

THE DANGEROUS DICHOTOMY OF *DEMOCRACY'S DISCONTENT*, OR MICHAEL SANDEL AND THE FALLACY OF THE FALSE DILEMMA

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I.

In this article, I intend to disagree rather pointedly with the thesis Michael Sandel advances in *Democracy's Discontent*.¹ My disagreement, however, should not obscure the fact that there is much of value in this insightful and thought-provoking book. I believe, for example, that *Democracy's Discontent* provides both a devastating critique of what I will be referring to as Rawlsian liberalism and an extremely valuable history of the political thought of America's intellectual elites from the Founding to the present. Although the brevity of the symposium format makes it impossible for me to explore the praiseworthy aspects of this work, they should not go unremarked.

II.

Michael Sandel presents the argument of *Democracy's Discontent* in an entirely straightforward manner. He asserts that there are two rival candidates for America's public

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¹MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996)

philosophy:² a liberal political theory that “asserts the priority of fair procedures over particular ends,”³ i.e., the public philosophy of the “procedural republic,”⁴ and a republican political theory that “affirms a politics of the common good,”⁵ i.e., the public philosophy of the “self-governing republic.”⁶ He also asserts that over the past half century, the public philosophy of the procedural republic has displaced the public philosophy of the self-governing republic as the driving force in American political life, and further, that this is responsible for the twin features of what he refers to as “democracy’s discontent”: people’s growing sense that they are losing control over the forces that govern their lives and the decline of communities and community feeling.⁷ Sandel’s antidote for this discontent is a return to the republican public philosophy of the nation’s earlier days; one which “regards moral character as a public, not merely private, concern . . . [and] attends to the identity, not just the interests, of its citizens.”⁸

Unfortunately for Sandel, this argument is a classic example of the fallacy of the false dilemma. Sandel clearly intends his argument to present a simple disjunctive syllogism: the nation can subscribe to the public philosophy of either the procedural republic or republican self-government; subscribing to the public philosophy of the procedural republic leads to pernicious

²For Sandel, a “public philosophy” consists in “the political theory implicit in our practice, the assumptions about citizenship and freedom that inform our public life.” *Id.* at 4.

³*Id.*

⁴*Id.*

⁵*Id.* at 25.

⁶*Id.*

⁷*Id.* at 3.

⁸*Id.* at 25.

results; therefore the nation should subscribe to the public philosophy of republican self-government. Such an argument is sound, however, only when the disjunctive premise refers to mutually exhaustive possibilities. When this is not so—when it is made to appear that there are only two possibilities rather than the several that actually exist—the argument presents a false dilemma. And because the procedural republic and republican self-government clearly do not represent the only public philosophies available, this is precisely the nature of Sandel’s argument.

In what follows, I will show that the first premise of Sandel’s argument does indeed present a false dilemma by identifying some of the alternatives he ignores; specifically, the various strands of what is now called classical liberalism. I will also try to show the ways in which Sandel’s characterization of political discourse endangers proper political analysis. I will then suggest that Sandel’s second premise is false as well; that, although the public philosophy of the procedural republic may indeed be unacceptable, it is not responsible for democracy’s discontent. I will further suggest that in his failed attempt to support republican political theory, Sandel has, somewhat ironically, provided quite a strong argument against it. Finally, I will argue that it is classical liberalism rather than republican political theory that contains the true cure for democracy’s discontent.

III.

In 1785, Immanuel Kant argued that the only thing good in and of itself was a good will and that, therefore, there is a moral obligation to treat all rational beings as ends in themselves and never merely as means.⁹ In 1859, John Stuart Mill argued for a high degree of individual liberty on

⁹IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 62, 96 (H.J. Paton trans., Harper Torchbook 1964) (1785).

utilitarian grounds.¹⁰ In 1971, John Rawls argued for a conception of justice as fairness which implied that the just society was one derived from principles that rational, self-interested individuals would choose if they were divorced from all knowledge of their place in the world;¹¹ if, in Sandel's terminology, they were “unencumbered selves.”¹² For Michael Sandel, this seems to represent the history of liberal political thought.¹³

To describe Sandel's view of liberalism as myopic would be a bit of an understatement. In fact, it might be more accurate to say that Sandel sees liberalism through “Rawls-colored” glasses. Reading *Democracy's Discontent* would lead the uninitiated to believe that liberalism (1) consists exclusively in the attempt to derive substantive political principles from minimalist assumptions about what is good or, if possible, from none at all; and (2) rests entirely on a Kantian moral foundation that gives “the right” priority over “the good.” Sandel's description of the “liberal self” is based almost exclusively on references to Rawls's work.¹⁴ And one could scour the pages of *Democracy's Discontent* in vain searching for a substantive reference to any of the historical non-Kantian liberals such as John Locke, David Hume, Adam Smith, Benjamin Constant, Frederic Bastiat, Herbert Spencer, Ludwig von Mises, or F. A. Hayek, much less to any of the

¹⁰JOHN STUART MILL, ON LIBERTY (1859).

¹¹JOHN RAWLS, A THEORY OF JUSTICE 17-22 (1971).

¹²SANDEL, *supra* note 1, at 28.

¹³*See id.* at 8-11.

¹⁴*See id.* at 11-14 & nn.14-19.

contemporary liberals working in a non-Rawlsian tradition.¹⁵

It is true that John Rawls is a brilliant political philosopher and that the strand of liberal political thought that was launched with the publication of *A Theory of Justice*¹⁶ has had a major impact on contemporary political discourse. Unfortunately, this brilliance seems to have blinded Sandel to the existence of the other strands of liberalism. For this reason, he seems unable to see that what he calls the public philosophy of the procedural republic is merely the public philosophy of “Rawlsian liberalism,” not the public philosophy of liberalism *per se*.

For Sandel, liberalism is a political theory completely divorced from any substantive concept of the good. It posits a world of disembodied, “unencumbered” selves, autonomously choosing the good for themselves with no human ties or commitments prior to these choices, creating themselves *ab initio*. In such a world with no pre-existing, unchosen good, the only political obligation can be to respect the process of choice itself. Hence, the liberal commitment to individual rights and the neutral state merely reflects the conditions necessary to ensure these unencumbered selves the “freedom to choose their own values.”¹⁷

Now, it may be argued that this is not a fair depiction of even Rawlsian liberalism, but why

¹⁵See e.g., CHARLES MURRAY, IN PURSUIT OF HAPPINESS AND GOOD GOVERNMENT (1988); DOUGLAS B. RASMUSSEN & DOUGLAS J. DEN UYL, LIBERTY AND NATURE: AN ARISTOTELIAN DEFENSE OF LIBERAL ORDER (1991); DAVID SCHMIDTZ, THE LIMITS OF GOVERNMENT: AN ESSAY ON THE PUBLIC GOODS ARGUMENT (1991). A quick review of the index of DEMOCRACY’S DISCONTENT is quite revealing on this point.

¹⁶RAWLS, *supra* note 11.

