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Modern Republicanism—Or The Flight From Substance

Richard A. Epstein†

In their separate contributions to this issue of the *Yale Law Journal*, Professor Frank Michelman¹ and my colleague Professor Cass Sunstein² sketch out their respective modern visions of republicanism in both constitutional law and political theory. In this brief comment it is impossible to address the many issues that they raise, or to follow each author down the many byways that he chooses to travel. But it is both possible and important to isolate several themes, recurrent in both pieces, that seem central to their conception of modern republicanism. These themes, when fully understood, point out the serious weaknesses of modern republicanism as a comprehensive political theory. The overall conclusion can be stated very quickly. No political theory can concentrate on process and deliberation to the exclusion of substantive concerns. Yet that is precisely what Michelman and Sunstein heroically try to do.

The different parts of this essay in their separate ways all pursue their failure to come to grips with the substantive components of republicanism. The first section explores the extent to which Michelman and Sunstein can separate the procedural and deliberative elements of modern republicanism from the substantive and controversial outlook of the classical republican writers. The second section turns to a comparison of republicanism, as both Michelman and Sunstein reconstruct it, and its nemesis, interest group pluralism. I argue that both Michelman and Sunstein oversimplify the opposition because they do not draw sufficient distinctions between the normative and descriptive accounts of the pluralist position. This failure in turn leads them to dismiss, with scarcely a mention, the theories that have a Lockean emphasis on limited government and private property. In the third section I suggest that these theories offer a superior response to the pluralist nightmare Sunstein and Michelman describe. While both men praise the virtues of deliberation, they do not give us any guidance as to the form that deliberation should take or the ends that it should seek. Quite the opposite, as I argue in the fourth section, they only

† James Parker Hall Professor of Law, University of Chicago. Gerhard Casper, David Currie, Larry Kramer, and Michael McConnell gave extensive and valuable comments on an earlier draft of this paper. Sean Smith provided helpful research assistance.

1. See Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

2. See Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1564 (1988).

reinforce the position of the pluralists because their own papers dwell too long on abstraction and speculation. Their arguments are far less satisfactory when they deal with particular issues, be it restrictions on campaign expenditures, environmental protection, antidiscrimination laws, or rights of privacy. The weakness of their institutional analysis accentuates the substantive weaknesses of the republican agenda. Finally, in the fifth section I argue that their own republican viewpoint cannot answer the major challenge of modern constitutional law: the development of a substantive theory which demarcates the zone of collective legislative control from the zone of entrenched individual rights.

I. REPUBLICANISM: SUBSTANTIVE OR PROCEDURAL

As the leading exponents of the modern republican revival, Michelman and Sunstein mine a rich historical tradition, for republicanism is a self-conscious point of view that dates as far back as the Greek city-states and the early Roman republic of the Gracchi. Over the centuries republicanism has found voice in the Italian city states, in English political thought, and, most importantly for these purposes, in the American debate at the founding of the Constitution.³ In its earlier historical sense, the republican tradition was very broad indeed. With only a little loss of accuracy, it could be said to have embraced all those thinkers who thought that political power should be exercised by the people or their representatives, and not by a single individual with royal prerogative power. By this standard all traditional defenses based upon the divine rights of kings were outside the republican tradition. So too was the work of Thomas Hobbes, who in *The Leviathan* sought to demonstrate how the well-nigh absolute power of the sovereign derived ultimately from the rational consent of the governed. Remaining within the republican tradition were all theories that shared the common premise that governance was the collective responsibility of the people who were governed. By this litmus test the early Roman Republic stood in stark contrast to the Roman Empire of Augustus that displaced it. Similarly, in the context of English political thought, republicanism was an attack on the dominant institutions of Feudalism and Royalism, as traditionally understood. Defined in structural terms, republicanism could and did include within its capacious confines thinkers who disagreed on a wide range of issues—such as Harrington, Locke, and Adams.⁴

3. For the most exhaustive account on the development, see J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

4. "The Brookes, Hampdens, Vanes, Seldens, Miltons, Nedhams, Harringtons, Nevilles, Sidneys, Lockes are all said to have owed their eminence in political knowledge to the tyrannies of those reigns [of the first James and the first Charles]." J. ADAMS, *A Dissertation on the Canon and Feudal Law*, in *THE POLITICAL WRITINGS OF JOHN ADAMS: REPRESENTATIVE SELECTIONS* 20 (G. Peek ed. 1954).

So long as monarchic power remained a viable alternative to democratic or representative institutions, these inevitable differences in outlook among the republicans did not assume any fundamental status. All versions of republicanism were united by what they stood against, notwithstanding latent differences over what they stood for. But with the republican success in overwhelming monarchic conceptions of government,⁵ the differences within this tradition quickly assumed far greater importance.

