

## **Liberalism, Republicanism And The Spirit Of American Politics: A Critique Of Sandel**

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### **Introduction**

The spirit of the political life of the United States has been portrayed as a hegemonic liberal consensus.<sup>1</sup> In turn, criticism of this consensualist thesis high-lighted the importance of republicanism in American political history.<sup>2</sup> Debate among contemporary political philosophers is still caught in this to and fro of liberal assertion and republican counter. Since 1971, the prime mover of debate among North American political philosophers has been John Rawls. His most recent work *Political Liberalism* attempts to apply the liberal doctrine of toleration to philosophy itself. His radically constructivist theory attempts to develop a 'political' conception of justice with minimal dependence on moral and metaphysical presuppositions. It is Rawls's hope that, thus politicized, the conception of justice will be acceptable to citizens of diverse and conflicting moral, religious and philosophical views, in his terms, will become the focus of an overlapping consensus of comprehensive doctrines.<sup>3</sup> Conceived as acceptable to a plurality of comprehensive doctrines but grounded in no specific doctrine, Rawls's political conception of justice is thus an interpretation of liberal neutrality and promises a glorious synthesis of social cooperation and individual freedom.

Michael Sandel, in his fascinating *Democracy's Discontent*, presents the republican antiphon to Rawls's liberal canticle. Sandel portrays an anxious America whose politicians cannot respond to the two most prominent fears of the age, fears over the erosion of community and the loss of self-government. His purpose in writing *Democracy's Discontent* is to show "how the inability of the reigning political agenda to

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<sup>1</sup> Cf. Richard Hofstadter, *The American Political Tradition and the Men Who Made It* (New York: Vintage Books, 1948) and Louis Hartz, *The Liberal Tradition in America*, (New York: Harcourt, Brace and World Inc., 1955).

<sup>2</sup> Cf. Clinton Rossiter, *Seedtime of the Republic* (New York: Harcourt, Brace and World Inc., 1953). J.G.A Pocock, *The Machiavelli Moment* (Princeton: Princeton University Press, 1975). Gordon Wood, *The Creation of the American Republic* (Chapel Hill: University of North Carolina Press, 1969). Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967).

<sup>3</sup> John Rawls, *Political Liberalism*, (New York: Columbia University Press, 1993) Lecture IV.

address the erosion of the community reflects the impoverished conception of citizenship and freedom implicit in our public life." <sup>4</sup>

Sandel argues that the root of the problem lies in America's Rawlsian public philosophy. On his view public philosophy is: "the political theory implicit in our practice, the assumptions about citizenship and freedom that inform our public life."<sup>5</sup> According to Sandel, America's public philosophy is rooted in its conception of freedom. With extensive historical detail and some broad brush strokes, he portrays American political history as the gradual transition from a public political philosophy grounded in a republican conception of freedom, to contemporary practice which is grounded in a Rawlsian liberal view.

Whereas republicans conceive freedom in terms of self-government, liberals conceive freedom in terms of voluntarism. The republican holds that individual freedom must be achieved through communal political activity; through deliberation on the common good and concern for public affairs. On this view an individual receives the content of his freedom, the range of choices available to him and his hierarchy of goals, through participation in the community. By contrast, on Sandel's account, the liberal conceives freedom as the capacity to choose one's ends. A quotation from Rawls gives clear expression to this conception. He states that individuals: "do not think of themselves as inevitably bound to, or as identical with, the pursuit of any particular complex of fundamental interests that they may have at any given time, although they want the right to advance such interests (provided they are admissible). Rather, free persons conceive of themselves as beings who can revise and alter their final ends and who give first priority to preserving their liberty in those matters."<sup>6</sup>

These conceptions of freedom have significant implications for republican and liberal accounts of the role of government in individuals' pursuits of the good life. Republican politics has a distinctively formative component. It wishes to educate citizens in the civic virtues required for self-government. It wishes to inform and reform the character of citizens to enable them to participate more fully in the good life as defined by communal political deliberation.<sup>7</sup> Sandel promotes the dispersal of political sovereignty to the localized communities in which citizens are embedded and through which they learn to participate in a common public life. Liberal politics, by contrast, focusses on the capacity of individuals to form and revise their conception of the good. According to Sandel, it thus remains neutral as to the goods which individuals pursue. The liberal state does not support any one comprehensive conception of the good life but allows individuals to choose their own conceptions provided these are just. Sandel contends that this view of politics is embodied in the Supreme Court whose interest in the protection of individual rights is destructive of particular communities.

