Rainbow Republicanism

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On its face, a republican revival in constitutional law is a curiosity. How could republicanism flourish in the contemporary United States? Collective self-determination by political equals, animated by civic virtue to seek a common good, may have been possible in a small, participatory city-state such as Rousseau's Geneva.[1] But the odds are against it in Madison's extended sphere,[2] which is neither homogeneous, participatory, nor small.

Professors Sunstein and Michelman recognize this problem. But they are not modern antifederalists, championing the decentralization of power.[3] Instead, they advocate republicanism on a national scale.[4] Their solution is not politics restructured, but politics reconceived.

Sunstein and Michelman would reconceive lawmaking, even at the national level, as reasoned public dialogue or deliberation about the common good rather than competition among private interests for self-satisfaction. They reject the conception of politics as a marketplace for Hobbesean rent-seekers—atomized individuals seeking to maximize through politics the realization of their own preferences.[5] They conceive politics instead as the collective articulation of an objective common good.

This much draws on the republican tradition. But Sunstein and Michelman innovate on that tradition in one crucial way: They argue that the articulation of the common good is compatible with the nurturance of

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1. Rousseau idealized his native Geneva as a model of republican self-government. *See, e.g.*, J. ROUSSEAU, *Discourse on the Origin and Foundations of Inequality Among Men*, in THE FIRST AND SECOND DISCOURSES 78–90 (R. Masters ed. 1964); J. ROUSSEAU, *Letter to M. D'Alembert on the Theatre*, in POLITICS AND THE ARTS (A. Bloom trans. 1960).

2. *See* THE FEDERALIST No. 10, at 83 (J. Madison) (C. Rossiter ed. 1961) (arguing that "[e]xtend[ing] the sphere" of the republic reduces its vulnerability to the oppression of "factious combinations").

3. For an example of such a view, see Frug, *The City as Legal Concept*, 93 HARV. L. REV. 1057 (1980).

4. As Michelman put it elsewhere, "if the appeal of republican vision is restricted to cases of small, homogeneous communities, it has little contemporary significance for American constitutional law or theory." Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 22 n.96 (1986).

5. Hobbes is the great theorist of "possessive individualism." *See* C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (1962). Economic "rent" is the excess of revenues from an activity over its opportunity costs. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 9 (3d ed. 1986).

"social plurality."[6] They assert that the heterogeneity of social groups and perspectives is a republican virtue, not a vice. In short, they propose a new kind of republicanism: rainbow republicanism.

This Comment argues against rainbow republicanism and for a different alternative to a politics of Hobbesean rent-seeking: for a conception of politics as the interaction of groups that are more than simple aggregations of individual preferences, but less than components of a single common good. Such a conception may be labeled normative pluralism. This conception rejects "pluralism" as Sunstein and Michelman define it: namely, a struggle among persons who are autonomous bundles of presocial wants. To the contrary, normative pluralism, like republicanism, acknowledges that persons and values are forged in social interaction. But unlike republicanism, normative pluralism rejects any quest for agreement upon a single common good, and locates social interaction and value formation principally in settings other than citizenship. Normative pluralism thus envisions an ongoing and desirable role for groups that are social but not public—groups intermediate between individuals and the state.

I. Intermediate Groups in Constitutional Law

Two sorts of "groups" divide individuals into affiliations less comprehensive than the state: "involuntary" groups, such as those mapped out along lines of race, gender, ethnicity, or national origin; and "voluntary" groups that are more freely entered and exited, such as marriages, sexual partnerships, political parties, lobbying groups, charitable organizations, social clubs, religions, labor unions, and corporations.

The differences between these two kinds of groups should not be overstated. Some apparently "voluntary" statuses—such as class, religion, or sexual orientation—may in fact be more given than chosen.[7] Exit from some "voluntary" associations is freer than from others.[8] And the common fate of membership in an "involuntary" group may motivate voluntary organization; advocacy groups for blacks' or women's rights are obvious examples.[9]

Nonetheless, current constitutional law treats "involuntary" and "voluntary" groups quite differently. While classification on the basis of invol-

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6. Michelman, *Law's Republic*, 97 Yale L.J. 1493, 1533 (1988).

7. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 245–46 (1972) (Douglas, J., dissenting) (questioning whether children withdrawn from high school by Amish parents had any opportunity for free choice).

8. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794–95 n.34 (1976) (deeming corporate shareholders freer to vote with their feet among investments than employees are among jobs).

