ATTORNEY-CLIENT PRIVILEGE TO COMMUNICATIONS WITH FOREIGN LEGAL PROFESSIONALS .... *Daiske Yoshida* 209

FORDHAM LAW REVIEW

VOLUME LXVI NOVEMBER 1997 NUMBER 2

CONTENTS

SYMPOSIUM
HUMAN RIGHTS ON THE EVE OF THE NEXT CENTURY

BEYOND VIENNA & BEIJING: HUMAN RIGHTS IN THEORY

THE ELUSIVE QUEST FOR GLOBAL JUSTICE ..... *Edward B. Foley* 249

CAPABILITIES AND HUMAN RIGHTS ..... *Martha C. Nussbaum* 273

HUMAN RIGHTS GENEALOGY ..... *Ruti Teitel* 301

U.N. HUMAN RIGHTS STANDARDS & U.S. LAW

THE CURRENT ILLEGITIMACY OF INTERNATIONAL HUMAN RIGHTS LITIGATION ..... *Curtis A. Bradley & Jack L. Goldsmith, III* 319

SENSE AND NONSENSE ABOUT CUSTOMARY INTERNATIONAL LAW: A RESPONSE TO PROFESSORS BRADLEY AND GOLDSMITH ..... *Gerald L. Neuman* 371

THE LAW OF OUR LAND: CUSTOMARY INTERNATIONAL LAW AS FEDERAL LAW AFTER *ERIE* ..... *Beth Stephens* 393

FILARTIGA'S FIRM FOOTING: INTERNATIONAL HUMAN RIGHTS AND FEDERAL COMMON LAW ..... *Ryan Goodman & Derek P. Jinks* 463

ASPECTS OF HUMAN RIGHTS IMPLEMENTATION

PROTECTING HUMAN RIGHTS THROUGH A CONSTITUTIONAL COURT: THE CASE OF SOUTH AFRICA ..... *Brice Dickson* 531

THE STATES AND INTERNATIONAL HUMAN RIGHTS ..... *Peter J. Spiro* 567

THE EVOLUTION AND IMPLEMENTATION OF MINORITY RIGHTS ..... *David Wippman* 597

HUMAN RIGHTS & NON-GOVERNMENTAL ORGANIZATIONS

FOREWORD: HUMAN RIGHTS AND NON-GOVERNMENTAL ORGANIZATIONS ON THE EVE OF THE NEXT CENTURY ..... *Michael Posner* 627

SEXUAL HARASSMENT AND HUMAN RIGHTS IN LATIN AMERICA ..... *Gaby Oré-Aguilar* 631

OBSERVING THE RULE OF LAW: EXPERIENCES FROM NORTHERN IRELAND ..... *Angela Hegarty* 647

ASIA'S ACTIVISTS AND THE FUTURE OF HUMAN RIGHTS ..... *Dinah PoKempner* 677

NOTE

INDIGENOUS SELF-DETERMINATION IN AN AGE OF GENETIC PATENTING: RECOGNIZING AN EMERGING HUMAN RIGHTS NORM ..... *Kara H. Ching* 687

FORDHAM LAW REVIEW

VOLUME LXVI DECEMBER 1997 NUMBER 3

CONTENTS

DEDICATION

A DEDICATION TO THE NEW YORK COURT OF APPEALS ON ITS 150TH ANNIVERSARY 731

SYMPOSIUM
DERIVATIVES & RISK MANAGEMENT

FOREWORD: DERIVATIVES & RISK MANAGEMENT SYMPOSIUM .....*Alan N. Rechtschaffen* 735

COMMON LAW THEORIES OF LIABILITY IN DERIVATIVES LITIGATION .....*Aaron Rubinstein* 737

THE CHALLENGE OF DERIVATIVES (CONTINUED) ..... *Saul S. Cohen* 747

REACTING TO A REGULATORY INVESTIGATION INTO DERIVATIVES MARKET ACTIVITY ... *Ira Lee "Ike" Sorkin* 755

KEYNOTE ADDRESS ..... *Brooksley Born* 761

KEYNOTE ADDRESS .....*Susan M. Phillips* 767

THE TREASURY DEPARTMENT'S ROLE IN REGULATING THE DERIVATIVES MARKETPLACE .....*Roger L. Anderson* 775

THE FINANCIAL ACCOUNTING STANDARDS BOARD DERIVATIVES ACTIVITY AND DISCLOSURE.....*John M. "Neel" Foster* 779

ARTICLES

DO STATE LEGISLATURES HAVE A ROLE IN RESOLVING THE "JUST COMPENSATION" DILEMMA? SOME LESSONS FROM PUBLIC CHOICE AND POSITIVE POLITICAL THEORY..... *Marilyn F. Drees* 787

INTERSECTIONALITY AND POSITIONALITY:
SITUATING WOMEN OF COLOR IN THE
AFFIRMATIVE ACTION DIALOGUE ..... *Laura M. Padilla* 843

NOTES

THE LITTLE TRAIN THAT COULDN'T:
DID THE PENNSYLVANIA ANTI-TAKEOVER
STATUTE FAIL TO PROTECT CONRAIL
FROM A HOSTILE SUITOR?..... *David N. Hecht* 931

PHYSICIAN DATA BANKS: THE PUBLIC'S
RIGHT TO KNOW VERSUS THE
PHYSICIAN'S RIGHT TO PRIVACY ..... *Julie Barker Pape* 975

CREATING PROBLEMS RATHER THAN
SOLVING THEM: WHY CRIMINAL
PARENTAL RESPONSIBILITY LAWS DO NOT
FIT WITHIN OUR UNDERSTANDING
OF JUSTICE ..... *Tami Scarola* 1029

FORDHAM LAW REVIEW

VOLUME LXVI MARCH 1998 NUMBER 4

CONTENTS

SYMPOSIUM
THE RELEVANCE OF RELIGION TO A LAWYER'S WORK: AN INTERFAITH CONFERENCE

FOREWORD: THE RELIGIOUS LAWYERING MOVEMENT: AN EMERGING FORCE IN LEGAL ETHICS AND PROFESSIONALISM ..... *Russell G. Pearce* 1075

REMARKS

RELIGION AND THE LAWYER ..... *N. Lee Cooper* 1083

FAITH TENDS TO SUBVERT LEGAL ORDER . *Thomas L. Shaffer* 1089

THE THEOLOGICAL PERSPECTIVE

LAWYERS, CLIENTS, AND COVENANT: A RELIGIOUS PERSPECTIVE ON LEGAL PRACTICE AND ETHICS ..... *Joseph Allegretti* 1101

FAITH AND THE ATTORNEY-CLIENT RELATIONSHIP: A MUSLIM PERSPECTIVE..... *Azizah Y. al-Hibri* 1131

PRACTICING CRIMINAL LAW: A JEWISH LAW ANALYSIS OF BEING A PROSECUTOR OR DEFENSE ATTORNEY..... *Michael J. Broyde* 1141

RESPONSE TO THE PAPER AUTHORED BY PROFESSOR JOSEPH ALLEGRETTI: LAWYERS, CLIENTS, AND COVENANT: A RELIGIOUS PERSPECTIVE ON THE LEGAL PRACTICE AND ETHICS ..... *Peggy T. Cantwell* 1153