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<sup>4</sup> Michael Sandel, *Democracy's Discontent* (Cambridge: Harvard University Press, 1996) p. 3, 323.

<sup>5</sup> Sandel 1996: 4.

<sup>6</sup> John Rawls, "Reply to Alexander and Musgrave", *Quarterly Journal of Economics*, 88/4, p.641.

<sup>7</sup> Sandel 1996: 7.

Taken together, voluntarism and its implication for the public conception of the good, that is, neutrality, are the fundamental tenets of what Sandel calls the procedural republic. He argues that the liberal public philosophy holds that: "government should not affirm in law any particular vision of the good life. Instead it should provide a framework of rights that respects persons as free and independent selves capable of choosing their own values and ends." Further he states: "Since this liberalism asserts the priority of fair procedures over particular ends, the public life it informs might be called the procedural republic."<sup>8</sup>

According to Sandel, John Rawls has articulated the most explicit contemporary defense of the procedural republic.<sup>9</sup> Rawls argues that the free exercise of public reason in a liberal democracy has as its result a plurality of reasonable comprehensive doctrines of the good life. Rawls accepts the importance these doctrines have in the lives of individuals, indeed he sees them as crucial to individual identity. Nevertheless, he argues that individuals are not bound to any particular comprehensive view and must have the freedom to revise their views. Further, because citizens recognize that it is reasonable to disagree on moral and religious views, they will not expect the state to enforce their own preferred view.

On Rawls's view, the state must be neutral among comprehensive views in at least two ways: (1) The state's legitimacy is grounded in a political conception which is the focus of an overlapping consensus. The political conception is thus neutral in that it can be the basis of agreement among even conflicting reasonable comprehensive doctrines; it is agreeable to all. (2) The basic institutions and public policy grounded in the political conception are not designed to further any particular comprehensive view; public agreement is not based on, for example, a conception of the common good.<sup>10</sup>

According to Rawls, it follows that for citizens to engage in just public deliberation about constitutional essentials, they must be able to argue on the basis of what he calls public reason: common political presuppositions, uncontroversial evidence, and common forms of argument acceptable within the political conception. Thus, as Sandel contends, the Rawlsian view: "depends on the plausibility of separating politics from philosophy, of bracketing moral and religious questions where politics is concerned."<sup>11</sup>

Sandel's historical investigations intend to demonstrate that: "a political conception of justice must sometimes presuppose an answer to the moral and religious question it purports to bracket. At least where grave moral questions are at stake, it is not possible to detach politics from substantive moral judgment."<sup>12</sup> Further he wishes to indicate that the historical predominance of the liberal attempt to create a public political realm exclusive of moral and religious argument impoverishes political discourse and erodes civic virtue

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<sup>8</sup> Sandel 1996: 4.

<sup>9</sup> Sandel 1996: 290. Sandel characterizes Rawls view as "minimalist liberalism". Sandel 1996: 17-19.

<sup>10</sup> Rawls 1993: 192.

<sup>11</sup> Sandel 1996: 19.

<sup>12</sup> Sandel 1996: 23.

and the capacity for self-government. Sandel offers his version of civic republicanism as a correction and enrichment of the malaise of liberal public culture.

This essay investigates Sandel's account of two crucial events in American history, the Lincoln-Douglas debates during the 1858 senate campaign in Illinois (which set out the theoretical bases of the war against slavery) and the New Deal. The Lincoln-Douglas debates give historical support to Sandel's criticism of neutrality. A more thorough analysis than he provides suggests both the pervasiveness of Lincoln's moral interpretation of the evil of slavery and the substantive interests served by Douglas's apparent neutrality. However, Sandel's account of the Civil War and his criticism of neutrality is weakened by his failure adequately to recognize the important role played by William Lloyd Garrison as the moral gadfly of abolitionism. Further, Sandel's neglect of significant republican elements in the New Deal weakens his overall account of American history and of the ethical unity of individual and community which is its base.

