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Cass R. Sunstein

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Recommended Citation

Cass R. Sunstein, "Republicanism, Rights: A Comment on Pangle," 66 Chicago-Kent Law Review 177 (1990).

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REPUBLICANISM, RIGHTS: A COMMENT ON PANGLE

CASS R. SUNSTEIN*

Professor Pangle's essay revolves around a fairly straightforward narrative. The period of classical republicanism placed a high premium on virtue and responsibility; its conception of freedom presupposed rule, not license: its rulers were to be chosen on the basis of wisdom and character; it had no real place for rights. The early liberals, symbolized by Machiavelli, largely abandoned these commitments. Seeing selfishness as the usual motivating force of human behavior, they inaugurated a new emphasis on rights, and they disparaged virtue. The American founding, influenced above all by the early liberals, reflected at most a diluted belief in the republican commitments. The framers' main goal was the protection of rights. For them, self-interest was the ordinary motivating source of human behavior. American-style republicanism was egalitarian, libertarian, and democratic; it saw as its chief goal the protection and fostering of individual rights. As time has gone on, the American departure from republicanism has become all the more conspicuous, and also troubling. Its consequences have been "the shrinking of the spirit, the shriveling of the heart, the banalization of existence," manifesting itself in an extraordinarily wide array of social problems.

There is undoubtedly a great deal that is true in Pangle's account, and we should all be grateful that a scholar of Pangle's learning and commitment has chosen to devote himself to exploration of the role of republican thought in the American constitutional tradition. In this Comment, I want to venture a few cautionary words about Pangle's narrative. My basic concern is that he may have drawn the distinction between liberalism and republicanism a bit too sharply, in a way that is perhaps untrue to the amplitude of America's liberal republicanism.

As Pangle emphasizes, there is not one "republicanism" but many; and it is no simple task to describe those features of republicanism that unite, say, Aristotle, Jefferson, Madison, and Franklin Delano Roosevelt. But the American founders were insistent on their republicanism, and they did not at all understand the term to be an antonym to those of their

* Karl N. Llewellyn Professor of Jurisprudence, University of Chicago Law School and Department of Political Science.

commitments that we would now describe as liberal.¹ For the founders, republicanism connoted a form of democratic self-determination; a large degree of deliberation in government; political equality; and a belief that political outcomes should reflect a capacity to think about the public good.² The framers emphatically rejected the notion that self-interest is the inevitable motivating force behind human behavior. They did not believe that reason was always the slave of the passions. They sought to create a deliberative democracy that was realistic about human motivation but that sought simultaneously to encourage and provide a place for virtue.

At least if stated at a certain level of generality, then, the republican commitments of American constitutionalism have a degree of continuity with classical thought, on which the framers drew a great deal. It is in any case profitable to explore the ways in which the thought of the founding period shared characteristics with classical thought that have been abandoned in such prominent modern approaches as interest-group pluralism and contemporary neo-Lockeanism. A large part of the value of the modern revival of the republican tradition has been, not to displace liberalism, but to show that the American tradition is inadequately understood by those who see the framers as neopluralists or as believers above all in a prepolitical sphere of private rights.

Moreover, the writing and ratification of the American Constitution was not first and foremost a matter of protecting rights. We might recall here that the federalists did not want a bill of rights, and that the motivating force behind the Constitution was that the Articles of Confederation were ill-adapted to the process of republican self-government. In arguing for the Constitution, those who favored it did not exclusively stress "rights"—which is not to say that these were unimportant. Instead they wanted to provide a government that could promote economic prosperity and domestic security, and avoid the extraordinarily difficult conflicts that had characterized life under the Articles.

In any case, the American founders thought that their belief in rights marched hand-in-hand with their republicanism; and any form of republicanism that is worthy of contemporary support will have to place a high premium on rights. Like republicanism, the term "rights" embodies a widely disparate array of concerns. It includes the vast panoply of claims that individual citizens, or groups, might make against the state:

1. See G. Wood, *Classical Republicanism and the American Revolution*, 66 CHI.-KENT L. REV. 13 (1990).

2. For a summary and citations, see Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

freedom from discrimination; protections of property and contract; prevention of redistribution; rights of interstate mobility; political rights, including free speech and political participation; rights of criminal procedure; welfare rights; and so on. Many of these rights fit naturally with republicanism and are in no serious conflict with it. Rights of freedom of speech, political association, and assembly are quite logical counterparts of the republican commitments. The right to a jury trial, with its firm encouragement of citizenship, belongs in the same category. So too with the right of private property, furnishing a basic guarantee of independence and security, a check against arbitrary government, and a shield against the corruption of political activity through the sometimes distorting effects of interest.

Pangle is no doubt correct to emphasize the modernity of the notion of rights as we use that term. But I wonder if a republicanism of rights is in fact "problematic" or in the end even daring. No doubt, some conceptions of rights would warrant this characterization. It would be hard to combine republicanism with a rights-based system that had no place for deliberation in politics, that disparaged citizenship, or that was skeptical that different "preferences" might be distinguishable in terms of their consequences for the individual, for intermediate organizations, or for the state. A system of rights is critical, but (and here I fully agree with Pangle) it must not serve as a substitute for other values that rights simply do not promote. Nonetheless, so long as we define the category of rights in an appropriate way, a republicanism of rights is likely to be a fortunate alliance rather than an oxymoron or a crazy-quilt. Indeed, the American system has functioned best when it has adhered simultaneously to its republicanism and to its commitment to rights.

One final note. Pangle's wide-ranging concluding section seems to me to collapse ideas and problems that should be distinguished. There are of course profound differences among egalitarianism, libertarianism, and a commitment to popular sovereignty. Indeed the three are conflicting creeds. Libertarianism cannot always coexist with popular sovereignty, as the New Deal and Great Society periods (among many others) demonstrated. America's commitment to libertarianism (as the libertarians themselves stress) has been at best intermittent. Egalitarianism has never been a crucial principle of American constitutionalism, and a belief in egalitarianism, understood as equal distribution of resources, would be entirely incompatible with beliefs in popular sovereignty and libertarianism. When Pangle suggests that American republicanism, or liberal principles about the social contract, are founded on egalitarianism, libertarianism, and popular sovereignty, I find myself wishing that he

would say more about exactly what he thinks is entailed by these apparently quite different ideas.

There is much to be said, it seems to me, in favor of Pangle's views about the social problems with which he concludes. He points to a wide range of problems, including decreasing voting, dwindling interest in serious literature, fascination with brutal and sentimental entertainment, and drug use. On all these he is saying something true and important. But I wonder whether he might not be tackling too much too quickly. I wonder to what extent a "dissolution of relations between the sexes," an "erosion of the supports in tradition, religion, and reason for shared ties of reverence and meaning," and "a disconnectedness between generations" have actually occurred, and whether these belong at all in the same category. In any case I wonder about the precise relationships between these phenomena on the one hand and republicanism, liberalism, and rights on the other. Surely these relationships are not simple or linear ones. It would be most interesting for those concerned about these relationships to deal with them in more detail in the future.