

Liberalism, Republicanism and the Public Philosophy of American Democracy

I Introduction

Political philosophers can be placed on a spectrum according to how they view the relationship between philosophy and social institutions. At one extreme, a naive a prioriism considers social institutions only to the extent that they are necessary for the practical realization of, supposedly timeless, philosophical principles. At the other extreme, are certain Marxists and post-structuralists for whom philosophy is no more than an expression of specific social institutions: a particular discursive practice which occupies no privileged critical vantage-point in relation to other institutions.

In this paper, I shall look at the relationship between philosophy and institutions in the context of a critical examination of the work of the contemporary Harvard political philosopher, Michael Sandel. Sandel made his name in the early nineteen-eighties with his first book, *Liberalism and the Limits of Justice*¹, a fierce and eloquent critique of the work of his Harvard colleague, John Rawls. The extraordinary resonance of his original polemic

¹ Cambridge: Cambridge University Press, 1982. The recently published second edition (Cambridge: Cambridge University Press, 1998) contains a new preface and final chapter responding to Rawls's *Political Liberalism* (New York, N.Y.: Columbia University Press, 1993) as well as a very useful supplementary bibliography of the most important contributions to the debate that *Liberalism and the Limits of Justice* has provoked. Since, as far as the main body of the text is concerned, the two editions are identical, I shall specify an edition *only* when referring to this new material.

has elicited important clarifications of Rawls's position on the part of Rawls's followers and Rawls himself.² But Sandel's work recommends itself in the present context for another reason. In his more recent writing, culminating in his book *Democracy's Discontent*³, the scope of Sandel's argument has notably broadened; its target now is not just a particular political philosopher, however eminent, but the conception of liberalism that Sandel takes to be embedded within the institutions and practices of contemporary American democracy as a whole. Employing methods that are both philosophical and historical, *Democracy's Discontent* provides an illuminating example – rare in the Anglo-Saxon world – of political philosophy engaging with the intellectual foundations of social institutions. According to Sandel, we should not think of philosophy as merely timeless, abstract theory. Nor, on the other hand, are institutions passive vessels shaped solely by forces external to them. Philosophies carry within themselves assumptions that are expressions of particular forms of life while institutions are animated by practices within which political theory is already implicit.⁴

II Sandel's Argument

² Sandel claims that they are modifications, not clarifications, on Rawls's part. See fn [[?]] below.

³ Cambridge, Ma.: Harvard University Press, 1996

⁴ As Sandel describes the object of his book (in characteristically resonant language): "My aim is to identify the public philosophy implicit in our practices and institutions and to show how tensions in the philosophy show up in the practice. If theory never keeps its distance but inhabits the world from

Let me start by recalling the (by now rather well-known) structure of Sandel's earlier position. Put in a nutshell, it is this. Rawls, according to Sandel, claims to develop a broadly Kantian conception of justice – one whose central feature is that it is “deontological”, inasmuch as it makes the “right” prior to the good – but to do so without recourse to the metaphysical claims of transcendental idealism.⁵ Yet he does not succeed, Sandel claims. On the contrary, Rawls's apparently less metaphysically objectionable version of Kantianism “either fails as deontology or recreates in the original position the disembodied subject it resolves to avoid.”⁶ Rawls's Kantian theory of the subject, Sandel alleges, reduces the self to a mere locus or nodal point, all of whose properties are external and contingent to it; a subject of choice, whose voluntaristic fiat is, ultimately, the sole source of value. Only by seeing values as choices (or quasi-choices) can Rawls establish the intellectual foundations for the kind of neutrality between competing values which is the desired conclusion of his argument. In the years since *Liberalism and the Limits of Justice's* first publication, Sandel has not taken back this argument. On the contrary, he believes, it is Rawls who has retreated in the face of it. As Sandel reads him, Rawls later position represents a withdrawal from its earlier dependence on

the start, we may find a clue to our condition in the theory that we live.”
Democracy's Discontent, pp. ix-x

⁵ Sandel himself quotes Rawls's statement that: “To develop a viable Kantian conception of justice, the force and content of Kant's doctrine must be detached from its background in transcendental idealism.” *Liberalism and the Limits of Justice*, p. 13

⁶ *Liberalism and the Limits of Justice*, p. 14

commitment to a controversial, Kantian conception of the self but at the price of having left its deontological conclusions inadequately defended.⁷

Democracy's Discontent builds on this position. America, Sandel argues, is increasingly becoming what he calls a “procedural republic” – by which he means not (just) the often-noted fact that the United States is a society in which the recourse to litigation is more frequent and the influence of the courts more extensive than in any other advanced Western society. The procedural republic is the institutional embodiment, for Sandel, of deontological liberalism: it “asserts the priority of fair procedures over particular ends”.⁸ Just as Rawls’s deontological liberalism depended in Sandel’s earlier argument on unacknowledged Kantian premises, so, Sandel argues, the liberal ethic of the procedural republic “derives much of its moral

⁷ In the new final chapter of *Liberalism and the Limits of Justice*, Second Edition, Sandel refers to Rawls’s claim, made particularly in “Justice as Fairness: Political not Metaphysical” (*Philosophy and Public Affairs*, (14), 1985, pp. 223-51) and in *Political Liberalism*, that the case for liberalism is political, not metaphysical, as Rawls’s “revised view”, something which he “now argues” (p. 189). The consequence of this position, in Sandel’s view, is that: “... *Political Liberalism* rescues the priority of right from controversies about the nature of the self, but only at the cost of rendering it vulnerable on other grounds.” (pp. 195-96).