RESPONSE TO JOSEPH ALLEGRETTI: THE RELEVANCE OF RELIGION TO A LAWYER'S WORK ..... *Lawrence A. Hoffman* 1157

WHAT DOES RELIGION HAVE TO DO WITH LEGAL ETHICS? A RESPONSE TO PROFESSOR ALLEGRETTI ..... *James M. Jenkins* 1167

BEING A BUDDHIST AND A LAWYER ..... *Kinji Kanazawa* 1171

COVENANTING WITH THE POWERLESS: STRANGERS, WIDOWS, AND ORPHANS ..... *Dr. Ana Maria Pineda, R.S.M.* 1177

REPRESENTING NATIVE PEOPLE AND INDIAN TRIBES: A RESPONSE TO PROFESSOR ALLEGRETTI ..... *Frank Pommersheim* 1181

PRACTITIONERS OF HINDU LAW: ANCIENT AND MODERN ..... *K.L. Seshagiri Rao* 1185

THE POLITICAL THEORY PERSPECTIVE

JURISPRUDENCE AND THEOLOGY ..... *Edward B. Foley* 1195

SPIRITED DEBATE: A COMMENT ON EDWARD B. FOLEY'S *JURISPRUDENCE AND THEOLOGY*..... *Perry Dane* 1213

MUSLIMS AND ACCESSIBLE JURISPRUDENCE IN LIBERAL DEMOCRACIES: A RESPONSE TO EDWARD B. FOLEY'S *JURISPRUDENCE AND THEOLOGY*.. *Khaled Abou El Fadl* 1227

HOW FAR CAN WE SEPARATE THEOLOGY AND JURISPRUDENCE? COMMENT ON EDWARD B. FOLEY'S *JURISPRUDENCE AND THEOLOGY*..... *John Langan, S.J.* 1233

DELIBERATIVE DEMOCRACY, OVERLAPPING CONSENSUS, AND SAME-SEX MARRIAGE ..... *Linda C. McClain* 1241

THE LEGAL ETHICS PERSPECTIVE

THE RELEVANCE OF RELIGION TO A LAWYER'S WORK: LEGAL ETHICS..... *Leslie Griffin* 1253

NEGOTIATING BETWEEN TWO CONVICTIONAL SYSTEMS..... *Anver M. Emon* 1283

RELIGION IS NOT TOTALLY IRRELEVANT TO LEGAL ETHICS ..... *Monroe H. Freedman* 1299

LAWYER DISCIPLINE: CONSCIENTIOUS NONCOMPLIANCE, CONSCIOUS AVOIDANCE, AND PROSECUTORIAL DISCRETION ..... *Bruce A. Green* 1307

THE RELEVANCE OF RELIGION TO A LAWYER'S WORK—LEGAL ETHICS: A RESPONSE TO PROFESSOR GRIFFIN ..... *Thomas D. Morgan* 1313

Risking the Terrible Question of Religion in the Life of the Lawyer ..... *Burnele Venable Powell* 1321

GENERAL RESPONSES TO THE CONFERENCE

Comment ..... *Milner S. Ball* 1329

The Relevance of Religion to a Lawyer's Work ..... *Peggy T. Cantwell* 1333

Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation with Evil .... *Teresa Stanton Collett* 1339

A Citizen Lawyer's Moral, Religious, and Professional Responsibility for the Administration of Justice for the Poor ..... *Mary Ann Dantuono* 1383

A Christian Lawyer's Mandate to Provide Pro Bono Publico Service ..... *Nitza Milagros Escalera* 1393

The Practice of Law as a Vocation or Calling ..... *Timothy W. Floyd* 1405

The Discernment of (the Law Student's) Vocation in Law ..... *David L. Gregory* 1425

The Lawyer's Duties of Confidentiality and Avoidance of Harm to Others: Lessons from Sunday School ..... *Steven H. Hobbs* 1431

The Immutability of Faith and the Necessity of Action ..... *Randy Lee* 1455

The Religious Lawyer in a Pluralist Society ..... *Howard Lesnick* 1469

Religious Symbols and Religious Garb in the Courtroom: Personal Values and Public Judgments ..... *Samuel J. Levine* 1505

A Catholic Lawyer and the Church's Social Teaching .... *F. Giba-Matthews, ofm* 1541

Faith and the Liberal Legal Order: An Appreciative Response to Shaffer and the Symbolism Workshop ..... *Elizabeth Mensch* 1557

INDIGENOUS ETHICS AND ALIEN LAWS:
NATIVE TRADITIONS AND THE
UNITED STATES LEGAL SYSTEM ..... *Mark A. Michaels* 1565

WORKING GROUP REPORTS & AGENDAS

REPORT OF WORKING GROUP #1 1585

AGENDA: THE RELIGIOUS LAWYER IN A RELIGIOUSLY
PLURALIST SOCIETY 1589

REPORT OF WORKING GROUP #2 1591

AGENDA: RELIGIOUS PERSPECTIVES ON THE RULE OF LAW... 1593

REPORT OF WORKING GROUP #3 1597

AGENDA: THE PRACTICE OF LAW AS A VOCATION OR
CALLING 1601

REPORT OF WORKING GROUP #4 1605

AGENDA: MORAL [AND RELIGIOUS]
COUNSELING OF CLIENTS 1609

REPORT OF WORKING GROUP #5 1613

AGENDA: DECIDING WHETHER TO REPRESENT A CLIENT..... 1619

REPORT OF WORKING GROUP #6 1621

AGENDA: THE DUTY OF CONFIDENTIALITY AND
HARM TO OTHERS 1623

REPORT OF WORKING GROUP #7 1627

AGENDA: PRO BONO AND SERVICE OBLIGATIONS 1629

REPORT OF WORKING GROUP #8 1633

AGENDA: RELIGIOUS SYMBOLS IN THE LEGAL
WORKPLACE AND COURTROOM 1637

BIBLIOGRAPHY 1643

FORDHAM LAW REVIEW

VOLUME LXVI APRIL 1998 NUMBER 5

CONTENTS

DEDICATION

THE BOARD OF EDITORS OF THE FORDHAM LAW REVIEW DEDICATES THIS ISSUE TO THE MEMORY OF EDWARD J. FREEMAN 1653

ROUNDTABLE DISCUSSION
THE FUTURE OF CLASS ACTION MASS TORTS

THE FUTURE OF CLASS ACTIONS IN MASS TORT CASES: A ROUNDTABLE DISCUSSION ..... *Stephen A. Saltzburg, Hon. Edward R. Becker, Hon. Alicemarie H. Stotler, Debra M. Torres, Esq., Hon. Jack B. Weinstein, Melvyn I. Weiss, Esq.* 1657

ARTICLES

IF NOT MARRIAGE? ON SECURING GAY AND LESBIAN FAMILY VALUES BY A "SIMULACRUM OF MARRIAGE" ..... *Craig W. Christensen* 1699

HARMONIZATION OF SECURITIES DISCLOSURE RULES IN THE GLOBAL MARKET— A PROPOSAL ..... *Uri Geiger* 1785

THE POWER AND THE PROCESS: INSTRUCTIONS AND THE CIVIL JURY ..... *Elizabeth G. Thornburg* 1837

NOTES

STATUTORY INTERPRETATION OF FEDERAL JURISDICTIONAL STATUTES: JURISDICTION OF THE PRIVATE RIGHT OF ACTION UNDER THE TCPA ..... *Fabian D. Gonell* 1895

CLINTON COUNTY COMMISSIONERS V. EPA: CLOSING OFF A ROUTE TO PRE-ENFORCEMENT REVIEW ..... *Karen M. Hoffman* 1939

CONTINUITY FOR TRANSATLANTIC COMMERCIAL CONTRACTS AFTER THE INTRODUCTION OF THE EURO ..... *Rebecca H. Marek* 1985

HAIL, HAIL, THE GANGS ARE ALL HERE: WHY NEW YORK SHOULD ADOPT A COMPREHENSIVE ANTI-GANG STATUTE ..... *Bart H. Rubin* 2033

FORDHAM LAW REVIEW

VOLUME LXVI MAY 1998 NUMBER 6

CONTENTS

REMARKS

A RETURN OF PROFESSIONALISM ..... *Paul J. Kelly, Jr.* 2091

ESSAY

EFFICIENCY AND CONSPIRACY: CONFLICTS OF INTEREST, ANTI-NEPOTISM RULES, AND SEPARATION STRATEGIES ..... *Saul Levmore* 2099