9. The modern First Amendment doctrine of "freedom of association" was forged to protect such black civil rights organizations. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (protecting anonymity of NAACP membership lists); Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. 1 (1964).

untary group affiliations is subject to attack in the name of equality, voluntary associations are protected in the name of liberty. Equal protection doctrine shields individuals from disadvantages stemming from some (but not all) involuntary group memberships. The paradigm case is race; gender, alienage, and illegitimacy have been deemed likewise suspect, although to a lesser extent. The basic principle is that such "immutable" characteristics shall not be bases for lawmaking unless the state can furnish extremely strong justification. This principle is in keeping with the general hostility of liberal individualism to the allocation of political fortune on the basis of statuses over which one has no control.

In contrast, current constitutional law protects voluntary associations. Under prevailing First and Fourteenth Amendment liberty and privacy doctrines, the state may neither compel nor penalize membership in such groups, nor may it determine the agendas they pursue, without strong justification.[10]

Insulating voluntary associations from intrusion by the state serves a hybrid of individualist and communitarian ends. As political theorists from Tocqueville to the present have suggested, intermediate voluntary groups furnish one answer to the problems of large scale and heterogeneity in the United States. Large scale makes a classic liberal individualist model of politics unworkable, because autonomous, self-interested, free-willing citizens cannot directly participate in and control political outcomes. On the other hand, heterogeneity of national, racial, religious, and other social identities and traditions precludes classic communitarianism, for no longer can civil society be coextensive with the state. Intermediate organizations fill the gap between individuals and the state. On the one hand, they are vehicles that reflect and amplify individual members' interests. On the other, they are subnational bases for social integration and the formation of ideals and beliefs. They are both instrumental and formative, both mechanical and organic, both conveyor belts for interests and nurturing grounds for values.[11] In short, as Justice Brennan put it, voluntary associations serve as "critical buffers between the individual and the power of the State."[12]

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10. The promotion of equality or the prevention of harm may amount to such justification. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984) (holding that policy of ending sex discrimination justified state intrusion upon male-only club membership policy).

11. *See, e.g.*, 2 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 485-88 (J. Mayer & M. Lerner eds. 1966); McConnell, *The Public Values of the Private Association*, in NOMOS XI: VOLUNTARY ASSOCIATIONS 147, 149 (J. Pennock & J. Chapman eds. 1969) (noting that private associations not only facilitate government but also "build norms and patterns of behavior"); Note, *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 987-89 (1963); Stewart, Book Review, *Organizational Jurisprudence*, 101 HARV. L. REV. 371, 380-84 (1987) (describing alternative normative conceptions of intermediate organizations); Wolff, *Beyond Tolerance*, in A CRITIQUE OF PURE TOLERANCE 3, 36 (R.P. Wolff, B. Moore, Jr. & H. Marcuse eds. 1965) (describing pluralist theory of intermediate organizations as uniting " 'liberal' principles and 'conservative' sociology").

12. Roberts v. United States Jaycees, 468 U.S. at 619.

Prevailing constitutional doctrine thus views involuntary group membership as presumptively irrelevant to public ends. "Immutable" characteristics may be reflected in law—for example, in affirmative action plans—only to the extent necessary to hasten their withering away.[13] Voluntary group membership, in contrast, is meant to live on and flourish, subject only to limited state intrusion.

II. Intermediate Groups in the Republican Revival

Sunstein and Michelman reverse the traditional constitutional distinction. While they agree, of course, that involuntary group membership cannot be the basis for imposing disadvantage, they would each "make a virtue of [social group] plurality."[14] Indeed, Sunstein would go so far as to institutionalize involuntary group cleavages in politics by adopting proportional representation for "[b]lacks, women, the handicapped, gays and lesbians" and similar groups.[15]

In contrast, Sunstein and Michelman accord little value to the flourishing of private voluntary groups. Either they disparage such groups as roving bands of self-interested Hobbesean rent-seekers that merely amplify individual desires, or they seek to assimilate such groups to republicanism by depicting them as extra-political vehicles for republican deliberation or dialogue.[16]

This section argues, first, that Sunstein's and Michelman's embrace of involuntary-group heterogeneity deeply undermines the republican model, and second, that their account of voluntary groups undervalues the importance of keeping such groups private and outside the state.