Sandel's account of American history is thus one-sided. While he recognizes that both liberal and republican conceptions of freedom have been present throughout American history, he nevertheless focuses on the displacement of republicanism by liberalism: "Broadly speaking, republicanism predominated earlier in American history, liberalism later."<sup>13</sup> This abstract focus on the progressive ascendancy of liberalism has two significant results. First, Sandel's account of the Civil Rights movement, what he calls, "the finest expression of republican politics in our time," is weakened.<sup>14</sup> Without recognition of the republican elements in the New Deal, a serious lacuna is present in any account of the development of Black civic-engagement. The national interest in civil rights did not suddenly emerge in 1954 with *Brown v. the Board of Education of Topeka* or in the 1960's with the moral eloquence of Martin Luther King.<sup>15</sup> The New Deal of the 1930's helped politicize Blacks and involved them in government on a national scale.

Second, Sandel's criticism of Rawls is weakened. Sandel's history exhibits a profound republican moment in the constitution and public culture of the United States which gives force to his criticism of Rawls's conception of public reason, by indicating the inadequacy of the Rawlsian conception to give a comprehensive account of the public culture of the United States. However, so far as this republican element is portrayed as thoroughly supplanted by liberalism, its relevance to contemporary public culture is obscured. Sandel's attempt to demonstrate the inadequacy of Rawls's conception of public reason to comprehend the political culture of the United States would be greatly

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<sup>13</sup> Sandel 1996: 6.

<sup>14</sup> Sandel's account would be strengthened by further examination of the civil rights movement. But the criticism I make here is not that he *does* not provide an adequate account of the civil rights movement but that he *cannot* because he neglects the republican origins of this movement in the New Deal.

<sup>15</sup> *Brown v. the Board of Education* consolidated under one name a group of cases, all of which challenged the 'separate-but-equal doctrine of *Plessy v. Ferguson*. In the decision Chief Justice Earl Warren stated: "Segregation of white and coloured children in public schools has a detrimental effect upon the coloured children" for it "generates a feeling of inferiority as to their status in the community that may effect their hearts and their minds in a way unlikely ever to be undone." *Oliver Brown v. Board of Education of Topeka, Kansas* 347 U.S. 483 (1954)

strengthened if he more fully indicated the presence of civic republicanism in contemporary public life and political institutions.

Third, Sandel thus only partially represents both the ethical core of the American spirit and the malaise of contemporary American society. This malaise is more precisely described as an overemphasis of the liberal moment of its public culture. Its correction is to be found not simply in the reassertion of republican values but in a theoretical and practical recognition of the mutual integrity of its liberal and republican moments. This fundamental reciprocity and unity, and the political struggle to recognize and instantiate this, is the lesson of the epochal events of American history. The Civil War indicates that the ethical community in its totality, the Union, is prior to and authoritative over the more particular interests of states (in succession) and individuals (in 'property', i.e, slaves). However, the authoritative power of the Union flies the banner of freedom, its activity instantiates subjective freedom and is its objective ground.

The post-Civil War growth of capitalism creates a civil society opposed in part to the agrarian ethical order of Jeffersonian America. Whereas the ethical life of the country rests on nature and family, civil society replaces these bonds with an order constituted by the aggregation of individual interests. The institutions characteristic of civil society, corporations and the 'night-watchman' state, presuppose a universal moral principle common to agrarian life, generally the Protestant work ethic. However, this principle does not receive clear institutional expression as in the case of an established religion; the principle of the sanctity of the individual conscience prohibits the establishment of religion. Rather the individual is now the locus of this ethic and the institutions of civil society have as their end the security and protection of property and personal freedom.