Understood in some narrower sense, republicanism stood in opposition to other forms of democratic and constitutional theory, such as Lockean natural rights and social contract theory.⁶ The single belief in popular government was no longer sufficient to distinguish the republicans from their new rivals. Republicanism in this narrower historical sense had a strong substantive component, which contained, and prominently displayed, militarist, elitist, religious, and sexist sentiments that both Professors Michelman and Sunstein explicitly disavow.⁷ Their disavowal comes at some cost because it makes it difficult to explain the coherence and appeal of republicanism as a historical movement. There was an underlying, if not wholly attractive, unity in these substantive portions of republican theory. The conditions in ancient times were not those of peace and harmony throughout the world. All citizens had to be ready to defend the state against its external enemies. Cities had to be defended by extensive and costly fortifications. Provisions, especially water, had to be stored to withstand long sieges. Those who miscalculated could find their homes sacked and their populations massacred. A very large fraction of social output was spent on aggression and defense. The everpresent facts of life forced everyone to think hard of the obligations of citizenship and the powerful demands of the public domain. Military service—with its supporting social institutions—necessarily occupied a far more prominent place in the life of the polity than it does today. The belief in the country against the city, the trust in countrymen and the suspicion of foreigners whose loyalties may lie elsewhere, the insistence on the strenuous life against the life of luxury, the dominance of men over women, all followed from the effort to insure that national security was not undone by individual, selfish pursuits.

In this environment, deliberation and participation were best understood as part of a system designed to forge the internal unity and moral cohesion necessary to maintain the common defense. The republic would not survive unless there was a clear consensus regarding the need and desirability not only of fighting, but also of maintaining a constant readi-

5. See, e.g., J. LOCKE, *A FIRST TREATISE ON GOVERNMENT* (1690). With its attack on Sir Robert Filmer, this is perhaps the decisive text.

6. Pocock, for example, does not treat Locke in any detail in his account of "Atlantic Republicanism." J.G.A. POCKOCK, *supra* note 3, at 423–24.

7. See, e.g., Michelman, *supra* note 1, at 1495; Sunstein, *supra* note 2, at 1539–40.

ness to fight. Even here there were limits to open and complete political discourse, which created tensions for the classical republicans just as they do for us. When the time for action was at hand, military imperatives demanded hierarchical command structures, not collective deliberation. In times of war, the republic depended upon the consuls and generals, not on the senate and the plebes. The sovereign importance of the individual and the collective importance of public debate both presuppose a level of peace and security that republican theorists did not find in their historical studies or observe in their contemporary affairs. Political deliberation and participation can be elevated into overarching values only when military preparedness becomes the obligation of a specialized professional class. These values cannot flourish in a state when to be a citizen is also to be a soldier. The transformation of classical to modern republicanism that both Michelman and Sunstein seek is not some refinement of classical doctrine. It is in large measure a new theory which borrows selectively, and seductively, from the past.

II. REPUBLICANISM AND PLURALISM

Michelman and Sunstein, then, are less than contextual when they offer us a republicanism of participation and deliberation. But, taking them at their word, it becomes important to ask how this republican position differs from, say, the Lockean one, and what makes it a preferable political or constitutional philosophy. Michelman and Sunstein give essentially the same answer to this question. As they understand republicanism, its central focus is not on Lockean property rights and limited government, but on the nature and character of the collective political process within a system of representative government. The key elements of that process are "deliberation" for Sunstein⁸ and "public practical reason" for Michelman. The theory thus allows for, in Michelman's words, the possibility that individuals can "communicate such material in ways that move each other's views on disputed normative issues towards felt (not merely strategic) agreement, without deception, coercion, or other manipulation."⁹ Notwithstanding differences in terminology, both Michelman and Sunstein see in politics something more than the petty, factional struggles of self-interested individuals who enter into the political arena in order to maximize their individual welfare, no matter what costs are thereby imposed upon other persons in society. In their view, republicanism is an uneasy cross between aspiration and description. It is possible for individ-

8. Sunstein qualifies the position to make sure that it is deliberation among political equals over matters of universal concern with the participation of broad segments of the population. In contrast, I regard deliberation as the primary virtue, and his other three points as elaborative of the central ideal.

9. Michelman, *supra* note 1, at 1507. The reference to practical reason seems here to have a heavy and intended Kantian overtone. See Michelman, *supra*, at 1511-12 (describing what the pluralist "denies," and what he accepts).

uals to put aside their own short term welfare in order to enter into a collective and disinterested search for the common good. It is possible for political discourse to be more than a sham that cloaks the consuming search for private advantage. It is possible to make arguments to show that one substantive position is correct, and that its rival is in error, so that all will emerge wiser after deliberation than they were before it. Citizens can confess error, and change their minds when confronted with the unanswerable, and often objective, arguments of their fellow citizens and legislators. In a word, an informed citizenry can beat the system. Republicanism can find in, or make of, politics something more than a tawdry race to the bottom. Affirmatively stated, politics offers a calling in which we can find the highest expression of individual self-worth and respect. Politics becomes a noble undertaking.