A. *Republicanism and Involuntary Groups*

Sunstein and Michelman argue that republicanism should acknowledge and affirm differences in involuntary group perspectives. Deliberation in the new republican regime will not be the province of a privileged elite likely to confuse its own partial self-interest with the public good. Rather,

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13. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (opinion of Blackmun, J.) ("In order to get beyond racism, we must first take account of race. There is no other way."); Sullivan, *The Supreme Court, 1985 Term—Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78 (1986) (describing the Supreme Court's reliance on remedial justifications for affirmative action).

14. Michelman, *supra* note 6, at 1528; *see* Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539, 1574–75 (1988).

15. Sunstein, *supra* note 14, at 1585; *see id.* at 1588–89. Sunstein admits that, to a republican, proportional representation is a "second-best solution." *Id.* at 1588. In fact, it seems even less republican than that. For one thing, republicanism's requisite political equality and independence, *see id.* at 1552–53, is compromised if representatives are bound to identifiable partial constituencies as proportional representation would require. More important, to admit disadvantaged groups themselves to the chamber is to concede that stake matters to political arguments and outcomes, and that the powerful may be more moved by confrontation than moralized by reason. But these are premises of "pluralism," not republicanism; they suggest that politics is a matter of bargaining from self-interest after all.

16. *See infra* notes 23–36 and accompanying text.

the republican revival will replace the war of all against all with dialogue among all about all—including those involuntary groups that have been traditionally disadvantaged in politics. If those groups cannot actually be included in the deliberations—as they would in Sunstein's proportional representation scheme—they are to be evocatively included by legislators' or judges' empathy with their perspectives.[17]

Why do Sunstein and Michelman forego the more straightforward republican approach of treating such group "perspectives" as undesirable contingencies to be transcended in favor of a single universal, public-regarding point of view? Heterogeneity of "perspective" would appear to bristle with just as much danger of faction and partiality as the heterogeneity of interests, preferences, and desires that Hobbesean rent-seekers trade on and republicanism condemns.

There are two possible answers. The first is that Sunstein and Michelman see current differences in involuntary-group perspectives as the eradicable products of existing differences in power. This view would align them with those who interpret the equal protection clause as a ban on subordination, mandating that, where serious background inequalities in power divide social groups, they be treated differently rather than the same.[18] Under this approach, affirmative action programs for blacks and women not only do not violate the equal protection clause, but may be constitutionally compelled. Similarly, a black-dominated school board's choice to exclude whites from its neighborhood schools would not now violate equal protection even if a white-dominated school system's segregation policy would do so. And women could exclude men from their downtown athletic clubs while men must admit women to theirs.

The second possible answer is that Sunstein and Michelman see differences in involuntary group perspectives as ineradicable, even if power inequalities could be reduced. This view would align them with those who view perspectival differences among involuntary groups not as the unfortunate residue of history, but rather as inevitable or normatively desirable.[19] Under this approach, equality would not require sameness or assimilation, but rather shifts in perspective. For example, if pregnancy were viewed through women's perspective rather than through the "male

17. *See* Sunstein, *supra* note 14, at 1574–75; Michelman, *supra* note 6, at 1530.

18. *See, e.g.*, Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Strauss, *The Myth of Color-Blindness*, 1986 SUP. CT. REV. 99 (noting that in a racially unequal world, there can be no race-blind decisions, but only a choice among race-conscious ones); C. MACKINNON, FEMINISM UNMODIFIED 32–45 (1987).

19. *See, e.g.*, D. BELL, AND WE ARE NOT SAVED 102–22 (1987) (suggesting that black-run schools may do more to advance racial equality than their integrated counterparts); C. GILLIGAN, IN A DIFFERENT VOICE (1982); Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) (advocating that decisionmakers take perspectives other than their own into account); Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS (forthcoming 1989) (endorsing a "heterogeneous public" reflecting "group differentiation").

norm" of a work life uninterrupted by stints as an incubator, then a law giving pregnant women more time off from work than men, without loss of benefits, would not violate equality so much as vindicate it.[20]

On either the unequal-power theory or the multiple-perspective theory, republican dialogue appears unworkable. For both these theories suggest that involuntary group members conceive of the good differently depending on their different histories, experiences, needs, and attributes. Such fractures in perspective will mar agreement on an overarching common good. If group values are not all commensurable on a common scale, politics will amount to trading among incommensurable positions after all.

To be sure, the unequal-power theory may be more hospitable to republicanism in the long run. If power inequalities were reduced, perspectival differences might decrease along with them. But in the meantime, dialogue across the chasms separating differently situated groups will surely be harder than republicans think. Moreover, the course of power equalization is unpredictable, and new inequalities may arise to replace the old, perpetuating the problem.