¹⁷SANDEL *supra* note 1, at 8.

quibble?¹⁸ It certainly does not come close to describing any of the other strands of liberalism. Consider the pre-Kantian liberals such as Locke, Smith, and Hume. Far from having no substantive concept of the good, these thinkers argued for individual rights and limited government as indispensable to the attainment of the common good. Locke's *Second Treatise of Government*¹⁹ is an extended argument against the divine right of kings with its implicit legitimation of the monarch's pursuit of his private interest at the expense of the public good. Locke advocated government limited by the rights of individuals as the only means to realize "the peace, safety, and public good of the people."²⁰ Far from privileging the right over the good, Locke argued that "[t]he public good is the rule and measure of lawmaking"²¹ and that the state's power "can never be supposed to extend farther, than the common good."²² Similarly, Adam

¹⁸In fact, this almost certainly is not a fair depiction of Rawls's thought. Sandel seems to have entirely overlooked the distinction between Rawls's people in the original position, a hypothetical construct created purely as part of his argument for his two principles of justice, and the actual members of society; a distinction that Rawls is extremely careful to draw. It should be clear that Rawls's contention that the basic structure of society should be organized according to principles of justice that would be chosen by people who were unaware of any of the particular aspects of their lives implies nothing about the moral or metaphysical status of real human beings. It certainly does not imply that people are or should think of themselves as unencumbered selves. However, it is not my object in the present context to criticize Sandel's interpretation of Rawls's theory, but rather to point out that *Sandel's version* of Rawlsian liberalism does not encompass all of liberal thought. Therefore, for purposes of the present work, I would beg the reader's indulgence and ask that he or she understand the phrase "Rawlsian liberalism" as referring to Sandel's interpretation of Rawlsian political theory.

¹⁹JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (C.B. Macpherson ed., 1980) (1690).

²⁰*Id.* at §131.

²¹JOHN LOCKE, *A LETTER ON TOLERATION* 103 (Raymond Klibansky ed. & J.W. Gough trans., 1968) (1689) (footnote omitted).

²²LOCKE, *supra* note 19, at §131.

Smith's *Wealth of Nations*²³ presents a sustained attack on government for actions that promote particular interests at the expense of the general well-being of society. It will be recalled that the most famous passage of that work argues for the freedom of individuals to pursue their own interests as the most effective means of promoting the public interest.²⁴ And it would appear odd at best to describe David Hume—who begins his essay *Of the Origin of Government*²⁵ by declaring “[m]an, born in a family, is compelled to maintain society, from necessity, from natural inclination, and from habit”²⁶—as conceiving of the members of society as unencumbered selves.

Or consider the strain of liberalism associated with Ludwig von Mises and F. A. Hayek. These thinkers had a quite definite conception of the good, i.e., the material well-being of the

²³ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (R.H. Campbell, et al. ed., 1976) (1776).

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As every individual, therefore, endeavours as much as he can both to employ his capital in the support of domestick industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the publick interest, nor knows how much he is promoting it. By preferring the support of domestick to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. (Footnotes omitted.)

Id. at 456.

²⁵DAVID HUME, *Of the Origin of Government*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 37 (Eugene F. Miller ed., 1985) (1777).

²⁶*Id.* at 37.

members of society in a pareto optimal rather than a utilitarian sense.²⁷ There is no question of the right having priority over the good for them. They argued for individual rights and a neutral, limited state on the purely instrumental grounds that, as a matter of empirical fact, both are necessary to the attainment of the good. Mises's economic calculation argument²⁸ and Hayek's arguments concerning the inherent limitations of human knowledge and the functioning of the price system²⁹ were designed to show that a state limited to the protection of individual rights was essential to the achievement of material prosperity. This "Austrian" strand of liberalism is based upon the observation that major social benefits can be reaped from the unimpeded division of labor among individuals with diverse and particular skills, knowledge of local conditions, and cultural practices. Nothing could be more removed from the conception of a society of unencumbered selves.

Finally, consider the contemporary liberals working in an Aristotelian vein such as Charles Murray, Douglas Rasmussen, and Douglas Den Uyl. They too have a definite conception of the good, which consists in the happiness individuals achieve by realizing their potential as human beings; what Aristotle called *eudaimonia*.³⁰ They too give no priority to the right over the good, but argue for the liberal society as a necessary means to the achievement of the good. Thus,

²⁷See LUDWIG VON MISES, *LIBERALISM IN THE CLASSICAL TRADITION* 7-10 (Ralph Racio trans., 3d ed. 1985).

²⁸See LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* 698-715 (new rev. ed. 1963).

²⁹See FRIEDRICH A. HAYEK, *The Use of Knowledge in Society*, in *THE ESSENCE OF HAYEK* 211, 211-12 (Chiaki Nishiyama & Kurt R. Leube eds. 1984).

³⁰ARISTOTLE, *NICOMACHEAN ETHICS* bk. 1, ch 7, l. 1098a16.

Murray argues for a severely restricted sphere for governmental action because it tends to displace the opportunities for self-directed, community-based charitable activity that individuals need to lead meaningful lives,³¹ and Den Uyl and Rasmussen argue for a strong conception of individual rights as necessary to guarantee individuals the realm of self-directed activity that they consider not merely necessary for the attainment of *eudaimonia*, but as the precondition for moral action itself.³² This approach seems to have very little in common with that of the procedural republic.

Sandel devotes a significant portion of his book to the discussion of the political thought of the Founding Fathers. Because they were influenced by classical liberalism as much as, if not more than, by the republican tradition, it seems strange that Sandel would so thoroughly ignore it. And yet, the textual evidence for Sandel's identification of liberalism with Rawlsian liberalism is legion. For just two examples, consider the following:

Rather than promote a particular conception of the good life, liberal political theory insists on toleration, fair procedures, and respect for individual rights—values that respect people's freedom to choose their own values. But this raises a difficult question. If liberal ideals cannot be defended in the name of the highest human good, then in what does their moral basis consist?³³

³¹See MURRAY *supra* note 15.

³²See RASMUSSEN AND DEN UYL *supra* note 15. For a more thorough discussion of this approach, see John Hasnas, *Are There Derivative Natural Rights?* 9 PUB. AFF. Q. 215 (1995).

³³SANDEL, *supra* note 1, at 7-8.

Despite their many differences, libertarian and egalitarian liberals agree that people's entitlements should not be based on their merit or virtue or moral desert, for the qualities that make people virtuous or morally deserving depend on factors "arbitrary from a moral point of view." The liberal state therefore does not discriminate; none of its policies or laws may presuppose that any person or way of life is intrinsically more virtuous than any other. It respects persons as persons, and secures their equal right to live the lives they choose.³⁴

Sandel clinches the matter when he explicitly identifies the public philosophy of the procedural republic with Rawls's *A Theory of Justice* in his penultimate chapter.³⁵

In *Democracy's Discontent*, Sandel wants to convince us that the country should adopt

³⁴*Id.* at 13 (footnote omitted). This passage is extraordinarily revealing because it characterizes libertarian (classical) liberals as agreeing with the essential premises of Rawls's political theory. Thus, it shows how Sandel collapses classical liberalism into Rawlsian liberalism. In fact, of course, there are almost no classical liberals who would agree with these propositions.