ARTICLES

OUR ADMINISTRATIVE SYSTEM OF CRIMINAL JUSTICE ..... *Gerard E. Lynch* 2117

THE VESTIGIAL CONSTITUTION: THE HISTORY AND SIGNIFICANCE OF THE RIGHT TO PETITION ..... *Gregory A. Mark* 2153

NOTES

THE AMERICANS WITH DISABILITIES ACT AND STATE PRISONS: A QUESTION OF STATUTORY INTERPRETATION ..... *Emily Alexander* 2233

THE OTHER "NEGLECTED" PARTIES IN CHILD PROTECTIVE PROCEEDINGS: PARENTS IN POVERTY AND THE ROLE OF THE LAWYERS WHO REPRESENT THEM ..... *Kathleen A. Bailie* 2285

WILL JEWISH PRISONERS BE *BOERNE* AGAIN? LEGISLATIVE RESPONSES TO *CITY OF BOERNE V. FLORES*..... *Yehuda M. Braunstein* 2333

THE MAINE CLEAN ELECTION ACT: THE FUTURE OF CAMPAIGN FINANCE REFORM ..... *Michael E. Campion* 2391

HUMAN EMBRYO EXPERIMENTATION:
REGULATION AND RELATIVE RIGHTS . *Christine L. Feiler* 2435

THE CONSTITUTIONALITY OF COVENANT
MARRIAGE LAWS ..... *Melissa Lawton* 2471

WHAT CONGRESS SAID ABOUT THE HEIGHTENED
PLEADING STANDARD: A PROPOSED
SOLUTION TO THE SECURITIES
FRAUD PLEADING CONFUSION ..... *Patricia J. Meyer* 2517

THE UNIVERSITY'S LIABILITY FOR
PROFESSOR-STUDENT SEXUAL
HARASSMENT UNDER TITLE IX .... *Henry Seiji Newman* 2559

ADAPTING TITLE VII TO MODERN EMPLOYMENT REALITIES:
THE CASE FOR THE UNPAID INTERN ..... *Craig J. Ortner* 2613

AN ARGUMENT FOR PRESERVING THE AGENCY
DEFENSE AS APPLIED TO
PROSECUTIONS FOR UNLAWFUL
SALE, DELIVERY, AND POSSESSION
OF DRUGS ..... *Scott W. Parker* 2649

A NATURAL LAW DEFENSE OF
BUCKLEY V. VALEO ..... *Jack B. Sarno* 2693

THE ORDER OF THE COIF ANNUAL LECTURE

THE CONSTITUTION OF THE PROCEDURAL REPUBLIC: LIBERAL RIGHTS AND CIVIC VIRTUES

*Michael J. Sandel**

PROFESSOR FLEMING: Good evening. I'm Professor Jim Fleming. On behalf of Dean John Feerick, along with Associate Dean Mike Martin and Professor Dan Capra, who are President and Secretary-Treasurer of the Fordham Chapter of The Order of the Coif, I would like to welcome you to The Order of the Coif Annual Lecture.

Our speaker is Michael J. Sandel, Professor of Government at Harvard University. His lecture is entitled "The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues."

Let me say a few words about The Order of the Coif Annual Lecture Series. The Order of the Coif is an honorary scholastic society. Pursuant to its historic purpose of promoting excellence in legal scholarship, it sponsors a national lecture series designed to afford member schools additional opportunities to present lectures by outstanding speakers. The goals of the program are to encourage legal scholarship, to advance the body of legal knowledge, and to promote significant dialogue upon legal issues among scholars, members of the bench and bar, and law students. The brochure for this lecture contains a statement about the purposes of both The Order and the Annual Lecture Series.

Fordham University School of Law was awarded a chapter in The Order of the Coif in 1994, and it is pleased to present The Order of the Coif Annual Lecture by Professor Michael Sandel.

It is a privilege and a pleasure for me to introduce Professor Sandel. He is widely regarded as one of America's most important and provocative political and constitutional theorists and as a leading figure in the revival, or reinvigoration, of the civic republican strand of our political and constitutional tradition.

Professor Sandel is the author, most recently, of *Democracy's Discontent: America in Search of a Public Philosophy*, which has already

* This lecture draws upon my book *Democracy's Discontent: America in Search of a Public Philosophy* (1996). I would like to thank The Order of the Coif for sponsoring the lecture, and Dean John Feerick and the faculty of the Fordham University School of Law for their warm hospitality and probing questions. I am especially grateful to Professor James E. Fleming for his skillful arrangements and for leading the stimulating discussion that preceded and followed the lecture.

been highly acclaimed as a major work in countless reviews that span the political and constitutional spectrum. His earlier book, *Liberalism and the Limits of Justice*, is one of the most influential critiques of rights-based liberal theories associated with John Rawls and Ronald Dworkin. He is also a public philosopher of sorts, who regularly comments on American political and constitutional issues as a contributing columnist to the *New Republic*.

Finally, Professor Sandel is known as an outstanding speaker, typically drawing some 800 students in his undergraduate course at Harvard entitled "Justice." While I was a law student, I had the honor of serving as a teaching fellow in that great course and benefitted immeasurably from that experience.

Now, I give you Michael Sandel.

PROFESSOR SANDEL: Thank you very much for those very generous words of introduction from my friend, Professor Jim Fleming, and thank you all for having me. It's an honor to be here and an honor to speak under the auspices of The Order of the Coif.

My subject today is "The Constitution of the Procedural Republic." What I mean by the "procedural republic" is a certain way of thinking about politics and law. It describes a public philosophy—a vision of citizenship and freedom that is embodied in our legal and political practices.

What I'd like to argue is that the procedural republic is animated by a powerful and attractive vision of citizenship and freedom; and yet, it is flawed. Despite the attraction of the public philosophy of procedural liberalism, it gives up too much. It gives up on an older, more demanding understanding of citizenship and freedom connected with a rival tradition of political thought, a competing public philosophy. That competing public philosophy might be described as the civic, or the republican, tradition.

I. Liberal and Republican Freedom

Let me begin, before turning to our present political and constitutional circumstance, by saying something about these two traditions of thought and of practice. Let me first describe the public philosophy that informs contemporary political and constitutional discourse: the public philosophy of procedural liberalism. Why is it attractive, and why has it come to be the predominant public philosophy of our day?

According to procedural liberalism, to be free is to have the right to pursue my own values, interests, and ends, my own vision of the good life, whatever it may be, so long as I respect other people's right to do the same. According to the public philosophy of procedural liberalism, government shouldn't try to form in its citizens any particular purposes or ends, any particular virtues. Instead, government should be neutral among competing moral and religious outlooks.

Procedural liberalism worries about the danger of coercion; it worries about the danger of imposing on people values they may not share. That is why it insists that the Constitution must defend a framework of rights that is neutral among ends, neutral among the competing moral and religious convictions its citizens espouse.

The appeal of procedural liberalism is clear. We live, after all, in a pluralistic society. We know that people disagree on a great many moral and religious questions. So isn't it reasonable to try to bracket or set aside those moral and religious disagreements, those competing visions of the good life, when designing the basic structure of rights and duties that are enforced by law?

What is the rival picture? What is the more demanding notion of citizenship and freedom that procedural liberalism rejects? According to the civic—or republican—tradition, to be free isn't just to choose one's own ends or values or conception of the good life. To be free, according to the republican tradition, is to participate in self-rule, to share in self-government.