⁸ “Its central idea is that government should be neutral toward the moral and religious views its citizens espouse. Since people disagree about the best way to live, government should not affirm in law any particular vision of the good life. Instead, it should provide a framework of rights that respect persons as free and independent selves, capable of choosing their own values and ends.” *Democracy's Discontent*, p. 4

force” from a certain image of the self, the “unencumbered self”, as Sandel calls it⁹

It may well be that the claims outlined here will strike the reader with a certain weary familiarity. The idea that liberalism seeks to establish its values on a conception of the self and of its identity that is voluntaristic and impoverished is a commonplace of anti-liberal thought. In fact, however, the similarities between Sandel’s position and collectivist and traditionalist critiques of individualism are potentially misleading. To Sandel’s dismay, it has led to his views being assimilated to those of other thinkers from whom he would wish to distance himself quite sharply. For these reasons, Sandel is uncomfortable with the label “communitarian” that is often applied to his work.¹⁰ As he makes clear in the Preface to the Second Edition of *Liberalism and the Limits of Justice*, he endorses a rights-based approach to politics of the

⁹ : “For the liberal self, what matters above all, what is most essential to our personhood, is not the ends we choose but our capacity to choose them ... [T]he image of the self as free and independent, unencumbered by aims and attachments it does not choose for itself, offers a powerful liberating vision. Freed from the sanctions of custom and tradition and inherited status, unbound by moral ties antecedent to choice, the liberal self is installed as sovereign, cast as the author of the only obligations that constrain.” *Democracy’s Discontent*, p. 12

¹⁰ This label is commonly applied not just to Sandel himself but to three other critics of liberalism whose ideas were at the centre of discussion in the 1980s, Charles Taylor, Alasdair MacIntyre and Michael Walzer. “Communitarianism” is misleading, Sandel explains, to the extent that it suggests a contrast with individualism in the sense that it gives priority the values embodied in some particular community or tradition; it is the force of this collective aspect of the community that sets the boundaries to what an individual can claim. In this sense, however, Sandel explicitly rejects communitarianism; if the opposition between individualism and collectivism is framed in this way then he is an individualist.

very kind that many critics of liberalism reject: the issue, as he sees it, is on what basis rights are to be identified and justified.¹¹ Furthermore, like liberals, Sandel accepts a fundamentally pluralist vision of society. He sees no prospect of returning to some lost golden age of value uniformity, nor does he think it desirable.

In the light of this, it might seem, then, that Sandel's argument with liberalism is simply an argument about philosophical foundations – two different ways of justifying the same institutions and policies. But this is not so, Sandel believes, and, at this point, his argument against liberalism takes a perhaps surprising turn. Deontological liberalism, founded on the notion of neutrality between competing conceptions of the good, is not truly neutral, he argues. As a matter of fact, its philosophical foundations in the idea of the unencumbered self intrude on its manner of thinking and arguing about matters of public policy with the consequence that it disadvantages those who hold their values in characteristically non-liberal ways: “encumbered” selves whose values form a part of their identities and cannot be represented as mere “life-style choices”.¹²

¹¹ “What is at stake in the debate between Rawlsian liberalism and the view I advance in *Liberalism and the Limits of Justice* is not whether rights are important but whether rights can be identified and justified in a way that does not presuppose any particular conception of the good life. At issue is not whether individual or communal claims should carry greater weight but whether the principles of justice that govern the basic structure of society can be neutral with respect to the competing moral and religious convictions its citizens espouse.” *Liberalism and the Limits of Justice*, Second Edition, p. x

¹² “... the image of the unencumbered self, despite its appeal, is inadequate to the liberty it promises. In the case of religion, the liberal conception of the

The label which Sandel prefers in *Democracy's Discontent* for his own alternative to liberal neutrality is “republicanism”.¹³ Republicanism as Sandel presents it has two key features. First, unlike liberalism, it is not and does not pretend to be neutral between competing conceptions of the good. On the contrary (and this is its second key feature) it assesses and seeks to promote conceptions of the good in the light of a fundamental criterion: that of citizenship. To be a citizen, according to the republican tradition as it goes back to Aristotle, is to be capable of sharing in self-rule and this presupposes certain qualities or virtues. Thus republicanism requires a “formative politics” to promote those virtues rather than the simple neutrality of deontological liberalism.¹⁴ Sandel believes that republicanism, like procedural liberalism, is embedded as part of the institutions and public philosophy of American democracy. Hence that public philosophy is antinomical: republicanism, although it remains a theme in American life, has more and more been displaced by the neutrality of the procedural republic. That, in a nutshell, is Sandel’s diagnosis of the source of “democracy’s discontent”.

person ill equips the [Supreme] Court to secure religious liberty for those who regard themselves as claimed by religious commitments they have not chosen. Not all religious beliefs can be redescribed without loss as ‘the product of free and voluntary choice by the faithful.’” *Democracy's Discontent*, p. 65

¹³ Intended, of course, not in the party-political sense – Sandel’s politics are the politics of Roosevelt and Kennedy rather than Hoover and Reagan.