It is clear, however, who Sandel has in mind in this passage. Whenever communitarians (or Rawlsian liberals for that matter) wish to refer to or criticize classical liberal political thought, the call goes out to round up the usual suspect and Robert Nozick is brought to book. (Indeed, Nozick is the only classical liberal political theorist to receive a substantive reference in *Democracy's Discontent*. See *id.* at 291.) This is convenient because Nozick, like Rawls, bases his political argument on a Kantian moral foundation. Thus, an attack on the Kantian basis of Rawls's theory can usually be directed against Nozick's libertarianism as well, neatly killing two birds with one stone. However, not even Nozick would agree with the propositions Sandel wants to attribute to classical liberals. In fact, in *Anarchy, State, and Utopia*, he explicitly argues against Rawls's assertion that individuals' natural endowments are arbitrary from a moral point of view. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 213-31 (1974).

By characterizing classical liberalism as merely a variant of Rawlsian liberalism, this passage provides particularly strong evidence that Sandel is unable to perceive any liberal working outside of the Rawlsian tradition.

³⁵See *id.* at 290-91.

the public philosophy of the self-governing republic, a philosophy that “teaches that to be free is to share in governing a political community that controls its own fate. . . .[and that] [c]ultivating in citizens the virtue, independence, and shared understandings such civic engagement requires is a central aim of republican politics.”³⁶ In his political world view, this is the only alternative to the failed liberal public philosophy of the procedural republic.³⁷ However, because this is clearly not the case—because the philosophy of Rawlsian liberalism represents only one of many liberal philosophies³⁸—it is clear that what Sandel has offered us is nothing more than a book-length illustration of the fallacy of the false dilemma.

IV.

We have seen that *Democracy’s Discontent* confronts us with the false dilemma of having to choose between a public philosophy of fair procedures in which political action is limited to measures that enable “unencumbered” selves to choose their own values and one of collective

³⁶*Id.* at 274.

³⁷The evidence that Sandel sees this as an either/or situation permeates his book. *See, e.g., id.* at 5-6, 125-27, 321-24. One of the clearer illustrations of this is his statement that:

The procedural republic that has unfolded over the past half-century can now be seen as an epic experiment in the claims of liberal as against republican political thought. . . . If the public philosophy of contemporary liberalism fails to answer democracy’s discontent, it remains to ask how a renewed attention to republican themes might better equip us to contend with our condition.

Id. at 323-24.

³⁸Since as I have previously suggested, see *supra* note 18, Sandel’s version of Rawlsian liberalism is not an accurate representation of Rawls’s thought, it would seem that a proper statement of Rawlsian liberalism would itself constitute an alternative liberal philosophy that Sandel has failed to consider. I am grateful to Henry Richardson of Georgetown University for pointing this out to me.

self-government in which the political machinery is used to actively inculcate “civic virtue” in the citizenry. This dichotomy poses a serious danger to clear political thinking because, by collapsing liberal political theory into Rawlsian liberalism, it tends to eliminate from consideration the more traditional and, in my opinion, more reasonable arguments for the liberal society.

For example, if one accepts Sandel’s dichotomy, then the liberal commitment to individual rights and state neutrality is inextricably linked to a conception of people as unencumbered selves with no unchosen moral obligations.³⁹ This is the case because for Rawlsian liberalism it is the Kantian view of personhood that generates the commitment to rights and neutrality. However, what is overlooked is that for almost all other strains of liberalism, no such link exists.

Classical liberals are indeed committed to individual rights and the neutral state, but they are emphatically not committed to a view of individuals as unsituated Kantian selves voluntarily choosing their moral obligations. In fact, precisely the opposite is the case. Classical liberals support individual rights and the neutral state because they view the members of society as whole persons, complete with commitments to and the potential for prejudice in favor of their own family, community, culture, or race. Classical liberals support individual rights not because people have no unchosen obligations, but because rights serve as a bulwark against the threat of tyranny that is always present when “fully encumbered,” morally imperfect human beings wield great amounts of power.⁴⁰ They support the neutral state not because it is necessary to guarantee

³⁹*See id.* at 28.

⁴⁰It is worth noting that throughout Part II of *DEMOCRACY’S DISCONTENT*, Sandel provides an excellent historical account of the continual call by the nation’s intellectual elites for government that focuses on the common good and instills republican virtue in the citizens. Interestingly, by his own account, these calls are almost never heeded for reasons having to do with the tendency of the groups vying for power to serve their own rather than the common

individuals the “freedom to choose their own values,”⁴¹ but because the state acts as the common agent of individuals encumbered by diverse sets of commitments to their families, communities, and cultures. The underlying idea is that to be the agent of all, the state must be neutral among all. Simply put, if all are to be taxed to support the state, it is wrong to use those funds in ways that are antithetical to the moral commitments of some in order to advance those of others; for example, to force Jews to pay taxes to support a state-financed nativity scene at Christmas. As should be apparent, this argument makes sense only if people are seen as coming to the political process with antecedent moral commitments.

Further, no classical liberal argues that there are no unchosen *moral* obligations. Classical liberals do not deny that obligations can arise out family, community, and cultural ties. Only Rawlsian liberalism requires the exclusion of particular knowledge of one’s place in society. Classical liberals do argue, however, that there are only a minimal level of unchosen *politically enforceable* obligations.⁴² But their reason for this has nothing to do with the metaphysical status of human personality.

Classical liberals recognize that the moral commitments to family, community, and culture are rarely, if ever, consent-based. When interacting with people that one knows well and trusts or with whom one shares a common set of cultural values, contractual relationships are often both unnecessary and inappropriate. However, classical liberals also recognize that human beings can

interest.

⁴¹SANDEL *supra* note 1, at 8.

⁴²For evidence that Sandel is unable to distinguish moral from political obligation, see *id.* at 14.

benefit from interaction with others with whom they share no familial, communal, or cultural bonds. Their argument is that at this level of social interaction, the morally appropriate basis for interpersonal relationship is mutual agreement rather than coercion.

One might say that classical liberals recognize “moral economies of scale.” Whereas familial, communal, and cultural obligations provide the framework for moral action within particular subgroups of society, consent is the mechanism for extending the moral order beyond these subgroups to include all members of society. Thus, for classical liberals, it is the realm of what Hayek called “the extended order of human cooperation”⁴³ that is the realm of consent. But this “extended order” of society-wide cooperation is precisely what we generally refer to as the political realm. This explains how classical liberals can argue that the only politically enforceable obligations are those designed to prevent violence and protect citizens’ ability to form voluntary agreements, while simultaneously recognizing that these politically enforceable obligations do not exhaust the citizens’ moral obligations.⁴⁴ Far from having no conception of the good independent of subjective individual choice, classical liberals regard peaceful, voluntary social interaction as the

⁴³See F.A. HAYEK, 1 THE COLLECTED WORKS OF F.A. HAYEK: THE FATAL CONCEIT: THE ERRORS OF SOCIALISM 6 (W.W. Bartley III ed., 1989) (1988).