How is this conception opposed to procedural liberalism? In the following way: the republican tradition says that to share in self-rule, to participate in shaping the forces that govern the collective destiny, requires certain qualities of character, certain habits and dispositions. It requires that citizens possess or come to acquire certain civic virtues. What civic virtues? Adherents of the republican tradition have advocated a wide range of civic virtues, but among them, typically, are a knowledge of public affairs and a capacity to deliberate about the common good. The republican tradition emphasizes that this isn't the kind of skill that can be learned from books or lectures. It is the kind of skill that requires a certain moral disposition—a sense of belonging, a sense of identification with the community whose fate is at stake. The civic virtues typically include a sense of belonging that orients people away from sole concern with their individual interests toward the common good.

It may now be clear how there can arise a tension between these two understandings of freedom. For on the republican conception of freedom as sharing in self-rule, it is not enough to show up at the polls and express my preference once every four years or two years. On the republic conception, civic education matters because everyone has a stake in the moral and civic character of citizens. But that means that government can't be neutral; it means that politics and law can't be neutral with respect to the moral and civic character of its citizens.

The republican tradition accords to politics and to law a formative project. The formative project consists in worrying about the conditions of life—of social and cultural and political and economic life—that shape the virtues, the habits, and dispositions of citizens.

Once politics is accorded, as the republican tradition assigns it, a formative role, then it is possible to see why procedural liberals worry.

It is precisely the formative project that liberals see as containing the danger of coercion. That is partly what animates the liberal resolve to bracket morality and religion and character formation and virtue talk in politics.

I've described two public philosophies, two pictures of what it means to be a free citizen. But how do they bear on our actual political and constitutional life, and how does the embrace of procedural liberalism amount to a certain deflation of American ideals? How does it constitute a giving up on the aspiration to republican freedom?

I'd like to try to answer these questions by looking at some examples drawn from the American political and constitutional experience. What I'd like to suggest is that both of these public philosophies, both understandings of citizenship, have been present throughout the American political and constitutional tradition, but in shifting measure and relative importance.

Roughly speaking, republican understandings predominated earlier in the history of the Republic, from the time of the founding, through much of the 19th century, and into the early years of the 20th century; while the liberal procedural public philosophy, though present from the start, was at first a minor voice. It did not become predominant until the 20th century, especially in the decades since World War II.

I would like to suggest that the procedural understanding of freedom has gradually eclipsed the civic one; I would like also to show that the eclipse of the civic by the procedural understanding represents a loss—a loss of something indispensable to the project of self-government.

II. Procedural Liberalism in Constitutional Law

Consider some examples drawn from constitutional law. The Bill of Rights, which goes back almost to the founding, provides for the rights to freedom of speech and religious liberty. What's interesting, though, is that the interpretation of the rights to free speech and religious liberty, and more recently the interpretation of the right to liberty that has come to include the right to privacy, are products of recent decades. In fact, you can identify a moment that illustrates the shift from the civic to the republican understanding of citizenship if you consider the time when the Supreme Court changed its mind within three years, between 1940 and 1943, in the flag salute cases.

Minersville School District v. Gobitis[1] involved two children of Jehovah's Witnesses who were expelled from public school for refusing to salute the flag. The parents claimed the flag salute violated their religious beliefs. In an opinion by Justice Frankfurter, the Supreme Court upheld the flag salute. Frankfurter invoked the republican tradition, the formative project. He held that states can require the flag

1. 310 U.S. 586 (1940).

salute in order to inculcate in young citizens "the binding tie of cohesive sentiment" on which liberty depends.[2] This was Frankfurter's phrase, a phrase that affirms the formative ambition of the republican tradition.

Three years later, the Supreme Court heard another flag salute case, *West Virginia State Board of Education v. Barnette*,[3] and this time they struck it down. In doing so—and now it was Justice Jackson who wrote for the Court—they struck it down in the name of freedom, but in the name of a different conception of freedom. They didn't announce their shift from a formative to a procedural understanding of freedom. But in retrospect, the shift can clearly be seen.

According to Jackson's opinion, liberty depends not on cultivating virtue, but rather on identifying certain rights and placing them beyond the reach of majorities. Government can't impose on its citizens any particular conception of the good life. He puts it as follows: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."[4] Whenever a judge talks about a "fixed star" or a "fixed point," suspect that he or she is innovating. Jackson was innovating; in fact, his opinion in *Barnette* was a decisive departure. Not only was he overturning an opinion about flag salutes; he was announcing a new conception of liberty, a conception characteristic of the procedural republic: the idea that freedom consists in having certain rights that are beyond the reach of the majority, that it is the role of courts to enforce them, and that courts should interpret those rights according to the ideal of neutrality, an ideal that says no government or state or school board may impose any particular virtues or vision of the good life.

After World War II, shortly after the flag salute cases, in other areas of constitutional law, the Supreme Court began to take up its now-familiar role of protecting individual rights against majorities, against government infringement, in the name of being neutral toward competing conceptions of the good life.

In 1947, for the first time, the Supreme Court declared that government must be neutral toward religion.[5] In subsequent decades it defended this idea of neutrality toward religion in the name of the idea of choosing our religious beliefs for ourselves. Justice Stevens, in a 1985 case, gave articulate expression to the idea of freedom that animates the procedural republic when he said that "religious beliefs worthy of respect are the product of free and voluntary choice by the faithful."[6] Here you have the idea of rights in the name of neutrality,

2. *Id.* at 596.
3. 319 U.S. 624 (1943).
4. *Id.* at 642.
5. Everson v. Board of Educ., 330 U.S. 1, 18 (1947).
6. Wallace v. Jaffree, 472 U.S. 38, 53 (1985).

and neutrality for the sake of letting people choose their beliefs for themselves.

During this same period, from the 1940s to the 1970s, the Supreme Court broadened its protection of free speech and, more important, shifted the justification for free speech. Whereas previously the Court had emphasized the importance of speech to self-government, increasingly, through the 1950s, 1960s, and 1970s, the Court emphasized the importance of the right to free speech for self-expression, choosing and expressing one's own opinions—as one commentator put it, making "the choice of the speech by the self the crucial factor in justifying protection."[7] Here again we have a picture not just of rights, but of rights for the sake of neutrality, and neutrality as a way of respecting choice—choice of ends, values, or beliefs.

Finally, in a series of decisions from the 1960s to the 1980s, the Court comes to enforce, in the name of autonomy and freedom of choice, a right of privacy that prevents government from trying to legislate morality in areas like contraception and abortion.[8] So it is only in the 1940s and 1950s and 1960s that the language of neutrality, autonomy, and choice come to predominate in constitutional law, to inform the theory and practice of constitutional rights.

As I have described it so far, procedural liberalism seems to offer an attractive conception of freedom. After all, hasn't it expanded individual rights to religious liberty, free speech, and privacy, and thereby broadened freedom? Where, then, is the loss? Where is the deflation of ideals? What did we give up as we drifted toward a procedural republic? It's easier to answer this question, to see what we gave up, if we look beyond constitutional law and consider those aspects of political debate that engage more directly the question of how to form civic virtue in citizens.

III. The Political Economy of Citizenship

Consider, for example, debates about the economy: tax policy, trade policy, budget proposals, or regulatory reform. Most of the time, liberals and conservatives alike argue in the name of two values: increasing the general welfare, the size of the gross domestic product; and, to a somewhat lesser extent, worrying about how fairly the fruits of affluence are distributed. These are the two justifications that political figures advance when they argue for one or another economic policy.

But prosperity and fairness are not the only justifications that historically have been offered when Americans have debated economic affairs. There is a third consideration that goes back to Thomas Jefferson and that has faded only recently: What economic arrangements

7. C. Edwin Baker, Human Liberty and Freedom of Speech 256 (1989).

8. Roe v. Wade, 410 U.S. 113 (1973)(abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception).

are more likely to cultivate in citizens the qualities of character that will equip them for self-government? This might be called the civic strand of economic argument or the political economy of citizenship.