Michelman and Sunstein no longer contrast this republican tradition with its traditional rivals of empire, monarchy, and feudalism. Today its modern rival is "interest group pluralism."¹⁰ Interest group pluralists regard politics as an exercise of will and power. These pluralists believe that individuals bring their own set of arbitrary, external and unalterable preferences to a political marketplace, and therein they make "deals" that leave them better off than before, taking into account their original endowments, the costs of transacting, the perils of political defeat, and the gains from successful political action. The pluralists, so Michelman and Sunstein claim, have abandoned any prospect of individual self-realization through the political process. At its best, the pluralist sees politics as an extension of market behavior into the political realm. At its worst, the pluralist recognizes that politics is an endless series of pathological special interest deals whose sole validation derives from the electoral and the legislative process that generated them.

In stating their positions, both Michelman and Sunstein blur the line between normative and descriptive theory. As a normative matter it is clearly desirable that all political and public debates take place with a disinterested commitment to the common good. As a descriptive matter, there is abundant evidence that all too often politics is just the way the pluralists describe it: ceaseless compromises between competing factions, none of which would pay a nickel to advance the common good, even if they could identify it. It does not take an elaborate empirical study to note the powerful influence that individual self-interest exerts over politics. For example, the United States surely needs military bases. But the country does not need every base currently in use. Yet what will be the fate of the Congressman who admits publicly that a base located in his district

10. See Sunstein, *supra* note 2, at 1542-47; Michelman, *supra* note 1, at 1507-08. Note that the term "interest group" in this description excludes from this pluralist pantheon any political philosophy that simply believes that everyone in society should be willing to accept and tolerate persons whose beliefs and practices are different from their own. Michelman concurs.

should be closed down as unnecessary or redundant? Congressmen are expected to fight for local interests and local constituents. No matter how lofty their ambitions when they enter public service, they quickly learn that political survival depends upon their dogged defense of parochial interests against all comers in the political arena.¹¹ The story about military bases can be repeated with social security, public works, agricultural subsidies, tax reform, trade regulation, and environmental protection—indeed with all possible subjects of legislative action, which in the American context is just about everything.

In the face of this massive volume of special interest politics, how can republicanism be thought to describe the dominant patterns of political discourse? To be sure, in times of war or grave national catastrophe, we see less special interest politics and more legislation for the national good. But even this case hardly proves that self-interest does not dominate political action. Rather, it shows that when national survival is at stake, individual survival is necessarily at stake as well: we are back to the ancient problem of the city walls. Under those extreme circumstances, self-interested people care less for their special interests than they do in normal times. A tax break for intangible drilling costs does not count for much if some foreign aggressor stands off our shores. Accordingly, we should see fewer abuses in times of national travail, but by no means should we expect them to be eliminated entirely.¹² profiteers flourish in wartime as well. Once the common peril is gone, politics returns to business as usual. The level of special interest politics will quickly rise to its former levels, as its cost to individual practitioners of the art falls.

The picture here may be a bit too stark. There are some persons who genuinely care about the public welfare: the disinterested career bureaucrat and the aristocratic public servant are not wholly myths. Similarly, there are those who honestly believe that the protection of their own special interest will advance the interest of the nation as a whole. Sometimes they will be wrong, as they are when they say, "everyone needs housing, so we as a nation have to give tax breaks to real estate developers." But sometimes they are correct, as they are when they say that "rent control destroys rental housing markets and the communities that this housing nourishes." Often there is a powerful psychological need to believe that

11. See Barnes, *The Unbearable Lightness of Being a Congressman*, THE NEW REPUBLIC, Feb. 15, 1988, at 18. The article traces the career of Congressman John P. Hiler, a graduate of the University of Chicago Business School, who started out his career as a staunch supply-sider and champion of small government. A reelection victory by 47 votes persuaded him that he had to spend an enormous portion of his time defending the prefabricated home industry, which was concentrated in his Indiana District.

12. The point of the title of Arthur Miller's *All My Sons* (1949), for example, is that the businessman who makes defective airplane parts not only hurts his own son, but "all" his sons. In wartime, the constant refrain of collective concern helps counteract the force of egoism, because it means that individual actors will not regard losses to others as "external losses" off their own personal agenda. It is another illustration of the substantive parts of republicanism at work.

one's own interest advances the public good, even when it does not. While these complications occasionally cloud the overall picture, they do nothing to give empirical credibility to the claim that politics will be dominated by the disinterested pursuit of the common good. If anything, the subtle effect of unconscious bias may make it exceptionally hard to root out error in the political context, for so much is at stake. Self-interested behavior may not be the whole truth of politics, but it is too large a component of politics for anyone, republican or not, safely to ignore.