¹⁴ “Central to republican theory is the idea that liberty depends on sharing in self-government.... To share in self-rule ... requires that citizens possess, or come to acquire, certain qualities of character, or civic virtues. But this means that republican politics cannot be neutral towards the values and ends its citizens espouse.” *Democracy's Discontent*, pp. 5-6

In the remainder of this paper I shall offer a counter-critique to Sandel's account of the limits of liberalism. I shall ask (and suggest answers to) two questions: (1) Does liberalism indeed rest, in the way that Sandel claims, on an objectionably impoverished view of the self? I claim that it does not. (2) Must its conception of neutrality, as Sandel maintains, fail to do justice to the force of the claims of those who hold values as a matter of commitment and identity, rather than choice? Again, I argue that this is not so. My defence of liberalism will not, however, be completely unqualified. In particular, it seems to me that Sandel raises difficult questions with respect to the nature of liberal neutrality and the relationship between liberalism and civic virtue. I agree with Sandel both that these questions are of fundamental importance and that they have not been dealt with wholly satisfactorily by the most prominent liberal theorists. But, unlike Sandel, I do not believe that they are problems that are disabling for liberalism and that, in consequence, they should lead us to adopt the republican alternative.

III The Liberal Self

As indicated above, Sandel's most extensive argument for the connection between liberalism and the Kantian, "unencumbered" self is given in *Liberalism and the Limits of Justice* and *Democracy's Discontent* draws freely on the claims made there. In my view, the argument is unpersuasive, however. Sandel starts his discussion in *Liberalism and the Limits of Justice* with a division of conceptions of the self between two extreme poles, poles which he

attributes (not without some degree of simplification) to Hume and Kant respectively. At one end, we have what he calls the “radically situated” self: a self without any central focus for its identity, with no separation between itself and its experiences, and which, in consequence, must acknowledge everything – all of its desires and emotions – as equally a part of itself. At the other, there is the abstract, Kantian self. Here the self is detached from its attributes. This self is defined by its very power of possession: its capacity to have and, most importantly, to distance itself from and choose between desires and values. According to Sandel, Rawls, despite his explicit claim that his argument does not depend on the metaphysics of transcendental idealism, is nevertheless committed to the transcendental idealist view of the self.

Sandel believes that this commitment is implicit in a phrase of Rawls’s to the effect that “the self is prior to the ends which are affirmed by it”. This phrase is repeated in slightly different words throughout *Liberalism and the Limits of Justice*,¹⁵ and is used again to characterize the liberal conception of the self in *Democracy’s Discontent*.¹⁶ The sense of this priority is thus

¹⁵ For instance: “the self, shorn of all contingently-given attributes, assumes a kind of supra-empirical status, essentially unencumbered, bounded in advance and given prior to its ends, a pure subject of agency, ultimately thin”. *Liberalism and the Limits of Justice*, p. 94

¹⁶ “... the Kantian self is a choosing self, independent of the desires and ends it may have at any moment. Kant expressed this idea by attributing to human beings the capacity to act with an autonomous will. Contemporary liberals rely on the similar notion of a self given prior to and independent of its purposes and ends.... For the liberal self, what matters above all, what is most essential to our personhood, is not the ends we choose but our capacity to choose them. ‘It is not our aims that primarily reveal our nature,’ but rather the framework of rights we would agree to if we could abstract from our aims. ‘For the self is

evidently of considerable importance.¹⁷ Does it commit Rawls to the abstract, Kantian self as Sandel claims? I do not believe that it does.¹⁸

prior to the ends which are affirmed by it; even a dominant end must be chosen from among numerous possibilities.’ ... Freed from the sanctions of custom and tradition and inherited status, unbound by moral ties antecedent to choice, the liberal self is installed as sovereign, cast as the author of the only obligations that constrain. More than the simple sum of circumstance, we become capable of the dignity that consists in being persons of our own ‘creating, making, choosing.’ We are agents and not just instruments of the purposes we pursue. We are ‘self-originating sources of valid claims.’” *Democracy’s Discontent*, p. 12. Sandel’s quotations here come from Rawls’s *A Theory of Justice*, G. Kateb, “Democratic Individuality and the Claims of Politics” and Rawls again (“Kantian Constructivism in Moral Theory”), respectively.

¹⁷ The passage in which the phrase appears is as follows: “... the structure of teleological doctrines is radically misconceived: from the start they relate the right and the good in the wrong way. We should not attempt to give form to our life by first looking to the good independently defined. It is not our aims that primarily reveal our nature but rather the principles that we would acknowledge to govern the background conditions under which these aims are to be formed and the manner in which they are to be pursued. For the self is prior to the ends pursued by it; even a dominant end must be chosen from among numerous possibilities. (There is no way to get beyond deliberative rationality.) We should therefore reverse the relation between the right and the good proposed by teleological doctrines and view the right as prior. The moral theory is then developed by working in the opposite direction.” J. Rawls, *A Theory of Justice* (Cambridge, Ma.: Harvard University Press, 1971), p. 560. Quoted *Liberalism and the Limits of Justice*, p. 19. Sentence in parentheses omitted by Sandel.