Thomas Jefferson argued against big factories, against America becoming a manufacturing nation. He said we should remain an agrarian and a trading nation. The reason he advanced was not that greater prosperity would result if Americans stayed on the farm and traded with other countries; Jefferson's argument was about virtue. "Those who labor the earth are the chosen people of God," the embodiments of "genuine virtue."[9] Thinking of Manchester and the manufacturing cities of Europe, Jefferson feared that factory workers were bound to become a dependent, propertyless mob, unable to stand on their own two feet, incapable of talking back to government or to exercise independent judgment. They would, in short, lack civic virtue. "Dependence begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition."[10] Jefferson worried about the way in which economic arrangements shape civic character and civic virtue.

As we all know, Jefferson lost that debate. America became a manufacturing nation, and had already become one even as he advanced this argument. But the civic ideal underlying Jefferson's position persisted and informed American public debate through the 19th century and into the 20th.

Consider next the terms of political discourse in the Progressive era. Progressive reformers worried about the power of big business. By the early 20th century, the economy had become national, but democratic life was still organized locally, in cities and towns. American democracy, still dispersed and decentralized, was overpowered by an economy suddenly national in scope. Progressive reformers sought to ease the gap between the scale of economic life and the terms of political community. They worried about the effect of big business and concentrated economic power on the character of citizens. They feared that it was making American citizens servile and dependent in just the way that Jefferson had predicted a century earlier.

Progressives proposed a number of responses to this predicament. I would like to take a concrete example to bring out the way in which the political economy of the Progressive era differs from our own.

One response was the antitrust movement. Now, antitrust law persists to this day as an influential body of law. Lawyers in the Antitrust Division of the Department of Justice spend a lot of time bringing antitrust cases. What's striking is how different the rationale is for

9. Thomas Jefferson, Notes on the State of Virginia (1787) *reprinted in* Jefferson Writings 290-91 (Merrill D. Peterson ed., 1984).

10. *Id.* at 291.

antitrust law today from what it was when the Progressive reformers struggled with the power of trusts, monopolies, and big business.

One of the leading Progressive-era advocates of antitrust law was Louis D. Brandeis. Before he was appointed to the Supreme Court by Woodrow Wilson, Brandeis was an activist attorney and progressive reformer. His case against monopolies—he talked about the "curse of bigness"—was not that monopolies drive up consumer prices, and thereby decrease the general welfare; in fact, he didn't care, very much anyhow, about consumer welfare. His argument was a civic argument. He favored antitrust law as a way of reasserting democratic authority, as a way of enabling Americans to be citizens who could participate in self-rule and reach the sources of power. The only way to do that, Brandeis thought, was to break up the monopolies and the trusts so that a decentralized political system could exercise democratic authority over the economy.

Brandeis' argument reflected a long tradition of republican political thought. His was a producer ethic, not a consumer ethic. Consistent with a tradition going back to Jefferson and the Knights of Labor in the Gilded Age, he favored economic conditions that would enable farmers, artisans, small businessmen, and entrepreneurs to be citizens, civic leaders, people whose conditions of work afforded them the independence of mind and judgment to be effective citizens.

Brandeis' outlook contrasts sharply with the consumer-oriented reform movements of our day. Unlike the consumer movement of Ralph Nader, Brandeis was wary of consumers. His emphasis was on conditions of production. Brandeis' support for resale price maintenance illustrates the contrast between his case for antitrust and the contemporary consumer advocates' case for antitrust.

Resale price maintenance was a practice that enabled the manufacturer to prevent retailers from selling a product below a certain price. Consider the example of Gillette razors. If Gillette could fix the retail price of its razor, the price of Gillette razors would be higher than if Wal-Mart or the chain stores could discount them. But there was an advantage in this practice, Brandeis believed, because it would protect the local drug store from the cut-throat competition that the chain stores represented. "Every dealer," he wrote, "every small stationer, every small druggist, every small hardware man," can sell Gillette razors if you allow Gillette to fix the price.[11] Otherwise, the small retailer would be unable to compete with the chain store or the department store, which would monopolize the trade.

Brandeis considered it foolish for consumers to insist nonetheless on lower prices for Gillette razors. The effect would be to force small retailers out of business, leaving the big chains and department stores

11. Michael J. Sandel, Democracy's Discontent: America in Search of Public Philosophy 237-38 n.108 (1996) (quoting Brandeis' testimony before Congress).

to raise the price of Gillette razors. More important, the lower prices on Gillette razors would come at the expense of the political economy of citizenship; it would mean giving up on an economic structure of many small, local businesses that hold communities together and that cultivate not a nation of clerks, but a nation of entrepreneurs and small business people.

Jump ahead to the New Deal. Here we can see a moment of transition in antitrust policy comparable to the one we saw in the flag salute case. In 1938 Franklin Roosevelt appointed a man named Thurmond Arnold to be the head of the Antitrust Division of the Justice Department. Arnold had made a career heaping scorn on Brandeis-type arguments for antitrust. He thought it was a kind of hopeless nostalgia, a kind of old religion, to worry about the curse of bigness. Arnold argued that it was not possible to reverse the age of organization.

To his misfortune, Thurmond Arnold had also ridiculed Senator Borah, a great antitruster, who questioned Arnold during his Senate confirmation hearing. Arnold promised that he would be a vigorous advocate of antitrust prosecution. Senator Borah scratched his head, and he approved the nomination, but he did advise Arnold to revise the chapter in his book on trusts.

Arnold was true to his word. His was the most vigorous period of antitrust enforcement in American history. By the time he left in 1943, he had filed and won more antitrust cases than the Justice Department had initiated in all of its previous history. Wasn't this a great reversal of Arnold's stand against the antitrust tradition? Not really, because Arnold's revival of antitrust law was a revival with a difference: unlike Brandeis and the earlier antitrusters, Arnold didn't try to decentralize the economy for the sake of self-government, but rather to regulate the economy for the sake of lower consumer prices. For Arnold, the purpose of antitrust law was to promote economic efficiency and to keep consumer prices down, not to advance democracy or to cultivate civic virtue or to create a political economy of independent entrepreneurs. Americans should be enlisted to support antitrust enforcement, Arnold insisted, not out of hatred of big business, but out of interest in "the price of pork chops, bread, spectacles, drugs, and plumbing."[12]

So two antitrusters, Brandeis and Thurmond Arnold, both advocated the same policy, but for different reasons. In the change in justification, we see a shift from a political economy of citizenship to a political economy of consumer welfare. And in that shift we can glimpse a shift from the civic idea of freedom to a liberal idea—the liberal procedural idea—of freedom.

Concerned as he was with the welfare of consumers, Arnold gave up, in his antitrust policy, the old formative ambition. He worried

12. Thurman W. Arnold, The Bottlenecks of Business 123 (1940).

solely about productivity and prices. Giving up on the formative ambition is indicative of the shift from the political economy of citizenship to one premised on consumer welfare.

This shift occurred in antitrust policy at just about the same time that the Supreme Court changed its mind in the flag salute cases. Thurmond Arnold left the Justice Department in 1943, which was the very year—history is seldom so tidy—that Justice Jackson gave his famous opinion about the fixed star in our constitutional constellation and about the idea of government being neutral.

But the new public philosophy was also unfolding more broadly in American public life and political debate. The advent of Keynesian fiscal policy in the 1940s, 1950s, and 1960s was another instance of Americans giving up on old debates about the structure of the economy and the civic aspirations those debates reflected. The new political economy took consumer preferences as given, and sought to regulate the economy by manipulating macroeconomic demand.