III. TWO RESPONSES TO PLURALISM

As a descriptive matter, the pluralist can rightly regard both Michelman and Sunstein less as republicans and more as romantics. As a normative matter, the situation is somewhat more complex. There are at least two paths that the pluralists can pursue. One line, for which I have only modest sympathy, is to argue that the political process "works" and should be left to stand as it is. Michelman and Sunstein constantly tell us that politics is a search for the common good through deliberation. However, they have not operationally defined what that common good is, or how it is to be reached. Short of the necessary roadmap, all that is left to guide political decisions in the short run is the very thing they decry: the pursuit of individual interests as these are subjectively defined by the persons who hold them. So long as the political process contains both electoral checks, so long as majorities can only be assembled through compromise and horsetrading, then pluralism is just fine.¹³ The system of democratic, electoral politics may not look pretty, but it does work. There is no reason to trade in that system of politics, which has served us well for some 200 years, for a mysterious and ill-defined ideal, which has yet to be tested in practice here, or indeed anywhere else in the modern world. "If it ain't broke, don't fix it," or so the defender of pluralism argues.

The second response to the pluralist description is far more pessimistic, but I believe, more accurate. While it accepts that there is no collective way to define what constitutes the good life, it does not think that any deference should be given to politics, understood as business as usual under majority rule. The basic position is that pluralist politics may work, but it still works badly and may be improved by a careful design of the basic constitutional system in which political action takes place. Here the argument turns, at least in part, on an issue that both Michelman and

13. See, e.g., Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983). For a recent judicial expression of the same belief, see *Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988) (Posner, J.) (rejecting substantive due process challenge to village zoning decisions): "The check on its behavior is purely electoral, but, as the Supreme Court stated . . . in a democratic polity this method of checking official action cannot be dismissed as inadequate per se." *Id.* at 469.

Sunstein studiously avoid: what is the relative capacity of competitive markets and complex political organizations to provide individuals the goods and services they regard as necessary for the good life? Within this framework it is possible to argue that competitive markets, if protected against political manipulation, provide all people more of what they privately desire than any legislative allocation of material goods and services.

This endorsement of the allocative superiority of competitive markets is indeed one of the major conclusions of modern welfare economics.¹⁴ Even though people cannot agree upon a single account of the common good, they can enter into exchange transactions with each other. Price thus becomes the transmitter of the social central nervous system that links together individuals whose personal preferences are otherwise separate, unknowable, and incomparable. If I pay you \$X for Y good, it means that I attached a higher private value to Y good than to \$X, for otherwise I would not have entered into the exchange. For your part, you attach a higher value to \$X than to Y good, for otherwise you would not have entered into the exchange. With a well-defined system of individual property rights, each of us can reach higher levels of private satisfaction from exchange. This happy result can be validated from without, even if the analyst has no information as to the subjective preferences of any individual market participants. A competitive market happily removes all the incentives to engage in strategic behavior—to conceal preferences, to bluff, and to deceive. If markets are reasonably well functioning, revealed preferences are powerful evidence of subjective preferences. Only when property rights are not well-defined do prisoner dilemma games emerge, in which the systematic pursuit of individual preferences will lead to a result that collectively none of the players wants.¹⁵ To overcome the inevitable frictions of ordinary human affairs, the correct uniform response is to lower the cost of information and bargaining, not to lock in monopoly returns through political deals.

Unregulated political markets tend to work in very different ways from a free market. It is now possible for some political coalition to block the voluntary exchange between private parties. Special interest legislation, on this account, is any form of legislation that tends to take us further from the competitive solution. With politics, it is far more difficult to exhaust all the potential gains from trade because there are so many parties whose interests must be satisfied before agreement is reached. For this reason, politics is not a process that works well because the transactional obstacles that it places in the path of trade are just too great, no matter what the apologist for democratic pluralism might say. Labor markets, for example,

14. For a very accessible account, see D. FRIEDMAN, *PRICE THEORY* ch. 15 (1986).

15. See, Sen, *Behaviour and the Concept of Preference*, in RATIONAL CHOICE 60 (J. Elster ed. 1986). For an extensive account of these games, see generally R. HARDIN, *COLLECTIVE ACTION* (1982).

are ordinarily competitive, or nearly so, but not when the state imposes a system of minimum wages, collective bargaining, or comparable worth. Protective tariffs, import quotas, discriminatory taxes, and onerous regulations can easily disrupt both domestic and foreign markets in goods and services. Indeed the world can be filled with large numbers of situations in which the gains to a cohesive legislative group can be far smaller than the losses to its disappointed rival, even when the winning coalition is itself a political minority. In principle, it is conceivable for all losers in the political process to band together to bribe the winners to change their votes. The transaction costs blocking their way are prohibitive, however, so that large social gains are left unrealized. Politics thus leads to a greater dissipation of private and social wealth through factional struggle—the “rent-seeking” of modern public choice theory.¹⁶ Interest group pluralism therefore becomes all too accurate as a description of the political process, but it is the description of a disease, not of a healthy political society.