¹⁸ The phrase regarding the priority of the self to its ends appears is offered by Rawls as a concluding summary of his argument against hedonism. Hedonism, Rawls takes to be the belief in pleasure as the dominant end. It is, he says, either trivial or false. If we take the pleasurable to be identified with reference to what we in fact choose (the saint chooses martyrdom because it gives him greater pleasure, and so on) then the theory is explanatorily empty. But, if pleasure is defined independently as a psychological state, then it is, Rawls claims, simply not a reasonable dominant end: “We need only note that once pleasure is conceived, as it must be, in a sufficiently definite way so that its intensity and duration can enter into an agent’s calculations, then it is no longer plausible that it should be taken as the sole rational aim.” *A Theory of Justice*, pp. 556-57

Rawls does indeed reject the identification of the self with the particular set of desires it may have at any one time. But it does not follow from this that the self is radically distanced from or entirely independent of its desires. Simply, Rawls takes it to be an evident fact that we often have to adjudicate between different sets of desires which we might end up having if we were to take one course of action or another and that this will not be a matter of normative indifference to us.¹⁹ This is not to say, however, that such choices take place in some radically detached existentialist vacuum. As Rawls puts it: “At any given time rational persons decide between plans of action in view of their situation and beliefs, *all in conjunction with their present major desires* and the principles of rational choice. Thus we choose between future desires *in the light of our existing desires*, including among these the desire to act on rational principles.”²⁰

Our present aims, beliefs and desires are not inessential in the sense of being dispensable to us; it is only in terms of them that we can decide between competing rational plans of action. But they are not essential in the sense that the self may be fixed in its identity by reference to any single group of them, once and for all. It is in this way – that it is not to be *reduced to* its ends, but not that it has its identity in metaphysical abstraction from them entirely – that Rawls takes a view of the self as “prior to the ends affirmed by it.” In other words, Rawls is just locating his conception of the self somewhere in the

¹⁹ “We can choose now which desires we shall have at a future time”, *A Theory of Justice*, p. 415

spectrum between Kant and Hume rather than committing himself to a position on the Kantian extreme.²¹

Since the publication of *Liberalism and the Limits of Justice*, Rawls has argued in print that his version of liberalism does not depend on an objectionable metaphysics of the self.²² Yet *Democracy's Discontent* does not withdraw Sandel's earlier claim. Indeed, it takes it further. The "unencumbered self" is no longer just a doctrine ascribed to *A Theory of Justice* but is held to be a key assumption underlying contemporary liberalism in general. Why does Sandel believe that the connection between liberalism and the abstract, Kantian conception of self-hood is so fundamental? Ultimately, I think, the answer for Sandel is not so much textual as

²⁰ *A Theory of Justice*, p. 415. My emphasis.

²¹ Note that the argument of this section has been that Sandel is wrong to ascribe a metaphysically objectionable account of the identity of the self to Rawls, not that *A Theory of Justice* makes no use of any view of the nature of the self whatsoever.

The latter claim, in fact, would be an extremely strong one for any political philosophy and not true in the case of Rawls, as we can see from the following simple example. One of the most familiar arguments to be found in *A Theory of Justice* is the claim that utilitarianism does not take proper account of the "separateness of persons"; that, in effect, it aggregates and balances the welfare of individuals in the same way that a rational individual might do regarding his or her own welfare through time. But there is certainly an assumption here: namely, that the separateness of persons *is true*. What if it were not – that we were all, really, one person? Surely then Rawls's argument against utilitarianism would fail.

So Rawls's theory is not *wholly innocent* of views regarding the metaphysics of the self. But he is not committed to a specific positive account of the self and its identity – only (in this case) to the falsehood of a claim which will in any case strike most of us as too bizarre to warrant serious consideration.

²² See note [[?]] 11 above.

substantive: the commitment to the unencumbered self is necessary, he believes, to support the liberal doctrine of neutrality.

IV Neutrality

One may argue whether Sandel is right about the liberal's commitment to the "unencumbered self".²³ But it is surely beyond dispute that liberalism is indeed, for whatever reasons, committed to the idea of neutrality and it is in addressing this that *Democracy's Discontent* is most original. Abstracting as it does from the substantive assessment of attitudes and values, liberal neutrality cannot deal properly with obligations of solidarity, religious duties and other moral ties unrelated to choice, Sandel claims: "It fails to capture those loyalties and responsibilities whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are."²⁴ As evidence, Sandel offers a series of discussions of recent court decisions on free speech, the treatment of religion, abortion and homosexuality. In different ways, those who have suffered from the Court's

²³ I believe that he is wrong. Certainly, a commitment to an abstract, Kantian view of the self might well lead to liberal neutrality. But that is not the only or, as it seems to me, the most obvious reason to adopt a position of neutrality. Neutrality can be supported more directly by the intuition that it is just *fair* to treat some values equally when they come into conflict with one another. (Note that this does not entail agnosticism – one does not have to *doubt* a value in order to believe that there are circumstances under which it should not necessarily prevail. Nor does one have to believe that this is true of *all* values: the value of fairness isn't necessarily overriding – accepting it doesn't therefore require that we are always neutral between competing values.) So I think that Sandel mistakes for a necessary and sufficient condition of liberal neutrality what is, at most, a sufficient one.

decisions are all, he says, “situated selves with good reason to resist the demand to bracket their identities for the sake of political agreement; their concerns cannot be translated without loss into the voluntarist, individuated terms on which the procedural republic insists”.²⁵ This is why they lose out. In this section I shall take up Sandel’s claims in relation to examples from two of the areas he discusses: the United States Supreme Court’s treatment of religious liberty and of freedom of speech. I shall argue that the Court’s position with regard to these issues is not unsatisfactory for the reasons that he supposes – that is, either I do not agree with Sandel that the Court’s position is unsatisfactory or, where I believe that Sandel is right, then the reason to reject the Court’s judgement is not because of its commitment to liberal neutrality as such.