In 1962, President John F. Kennedy articulated the appeal of moral neutrality implicit in Keynesian economic management. In retrospect, we remember John Kennedy for the great passage in his Inaugural Address, "Ask not what your country can do for you, ask what you can do for your country." That was a ringing expression of the civic ideal and of its demanding notion of citizenship. But in the actual conduct of his domestic policy, and especially of his economic policy, Kennedy articulated the new understanding, the new dispensation.

Here's what he said about modern economic debate in connection with his proposed tax cut of 1962, the high point of confidence in Keynesian fiscal management. "[M]ost of the problems, or at least many of them, that we now face," Kennedy declared, "are technical problems, administrative problems. They are very sophisticated judgments which do not lend themselves to the great sort of passionate movements which have stirred the country so often in the past."[13] "What is at stake in our economic decisions today is not some grand warfare of rival ideologies . . . but the practical management of a modern economy."[14] Kennedy urged the country to face technical problems without ideological preconceptions, to focus on the sophisticated and technical issues involved in keeping a great economic machinery moving ahead.[15]

Kennedy was articulating the received wisdom of the day. By 1962, the standard way of talking about economic policy was a way that abandoned old debates about the structure of the economy, its effect on democratic possibilities, on citizenship, and on the formative pro-

13. John F. Kennedy, Remarks to White House Conference on National Economic Issues (May 21, 1962) *reprinted in* 1962 Pub. Papers 422.

14. John F. Kennedy, Commencement Address at Yale University (June 11, 1962) *reprinted in* 1962 Pub. Papers 473.

15. *Id.*at 475.

ject. The new political economy of prosperity and fairness took consumer preferences as given, and pointed the way to the procedural republic.

IV. Reviving the Civic Project

What would it mean to revive the concern with civic virtue, the formative tradition, in our time? Some fear that it would mean embracing the kind of politics the Moral Majority and the Christian Coalition embrace. After all, they talk about virtue; they have a formative project; they want to legislate morality; they want government to take an interest in the moral character of citizens. Some would say that this demonstrates the danger of any attempt to revive the formative project.

If you look at current debates about welfare, you see this shift among conservatives. In the 1950s and 1960s, what was the conservative complaint against the welfare state? Recall the objections of Barry Goldwater and Milton Friedman to the welfare state: it coerces people; it violates the freedom of the taxpayer; it violates individual choice. That was an argument drawn from procedural liberalism: People should be free to spend their money as they choose, libertarian conservatives maintained; they shouldn't be coerced by the government to give to worthy causes, like school lunches, food stamps, or welfare.

Beginning in the 1980s, however, the conservative argument against welfare changed and began to draw on civic themes. Now conservatives argue that welfare is deplorable not because it violates the freedom of the taxpayer, though they may still think that, but because it breeds dependence, it corrupts the character of the recipient. This is a civic argument, reminiscent of the political economy of citizenship. Conservatives now oppose welfare on the grounds that it corrupts the character of citizens.

What is interesting, however—and this is a point I must make if I'm going to persuade many people in the room—is that the civic tradition, the formative project, is not inherently conservative and should not be regarded as such. In fact, even the argument about welfare that emphasizes its formative consequences and the dependence it induces did not originate with Ronald Reagan or Newt Gingrich or William Bennett.

Consider the following civic argument against welfare. Welfare was perhaps "our greatest domestic failure," because it rendered

> millions of our people slaves to dependency and poverty, waiting on the favor of their fellow citizens to write them checks. Fellowship, community, shared patriotism — these essential values of our civilization do not come from just buying and consuming goods together. They come from a shared sense of individual independence and personal effort.

The solution to poverty, this public figure argued, was not a guaranteed income paid by the government but "dignified employment at decent pay, the kind of employment that lets a man say to his community, to his family, to his country, and most important, to himself, 'I helped to build this country. I am a participant in its great public ventures.'" A guaranteed income "simply cannot provide the sense of self-sufficiency, of participation in the life of the community, that is essential for citizens of a democracy."[16]

Who do you think said that? It was Robert Kennedy shortly before he was assassinated. Robert Kennedy, of all of the politicians in recent decades who have groped to address the discontent that afflicts procedural liberalism, was alive to the civic strand of freedom. He was reviving this older tradition that goes back to Jefferson and to Brandeis, that worries about the social and economic and political conditions that foster effective citizenship. It is interesting that he appealed to blue collar conservatives, to those who had voted for George Wallace in the Indiana primary, and he also appealed to the left wing of the Democratic party.

What has happened, though, since 1968 is that for the most part it has been conservatives who have reached beyond the terms of political discourse made available by procedural liberalism. It is they who have spoken about virtue and about prayer in schools.

There are other precedents. Robert Kennedy isn't the only public figure on the left to invoke republican ideals. If you look back at the civil rights movement, Martin Luther King advanced civic arguments, moral arguments, and, sometimes, religious arguments. His "Letter from a Birmingham Jail,"[17] has all kinds of religious references as well as moral and civic arguments. At the time, there were those who insisted that religion and politics shouldn't mix, that they should be kept separate, that it was dangerous to mix them.

There was one Southern minister at the time who criticized Martin Luther King for bringing religious arguments into politics. This critic claimed that the role of a minister is to save souls, not to engage in politics, not to lobby for civil rights—to save souls. Religion, he maintained, is a private matter. The name of that Southern minister critical of Martin Luther King was Jerry Falwell. He changed his mind by 1980. I think Jerry Falwell was right the second time, after he changed his mind—not right about his politics, but right about the indispensable role of morality and religion in political discourse, right about the indispensability of the formative aspect of democratic life.

16. Robert F. Kennedy, Press Release, Los Angeles (May 19, 1968) *reprinted in* Edwin O. Guthman & C. Richard Allen, RFK: Collected Speeches 385-86 (1993).

17. Martin Luther King, Jr., I Have a Dream: Writings and Speeches That Changed the World 85 (James M. Washington ed., 1992).

So what would it look like to revive under present conditions this older civic ambition? How could it be other than the province of conservatives?

One of the things that conservatives have ignored is the market economy and its effect on virtue and on the habits and dispositions that orient citizens to the common good. The social and cultural conservatives emphasize Hollywood movies and television and sex and violence and rap music. And they are right, in my view, to criticize the coarse and corrupting and vulgar messages that flow from the popular culture. What cultural conservatives, however, often neglect are the formative effects of an unfettered market economy, which, in ways that Brandeis and Jefferson understood, can also undermine the stable communities and sources of moral authority that shape the habits and dispositions of citizenship.

Very little is said in our politics about the growing gap between rich and poor, which is more pronounced than at any time since the 1920s. One of the reasons it is difficult to talk about this inequality, I think, has to do with the narrowness of our political agenda. One argument that is sometimes made—and it hasn't been very effective politically—is that gross inequality is unfair to those at the bottom. That is an argument that can be made within the terms of procedural liberalism. Those at the bottom don't have the chance to choose their life plan, their way of life, their values, like everybody else.

But the civic tradition offers another way of thinking about the gap between rich and poor—not just from the standpoint of the individuals who find themselves at the bottom, and therefore less able to choose their ends, but from the standpoint of a common life. From Aristotle to Rousseau, republicans have worried about too great a gap between rich and poor if it leads to separate ways of life. For if fellow citizens become accustomed to living in separate neighborhoods, shopping in separate stores, taking different forms of transportation, not bumping up against one another in the course of their everyday life, then eventually they will find themselves unable to deliberate about the common good; they won't share enough to be able to think of one another as citizens with mutual obligations.

What we are seeing now is the evacuation of the public sphere. The affluent are able to buy their way out of public transportation and public schools, public institutions, public parks, and retreat to gated communities, or private enclaves. Here is one area in which the older tradition of the political economy of citizenship might provide a resource for criticizing—or at least talking about—a development in the American economy and in political patterns that is very difficult to capture within the terms of procedural liberalism alone.