The multiple-perspective approach, however, is not even theoretically compatible with republicanism. For under this approach, differences in perspective are here to stay. The color-blind and sex-blind millenium will not arrive, nor should we want it to.[21] For all to see the world through the same set of epistemological lenses would be undesirable. But if that is so, we will never be one big republican community—not even in an ideal world.

This is not to deny that lawmakers should try to transcend their own "perspectives" in order to take others' into account, nor that communication may take place across involuntary-group boundaries. But differences in involuntary-group power and perspective at the very least make it unlikely that politics will ever tend toward undominated dialogue, as Michelman envisions, or yield uniquely correct outcomes, as Sunstein suggests.[22] Affirming ongoing differences among involuntary groups appears a fatal concession, undercutting the republican project of pursuing, even aspirationally, a unitary common good.

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20. *See* Minow, *supra* note 19, at 42–43.

21. An additional problem is that some differences will run deeper than "perspective." Pregnancy is an obvious example, pending the invention of plastic wombs. *See* Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977). And even conceding the element of social construction in disadvantages suffered by the physically disabled, *see* tenBroek & Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809 (1966), the underlying differences between disabled and able persons may not be fully eliminated.

22. Michelman, *supra* note 6, at 1526–27; Sunstein, *supra* note 14, at 1574–75.

B. *Republicanism and Voluntary Groups*

Private voluntary associations pose a threat to republican aspirations parallel to that posed by the plurality of involuntary social groups. Again, the problem is partiality, but in a double sense. To the extent that voluntary groups amplify individual wants, they embody partial rather than universal interests or preferences. To the extent they operate as settings for personality formation and social integration, they embody partial rather than universal perspectives or world views. In this context, partiality is the point. The partiality of voluntary associations is not meant to wither away, even if it could; such groups are irreducibly partial, by definition. None embraces, or could embrace, everyone in the polity without losing its identity.

This problem is one of value, not merely scale. Whereas republican deliberation proceeds "from the point of view of everybody,"[23] private associations take a narrower view. Their membership, as well as their views, are defined by exclusion as much as inclusion. Religious communities, for example, lay different and mutually incompatible claims to universal truth; to take the point of view of everybody, including nonbelievers, would destroy them.[24]

Private voluntary associations threaten republicanism in another sense, too: they compete with the state for loyalty and attachment. There is an economy of energy available for collective life, and limits must be drawn.[25] We cannot be equally available for participation in family, church, and state. Parenting and worshipping may siphon off strength from citizenship. Private voluntary associations offer an alternative to government as a vehicle for collective self-formation. To that extent, the flourishing of such associations detracts from republican commitment to collective self-determination in the universal rather than the particular mode.

In light of these threats, it is no surprise that the republican revival would give private voluntary associations short shrift. Traditional republicanism stressed the priority of self-government in the public, universal sphere over other possible sources of freedom and identity. And although they have thrown militarism, fraternity, and misogyny overboard, Sunstein and Michelman have not abandoned the tradition on this score.[26] If

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23. Sunstein, *supra* note 14, at 1570.

24. *See* Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) (rejecting free exercise challenge by fundamentalist Christians to compulsory assignment of "secular humanist" texts at public school), *cert. denied*, 108 S. Ct. 1029 (1988).

25. *Cf.* Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (describing "the economy of virtue" available for "republican moments").

26. *See, e.g.*, Michelman, *Politics or Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487, 509 (1979) ("Politics is a process—not the only one, but an indispensable one—for making the self-defining choices that constitute our moral freedom."); Sunstein, *Routine and Revolution*, 81 NW. U.L. REV. 869, 877 (1987) (approving the republican view that "politics is valued above other activities").

politics is the best vehicle for collective self-definition, there is reason to distrust the autonomy of competing private vehicles.

Sunstein and Michelman have three possible responses. The first is a policy of containment. This approach would contract the realm of collective self-definition outside the state by increasing regulation of private associations and decreasing their constitutional protection. No more speech rights for corporations[27] or other vehicles for aggregated wealth.[28] Newly heightened scrutiny for garden-variety socioeconomic legislation of the kind the Court has left alone since 1937 in order to smoke out the lobbies and unions that are behind it.[29] Sharper skepticism toward freedom of association claims; cases like *Roberts v. United States Jaycees*[30] would become the rule rather than the exception.