First, however, I must distinguish between different forms that a commitment to liberal neutrality might take. This is important for, if court decisions fall out in a certain way, then that may not be because liberal neutrality is inherently incapable of giving proper weight to fundamental commitments and convictions but because of the particular interpretation of neutrality that is being applied in that particular case. Neutrality, I shall argue, comes in three basic forms, each of which is properly described as a form of “liberal neutrality” in Sandel’s sense since each remains neutral with respect to competing conceptions of the good. But since the implications of each form

²⁴ *Democracy’s Discontent*, p. 14

²⁵ *Democracy’s Discontent*, p. 116

are quite different, it is of great importance which is at stake in any particular context.

The first form of neutrality is the neutrality of non-interference. For the state to be neutral in this sense with respect to some issue it must simply abstain from intervention for any reason whatsoever – even in pursuit of the goal of fairness. This, one might think, is in fact a very illiberal form of neutrality: the anarchistic neutrality of the Hobbesian state of nature. Certainly, it is hard to imagine endorsing it as a comprehensive political ideal, but it should not be neglected for that reason. To say that the state should never intervene at all is, of course, bizarre, but to say that there are *certain areas* in which the state should not intervene is not so implausible. The argument is most likely to rest, I think, on what is often called the “liberalism of fear” – the idea, that is, that the reason to adopt policies of non-intervention lies in fear of the consequences of intervention, however apparently well-intentioned. There may be spheres of life – private sexual behaviour comes to mind as an obvious example – in which *any* attempt at regulation by a public authority may be expected to cause more harm than good. Thus, while the neutrality of non-interference cannot be the whole of a liberal account of neutrality, it can – and, indeed, as we shall see, in American public life does – play a role within a wider conception within certain spheres.

The second form of liberal neutrality is the neutrality of fair procedure (often called, rather unhelpfully, “equality of opportunity”). Where the state pursues the neutrality of fair procedure it takes responsibility for the fairness

of the process, the levelness of the playing-field, not the desirability of the outcome. Finally, there is the neutrality of equality. Neutrality in this strongest sense requires that the interests of all those affected carry equal weight. Egalitarian neutrality operates wherever it is agreed that individuals have equal claims in relation to some benefit or liabilities to share in some burden.

It is very often assumed that liberals can be divided with respect to which of these forms of neutrality they favour. Thus egalitarians like Rawls and Dworkin are taken to favour egalitarian neutrality, while libertarians are taken to favour the neutrality of fair procedure. There is, of course, some point to this contrast, but it is misleading if it is assumed that theorists must be committed exclusively to a single form of neutrality. On the contrary, many liberals favour different forms of neutrality in different contexts – and this is also the case (I shall argue) with that quintessentially liberal institution, the Supreme Court of the United States of America.²⁶

V Religious Liberty

If there is any area of life in which we are truly encumbered selves then it is, surely, in relation to our religious beliefs. If we have such beliefs, then it seems absurd to say that they are, for us, things that we have “chosen” – as if

²⁶ While Rawls’s conception of neutrality is predominantly that of egalitarian neutrality, he acknowledges the importance of procedural neutrality in certain areas (for instance, in endorsing the idea of equality of opportunity).

they were something voluntary and optional.²⁷ According to Sandel, however, contemporary liberalism derives its commitment to religious liberty “not from the moral importance of religion but from the need to protect autonomy ... to respect people’s capacity to choose their own values and ends.”²⁸ How such “voluntarist assumptions can crowd out religious liberty for encumbered selves” is shown by the case of *Thornton v. Caldor, Inc.* (1985), Sandel claims.

In this case, the Supreme Court struck down a law guaranteeing to those whose religious convictions involved observance of a sabbath the right to designate which day of the week they wished to have as their day off.²⁹ Justice O’Connor, siding with the majority, held that the statute was unconstitutional in conferring an advantage on sabbath observers in virtue of their religious beliefs. “All employees, regardless of their religious orientation, would value ... the right to select the day of the week in which to refrain from labour.”, she wrote.³⁰ Sandel comments:

But this objection confuses the right to perform a duty with the right to make a choice. Sabbath observers, by definition, do not *select* the day of the week they rest; they rest on the day their religion requires. The benefit the statute confers is not the right to choose a day of rest, but

²⁷ Which is not to say, of course, that those who have such beliefs would not choose to have them or would choose *not* to have them if they could.

²⁸ *Democracy’s Discontent*, p. 66

²⁹ That is, each worker would be entitled to a day off every week, but only sabbath observers would have the right to determine which day.

³⁰ Quoted, *Democracy’s Discontent*, p. 67

the right to perform the duty of sabbath observance on the only day it can be carried out.³¹

At first sight, endorsing the decision of the Court in this case might indeed seem perverse: surely that would be to value the *preferences* of unbelievers equally with the *commitments* of the believers. But I do not think that Sandel's argument should be accepted as it stands. There are, I think, two kinds of argument that a liberal might make in defence of the Court's decision. First of all, it might be asked, why should only religious believers have commitments? What, for instance, about the unbeliever who argues as follows: "If I do not receive my day off on (say) Sunday then I will be forced to spend it without my family. Spending a day with my family is not, for me, an option or 'life-style choice'; I regard it as an obligation"? The second argument takes the opposite route. Even if the unbeliever has no values that he regards as "commitments", why, it asks, should he be disadvantaged in consequence? Perhaps the individual who recognises nothing more important than being able to watch the football team he has chosen to support on a Saturday afternoon deserves our sympathy for the poverty of his existence. But should the claims of such individuals take a back seat to those of believers? Should people be disadvantaged just because the things they value have been chosen? Sandel claims that the "procedural republic" disadvantages those with unchosen values; on the contrary, so this argument goes, all it does is fail to give them some special (unfair) advantage.