⁴⁴The distinction being described is often expressed in terms of the difference between civil society and the political domain. Civil society encompasses the myriad mediating institutions that arise out of familial, communal, cultural, and voluntary affiliations and generate many of the fundamental moral obligations that regulate life in society. The political domain, on the other hand, encompasses only those institutions and (politically enforceable) obligations that are necessary for the maintenance of a just society and that bind all members of society regardless of affiliation. The classical liberal’s contention that the political domain should be limited to those institutions and obligations necessary to eliminate coercion from human interaction entails absolutely no limitation upon the moral obligations that may be generated by the mediating institutions of civil society, or, for that matter, has anything to say about these obligations one way or the other. Classical liberalism is a philosophy about the proper scope of the political domain—nothing more.

means of achieving the substantive good, whether conceived of as individual happiness (*eudaimonia*), collective well-being, or both.

Another example of how Sandel's division of the political universe between Rawlsian liberalism and republican political theory undermines political discourse concerns the meaning of liberty. By identifying Rawlsian liberalism with liberalism, Sandel makes it appear that there are only two available conceptions of liberty: the liberty he identifies with liberalism which inheres in the freedom of idealized, morally unencumbered individuals to choose their own ends and values;⁴⁵ and the liberty he associates with the self-governing republic which inheres in the democratic, collective choice of society as a whole.⁴⁶ But Rawlsian liberalism is not all of liberalism, and the Rawlsian conception of liberty⁴⁷ is not the only liberal conception of liberty. There is also the more traditional, classical liberal conception in which liberty inheres in the individual choice of real, situated, fully encumbered human beings. This conception of liberty consists in the freedom of whole persons possessed of particular talents, knowledge, and moral commitments to employ their talents, use their knowledge, and honor their commitments in the ways they think appropriate. Unlike the Rawlsian conception of liberty which is derived from the denuded sameness of depersonalized individuals, the value of liberty in the classical liberal sense

⁴⁵See SANDEL *supra* note 1, at 4-5.

⁴⁶*Id.* at 26, 274-75.

⁴⁷In employing this locution, I am probably, once again, doing Rawls a disservice since what is being discussed is Sandel's representation of a conception of liberty he attributes to Rawls, rather than any conception of liberty Rawls actually advances. However, following the convention I established earlier, see *supra* note 18, and for the same reasons, I would ask the reader to understand the phrase "the Rawlsian conception of liberty" as referring to Sandel's interpretation of the Rawlsian conception of liberty.

derives entirely from the differences among people. This is because it is these differences that make individuals valuable to each other and allow all to gain from the division of labor that results from voluntary cooperation. By obscuring this conception of liberty, Sandel's dichotomy hides the liberal politics it supports; one designed to minimize the use of both individual and state coercion in order to facilitate voluntary cooperation among diverse individuals and thereby achieve the collective as well as the individual good. This allows Sandel to make it appear that we must choose between a robust and uplifting conception of collective self-government and a sterile and unmotivated liberalism. In his portrait of the political landscape, the more inspiring liberalism of a society of diverse individuals freely and peacefully working together to achieve the common good is entirely lost from view.

These examples show that what is being suppressed by Sandel's dichotomy is precisely what differentiates classical liberalism from the republican political theory and Rawlsian liberalism that exhaust Sandel's political universe; that is, its insistent focus on the non-idealized behavior of real human beings *both* as private citizens and as agents of the state. Political theory is concerned with the relationship between the individual members of society and the government. The distinguishing characteristic of classical liberalism is that it recognizes that the government is nothing more than a collection of some of the individual members of society. Thus, classical liberal political theory is concerned with the relationship between the individual human beings that comprise the citizenry and the individual human beings that comprise the government. This is true of neither republican political theory nor Rawlsian liberalism, both of which regard the government as an ideal type.

Consider first Sandel's account of republican political theory. This theory's "formative

project”⁴⁸ is motivated by the belief that when left to their own devices, the individual members of society will not develop the civic virtue necessary to the successful functioning of a self-governing republic.⁴⁹ This is why “[r]epublican government cannot be neutral toward the moral character of its citizens or the ends they pursue,”⁵⁰ but must strive “to form or reform the moral character of citizens, to strengthen their attachment to the common good.”⁵¹ This line of reasoning necessarily takes a fairly utopian view of government. To believe that the government can inculcate the proper virtues in citizens who are either too corruptible or too self-interested to do it for themselves requires one to believe not only that the government itself is not corruptible—i.e., that the individual members of society who comprise the government are not equally susceptible to the temptations that beset the general population—but also that there exists a practicable democratic election procedure that will select only such individuals for government service.⁵² As Sandel has described it, republican political theory proposes to cure the behavioral defects of real, morally imperfect citizens with the output of an ideal state.

Next consider Rawlsian political theory which, as Sandel describes it, is even further abstracted from reality. This strand of liberalism begins by postulating a highly idealized

⁴⁸*Id.* at 323.

⁴⁹By Sandel’s account, the “moral and civic engagement,” *id.* at 323, that constitutes such civic virtue consists in “a knowledge of public affairs . . . a sense of belonging, a concern for the whole, a moral bond with the community whose fate is at stake.” *Id.* at 5.

⁵⁰*Id.* at 127.

⁵¹*Id.*

⁵²As mentioned previously, Sandel spends a considerable portion of his book detailing the failure of the American government to live up to this standard. *See supra* note 40.

conception of the individual, one in which the individual is “[f]reed from the sanctions of custom and tradition and inherited status, unbound by moral ties antecedent to choice.”⁵³ As Sandel describes it, the liberal self is “free and independent, unencumbered by aims and attachments it does not choose for itself.”⁵⁴ With this as its starting point, Rawlsian liberalism proceeds by asking what governmental structures would be necessary to ensure that such idealized individuals will indeed be able to choose their ends for themselves. Clearly, such a government would have to be one that “does not try to cultivate virtue or impose on its citizens any particular ends.”⁵⁵ Therefore, what is needed is a “procedural republic”⁵⁶ limited to upholding “a framework of rights . . . within which persons can pursue their own conceptions of the good, consistent with a similar liberty for others.”⁵⁷ Unsurprisingly, this conception of government is as highly idealized as the conception of the individual from which it is derived. For, in order to function properly, it would have to be staffed by individuals who not only are not susceptible to the ordinary forms of corruption, but in addition, are dedicated to preventing their beliefs about what is good from influencing their official behavior. Furthermore, even if individuals with such a rarefied form of dedication could be found, they would have to possess a superhuman level of self-awareness to ensure that their personal moral commitments were not unintentionally shaping their interpretations of law and public policy. Thus, as Sandel depicts it, Rawlsian political theory

⁵³SANDEL *supra* note 1, at 12.