Given this orientation—and it is one that I generally hold—the business of constitutions is not to ratify whatever political deals the legislature is able to put together, even with full deliberation. Instead it is to try to find ways to ensure that legislation will work on those things for which markets fail—such as defense, social order, and other common pool problems. Likewise, a constitution should curb legislative influence in areas where markets tend to work—e.g. in the provision of ordinary goods and services.¹⁷ It is therefore no accident that many public choice theorists, of whom Buchanan and Tullock are perhaps the most representative,¹⁸ combine a powerful acceptance of the descriptive side of the political pluralists with an insistent call for a strong constitutional order which in every way limits the power of the government to tax, to borrow, and to regulate. This program, moreover, does not view democratic government, much less political deliberation, as an end in itself. Instead it views democracy first as a necessary evil, and then as the best means to a desired social end: to establish those political institutions which maximize in the aggregate the satisfactions and preferences that they serve, by insuring the continued operation of competitive markets in wide areas of human life.

Democratic institutions are far better than the monarchical institutions that they replace, only because they offer powerful protection against malevolent dictatorship of a single person. But Churchill missed a key point

16. See Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 64 (1974); TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (J. Buchanan, R. Tollison & G. Tullock eds. 1980). For recent suggestions that there are important practical limits on the scope of rent-seeking, see Flowers, *Rent Seeking and Rent Dissipation: A Critical View*, 7 CATO J. 431 (1987). Flowers' point is that rent dissipation cannot be total, for if it is, then politicians will not be able to gain the votes, which are the object of the exercise.

17. I discuss some of these issues in R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* ch. 14–15 (1985).

18. J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1962).

when he said that democracy was the worst form of government, except all the others. Popular democracy can be improved upon by a set of constitutional guarantees that entrench certain individual rights, whether of speech, property, or religion, against government usurpation. So long as Michelman and Sunstein recognize, as they do, the problem of factions and special interests, they must explain, as they do not, why their conception of republicanism is superior to the Lockean tradition of private property and limited government, which has emerged historically as one considered response to the pluralist nightmare.

Michelman and Sunstein are familiar with this position, and have often sought to bolster the republican defense by noting that we cannot trust markets and private choice because the subjective preferences of individuals are not "exogenous" to the political and market forces that shape human beings and what they desire.¹⁹ In one sense their point has to be correct, for everyone has to undergo some form of upbringing, and everyone knows that what he can purchase in the market is determined at least in part by what goods are available for purchase. But their great mistake is to assume that this insight can be applied selectively to those forms of institutional organizations whose legitimacy they question. The very defect they detect in markets can be found in politics as well, where the impulse for indoctrination is, if Sparta is our republican model, far greater. Here too preferences are molded by what persons are taught, and by what is available. It becomes awkward to make the claim that some preferences, to wit those of republicans, are untainted, while those of ordinary people unversed in political theory are not. The cynic might well say that both Michelman and Sunstein applaud republicanism because it gives skilled academics a comparative advantage: this is the public choice explanation as to why intellectuals prefer politics to markets.²⁰ The less skeptical commentator might simply observe that, if there is a problem with the endogenous formation of preferences,²¹ then no set of institutional arrangements can escape it. At that point, the sensible solution is to diversify the risks of blindness and error, and that can be done only by sharply circumscribing the dangerous republican ideal that views government as the chief architect and teacher of proper preferences. The superiority of private property and competitive markets is not tied inevitably to some very simple model of human psychology. It is strengthened when the very factors that republican theorists point to are taken into explicit account.

19. See, e.g., Sunstein, *Legal Interferences With Private Preferences*, 53 U. CHI. L. REV. 1129 (1986); see also J. ELSTER, *SOUR GRAPES* (1983); Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015 (1978).

20. Levy, *The Statistical Basis of Athenian-American Constitutional Theory*, 18 J. LEGAL STUD. (forthcoming 1989).

21. I think the problem is vastly overstated, and I believe that human personality is far more stable than this point suggests. See my remarks in *Symposium on Richard Epstein's Takings: Private Property and the Power of Eminent Domain*, 41 U. MIAMI L. REV. 136, 136-42 (1986).

With the tendency for absolutism so strong, better that there be many absolutisms instead of just one.

IV. GETTING DOWN TO CASES

The weakness of Michelman and Sunstein's republican approach as against a public choice alternative becomes clearer by looking at the particular issues that they address. Sunstein, for example, is confident that considered deliberation can yield the "correct" result on a wide range of issues ranging from the proper treatment of campaign contributions, to antidiscrimination laws, to environmental legislation. He offers nothing, however, but the vaguest sense of what the proper conclusions are, or how they might be reached in a political setting. In each case what is missing from his analysis is the public choice perspective, which is important because it shows how astute, self-interested actors (whose preferences may be exogenous or endogenous, or both) can defeat the reforms he hopes to achieve through political deliberation.

A. *Campaign Restrictions*

Let us start with financial contributions to political campaigns. We are only told that, as republican principles stress deliberation between political equals, there is no principled reason to look askance at explicit government limitations upon campaign contributions. These limitations are designed to curtail the ability of the rich and the powerful to control political discourse.²² But clearly this is an issue on which much more has to be said. The key questions are those which the standard public choice theory tries to answer: who wins, who loses, and why? The effects are not necessarily those that Sunstein hopes to bring about.