³¹ *Democracy's Discontent*, p. 67

Perhaps, though, the court was wrong.³² I can see two arguments that even an egalitarian liberal might make for this conclusion. Neither argument, however – and this is the important point – rests on what Sandel deprecatingly calls “voluntarist assumptions”. The first argument would claim that we should sanction a departure from equal treatment between believers and unbelievers, given that the religious believer’s commitments constitute an expensive, unchosen need on his part. Liberals have no difficulty in acknowledging the special claims of (for example) the physically handicapped and there is no reason to suppose that this violates the principle of neutrality. A religious commitment might be dealt with in the same way, as an unchosen burden which entitles whoever bears it to special help from the community at large.³³ Second, a liberal might argue that the court was wrong to decide as it did even if religious commitments are not to be given special weight in virtue of being unchosen “handicaps” (certainly, those who have those commitments will be reluctant to have them described in that way!). There is a case for giving special weight to the believer’s claims simply because of the greater

³² Not wrong, I should say, from the point of view of constitutional law, but regarded purely from the philosophical standpoint of the application of principles of liberal equality.

³³ You might think that it violates the principle of equality. Certainly, it seems to mandate that we supply the person in question with an extra share of the community’s resources. But if equality is considered to be not about resources but a matter of welfare level (or similar) then there is no conflict with equality: a greater quantity of resources is required to bring certain individuals (the handicapped, for instance) to a given level of welfare and to give them those extra resources is to realize equality, not violate it. Arguably, we might think of those whose religious commitments impose particular burdens on them in the same way.

intensity of the preference that the believer has. There is, however, no reason to treat this as a special entitlement just in virtue of the fact that the claim is based on a *commitment* or that the commitment in question is *religious*; what matters is simply the importance it has for the believer.³⁴

For my part, I tend to think that the court was right and so I favour a combination of the first two arguments. But none of the four arguments presented here is disreputable, none depends on “voluntarist assumptions” and none is illiberal.

VI Freedom of Speech

As regards freedom of speech, Sandel’s point is that the content-neutrality apparently mandated by liberalism (the idea that we shouldn’t protect speech more or less for reasons that depend on its content) leads to perverse results. One case that he discusses does, it seems to me, show the jurisprudence of the Supreme Court in a somewhat bizarre light, but the conclusion is one that the liberal (so I shall argue) is not mandated to accept.

³⁴ If we think of this from the point of view of liberal equality, then the fact that we give the religious believer some special weight in this case should entail compensation elsewhere. It isn’t that religious believers have greater overall claims on public resources; it’s just that they have a greater weight of claim in this case. From this point of view, it might be reasonable to subject those who register to take advantage of an entitlement to special treatment in virtue of their religious commitments to a form of *Kirchensteuer* to compensate the community for the extra costs they impose.

The case³⁵ arose when the regulatory authority tried to prevent Consolidated Edison (the monopoly power company supplying New York) from inserting statements in its billing envelopes advocating nuclear power. The Supreme Court ruled that this violated the utility's freedom of speech. What is notable is that in its decision the Court attached no importance at all to the fact that the company was using its monopoly power to provide a privileged platform to promote its interests – the kind of consideration that would have been relevant if what were at stake were the neutrality of fair procedure or the neutrality that mandates the equal consideration of interests. The Court plainly took the view that the appropriate kind of neutrality to adopt in relation to freedom of speech is the neutrality of complete non-interference. One may well think that in so doing it was completely misguided, but the decision illustrates clearly the following point. The fact that in free speech cases the Court has not given what Sandel considers to be the appropriate weight to the concerns of “situated selves” does not show that liberal neutrality must fail to do justice to interests of that kind. In confining itself to non-interference the court has simply excluded any policy of giving weight to interests at all. Behind it would lie the argument that even the attempt to ensure a level playing-field for those advocating different points of view – the neutrality of fair procedure – would carry with it such dangers that the remedy is worse than the disease. It is not content-neutrality, as Sandel claims, but the

³⁵ *Consolidated Edison Company of New York v. Public Service Commission of New York* (1980)

adoption of the neutrality of non-interference that best explains the jurisprudence of the Supreme Court in this case.

VII Neutrality and Virtue

Yet even if I am right in rejecting Sandel's claim that, because of liberal neutrality, "encumbered selves" find themselves unjustly treated, it may seem that liberal neutrality (in whatever form it is adopted) faces another, even more serious, objection: that it mistakenly abstracts from the character of the citizens who fall under its aegis. Perhaps nothing puts this point more vividly than Kant's claim that the object of politics is not the moral improvement of man, and his remark that the problem of government can be solved even by "a nation of devils (provided that they have understanding)."³⁶ In other words, it does not matter from the point of view of liberal politics what character or system of values citizens have; what matters only is designing a just framework within which they can co-exist. Yet, surely, there is something misguided, even perverse, about this abstraction. The character of the people who compose a society *does* matter – it matters a very great deal. We care whether our neighbours are friendly or hostile, honest or malicious, helpful or indifferent. What is more, it is obviously wrong to believe that political institutions do not make a difference to what sort of character citizens have.

³⁶ "Perpetual Peace" in H. Reiss (ed.), *Kant's Political Writings* (Cambridge: C.U.P., 1970) [1?]

On this issue, I take Sandel's side. To the extent that liberals deny the importance (or permissibility) of the consideration of character in the design of political institutions the republicans are right to criticise them, I believe. But, as I shall argue, they are not right because liberalism is incapable in principle of giving weight to the consideration of character. Thus in this final part of the paper, I am attempting to offer a *rapprochement* between republicanism and liberalism; arguing that it is coherent to integrate within liberalism what I take to be republicanism's most trenchant point of criticism of it.