⁵⁴*Id.*

⁵⁵*Id.* at 290.

⁵⁶*Id.*

⁵⁷*Id.*

proposes an ideal state to facilitate the interests of ideal people.

What is missing from both approaches is precisely what classical liberalism provides, the recognition that a successful political theory must create a governmental structure that can be run by real human beings. Classical liberals explicitly reject the type of abstract political theorizing that produces morally perfect political structures that can function properly only if staffed by morally perfect beings. Rather, they begin with the assumption that because the government is nothing more than a group of human beings, there are limits to what it can be expected to accomplish. They argue that the recognition that there will come a point at which the government itself will necessarily constitute a greater danger than any of the evils it is designed to eliminate must be built into a proper political theory. Accordingly, classical liberal political theory proposes to cure the behavioral defects of real, morally imperfect citizens only to the extent that that can safely be done by a government staffed by real, morally imperfect human beings.

In my opinion, the most significant danger posed by the dichotomy of *Democracy's Discontent* is that by eliminating this perspective from consideration, it may cause us to overlook the limits that human nature imposes upon the functioning of government.

V.

It must be clear by now that I hold no brief for the Rawlsian liberalism that Sandel identifies as the public philosophy of the procedural republic. I agree with Sandel that it is a seriously flawed political theory and I believe that the thoughtful and sustained critique of it that he articulates in *Democracy's Discontent* represents a valuable contribution to political thought. I further agree that what Sandel calls democracy's discontent is a real phenomenon. People do sense that they cannot control the forces that govern their lives, and traditional commitments to

community have certainly been unraveling. I do not agree, however, that it is the ascendancy of Rawlsian liberalism as a public philosophy that has produced these consequences.

Sandel apparently believes that the members of the contemporary public have internalized a Rawlsian conception of liberty and of what it means to be a citizen. Thus, he believes that they see themselves as free of any unchosen obligations, which accounts for the decay of community feeling, and as citizens of a polity barred from pursuing any substantive conception of the good, which accounts for their feeling that they cannot effectively control their futures.⁵⁸ Now, although it is undoubtedly true that Rawlsian liberalism has had a major influence on the thinking of America's intellectual elite and hence on the nation's politics, I find it extremely difficult to believe that the members of the general population—most of whom have never heard of John Rawls and could not care less about political philosophy—have assimilated a conception of either the “liberal self” or a politics that privileges the right over the good. To believe not only that the public has assimilated such conceptions, but also that the resulting intellectual dissonance between “the liberal self-image and the actual organization of modern social and economic life”⁵⁹ or the “separating [of] our identity as citizens from our identity as persons more broadly conceived”⁶⁰ is responsible for the decline of community and the public's discontent with politics is to invest

⁵⁸This explains Sandel's assertions that “[t]he sense of disempowerment that afflicts citizens of the procedural republic may reflect the loss of agency that results when liberty is detached from self-government and located in the will of an independent self, unencumbered by moral or communal ties it has not chosen,” *id.* at 203, and that “[t]his sense of disempowerment arises from the fact that the liberal self-image and the actual organization of modern social and economic life are sharply at odds,” *id.* at 202.

⁵⁹SANDEL *supra* note 1, at 202.

⁶⁰*Id.* at 322.

political theory with a power only an academic could believe it to possess.⁶¹

I would like to offer a somewhat simpler explanation for democracy's discontent. I believe that people perceive that they are losing control over their lives and that communities are unraveling because the government of the United States has spent the better part of this century pursuing policies that deprive individuals of control over their lives and cause communities to unravel.

Let us consider the public's perceived loss of control first. In the early part of this century, the Supreme Court routinely struck down state efforts to limit the economic freedom of citizens as unconstitutional restrictions on the liberty of contract protected by the Due Process Clause.⁶²

⁶¹I am concerned that I not be seen as attacking a straw man at this point. I have represented Sandel as claiming that the members of the general population have internalized a Rawlsian self-image and that this is the mechanism by which Rawlsian liberalism has produced democracy's discontent. This may seem unfair. After all, the vast majority of United States citizens are not college educated and are regular church-goers who consider themselves committed Christians. It seems quite unbelievable to assert that such citizens have internalized an image of themselves as unencumbered selves free of all unchosen obligations. Further, in a country in which public opinion polls repeatedly demonstrate that a large majority of the population would vote against the substantive provisions of the Bill of Rights, it seems odd to suggest that the citizens view the government as an entity that must let respect for individual rights stand in the way of (whatever they believe to be) the common good. Recent (and not so recent) political campaigns certainly provide no evidence that citizens have adopted such a view. Accordingly, it is difficult to believe that a thinker as sophisticated as Michael Sandel would advocate such an unlikely position.

However, difficult to believe or not, there is simply no other way to interpret Sandel's argument. For in addition to the evidence provided by the text of *Democracy's Discontent* itself, *see, e.g., supra* notes 58-60 and accompanying text, Sandel made it perfectly clear in the remarks that opened this symposium that he does indeed believe that the general public has internalized the tenets of Rawlsian liberalism and that this what has produced democracy's discontent. *See* [reference to the section of Sandel's talk in which he quotes from works of pop psychology].

⁶²*See, e.g.,* *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (invalidating Kansas statute that prohibited "yellow dog" contracts); *Lochner v. New York*, 198 U.S. 45, 64 (1905) (invalidating New York statute that restricted bakers' working hours to 10 per day).

In the 1930s, this concept of substantive due process led the Court to invalidate several elements of Franklin Roosevelt's New Deal.⁶³ In response, an angered Roosevelt, who had been re-elected in a landslide, proposed a plan to pack the Court with new appointments. Shortly thereafter, in *West Coast Hotel v. Parrish*,⁶⁴ the Court reversed itself, and in this and a series of subsequent decisions declared that it would uphold virtually all governmental regulation of the economy.⁶⁵ With the exception of the islands of fundamental rights carved out by the famous footnote four of *United States v. Carolene Products*,⁶⁶ the Court simply renounced any effort to protect citizens' freedom. As Laurence Tribe has described it, "the Court declared that it would sustain regulation in the socioeconomic sphere if any state of facts either known or reasonably inferable afforded support for the legislative judgment. Even this limited scrutiny soon gave way to virtually complete judicial abdication."⁶⁷

For the past sixty years, it has been the policy of the Federal government to provide strong protection to a limited set of fundamental civil rights, while providing virtually no protection for

⁶³See e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 311-12 (1936) (invalidating statute that regulated price fixing, unfair trade practices, and minimum working conditions in the coal industry); *United States v. Butler*, 297 U.S. 1, 74-75 (1936) (invalidating the Agricultural Adjustment Act); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1934) (invalidating the National Industrial Recovery Act).

⁶⁴300 U.S. 379 (1937).