A second response to the threat posed by voluntary groups is a policy of colonization. Instead of contracting the realm of private association, republicans could leave it in place but appropriate it for republican ends. This is Sunstein's approach when he writes that "[c]itizenship, understood in republican fashion, does not occur solely through official organs," but also through private associations, which can "serve as outlets" for "deliberation," "community," and "civic virtue."[31] This is likewise Michelman's approach when he includes even "voluntary organizations," "clubs," and "street life" among the forums of republican debate.[32]

On this view, voluntary associations serve as private boot camps for citizenship. Their principal value to republicans is a scale consonant with greater participation, feelings of attachment, and common commitment than is possible in the hopelessly oversized state.[33] Family and home, for example, serve not as havens from the dominant culture, but as vehicles for teaching the primacy of the common good, writ small.

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27. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

28. *See* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981); Buckley v. Valeo, 424 U.S. 1 (1976).

29. *See* Sunstein, *supra* note 14, at 1579; Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 69–72 (1985) (urging reversal of decisions applying deferential rational-basis review to economic legislation involving wealth transfers—for example, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (upholding pension scheme benefiting incumbent union members over other retired railroad workers)).

30. 468 U.S. 609 (1984) (rejecting freedom of association claim by sexually segregated private business club).

31. Sunstein, *supra* note 14, at 1573; *cf.* Sandel, *Democrats and Community*, THE NEW REPUBLIC, Feb. 22, 1988, at 20–21 (finding seeds of republican potential in existing institutions of "family and neighborhood, religion and patriotism").

32. Michelman, *supra* note 6, at 1531. Michelman does not explain the relationship of these groups to the state, but he notes that they may influence "judicial agents" to realize their claims and world views. *Id.* at 1530. This depiction not only strays far from the traditional republican emphasis on participation in politics, but also appears to recreate, in diluted form, the very sort of external, "authoritarian" influence on judges that Michelman elsewhere in his article condemns. *See id.* at 1520.

33. Arguments for federalism often make the same point about local governments. *See* 1 A. DE TOCQUEVILLE, *supra* note 11, at 60–62; McConnell, Book Review, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491–1511 (1987).

A third approach, most evident in Michelman's endorsement of "a non-state centered" republicanism, is to expand the contours of republicanism beyond politics to "social life at large."[34] Under this approach, voluntary groups become not just forums for republican dialogue, but speakers in it. Civil rights organizations, for example, help to transform the broad public life that lies outside the formal channels of government. Extra-political social controversy is part of republican debate.

None of these three responses is satisfactory. Under a policy either of containment or of colonization, the virtues of private associations would be lost. Contracting constitutional protection for voluntary groups would impair their most crucial functions. Intermediate organizations not only facilitate individual self-definition and expression, but also keep the state from replicating itself by nurturing deviance, diversity, and dissent. These functions depend on subgroups' private status—on their detachment and distance from the all-inclusive state.

Likewise, private voluntary groups are poor ground for republican boot camps. They are neither civic, virtuous, nor deliberative in the republican sense. They are too homogeneous, too partial, too differentiated. To reconstitute them as molecularly complex microcosms of the undifferentiated public as a whole would be to change their character fundamentally.[35] But nothing less would fit them for the republican task.

The third approach, which would treat social controversy in the broad sense as republican dialogue, is the most compatible with existing liberal conceptions of private association. But it is not clear what is "republican" about this approach at all. To be linked in a common fate is not the same as applying collective will to a common project. Moreover, to recast private associations as participants in a common public life—however broadly "public" is defined—is to mute their potential deviance from and opposition to dominant norms.

Voluntary associations thus put republicans in a bind. Republicans cannot easily embrace them because of their irreducible partiality. But republicans cannot wholly reject them because they are among the only settings for community around. Normative pluralists have it easier: they do not mind keeping communal life fractionated and outside the state because they think that is where it belongs.[36]

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34. Michelman, *supra* note 6, at 1531.

35. The analogy in local government law would be not to Belle Terre, the small homogeneous suburb whose single-family zoning law was upheld by the United States Supreme Court, *see* Belle Terre v. Boraas, 416 U.S. 1 (1974), but to Mount Laurel, the small homogeneous suburb ordered by the New Jersey Supreme Court to absorb its "fair share" of the less affluent, *see* Southern Burlington County NAACP v. Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

36. *See* N. ROSENBLUM, ANOTHER LIBERALISM 152-86 (1987).