The public philosophy of procedural liberalism, the one that emphasizes freedom of choice above all, holds out a liberating, even exhilarating, promise: what could freedom be if not the unfettered ability to

choose my own way of life, my own conception of the good, without being imposed upon by government?

But what we're finding now in our public life—and here is where philosophy comes down to earth—is that the arrival of the procedural republic has coincided with a loss of mastery, a growing sense of disempowerment. Despite the expansion of rights in recent decades, Americans find to their frustration that they are losing control of the forces that govern their lives.

This may have something to do with the effects of the global economy, but it also has something to do with the self-image by which we live. The liberal image of the freely choosing self and the actual organization of modern social and economic life are sharply at odds. Even as we think and act as if we were freely choosing independent selves, we confront a world governed by impersonal structures of power that defy our understanding and control.

The public philosophy of procedural liberalism ill equips us to contend with our condition. Liberated though we may be from the burden of identities we haven't chosen, entitled though we may be to the range of rights secured by the procedural republic, we find ourselves overwhelmed as we turn to face the world on our own resources.

What kind of civic virtues, then, do we need today? How similar are they, and how different, from the ones that the philosophers of the republican tradition advanced? Since the days of Aristotle's *polis*, the republican tradition has assumed that self-government is an activity that must be rooted in a particular place, that must cultivate a comprehending loyalty to that place. We saw this, too, in Frankfurter's defense of the mandatory flag salute.

Self-government today, though, requires a politics that plays itself out not in a single place—whether nation or town or family or neighborhood or some transnational political community. It requires instead a politics that plays itself out in a multiplicity of settings, from neighborhoods, to nations, to the world as a whole. Politics today requires citizens who can live with the ambiguity of complex identities; it requires citizens who can think and act as multiply situated selves.

Here, then, is how we must translate republican ideals into terms relevant to our time: On the one hand, the formative project remains indispensable. We cannot do without the more demanding idea of citizenship to which, in their different ways, Aristotle, Rousseau, Jefferson, and Brandeis all aspired. But the civic virtue distinctive to our time is the capacity to negotiate our way among the sometimes overlapping and sometimes conflicting obligations that claim us and to live with the tensions to which multiple loyalties give rise.

It isn't easy to live with these tensions. Increasingly, our politics displays reactions against the demand that people live as multiply situated selves or as bearers of complex identities; we see recurring attempts to harden the distinction between "us" and "them," to assert

sovereignty with a vengeance, to shore up borders. These are reactions against the demand to live as bearers of complex identities.

So while the content of civic virtue has to be complicated to reflect this feature of our condition, we cannot secure freedom without reviving the formative project of republican tradition. The global media and markets that shape our lives beckon us to a world beyond boundaries and beyond belonging. But the civic resources we need to master those forces—or at least to contend with them—are still to be found in the places and stories, the incidents and identities, that situate us in the world, that cultivate a sense of belonging and of mutual responsibility. The task for politics now, after and beyond the procedural republic, is to cultivate these resources, and to repair the civic life on which democracy depends.

Thank you very much.

QUESTIONS AND ANSWERS

QUESTION [FROM DEAN JOHN D. FEERICK]: I was wondering as you spoke whether Justice Jackson in that 1943 decision was influenced by the danger he saw in Germany, where certain content was sought to be developed among the people, and he was afraid of that if he went other than the way he went?

PROFESSOR SANDEL: Yes, I think he was. I think this was a powerful influence, especially when you think of the image of a flag salute in 1943 in relation to Nazi Germany. So I do think that was a powerful influence on him, given his experiences.

But the question is whether he drew the right conclusion — and not only with respect to flag salutes, but with the underlying rationale, which went far beyond the actual case. Jackson offered an eloquent statement, not just against mandatory flag salutes, but in favor of a certain picture of freedom and of the role of the Constitution in securing freedom.

For all its eloquence and influence, Jackson's opinion gave expression to a public philosophy that—so I've tried to argue, anyhow—goes wrong in important ways and gives up an aspect of freedom that I think is not so dispensable.

QUESTION [FROM DEAN FEERICK]: A second question. I find a certain ambiguity or paradox, in that during the time that this philosophy existed, women didn't vote, we had blacks that didn't vote, we had a very restricted franchise in this country that excluded many whites from voting. Does that suggest that those who argue the republican position from an historical standpoint have the burden, because we didn't see it working as one might have expected it to work, given the arguments for it as you stated?

PROFESSOR SANDEL: Yes, I think that does carry a burden. In fact, not only did restrictions on the franchise coexist with the republi-

can public philosophy, but they drew their justification in many cases from the republican idea that only certain people possess the virtues necessary to deliberate well about the common good. These arguments were used to justify a wide range of exclusions, including property rights qualifications in early state constitutional debates, nativist arguments in the 19th century, arguments against immigration and against extending the vote to women and minorities. Any defender of the republican tradition has to own up to the burden that you rightly identify.

Republican arguments were also advanced by some Southern defenders of slavery. The Southern defenders of slavery criticized Northern wage laborers as being unfree. George Fitzhugh is a notoriously powerful example. He argued that Northern wage laborers were no freer than Southern slaves, since both lacked independence. While wage laborers possessed the liberal right to contract for their labor, Fitzhugh argued, they lacked the independence of condition and of mind and of judgment and of status that true participation in self-government requires. Now, he glorified and romanticized the kind of paternal authority that was exercised over Southern slaves, but Fitzhugh did have a trenchant critique of Northern wage labor, and it was a critique that drew on the republican idea of citizenship.

So the question is: Is it detachable from those dark episodes? In principle, I think it is detachable. There is nothing, I think, intrinsic to the republican idea that need regard virtue as fixed once and for all. To the contrary, some of the great early advocates of public education, such as Horace Mann in the 1830s, argued on republican grounds. Mann argued for the common school, not just on the grounds that we have an obligation to educate poor folks as well as rich folks, not just out of fairness—but, above all, for civic reasons: if everybody is going to vote in a democracy, everybody had better acquire the civic education necessary to deliberate well.

So the republican tradition does have its dark and exclusionary moments, but it has also animated (for the very same kinds of reasons) programs of public education and moral improvement. So I do not think it is intrinsically exclusive. It may run the risk of coercing people; that's the opposite worry—if you think about public education. The line between civic education and coercion may sometimes blur. The less exclusive republican citizenship becomes, the greater the danger of coercion. I think that risk does inhere in the republican tradition.

QUESTION [FROM PROFESSOR TRACY HIGGINS]: I'm impressed with the costs that you attribute to an increasingly so-called individualist interpretation of rights in your discussion of constitutional interpretation. Yet, it seems to me in the cases that you talk

about, maybe with the exception of *Barnette*,[18] a Justice Sandel could have written a concurrence rather than dissent.

PROFESSOR SANDEL: Maybe even in *Barnette*. I'm not that enthusiastic about compulsory flag salutes. I don't think they're very effective, given the purpose.

QUESTION [FROM PROFESSOR HIGGINS]: So I'm wondering whether that's the case; and, if it is, whether you're concerned more about political discourse than about the outcome in that series of cases. The only case I could think of that might be a counter-example is *Buckley v. Valeo*,[19] where a more civic republican position would have affected the outcome possibly. But as Professor Fleming has pointed out, many liberals criticize *Buckley*.[20]

PROFESSOR SANDEL: Yes. My primary concern is more with the reasons and the terms of public discourse, than with the outcome of particular cases. Still, I think there would be some outcomes that would differ—in the area, for example, of religious liberty.