⁶⁵See e.g., *Wickard v. Filburn*, 317 U.S. 111, 130-31 (1942) (upholding the new Agricultural Adjustment Act); *United States v. Darby*, 312 U.S. 100, 115 (1941) (upholding the Fair Labor Standards Act); *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 49 (1937) (upholding the National Labor Relations Act).

⁶⁶*United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

⁶⁷LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 582 (2d. ed. 1988).

citizens' economic liberty. This has unleashed government at all levels to issue regulations that, whatever their individual virtues, work *in toto* to reduce the economic opportunities of ordinary citizens. In addition to directly restricting the freedom of those regulated, governmental economic regulation has both accelerated the corporatization of America by imposing costs that burden small businesses and start-up companies more heavily than large, highly capitalized corporations and increased the power of highly-concentrated special interests by providing opportunities for them to obtain rents at the expense of the unorganized general public. After more than a half century of governmental policies that encourage the growth of large, powerful, and unresponsive institutions, it is hardly surprising that citizens have the impression that they are losing control of their futures.

Sandel appears to have been entirely taken in by the political rhetoric of rights. In his account of the triumph of the public philosophy of the procedural republic, he refers extensively to the rhetoric of economic (welfare) rights employed by Presidents Roosevelt, Truman, and Johnson.⁶⁸ He seems so dazzled by the image of expanded individual autonomy contained in this rhetoric that he entirely overlooks the reality of the excessive encroachment on individual autonomy flowing from the regulatory bureaucracy constructed to ensure these new "rights." I have argued elsewhere that because government is the agency charged with enforcing the laws designed to protect individuals' rights, expanding the number of politically recognized rights beyond a limited number of option (negative) rights expands rather than contracts the scope of

⁶⁸See SANDEL, *supra* note 1, at 281-2.

governmental social control.⁶⁹ Sandel's blindness to this and to the coercive machinery necessary to give substance to politicians' ethereal rhetoric about economic rights leads him to attribute people's growing sense of powerlessness to a form of cognitive dissonance—one that arises from citizens being intellectually committed to a government designed to ensure individual autonomy when what they really desire is one designed to help them achieve a substantive common good. I, on the other hand, attribute it to the reality of living under a government that, while preserving civil liberty, is continually shrinking the amount of economic liberty that citizens may exercise in their efforts to achieve their lives' goals.

Consider next the unraveling of the traditional commitments to community. Communities flourish when they have important functions to perform. People become committed to communities when they believe that by doing so they will help achieve an end they consider meaningful. The satisfaction they derive from these commitments is directly proportional to the amount of contribution that they can personally make to achieving that end. Accordingly, the most effective way to undermine a community is to render its existence no longer necessary to the realization of the end it was organized to further.⁷⁰

In the past, communities flourished because they performed vitally important functions. Civic, religious, and other fraternal organizations were often the only source of financial and spiritual support available to members who fell upon hard times. People were active in these groups not only because they might someday need the support services themselves, but because

⁶⁹See John Hasnas, *From Cannibalism to Caesareans: Two Conceptions of Fundamental Rights*, 89 NW. U. L. REV. 900 (1995).

⁷⁰For the more detailed account from which this brief synopsis was drawn, see MURRAY, *supra* note 15, at 213-40.

the opportunity to directly help others enriched their lives. However, as Sandel does an excellent job of pointing out in his account of the rise of the welfare state,⁷¹ for the past sixty years, the state has been steadily taking over the functions previously performed by these community organizations. Quite naturally, when the functions these groups perform are thus rendered unnecessary, the significance of the individual members' participation is dissipated, as, not surprisingly, is the members' commitment to the group. As Charles Murray explains it, "[i]ndividuals are drawn to community affiliations and attach themselves to them in direct proportion to the functional value of those organizations. . . . Take away the functions and you take away the community."⁷²

Sandel would have us believe that people have internalized an image of themselves as freely choosing unencumbered selves and it is this that has undermined their commitment to community. If it were conceivable that the general public had internalized such an image, it would certainly be possible for it to have this effect. However, no such esoteric assumptions are needed to explain the decline of community. Communities have declined because the government has displaced them. By taking over their essential functions, the state has rendered participation in communities far less meaningful to the members, which, in turn, has undermined their members' commitment to the communities.

In section III of this article, I accused Sandel of committing the fallacy of the false dilemma. I'm afraid that at this point I must accuse him of committing the *post hoc, propter hoc* fallacy as well. For, in *Democracy's Discontent*, he has noted that "[t]he triumph of the

⁷¹See SANDEL *supra* note 1, at 278-89.

⁷²MURRAY, *supra* note 15, at 228-29.

voluntarist conception of freedom coincided with a growing sense of disempowerment⁷³ and that the decline of community followed hard on the heels of the rise of Rawlsian liberalism.⁷⁴ He appears to have concluded from this concurrence that the ascendancy of Rawlsian liberalism and its voluntarist conception of freedom must have caused the sense of disempowerment and the decline of community. But to make the causal connection, Sandel has had to posit a psychological impact for Rawlsian liberalism that is both unsupported by the evidence and ascribes a quite unbelievable power to political theory. In my opinion, this superstructure is unnecessary because there is a simpler, more practical explanation at hand. People feel disempowered and communities are unraveling because for most of this century our government has pursued illiberal economic policies that reduce people's power to control their lives and undermine community.

VI.

In *Democracy's Discontent*, Michael Sandel provides no direct support for the public philosophy of the self-governing republic, resting his case for it entirely on the claim that it is the only alternative to the failed public philosophy of Rawlsian liberalism.⁷⁵ Because this is not the case—because Sandel's argument presents a false dilemma—Sandel has provided us with no legitimate reason to subscribe to republican political theory. Somewhat ironically, however, *Democracy's Discontent* contains a fairly powerful reason why we should not subscribe to this theory, which I will examine presently. But first, let us turn our attention to what Sandel means by republican political theory, and why he might wish to avoid making a direct argument for it.

⁷³SANDEL *supra* note 1, at 294.

⁷⁴*See id.* at 274-97.

⁷⁵*See id.* at 321-24.

By Sandel's account, republican political theory defines liberty as consisting in membership in a self-governing political community. The maintenance of liberty, therefore, requires the maintenance of collective self-government, which in turn requires that the individual citizens of the political community exhibit civic virtue; i.e., an independent and virtuous character coupled with a commitment to the common good. Because this is the case, the political machinery of the community must be employed to inculcate civic virtue in its citizens.⁷⁶

It is not surprising that Sandel presents no direct arguments for this theory given the obstacles he would have to overcome to do so. In the first place, the theory as stated lacks a moral foundation. Republican political theory asserts that republics should inculcate civic virtue in their citizens because such virtue is necessary to the proper functioning of the republican form of government. This assumes that it has been established that the republican form of government is itself morally valuable. But in Sandel's version of republican political theory, no argument for this conclusion has been offered. It is true that Sandel *defines* liberty as membership in a collectively self-governing political community and then argues that republican government is necessary for the maintenance of liberty in this sense. But this is merely semantics. It does nothing to show why

⁷⁶In Sandel's own words,

Republican political theory teaches that to be free is to share in governing a political community that controls its own fate. Self-government in this sense requires political communities that control their destinies, and citizens who think and act with a view to the common good. Cultivating in citizens the virtue, independence, and shared understandings such civic engagement requires is a central aim of republican politics. To abandon the formative ambition is thus to abandon the project of liberty as the republican tradition conceives it.