Reasons of four kinds are commonly advanced by liberals to deny the importance or permissibility of what Sandel calls "formative politics": (1) that formative politics are unnecessary; (2) that they presuppose an unrealistic degree of agreement about what is to be promoted; (3) that the methods required are unacceptable in principle; and, finally, (4) that to promote a particular form of character would be to violate liberal neutrality. I believe that all of these arguments can be effectively countered.

Surprising though it may sound, the idea that it is not necessary to design institutions in such a way as to promote virtue is, in fact, a commonplace of classical liberalism. For the classical liberals, it is not that the promotion of virtue is unimportant,³⁷ but it was, they believed, a benevolent

³⁷ Thus Mill: "The first element of good government, therefore, being the virtue and intelligence of the human beings composing the community, the most important part of excellence which any government can possess is to

peculiarity of liberal social institutions that the antagonism and self-seeking that they furthered actually led to the development of character - led to it more effectively, indeed, than if the state had set out to pursue the development of character as a conscious end.³⁸ This argument is, ultimately, empirical - and grossly implausible, surely, in the face of the evidence of this sad century. Sandel's jeremiad for the coincidence of the decline of public virtue with the rise of general affluence will resonate even with those who back away from his prescriptions.

A second reason to reject the idea of formative politics is that it is not possible to agree on what is to be promoted. Since liberalism accepts - indeed welcomes - diversity in people's values and plans of life, how can we agree in promoting a single conception of a good character? This argument, though superficially plausible, is, in fact, unconvincing for the following reason. It is true that liberalism is premised upon divergence in value-beliefs. But that divergence cannot be unlimited. There must at least be sufficient agreement between participants in a political community to allow agreement on political principles. Liberalism requires (to use a phrase of Rawls's) an "overlapping

promote the virtue and intelligence of the people themselves." "Representative Government" in *Three Essays* (Oxford: O.U.P., 1975), p.167

³⁸ No one puts the point more clearly than Kant: "Nature should thus be thanked for fostering social incompatibility, enviously competitive vanity and insatiable desires. Without these desires, all man's excellent natural capacities would never be raised to develop... The natural impulses... the sources of the very unsociableness which cause so many evils, at the same time encourage man towards new exertions of his powers and thus towards a further development of his capacities." *Idea for a Universal Natural History with a Cosmopolitan Purpose* in Reiss (ed.) p.45

consensus”. But if liberals accept this (as they must, in my view) then they leave themselves open to an extremely powerful reply. Why, it may be asked, should we think that consensus regarding the virtues of character is more difficult to achieve than consensus on political principles? In fact, it seems plausible to think that the opposite is true. There are certain virtues – say, honesty, kindness, intelligence, the disposition to act on reflection rather than impulse – that will be broadly – perhaps even unanimously – agreed to be valuable, even by people who disagree quite drastically about political principles. Hence there is no reason to believe that attitudes towards character are more subject to disagreement than basic principles of justice.

The third objection to formative politics is that the means that it would have to employ are morally impermissible. Certainly, if the only way in which a formative politics could be pursued were by the coercion of individuals, then it might well be that the liberal would have to conclude that the end would fail to justify the means. But that is plainly not the case. A formative politics does not have to be coercive; there are many non-coercive ways of pursuing formative ends (most obviously, through the use of economic incentives to alter market outcomes).

Finally – and perhaps most fundamentally – there is the objection that formative politics violates the principle of liberal equality. To favour certain attitudes and values in any way is, it is argued, to move away from the basic liberal principle that each person’s attitudes and values should be treated equally. Yet this is, I think, to construe the principle of liberal equality in a

way that is unnecessarily – and, I think, implausibly – strong. It suggests that people’s “conceptions of the good” should all have an equal chance of satisfaction, irrespective of others’ evaluation of those conceptions. Certainly, Rawls himself explicitly rejects such an idea.³⁹ If respect for individuals does not require that their conceptions of the good have an equal chance of being realised, then it may be permissible to include others’ attitudes towards an individual’s conception of the good as part of the final assessment of the weight that that conception receives.⁴⁰

To make this rather abstract idea more clear, consider someone who is liable to contract an infectious disease but who is reluctant to take precautions to prevent it (for instance, by taking steps to be vaccinated). Perhaps it would be wrong to coerce this person into being vaccinated, but it is surely not wrong for society at large, which would suffer the consequences of her becoming infected, to protect its interests by giving particular encouragement to her to

³⁹ He does so in the context of marking a contrast between utilitarianism and his own form of liberalism. He considers the case of someone who takes pleasure in discriminating against others: “An individual who finds that he enjoys seeing others in positions of lesser liberty understands that he has no claim whatever to this enjoyment. The pleasure he takes in others’ deprivations is wrong in itself ... The principles of right, and so of justice, put limits on which satisfactions have value ...” *A Theory of Justice*, p. 31.

Rawls’s example, one might think, does not establish my point, for only those conceptions of the good are disallowed that turn out to be in conflict with the principles of justice which are developed in the original position. They are specifically *unjust* conceptions rather than simply imperfectly virtuous ones. What is shown, however, is that liberalism is not committed to giving equal claims to all conceptions of the good no matter what their content.

do so – most obviously, by subsidising vaccination’s costs. We can see in this example a model for the way in which liberalism may legitimately seek to promote virtue. Where we have an interest in others’ attitudes, values and behaviour – and, as Sandel points out, we do have such interests to an intense degree – then it is perfectly reasonable, I believe, to include those in any calculation of public policy: universities (if we are interested in our fellow-citizens’ cultural level) and public broadcasting systems (if we are interested in their level of political information) are as clear candidates for support in this way as are public health systems. By this argument, liberalism can (and should) pursue a formative politics.