First, it is not clear that restrictions on campaign contributions affect the balance of political power between rich and poor. In any political system, there is a divergence of opinion, even among persons of wealth. Both the Democrats and the Republicans have their own fat cats to turn to. Without any government regulation at all, therefore, wealth can tend to cancel out wealth, as it does, for example, in corporate takeovers where shareholders and officers of both target and acquiring corporations tend to be large institutions and persons of means. The cancellation may not be perfect, but by the same token the current regulation may make matters worse, not better.

Second, restrictions on campaign expenditures cover only some forms of assistance to political candidates. The limits that these restrictions impose may have a differential impact upon rival political groups. Since the rules

22. See Sunstein, *supra* note 2, at 1576-78. The key case is of course *Buckley v. Valeo*, 424 U.S. 1 (1976).

limit the amount of money a person can spend to get into the public eye, they confer a systematic advantage on people with name recognition—athletes, movie stars, TV personalities. Similarly, the legislation benefits persons who rely more on contributions of labor than capital, including candidates with access to phone banks, door to door foot soldiers, mailing lists, college students, club members, union or government workers, and the like. These shifts in the relative importance of input may affect not only how campaigns are waged, but also who wins. Democrats appear to be better off with the restrictions than Republicans, but the effects are doubtlessly more complex than this simple sketch suggests.

The distortions of the political process manifest themselves in many other ways. Incumbents, for example, are provided with a raft of free perks from the government.²³ At taxpayers' expense, they can mail newsletters that inform constituents of what is taking place in Congress. These newsletters allow Congressmen to campaign on the side, thereby enhancing their probability of reelection. If campaign restrictions work to the systematic advantage of incumbents of both parties, then they cannot be justified as a way to open up the political process, which in fact they close. How else does one interpret a House reelection rate of 98 percent?²⁴

Finally, any systematic evaluation of campaign restrictions must ask what regulated persons will do in order to escape the brunt of the regulation without running afoul of the law. One important effect is the channeling of political contributions into special interest groups that are not subject to similar funding restrictions, whether Common Cause on the Left or the Business Roundtable on the Right. These groups in turn are able to play powerful lobbying roles on key issues that arise in Congress. A troublesome consequence is the rise of single-issuing lobbying—think only of abortion—which becomes one of the major problems confronting fatigued elected officials. Party discipline tends to break down under the pressure of these groups. With more and better funded players, legislative struggles can become epic, so that regulation has the precise opposite effect claimed for it. There is more factional intrigue, and less political equality. Congressmen may find it easier to win reelection, but the price is rising frustration with the job.²⁵

These considerations are related to the First Amendment's guarantees of freedom of speech. I take it as virtually self-evident that restrictions on campaign expenditures do constitute restrictions on freedom of speech, and hence are presumptively unconstitutional. The question of their ultimate constitutionality therefore turns on whether these restrictions can be

23. See Jackson, *Constant Congress: Incumbent Lawmakers Use the Perks of Office To Clobber Opponents*, Wall St. J., Mar. 22, 1988, at 1, col. 1.

24. See *id.*

25. See Wang, *Chaotic Congress: Lawmakers' Inability to Clear Up Gridlock Is a Rising Frustration*, Wall St. J., Mar. 21, 1988, at 1, col. 1.

justified. If the brief account given above is correct, then I am hard pressed to see what compelling state interests are served by a set of restrictions which only skews the political process in ways that reformers neither foresaw nor desired. In *Buckley v. Valeo*,²⁶ the Court put the point as follows: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."²⁷ Notwithstanding republican rhetoric and aspirations, this categorical rule is abundantly justified when the effect of legislative restraints is solely to work capricious redistributions of political power that critics of the present order would not defend on normative grounds. The only way to stop the power of special interest legislation is to limit the stakes of the political game, and this result in turn can be achieved only if the courts impose strict limitations on governmental taxation and regulation of private property and contract, limitations that are far more stringent than the highly deferential "rational basis" test now in vogue.²⁸ I may be incorrect in some of these particulars. But we develop a far stronger appreciation of constitutional safeguards of freedom of speech once a public choice view of legislative behavior displaces an uncritical celebration of the deliberative ideal.

B. *Privacy Rights*

The importance of substance is also shown by a brief examination of *Bowers v. Hardwick*,²⁹ one of the most bitterly contested decisions in recent years. That case sustained the right of the state to regulate the private sexual practices of consenting adults. Michelman disapproves of, perhaps even deplores, the result in this case.³⁰ This statute survived the democratic process in Georgia; and similar laws could be enacted today elsewhere even after the most impassioned of public deliberations. Here Michelman would have been better off making a classical libertarian defense against criminalizing certain kinds of sexual conduct even when carried on in private between consenting adults³¹ than attacking this decision on republican grounds. With adults we no longer have to worry about the problems of infants being led astray. With conduct behind closed doors we don't have to worry about at least one class of external effects upon other people, who don't have to witness conduct they disapprove of. This brief account is not an argument about deliberation. It is a substantive argument, and a powerful one, about individual entitlements.