Id. at 274. Sandel repeats this account of republicanism variously throughout his book. *See e.g.*, *id.* at 5-6, 26-27, 124-27, 270, 323.

membership in such a community should be regarded as morally valuable. Because republican political theory proposes to shape human character to fit its preferred conception of a political system rather than to construct a political system that fits human character, some showing as to why this political system is inherently (or even instrumentally) valuable is absolutely necessary. So, to provide direct support for republican political theory, Sandel would first have to supply the missing moral premise.

Furthermore, even if Sandel could supply this premise, he would still have to deal with the fact that republican political theory appears to be internally inconsistent. According to the theory, a republican government must inculcate civic virtue in the citizenry because a government that is selected by and responsive to the desires of the people will reflect their character. Thus, if the citizens are ill-informed, corrupt, or excessively attached to their private interests in preference to the public good, the government will make bad decisions or advance the interests of powerful factions at the expense of the common good; and this cannot be allowed. The problem is that if the people's character needs correction by the government, then the government is *ex hypothesi* not one chosen by citizens with the proper character, and therefore not one that can be trusted to pursue the common good and properly inculcate civic virtue in the citizenry. This suggests that a government that can be trusted to properly inculcate civic virtue in the citizenry must be comprised of insulated, morally superior individuals rather than those who would be selected by and responsive to the citizenry. However, in that case, the government would not be a republican one. So, to argue directly for republican political theory, Sandel would next have to resolve this "republican paradox."

Given these hurdles, it is perfectly understandable why Sandel would attempt only the

indirect argument for republicanism that I have attacked as a false dilemma. However, because this is the nature of the argument he presents—because he sees no viable alternative to republican political theory—Sandel believes we must embrace republican government regardless of any flaws it may possess. For this reason, Sandel is careful to caution us about the risks inherent in this form of government, the most serious of which is its tendency to become excessively coercive.⁷⁷ In issuing this caution, I believe that Sandel has, contrary to his intention, provided quite a strong argument against republican political theory.

Sandel realizes that as the size of republican political communities increases and as these communities become more inclusive, it becomes increasingly difficult to maintain a citizenry with good character. As this difficulty increases, so does the temptation to attempt to inculcate civic virtue coercively. In Sandel’s words, “[a]s the tendency to exclusion recedes, . . . the danger of coercion looms larger.”⁷⁸ Thus, he warns that we must be on guard against the “coercive face of soulcraft”⁷⁹ exhibited by such republican theorists as Jean-Jacques Rousseau—who declared that “if each citizen is nothing and can do nothing except in concert with all the others . . . one can say that the legislation has achieved the highest possible point of perfection”⁸⁰—and Benjamin Rush—who “wanted ‘to convert men into republican machines’ and to teach each citizen ‘that he

⁷⁷*See id.* at 318-21.

⁷⁸SANDEL *supra* note 1, at 319.

⁷⁹*Id.*

⁸⁰*Id.* (quoting JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 39 (Donald A. Cress ed. & trans., 1983) (1762)).

does not belong to himself, but that he is public property.”⁸¹ As Sandel himself points out, “[r]epublican politics is risky politics, a politics without guarantees. And the risks it entails inhere in the formative project. To accord the political community a stake in the character of its citizens is to concede the possibility that bad communities may form bad characters.”⁸²

Indeed.

History would suggest that this is no small risk. One might reflect that the South’s Jim Crow legislation was introduced to protect public virtue from the corruption that was certain to result from an unrestrained intermingling of the races. Interestingly, it is difficult to recall an instance of legislation that had a more powerful formative effect on the character of the people than did these laws. And it hardly need be mentioned that Hitler came to power in a republic by promising to protect the character of the German nation from the corrupting influence of the Jews and other minorities that uncontrolled markets permitted to flourish. However, one need not repair to such extreme examples to appreciate the risk Sandel asks us to accept. John Adams described the public character of his America in much the same way that communitarians describe the public character of contemporary America when he stated that “there is so much rascality, so much venality and corruption, so much avarice and ambition, such a rage for profit and commerce among all ranks and degrees of men even in America, that I sometimes doubt whether there is

⁸¹*Id.* (quoting Benjamin Rush, *A Plan for the Establishment of Public Schools and the Diffusion of Knowledge in Pennsylvania* in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* (Frederick Rudolph ed., 1965) (1786)).

⁸²*Id.* at 321.

public virtue enough to support a republic.”⁸³ If this was or is an accurate description of the character of the public, how secure can we be that any government it selects will scruple at the use of force? And how safe from coercion will we be if the people who come to power share not only Adams’s opinion of the public character but also his belief that “[i]t is the part of a great politician to make the character of his people. . . to extinguish among them the follies and vices that he sees, and to create in them the virtues and abilities which he sees wanting”?⁸⁴

Against the risk presented by the “coercive face” of republican political theory, Sandel can offer only the cold comfort that “the civic strand of freedom is not *necessarily* . . . coercive. It can *sometimes* find democratic, pluralistic expression.”⁸⁵ This suffices for him because he regards the risk as unavoidable. Because he sees republican political theory as the only alternative to the failed public philosophy of Rawlsian liberalism, he believes we have no choice but to run the risk. However, as I hope I have shown, republican political theory is not the only alternative to Rawlsian liberalism and hence this risk is not forced upon us. Given our historical experience with the attempts of past republican governments to reform public character, I submit that the presence of this risk constitutes one of the strongest arguments against republican political theory.

VII.

Michael Sandel is willing to risk the coercion inherent in republican political theory

⁸³SANDEL *supra* note 1, at 126 (internal quotation marks omitted) (quoting Letter from John Adams to Mercy Warren (Jan. 8, 1776), *in* 1 WARREN-ADAMS LETTERS 202 (Worthington C. Ford ed., 1917)).

⁸⁴*Id.* at 127 (internal quotation marks omitted) (quoting Letter from John Adams to Mercy Warren (Jan. 8, 1776) *in* 1 WARREN-ADAMS LETTERS 202 (Worthington C. Ford ed., 1917)).