One of the expressions of procedural liberalism and the ideal of neutrality in the religion cases has been to give great weight to the non-establishment clause at the expense of the free exercise clause. Take, for example, a number of cases where the Court has refused to uphold laws making special accommodation for religious observance. In *Estate of Thornton v. Caldor, Inc.*,[21] the Court struck down a law that provided Sabbath observers the right to designate their day of rest. Everyone had one day off under the statute. An employer couldn't require any worker to work seven days a week, but Sabbath observers could have their day off coincide with their Sabbath. By 8-1 the Court struck it down as failing to be neutral to those who might have other, non-religious reasons for wanting a week-end day off. That seems to me a decision that reflects the philosophy of neutrality and choice and that gets the outcome wrong because it enforces a picture of religion as a matter of choice.

Another example would be the case about the yarmulke in the Air Force, *Goldman v. Weinburger*,[22] where the Court didn't even require the Air Force to show that its disciplinary objectives would be impaired by making an accommodation to a rule that prohibits the wearing of headgear by officers, in this case someone serving in a health clinic.

---

18. *See supra* text accompanying note 4.

19. 424 U.S. 1 (1976).

20. *See, e.g.*, James E. Fleming, *Constructing the Substantive Constitution*, 72 Tex. L. Rev. 211, 246-47 (1993) (discussing numerous liberal constitutional theorists criticisms of *Buckley*).

21. 472 U.S. 703 (1985).

22. 475 U.S. 503 (1986).

So there are a number of cases, *Smith*[23] being another one, where the emphasis on neutrality in the religion cases has led to an overemphasis on the worry about establishment, even at a cost to accommodation of free exercise. That would be one set of cases where a critic of procedural liberalism might well reach a different outcome.

In the case of the privacy rights—the defect, I would say, in *Roe v. Wade*[24] is in the pretense of the Court to be neutral on the question of when life begins, on the moral status of the fetus. The Court held that no state may enact into law a particular theory of life, and then denied that it was endorsing a particular theory of life. The Court nonetheless proceeded to enunciate an elaborate, though reasonable policy about the trimesters and the relative interests of the state and the individual.

The problem was in pretending to a moral neutrality at odds with the right that it defended. Does that mean that the Court should have decided otherwise or that it should simply have been more willing to articulate and defend the moral judgment that underlies the right? In that case, I would be inclined to say that so abstemious a jurisprudence is mistaken and undesirable. It deprived that decision of much of its legitimacy. It eroded the legitimacy of the courts because it didn't own up to the moral, and partly theological, judgment that it depended on.

So the critique of procedural liberalism could make a difference either in the way the case is argued or, in some cases, in the outcome.

Could I offer one other example? In the free speech area, there may be a difference in the protection accorded commercial speech. If the FTC wants to regulate the number of commercials for sugared breakfast cereal that can be shown on Saturday children's cartoon shows, the First Amendment should not be interpreted to stand in the way. Shifting the emphasis away from neutrality and toward self-government in the free speech cases would lead, I think, to a number of different outcomes.

QUESTION [FROM PROFESSOR MICHAEL DORF]: Your answer on religious cases to Professor Higgins suggested to me a certain tendency to identify egregious aspects of the most procedural aspects of liberalism and call that liberalism. The kinder gentler points you identify as republican. If you take that pairing of cases, for example, the establishment of religion and free exercise cases, you will find for the most part the Justices who liked the establishment clause—that is to say, liked separation—also tend to like free exercise. Justice Stevens is the only exception that I can think of. So there is a real overlap.

23. Employment Div., Dep't of Hum. Resources of Oregon v. Smith, 494 U.S. 872 (1990).

24. 410 U.S. 113 (1973).

It struck me that this is especially true in your characterization of Justice Brandeis. I think about two of Justice Brandeis's most famous opinions. One is concurrence in *Whitney v. California*,[25] in which he says the Framers meant freedom—valued freedom—as both a means and an end, puts them together right there, so it's the liberal and the republican tradition. And then, when he comes to talk about the fear of government in his dissent in *Olmstead v. United States*,[26] what does he tell us? He tells us that government is the potent omnipresent teacher. So yes, he's concerned about morality, about citizenship, but he's also afraid that if government has certain kinds of powers that it's going to teach a very bad lesson. That, it seems to me, is exactly what Justice Jackson is getting at in *Barnette*; he is saying that of course government must inculcate values, but it can do it only in certain ways. So the more sympathetic view of liberalism is not that it wants to exclude moral arguments from the public domain, but that it wants to channel them in certain ways and say that they can only be given effect in certain ways because of a fear about government power, which is in some ways structurally similar to the fear about private power the progressives have, somewhat. Maybe the job of the future is to synthesize these two traditions along those directions.

PROFESSOR SANDEL: Well, any such attempt would have to decide a question of principle that does distinguish these two traditions. It would have to face the question: Is it permissible to attempt to shape the moral and civic character of citizens?

Now, some liberals would say yes, provided that the attempt to shape character observes certain restraints. Some liberals allow that government can try to cultivate certain qualities of character, certain virtues, provided they are restricted to liberal virtues like toleration, mutual respect, observing the rights of others—virtues that will uphold the procedural republic as a constitutional scheme and as a political practice.

But, says the liberal, those limited virtues of respect and toleration don't run the risk of coercing people because, they might say, very few life plans actually require anything at odds with those virtues; and if some fanatics or fundamentalists care a lot about other people's lives, we shouldn't credit that anyhow, so we don't have to worry.

But the question is whether the liberal's very limited soul-craft is sufficient or defensible. That's a question of principle, and it's one on which I suspect adherents of the liberal and republican traditions might disagree.

QUESTION [FROM EUGENE HARPER]: In your book, you start out with Aristotle and you cite Aristotle a fair number of times. To someone like myself who was educated here, at least in the pre-

25. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
26. 277 U.S. 438, 472-79 (1928) (Brandeis, J., dissenting).

Council philosophy departments, not citing Aquinas in the book with so much reference to Aristotle looks like, to coin a phrase, something unnatural. I noticed in your subsequent article on judgmental toleration that appears in Robert George's collection you have a little piece about Aquinas.[27] I wondered whether or not you were jumping into this and looking more at viewing the perfectionist natural law tradition whole hog, much like MacIntyre,[28] or whether or not it's just off your screen; and, if you have rejected it, whether or not you have rejected it for fear of coercion and so forth.

PROFESSOR SANDEL: The broader question, as I understand it, is: what is the relation of the natural law tradition to the republican tradition that I'm emphasizing?

It's true the natural law tradition is at odds with the liberal tradition on grounds similar to the ones I've been advancing in the name of the republican tradition going back to Aristotle, but also on other grounds that I don't emphasize—perfectionist grounds, you say. I think there are perfectionist arguments to be made against liberal political philosophy, and I agree with them to a point. For purposes of trying to understand democratic life and the relation of constitutional law to democratic life, the more powerful contrast with the reigning liberal public philosophy is to be found, it seems to me, in the republican tradition.

I think the republican tradition is better equipped, despite worries to the contrary, to deal with a pluralist society, to deal with disagreement. It is often held against republicanism that it requires shared values. It doesn't really. It is a tradition that is teeming with disagreement about what counts as virtue, what kinds of citizens should be formed, what the formative project should aim at, just as the liberal tradition is teeming with disagreement about what it means to respect the right to choose one's values freely.

It is the openness of argument about virtue, about the conditions of self-government, about the qualities of character that democratic life requires, and the competing answers to those questions, that I think we need to restore, not a particular answer to that question. That is why I see the republican tradition as a more apt rival to the reigning public philosophy than the natural law tradition, though I know this could be the beginning of a long argument.

PROFESSOR FLEMING: Professor Sandel, thank you.

PROFESSOR SANDEL: Thank you.

27. Michael J. Sandel, *Judgmental Toleration*, *in* Natural Law, Liberalism, and Morality (Robert P. George ed., 1996).

28. *See* Alasdair MacIntyre, After Virtue (1981).