III. Conclusion

The republican revival reconceives politics and lawmaking as quests for universal truth. Sunstein speaks of agreement on uniquely correct outcomes; Michelman speaks less of agreement than of undominated dialogue. But either way, each argues that proper political deliberation pursues shared normative understanding and a single common good. Normative pluralism rejects this quest. It affirms that not only interests but values are plural, and would protect the diversity of private associational life. Group heterogeneity is thus a problem for republicans, but a normative pluralist good.

Sunstein and Michelman are sensitive to the problem that social heterogeneity poses for republicanism. They innovate on the tradition, proposing a rainbow republicanism that would incorporate perspectival differences of various hues. Moreover, they deny that republicanism will endanger the diversity of private life; for example, both argue that *Bowers v. Hardwick*,[37] which upheld the Georgia sodomy law, was wrongly decided on republican grounds.[38]

These claims are valiant but unpersuasive. The problem with embracing heterogeneity is that the incommensurability of values among groups may defeat the republican enterprise; painters know that to mix all the colors of the rainbow produces mud. And the opposite result in *Hardwick* is difficult to square with the republican premise of self-government. Actual majoritarian political processes can and do produce sodomy laws, for instance because the citizenry values or purports to value potentially procreative sex over other varieties. Sunstein and Michelman can reject those processes as insufficiently deliberative or as not "committ[ed]" enough to "social plurality"[39] only by placing highly restrictive conditions on proper political debate. For example, they can claim that a sodomy-banning legislature wrongly failed to take into account the gay male perspective—oral and anal intercourse being potentially more central to gay male sexuality than to that of other groups.[40] But deciding *when* the perspectives of losers in the political process should have been taken into account requires criteria.[41] And such criteria will turn out to look suspiciously like rights ema-

37. 478 U.S. 186.

38. *See* Sunstein, *supra* note 14, at 1580–81 & n.224; Michelman, *supra* note 6, at 1532–37.

39. *See id.* at 1536.

40. *See* Sunstein, *supra* note 14, at 1580 n.224 (characterizing sodomy ban as an equal protection violation); Michelman, *supra* note 6, at 1532–37.

41. *See, e.g.*, Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063, 1075–76 (1980) (distinguishing homosexuals from burglars). Michelman wants judges to hear the voices of groups on the "margins," or of those "hitherto excluded," Michelman, *supra* note 6, at 1529, but he nowhere explains whether or how judges should distinguish, for example, between black and gay voices on the one hand, and those of Mormon polygamists or Ku Klux Klansmen on the other.

nating from "above" or "outside" politics—just what the republican deliberative norm was meant to avoid.[42]

Of course, rights of privacy and voluntary association themselves should not be embraced uncritically. Abuse and injury are intolerable even when practiced behind home and family walls. Nominally private associations can skew public life: for example, by excluding women from the commanding heights of the business lunch table or by exerting monopolistic power in political campaigns. Group power is unequally distributed, and many interests and values are not organized at all.[43] And not all private associations are appropriate settings for collective definition of values; for example, it is hardly clear that business corporations should enjoy strong rights of expression.[44]

In short, there can be no disagreement with Sunstein's statement, offered as a retort to "antirepublicanism," that "multiple threats are posed by private power, including that wielded by intermediate organizations, which are themselves a source of oppression."[45] Of course, government must regulate private associations; the question is to what extent.[46] But one may concede the need for regulation without agreeing that the solution is to reconceive all that is social as public.

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42. *See* Michelman, *supra* note 6, at 1510–12 (criticizing pluralist account of rights as grounded in transcendental or hypothetical constructs).

43. These are classic criticisms of the theory of interest-group pluralism. *See* Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 240–46 (1981).

44. *See* FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) (distinguishing, for First Amendment purposes, grass-roots political organizations that amplify citizens' voices from business corporations organized to amass capital); Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235 (1981); Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

45. Sunstein, *supra* note 14, at 1574.

46. "We may try to set a line dividing the internal affairs of a church or trade union from those of its activities which affect the public at large. . . . But we must recognize that the community cannot irrevocably part with its power to revise such grants and that it is impossible for all the parties to a dispute to have the last word." M. COHEN, *Communal Ghosts and Other Perils in Social Philosophy*, 16 J. PHIL. 673 (1919), *reprinted in* REASON AND NATURE 386, 397–98 (1931) (criticizing theories of "plural sovereignty" of private associations).