⁸⁵*Id.* at 321 (emphasis added).

because he believes this theory offers the only cure for democracy's discontent. However, he runs this risk with regret. He is fully cognizant of the danger republican government presents and admits "the truth in the liberal's complaint about republican politics."⁸⁶ He further concedes that "[w]hat to make of this complaint depends on the alternatives. If there were a way to secure freedom without attending to the character of citizens, or to define rights without affirming a conception of the good life, then the liberal objection to the formative project might be decisive."⁸⁷ It is only because he can perceive no such alternative that he believes the risk to be justified.⁸⁸

Sandel's way of stating the alternatives reflects his dichotomous view of the political universe as containing only Rawlsian liberalism and republican political theory. Had he a less myopic perspective he might have phrased his concession more accurately by stating: if there were a way to secure freedom without *the government* attending to the character of citizens, or to define rights *either* without affirming a conception of the good life *or so that they act as a means to the attainment of the good life*, then the liberal objection to the formative project *would* be decisive. However, had he seen this, he would also have seen that this is precisely the alternative that classical liberalism offers.

Classical liberal political theory is as concerned with the character of citizens as is republican political theory. It differs merely as to the means of cultivating it. Classical liberalism holds that character is something individuals must develop for themselves. Gaining the respect of

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸*See* SANDEL *supra* note 1, at 321-24.

others for one's good actions and having to face up to and learn from one's mistakes is precisely what character formation consists in. From the classical liberal perspective, to believe that government can instill virtue into citizens is to misconceive the nature of virtue itself.

Furthermore, classical liberal political theory provides just as definite a conception of the good life as does republican political theory. Because human diversity provides the potential for mutual gain through the division of labor when force is barred from interpersonal relationships, it is possible for human beings to simultaneously attain both individual happiness and collective well-being. Therefore, the classical liberal conception of the good life consists in the life of free and responsible individuals voluntarily cooperating in the building of their world.

Classical liberal political theory holds that the most effective way to simultaneously cultivate public character and realize the good life is to maintain an environment in which citizens have both the freedom to make decisions for themselves and the responsibility to live with the consequences of those decisions. Rights, as classical liberals understand them, exist precisely to maintain such an environment. Their purpose is to protect citizens against both individual and collective coercion to the greatest extent possible—and nothing more.⁸⁹ By thus extending the realm of voluntary cooperation, rights provide the soil in which public character and the common good can grow. The essential difference between classical liberalism and republican political

⁸⁹The classical liberal conception of rights includes none of the welfare rights that Rawlsian liberalism requires to ensure that “unencumbered” individuals have the resources they need to effectively choose their own ends. Such rights relieve some individuals of responsibility for their actions and coerce others into rendering aid when they would not voluntarily do so, which has pernicious effects on the public character and undermines the voluntary cooperation necessary to achieve the common good. Governmentally enforceable welfare rights can serve as the exemplar for the type of entity most likely to displace individual action and thereby undermine community.

theory inheres in the difference between attempting to cultivate and to inculcate virtue. Only the latter risks the “coercive face of soulcraft.”⁹⁰

Once classical liberalism emerges from the shadow of Rawlsian liberalism, it becomes clear that it is the proper cure for democracy’s discontent. The most obvious prescription for the relief of people’s feelings that they are losing control over their lives is to stop depriving them of control over their lives. By limiting the state to the effort to eliminate coercion from human relationships and prohibiting it from redistributing resources or otherwise engaging in social engineering, classical liberalism precisely fills this prescription.

Every dollar left in private hands is a dollar that individuals may spend in pursuit of their lives’ goals and one less over which they must engage in a political struggle for control. Merely ending the massive transfer of wealth from ordinary citizens to the highly concentrated, well-organized, and well-financed special interests that are best equipped to triumph in this struggle would go a long way toward restoring people’s sense of control over their destinies. Further, removing regulations not designed to combat coercion will reduce the competitive advantage that large, highly capitalized corporations gain from being better equipped to bear the costs these regulations impose. To the extent that people’s sense of disempowerment stems from the feeling that there are few alternatives to remaining a cog in the wheel of corporate America, the increased opportunity to pursue one’s dreams in a small business or by starting a business oneself should help dissipate it.

That classical liberalism is also the correct prescription for what ails our communities becomes apparent as soon as we attend to the kind of communities Sandel is concerned to

⁹⁰SANDEL *supra* note 1, at 319.

preserve. Sandel explicitly rejects the “unitary vision”⁹¹ of society as one big community precisely because such a community cannot be maintained without unacceptable levels of coercion.⁹² Rather, he adopts a more decentralized, Tocquevillian view that is concerned with “those communities intermediate between the individual and the nation,”⁹³ such as “[f]amily, neighborhood, religion, trade unions, reform movements, and local government.”⁹⁴

Now, one feature that all of these Tocquevillian communities share is that they form naturally. Throughout recorded history, human beings have voluntarily grouped themselves into such communities because doing so makes them better able to achieve their goals and lead lives they consider meaningful. If these are the communities that are declining, then the question that needs to be asked is not how politics can be used to encourage them, but rather what political measures are preventing people from participating in them.⁹⁵

As I have previously suggested,⁹⁶ communities are declining because the government is displacing them. When the services previously provided by families, neighborhood or religious organizations, unions, or local governments are provided as a matter of right by state and federal governments, these smaller communities are rendered unnecessary. This undermines their

⁹¹*Id.* at 320.

⁹²*See id.* at 319-21.

⁹³*Id.* at 314.

⁹⁴*Id.* at 117. For a more detailed account of the conception of community that Sandel supports, *see id.* at 320-21.

⁹⁵For the more detailed discussion from which these comments are derived, see Murray, *supra* note 15, at 213-40.

⁹⁶*See supra* notes 70-72 and accompanying text.

significance not only to their potential beneficiaries, but to those who would provide the services as well. As a result, people's commitment to these communities withers.

Classical liberal political theory bars such displacement. By restricting state action to the elimination of coercion, it leaves communities with the responsibility they have traditionally borne to provide the essential material and spiritual support people need to live successful lives. Because it is the presence of this responsibility that causes communities to flourish, classical liberal political theory holds that "[t]o encourage, nourish, and protect vital [communities], the government's main task is to make sure that no one interferes with people coming together in these voluntary acts of mutual benefit."⁹⁷ Classical liberalism would restore the vitality of our communities by once again rendering them vital to human well-being.

In *Democracy's Discontent*, Michael Sandel offers the civil rights movement of the 1950s and 60s as an exemplar of the beneficent effects of community.⁹⁸ It is an odd selection to offer in support of republican political theory. For, the Southern black churches and other organizations that Sandel credits for the movement were communities that flourished not only without political encouragement, but in the face of great political antipathy. They were communities that people joined and supported voluntarily because of the overriding moral significance of the role they played in people's lives; because they provided the mutual support necessary to survive and combat the injustice of state-mandated segregation. But perhaps most telling, the injustice these communities opposed arose from the "republican" effort to use the machinery of government to protect public character from the corruption that would result from contact with what was

⁹⁷MURRAY, *supra* note 15, at 239.

⁹⁸See SANDEL *supra* note 1, at 314.

believed to be an inferior race. Although I do not see how this example makes out much of a case for republican political theory, I can think of no finer evidence for the proposition that classical liberalism is the true cure for democracy's discontent.