Alternatively, it is possible to assume the validity of the libertarian

26. 424 U.S. 1 (1976).

27. *Buckley*, 424 U.S. at 48-49.

28. See, e.g., *Usery v. Turner-Elkorn Mining Co.*, 428 U.S. 1 (1975).

29. 478 U.S. 186 (1986).

30. See Michelman, *supra* note 1, at 1494, 1520-23, 1533-37.

31. *Id.* at 1495. There is a hint of this defense in *id.* at 1497-98.

framework while arguing that it misses some of the facts of particular relevance, especially as they relate to the question of external effects. In an age of AIDS the transmission of sexual diseases should not be stipulated out of the case as was done in *Bowers*, for its correlation with homosexual contacts is too powerful to ignore. In addition, someone has to make peace with the identification of more subtle externalities. If the rates of participation in homosexual activities are higher in men than in women, then there could be a possible disruption of marriage markets, owing to an excess of women of marriagable age for whom there are no available male partners. This is a problem that toleration of some (but not all) of the practices banned in *Bowers* might raise. These issues are all of constitutional dimension, and while I shall not even attempt to give my views on them here, staunch belief in the deliberative ideal does little, if anything, to advance the discussion of the thorny issues that *Bowers* clearly raises.

C. *Environmental Protection and Antidiscrimination*

A similar analysis could be made of the environmental and antidiscrimination legislation mentioned by Professor Sunstein.³² Sunstein assumes that correct deliberation will show the value of government regulation in both of these areas. In so doing, however, he cuts off the possibility that serious deliberation might yield the contrary conclusions in either or both of these areas. In his hands deliberation is no longer a neutral process consistent with any set of substantive outcomes. Rather it is transformed into the outcomes themselves, which are, however, not given any independent substantive defense. In dealing with antidiscrimination laws, Sunstein notes that these statutes will condemn discrimination against blacks and women.³³ But surely more has to be said before one can argue that either the equal protection clause or the Civil Rights Acts require or tolerate affirmative action, as opposed to colorblind legislation, or no legislation at all. Moreover, if the concern is with factions and special interest groups, then we should look with suspicion on those statutes which guarantee "set asides" on government contracts, whether for blacks and other minority groups, or, in recent practice, for women.³⁴ Surely there is some risk of factional politics if mayors and commissioners are allowed to dole out lucrative contracts to their friends. An explanation must be given for why open competitive bidding, desirable in so many other contexts, should be so quickly set aside in this context. It is possible that Sunstein could justify his substantive positions, but that will have to rest on a comprehensive theory that takes into account both individual entitlements and legis-

32. See Sunstein, *supra* note 2, at 1574.

33. *Id.* at 1584.

34. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

lative behavior. Deliberation hardly advances the case; indeed it could lead to a total rejection of antidiscrimination statutes.

Environmental regulation raises similar issues. Here I think that a libertarian is comfortable with some form of regulation in at least some cases.³⁵ Pollution is itself an ordinary tort, for which private remedies are often an inadequate response. Government regulation offers the possibility of preventing the harm before it happens and of punishing violators after the harm has occurred. Utilitarians will tend to see the world in much the same light. But still one should always be aware that environmental regulation can be severely flawed in its design or execution. The Superfund legislation, for example, is very troublesome because it imposes liability on any persons who ever came in contact with toxic substances, even if they were in no sense responsible for releasing these toxins into the environment.³⁶ Worse still, these sanctions are often applied retroactively, creating enormous dislocations for firms and their insurers. Similarly, much regulation of air pollution represents not a principled effort to stop pollution, but the victory of the "clean air/dirty coal" coalition in Congress. That coalition is an uneasy marriage of eastern coal producers and their labor unions, and environmental groups. Working together, they have imposed a wasteful set of restrictions upon low sulfur western coal in order to maintain the undeserved market position of the high-sulfur eastern coal.³⁷ No talk of deliberation explores the relevant choices. Instead, what is needed is a theory of individual rights which explains why there are entitlements against pollution, and a theory of public choice which explains why legislation to protect these entitlements can so easily go astray.

D. *Statutory Construction*

Finally, I believe that the theory of republicanism is of little help in the area of statutory construction. Here Sunstein argues that courts should construe statutes to counteract the deals private interest groups make.³⁸ In one sense this task cannot be accomplished within the strict republican framework because republicanism cannot provide us with the baseline against which judges can decide whether a certain piece of legislation is in the public interest or merely symptomatic of some interest-group pathology. Again there must be substantive commitments and principles.

Still, even if the republican can identify the corrupt statute, it is not clear that any canons of construction will be sufficient, or even useful, in

35. See Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

36. See Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a)(1)-(4) (1982). I have criticized this statute generally in Epstein, *The Principles of Environmental Protection: The Case of Superfund*, 2 CATO J. 9, 22-28 (1982).