Implicit in the New Deal, however, is a recognition of the limits of an order founded on mere self-interest, and the assertion of a common good with authority over the divisions of individual and of class. Though American political thought still wrestles with the form which this common good can take in a pluralist society, the presence of a common good appears in such developments as the increased participation of Blacks in political life - in the increase among Blacks of what Hegel calls "self-determining action on laws and principles".<sup>16</sup>

## **I. Public Reason And Moral Principle: The Lincoln-Douglas Debates**

### *1. The Limits of Bracketing Moral Controversies*

Sandel's account of the Lincoln-Douglas debates focuses on whether it was proper to bracket the dispute over slavery in order to preserve the stability of the Union. He states: "The debate between Lincoln and Douglas was primarily about whether to bracket a

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<sup>16</sup> G.W.F. Hegel, *The Philosophy of Right*, Tr. T.M. Knox (Oxford: The Clarendon Press, 1967) p. 156.

moral controversy for the sake of political agreement."<sup>17</sup> The central thrust of Sandel's interpretation of the debate shows how the type of neutrality embodied in the procedural republic is inadequate to important moral issues. Sandel draws on the ethical and symbolic position which Lincoln occupies in the public culture of the United States. He points to Lincoln as an archetypal political figure whose greatness consists precisely in his moral argument, in his criticism of neutrality. Time after time in his debates with Douglas, Lincoln attacks the presuppositions of neutrality. For example: [Of Douglas's indifference] "I hate it because of the monstrous injustice of slavery itself. I hate it because it deprives our republican example of its just influence in the world..."<sup>18</sup> Also: "Is it not a false statesmanship that undertakes to build up a system of policy upon the basis of caring nothing about the very thing that everybody does care the most about?"<sup>19</sup>

Lincoln, however, was not an abolitionist. He thought that the immediate emancipation of all slaves would cause untold suffering and instability. Nor did he support radical integration of the races. He argued, for example, that just because he believed in freedom and equality for the Negro, this didn't mean he would like to marry one.<sup>20</sup> George Fredrickson offers a judicious reading of Lincoln's view of Black people: "For Lincoln the Negro was a man - to alter the abolitionist battle cry - but not a brother."<sup>21</sup> Yet Lincoln fought for the ultimate extinction of slavery, believing that the Union could not maintain a balance between the two positions and that slavery was a grave moral evil. In his famous 'house-divided' speech he states: "Either the opponents of slavery,[sic] will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in course of ultimate extinction; or its advocates will push it forward, till it shall become alike lawful in all the states, old as well as new -- North as well as South."<sup>22</sup>

Sandel's argument is strengthened upon recognition of the pervasiveness of Lincoln's moral commitment in the climate of the time. Not only did Lincoln quote Scripture and assert Christian principles, but his assertions in the context of the 1850's represent a controversial interpretation of Christianity. As Saul Sigelschiffer contends, in 1844: "Southern clergy men could not accept the position that slavery was evil and un-Christian.... The Southern Methodists now withdrew from the national church and formed their own Methodist Episcopal Church South. A similar schism soon followed in the Baptist and Presbyterian Churches."<sup>23</sup> This bolsters Sandel's general portrayal of the interrelationship between morality and politics. Lincoln's assertions went two ways, so to speak. On the one hand, he drew on Christian principles to support his 'political' argument against slavery; on the other hand, his political position implicitly took sides on

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<sup>17</sup> Sandel 1996: 22.

<sup>18</sup> Roy P. Basler, (ed), *Abraham Lincoln: His Speeches and Writings*, (Cleveland: The World Publishing Co., 1981) p.291.

<sup>19</sup> Quoted in Sandel 1996: 23.

<sup>20</sup> Saul Sigelschiffer, *The American Conscience: The Drama of the Lincoln-Douglas Debates* (New York: Horizon, 1973) p. 281.

<sup>21</sup> George R. Fredrickson, *The Arrogance of Race* (Wesleyan: Wesleyan University Press 1988) p. 68.

<sup>22</sup> Basler 1981: 372-3.

<sup>23</sup> Sigelschiffer 1973: 26.

the substantive 'theological' question of whether or not Christian doctrine legitimized slavery.

A broader account of the debate than Sandel himself gives provides even further evidence for his claims about the limits of neutrality. First, Douglas's belief in neutrality presupposes a moral commitment. Though Douglas wished to bracket moral beliefs at the federal level, this was based on his prior allegiance to popular sovereignty, at the level of state or territory. Moreover, implicit in Douglas's position are two conflicting notions of what it means to "bracket".<sup>24</sup> On the first interpretation the federal government allows each territory to decide for itself whether to enter the Union slave or free. This is indicated by Douglas's support for the Kansas-Nebraska Act. On the second interpretation, the federal government respects the right of each individual to decide whether or not to own slaves. This is indicated by his support of *Dred Scott*.<sup>25</sup> Thus Douglas's substantive adherence to popular sovereignty supports not only his concept of neutrality but also his interpretation of bracketing.