VIII Conclusion

The idea that liberalism seeks to establish its values on an abstract and impoverished conception of the self can be traced to Hegel’s critique of the ideological foundations of the French Revolution (as he thought) in the ideas of Rousseau and Kant. For Hegel, as for Sandel, the weakness of the liberal conception of the self is that it is essentially voluntaristic, an abstract “subject of choice”, for whom the only genuine obligations are those which are self-assumed. Hence liberalism, for all its immediate appeal, is a destructive, ultimately self-undermining system. I disagree with Hegel and Sandel’s diagnosis of the voluntaristic roots of liberalism. Nevertheless, the further

⁴⁰ So, in contrast to Rawls, I am not suggesting that non-virtuous conceptions receive *no* weight, but that it is not wrong in principle to give *extra* weight to

point that they have to make seems to me to be both simple and immensely significant: to the extent that the institutions of public life are regarded as no more than means for the realization of individuals' private ends, they will lose the power to fulfil even that limited function. It is a warning that liberals ignore at their peril.

Addendum

Neutral Political Concern and the Exclusion of Ideals

Some might find my account of the basic forms of liberal neutrality problematic since it omits a distinction introduced by Joseph Raz and developed by Will Kymlicka between two types of neutrality that is sometimes taken as canonical for the discussion of Rawls's work. This is the distinction between neutrality in the form of the "exclusion of ideals" on the one hand and that of "neutral political concern" on the other.⁴¹ The exclusion of ideals (or "justificatory neutrality", as Kymlicka calls it⁴²) requires that the justification for government action must not draw upon the preference for any particular conception of the good, while neutral political concern requires that

those which contribute to the welfare of others.

⁴¹ J. Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), Part II

the state (or any similar agency that seeks to be neutral) “helps or hinders [the parties] to an equal degree”⁴³. As interpreted by Kymlicka this means that “government action should have neutral consequences”.⁴⁴ My omission is deliberate since the distinction between neutral political concern and the exclusion of ideals is, I think, unhelpful for the following reasons.

First, these two forms of neutrality are not on a level. Neutrality of concern is, in fact, a species of the exclusion of ideals: the requirement to help or hinder different life-plans to an equal degree is one conception of ideal-excluding neutrality. In my view, all three forms of liberal neutrality distinguished by me – the neutrality of non-intervention, neutrality of fair procedure and the neutrality of equality – incorporate justificatory neutrality; justificatory neutrality is a necessary condition of liberal neutrality.⁴⁵ Thus the classification of liberal neutrality into the exclusion of ideals and neutral concern is rather like a division of America into the United States and Michigan (and to ask whether Rawls’s theory embodies justificatory or consequential neutrality is as illuminating as asking in which of the two New York is situated).⁴⁶

⁴² W. Kymlicka, “Liberal Neutrality”, *Ethics* 99 (July 1989), pp. 883-905, p. 884

⁴³ *The Morality of Freedom*, p113

⁴⁴ “Liberal Neutrality”, p. 883

⁴⁵ What about the liberal who explicitly favours certain values – like tolerance, for example – as part of a substantive conception of the good? In that case, in my view, this person may be endorsing liberalism, but not liberal *neutrality*.

⁴⁶ A quibble on this point. Is it really true that only someone who accepted the exclusion of ideals could endorse neutral political concern? What about someone who valued a number of different conceptions of the good

Secondly, in my view, the idea of neutral political concern as requiring state action to have neutral consequences is of limited ethical appeal.⁴⁷ On this criterion, for example, a doctor who gives the same (effective) antibiotic treatment to someone suffering from a life-threatening illness and to someone suffering from a stomach-bug is not practising “neutral concern” since the consequential increase in welfare for the former is much greater than for the latter. The goal of producing equal welfare-consequences seems obviously counter-intuitive in this case. It is also counter-intuitive where an extremely sick person needs a more expensive form of treatment than someone suffering from a minor ailment. In that case, most people would think – surely rightly – that the proper course is to give *more* resources to the person who is more ill, thereby producing *greater* beneficial welfare-consequences for the more needy person.

So we have three distinct possible principles.

- (1) Devote to each resources of an equivalent cost. (*Equality of resources.*)
- (2) Devote to each resources that will produce an equal net benefit (or burden). (*Consequential neutrality.*)

substantively and concluded that they were equally deserving of support? Would that person not then be practising neutral political concern without excluding ideals? The answer is, no. The fact that the different conceptions of the good came out as being worthy of equal treatment would be a contingent matter – like a competitive race ending in a dead heat. There would be no reason *in principle* for the equal outcome and so it couldn't be said to be a matter of *neutrality*.

⁴⁷ This, of course, assumes that Kymlicka is right in glossing Raz's notion of helping “to an equal degree” as meaning being neutral in its consequences. This is the most natural reading, it seems to me.

(3) Devote to each resources that will take them to an equal level of welfare. (*Equality of outcome.*)

These three principles are, to my mind, all sub-species of my third form of liberal neutrality, the neutrality of equality. Of the three, consequential neutrality seems to me to have the least intuitive appeal.