37. See B. ACKERMAN & W. HASSLER, *CLEAN COAL/DIRTY AIR* (1981).

38. See Sunstein, *supra* note 2, at 1581.

slowing the pace of the special interest politics. Assume that courts make it clear that they will adhere to a rule that says, in effect, construe all doubtful statutes to avoid conferring unwanted gains upon special interest groups. This statute and its effect will be known to political actors once it is announced by judges. Forewarned is forearmed. If politicians are self-interested actors, they can be expected to take countermeasures to defeat its application. Thus once the various interest groups have reached their private deal, at the very least they then can use clearer language in order to counteract whatever "constructional" tour de force enterprising judges can invent. The strategy is not perfect, as the courts could always toughen the standard of interpretation *ex post*, but no matter what courts do large amounts of special interest legislation will work just as its supporters desire.

Moreover, this judicial strategy of tough construction cuts overbroadly, for it places all legislation under a pall of uncertainty. The more arcane the rules of construction, the harder it is for everyone, virtuous or not, to measure the going judicial "discount" in statutory interpretation. There is also the further risk that strong-willed courts will use their rules of construction to achieve ends that many people will regard as inappropriate. Special rules of construction thus create possible abuses of their own, and in and of themselves they do little to eliminate the stream of special interest legislation.

I believe that there is a counter to special interest legislation. It is invalidation on constitutional principles as they derive from the takings clause, the religion clauses, the speech clauses, the due process clauses, and the equal protection clause. But here my views are based on a clear substantive conception as to what falls within the scope of legislative power and what falls beyond its limits. In making that determination, little turns on whether the legislature has conformed its conduct to some abstract norm of deliberation. There is no reason to give statutory language anything other than its ordinary meaning. What matters is what the legislature has done, relative to what they are allowed to do—an issue of jurisdiction and substance, not of terminology.

V. RES PUBLICAE—OR PUBLIC AFFAIRS

In closing, I want to indicate why I think republicanism as a political philosophy is singularly ill-equipped to answer any serious constitutional inquiry. Even though Professor Michelman exhorts us to believe in the existence of a higher normative order, he does not tell us what that order is or why it should inspire devotion on the part of the citizenry. In a short comment, I cannot sketch out my own alternative substantive position, but I believe that we can take a clue from the origin of the term itself. "Republican" is a compound word derived from the two Latin words, "res"

and "publica," which loosely translated means "affairs pertaining to the public at large." This linguistic rendition gives a useful clue as to the proper task of a sound republican political philosophy. As the term "republican" suggests, we must decide what affairs belong to the public debate and discussion. Implicitly both Michelman and Sunstein have answered that question by saying that everything falls within that scope, because everything may be the subject of political deliberation.

I give a very different answer. I think that the best way to understand the theory of matters pertaining to the republic is to invoke the distinction between public and private goods as it emerges from modern economic theory.³⁹ A public good is one in which it is not possible to exclude (at least at reasonable cost) one person from sharing the benefits of goods and services that are provided to others. It follows that these public goods will be underproduced unless there is some way to coerce those who have benefited from their production into paying some share of its costs. Hence the argument for having streets, highways and defense funded by taxes.

Where public goods must be provided, someone must answer the question of how much of them should be provided, and how the goods provided will be financed. At root this function is necessarily legislative, and it is one that should be resolved after deliberation in which all different points of view are heard before a decision is made. A system of spot market transactions, where each speaker pays a determinate price for a right to speak, will not do the job. No private association, whether charitable or for profit, requires its speakers to pay for the right to be heard. Quite the contrary; since the information provided usually benefits the others, there is as much a need to encourage deliberation as to limit it. Accordingly rules of order—under which time is rationed not by price, but by queueing—are by market standards better suited for the task than any system of spot exchanges or auctions. There is no apparent reason why public bodies should follow different rules for their deliberations. And they don't.

Important as deliberation is, however, it is rarely sufficient to prevent bad outcomes. I do not want to suggest for a moment that simply because public goods are at issue, there should be no constitutional limitations upon the power of Congress or the states to tax and regulate public affairs. The system of limited government powers and entrenched individual rights is needed precisely because legislatures may go astray in spite of, or even because of, what is said in their collective deliberations. But what I do want to assert is the converse, that there is a domain of private affairs largely beyond the power of Congress to regulate precisely because there is no market failure that requires its intervention.

Viewed in this way, deliberation and practical political reason become part of a complex story which addresses both the need for and the limita-

39. See M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

tions of legislative action. Limited government, public choice, and private property all can be integrated into a single theory that incorporates some portion of the revived republican tradition. But this rival approach is much richer, for it recognizes that individual self-interest is the engine both of economic and social advancement and political intrigue. The two faces of individual self-interest thus create an inescapable problem that anyone must face in dealing with the first principles of political theory. It is a problem that simply cannot be answered by assuming that universal deliberation will provide us with some magic bullet that will cure all our intellectual and political ills.