Second, in context, neutrality can be used by political interests to further their own non-neutral agendas. As Lincoln observed, bracketing moral concerns and accepting the judgment of the court in *Dred Scott* implied the extension of slavery, which was the stated desire of the slave-owners. He accused Douglas of this subterfuge: "This declared indifference, but, as I must think, covert real zeal for the spread of slavery, I can not but hate."<sup>26</sup> But this does not seem entirely fair to Douglas. While on Lincoln's view *Dred Scott* ensconced the individual right to slavery as against both federal and state government, Douglas, in fact, interpreted *Dred Scott* in terms of territorial sovereignty. In a letter to a friend, J.B. Dorr, he states that he would not accept the Democratic nomination for president if the policy of the party: "either establishes or prohibits slavery in the Territory beyond the power of the people legally to control it, as other property."<sup>27</sup>

Moreover, this is the interpretation the Southern wing of the Democratic Party gave to Douglas's view. In a speech which presaged a split in the Democratic Party and in which the radical South denounced Douglas, Senator Judah P. Benjamin from Louisiana stated: "We accuse him of this, to wit: that having bargained with us upon a point upon which we were at issue, that it should be considered a judicial point; that he would abide the decision; that he would act under the decision, and consider it a doctrine of the party; that having said that to us here in the Senate, he went home, and under the stress of a local

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<sup>24</sup> Sandel misses this point and recognizes only the first alternative. For further discussion of the need for substantive doctrines in determining the mode of bracketing cf. Sandel's discussion of *Thornburgh v. American College of Obstetricians*. Sandel 1996: 102.

<sup>25</sup> The notorious *Dred Scott* decision, as Sandel notes, was the only time prior to the Civil War that the Supreme Court enforced the Bill of Rights against an act of Congress (Sandel 1996: 38-9). *Dred Scott* was a slave who sued in court for his freedom. Three cases in Missouri upheld the rights of Scott's owner. In February of 1856 the case of *Dred Scott v. Sanford* was argued before the Supreme Court of the United States. The Supreme Court likewise upheld the property rights of Scott's owner. *Dred Scott v. Sandford* 60 U.S. 393 (1856). Cf. below for further discussion.

<sup>26</sup> Basler 1981: 291.

<sup>27</sup> Sigelschiffer 1973: 391-2.

election, his knees gave way; his whole person trembled .... his success in the canvass for the Senate, purchased for an ignoble price, has cost him the loss of the Presidency of the United States"<sup>28</sup>

Though Douglas's own views can be distinguished from those of Benjamin, Lincoln convincingly demonstrated that Douglas served the interest of the slave-owners. Lincoln considered the Kansas-Nebraska Act and the *Dred Scott* decision as an "almost complete legal combination" as a "piece of machinery so to speak".<sup>29</sup> He states: "The working points of that machinery are: First that no negro slave, imported as such from Africa, and no descendant of such slave can ever be a citizen of any State, in the sense of that term used in the Constitution of the United States.... Secondly that 'subject to the Constitution of the United States' neither Congress nor a Territorial Legislature can exclude slavery from any United States Territory.... Thirdly, that whether the holding a negro in actual slavery in a free State,[sic] makes him free, as against the holder, the United States courts will not decide, but will leave to be decided by the courts of any slave State the Negro may be forced into by the master.... Auxiliary to all this and working hand in hand with it, the Nebraska doctrine or what is left of it, is to educate and mould public opinion, at least Northern public opinion, to not care whether slavery is voted down or voted up."<sup>30</sup>

Douglas did not see the conflict between his concept of territorial sovereignty and *Dred Scott's* instantiation of a universal individual right to own slaves. But Lincoln clearly realized that if the implications of *Dred Scott* were played out, the only role territorial sovereignty could play was democratically to support the slave trade. If citizens voted against the slave trade they would be contradicting the rights of the individual which, under *Dred Scott*, were protected by the Supreme Court.

Third, the relation of the constitution to the slave trade supports Sandel's claim that a neutralist republic cannot contain the moral energies of the people and cannot engage them in debate and criticism.<sup>31</sup> A look at how the South overturned the intentions of the framers of the Constitution is instructive. It can be argued that the framers of the Constitution intended that slavery die out.<sup>32</sup> Nevertheless, in spite of this opposition to slavery, within the confines of constitutional neutrality, a vociferous minority in the south stretched the boundaries of slavery on all fronts.

It can be argued moreover that with *Dred Scott*, the Constitution had been hijacked by southern interests. Five of the judges hailed from the South and a "heavy correspondence

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<sup>28</sup> Many Southerners broke away from the party and nominated their own candidate, John C. Breckenridge of Kentucky. Sigelschiffer 1973: 408.

<sup>29</sup> Basler 1981: 37.

<sup>30</sup> Basler 1981: 375-6.

<sup>31</sup> Sandel 1996: 24.

<sup>32</sup> Three aspects support this interpretation: (1) Article 1,9,11 which prohibits the slave trade after the year 1808, the least ambiguous evidence; (2) the political injunctions against slavery in the territories (e.g., the Ordinance of 1787) and; (3) Lincoln's analysis of the voting habits of the framers, perhaps the most ambiguous evidence. Cf. "The Cooper Institute Address", Basler 1981: 517-39.



passed between leaders and judges".<sup>33</sup> As Sigelschiffer indicates, there was an exchange of letters between President-elect Buchanan and Justice Grier.<sup>34</sup> In fact, two weeks before his inauguration, Grier wrote Buchanan: "I will give you in confidence the history of the case before us with the probable result ... there will therefore be six, if not seven (perhaps Nelson will remain neutral) who will decide the Compromise law of 1820 to be of non-effect."<sup>35</sup> Further, on March 4, in his inaugural address, Buchanan stated that he would "cheerfully submit" to whatever the Court decided. On March 6 the Court rendered its judgment by a vote of 7-2, Justice Taney arguing: (1) that Negroes were not citizens, (2) that the Constitution didn't include them as citizens; and (3) that the Missouri Compromise was void.<sup>36</sup> The *Dred Scott* decision effectively eliminated the constitutional and political bulwarks against the spread of slavery, and this on the basis of the individual rights of the slave-holder.

The official doctrine of neutrality thus left the slave owners outside the corrective influence of democratic debate and provided the moral space for more nefarious activities in the support of their own interests. This form of toleration leaves prejudices intact and allows them to fester in private life, ultimately spilling over into the political arena.

Historical interrogation of the Lincoln-Douglas debates thus supports Sandel's criticism of the political conception of neutrality in a number of ways: the historical stature of Lincoln indicates the political pedigree of reference to comprehensive doctrines; Douglas's view shows how neutrality presupposes moral commitment; and the growth of slavery shows that a politics of neutrality cannot correct the perverse moral energies of its citizens.

## *2. Rawlsian Public Reason and the Lincoln-Douglas Debate*

In light of his analysis of the Lincoln-Douglas debates and the moral critique of slavery, Sandel criticizes Rawls's suggestion that his political conception of public reason is compatible with the moral critique and actions which ended slavery. Rawls argues that his view of public reason permits citizens to present the comprehensive basis of their political values provided that there is division in the society about constitutional essentials or about the application of principles of justice, and provided that they do this in ways that strengthen the idea of public reason.<sup>37</sup> He points to the abolitionist movement as a paradigm for reference to comprehensive doctrines. He argues that, although they referred to their comprehensive doctrines, "they could have seen their actions as the best way to bring about a well-ordered and just society in which the ideal of public reason could eventually be honoured."<sup>38</sup> So, for Rawls, because they "could" have thought that

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<sup>33</sup> Sigelschiffer 1973: 49.

<sup>34</sup> (Sigelschiffer 1973: 49).

<sup>35</sup> Sigelschiffer 1973: 49.

<sup>36</sup> Sigelschiffer 1973: 50.

<sup>37</sup> Rawls 1993: 251.

<sup>38</sup> Rawls 1993: 251.

the reasons they referred to, though comprehensive, were required to strengthen the political conception to be subsequently realized, they did not contravene public reason.

Sandel rightly argues, however, that in the absence of extraordinary assumptions, it is difficult to interpret the abolitionist argument as consistent with the ideal of public reason advanced by political liberalism. What is more likely, he contends, is that abolitionists were hoping to get Americans to extend religious and moral reasoning to other issues.<sup>39</sup> Sandel concludes that Rawls cannot account for why Lincoln was right and Douglas wrong in 1858.

Sandel's account of Rawls's attempted appropriation of Lincoln and the abolitionists is persuasive. Rawls underestimates the significance of the fact that neither Lincoln nor the abolitionists were motivated by the intention of strengthening public reason. Moreover, in like circumstances it would be impossible to judge whether one's actions will, in the end, strengthen public reason. On what grounds could it have been predicted that the bloodshed and division of war would lead to an harmonious consensus on public reason, from what standpoint could it be reasonably suggested that resentment and disharmony would not be the result? The complexity of the calculations required makes them prohibitive from the standpoint of public reason. The conceptual point which Rawls wishes to make, presumably, that comprehensive doctrines can strengthen public reason, is muddled by his historical example.

Moreover, from a Rawlsian standpoint it is difficult to see how a legitimate conception of public reason could even have existed. According to Rawls, public reason is based on certain substantive conceptions of the person implicit in the public culture of a liberal democracy. On his view we accept his account of public reason in part because we share his intuitions about the nature of moral persons.<sup>40</sup> However, in its broadest sense the Civil War was fought over the meaning of the word "person". Because the meaning of "person" was controversial there could have been no sense in which a legitimate conception of public reason could have been appealed to.

Further, in this context, the position which won the day had its origin in the extremist views of abolitionist William Garrison. Neither Rawls nor Sandel gives an adequate account of the relative roles of Garrison and Lincoln. While Sandel is right to note that the free labour movement found Garrison's views too radical, he underplays Garrison's contribution. George Fredrickson offers a more judicious appraisal. Noting that Garrison's extremism isolated him on the far left of the anti-slavery movement, and that, therefore, he did not lead the political assault, Fredrickson states: "Nevertheless, he remains, and deservedly so, the central figure in the crusade against slavery."<sup>41</sup> Though Sandel is correct that Garrison's extremism alienated many, Fredrickson states: "his primacy as instigator of the movement was unchallenged, and he continued, up to the

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<sup>39</sup> Michael Sandel, "Political Liberalism" (Review), *Harvard Law Review*, v.107 (May, 1994) pp. 1791-2.

<sup>40</sup> Rawls 1993: 18-19,192.

<sup>41</sup> Fredrickson 1988: 73.

time of emancipation, to play an indispensable role as a moral gadfly, keeping the ideal ever in the sight of those engaged in confronting, the actual."<sup>42</sup> Likewise, C. Vann Woodward, indicates Garrison's importance: "History supports Garrisonian dogma ... that to be effective the eradication of slavery had to be root-and-branch, that the racist ideology supporting it permeated the country, and that abolishing slavery in alliance with racists and without eradicating their ideology would be largely an empty victory."<sup>43</sup> Garrison's zealous refusal to compromise with the "practical realities" of his time distinguishes his position from that of Lincoln.<sup>44</sup>

Further, while Sandel's characterization of Lincoln's "non-neutrality" is convincing, he neglects the implicit neutrality of Lincoln's position on the issue of White supremacy. On Lincoln's view, the state did not have a role in correcting the moral views of White supremacists. While Garrison attacked colonization, Lincoln favoured colonization, bracketing the problem of racism, so to speak, by separating the races.<sup>45</sup> Thus, Lincoln's view, by contrast with Garrison's, did not permit Blacks to participate in American political life and allows no fundamental correction of racism.

Moreover, Sandel underplays the inconsistency and fundamental danger of Lincoln's position. In his 1854 Peoria speech, for example, Lincoln is caught in a dilemma between his moral position and his practical position.<sup>46</sup> According to Lincoln, slavery is opposed to the Declaration of Independence because it permits men to be governed without consent. However, he is willing to compromise this position because he cannot admit the practical possibility of social and political equality between Blacks and Whites.

Harry Jaffa argues that Lincoln accepted the political inequality of Blacks because his fellow countrymen judged it necessary to the security of their rights, and the Declaration of Independence granted them the right to judge of this security.<sup>47</sup> But if slavery itself can be judged practically necessary to the security of White rights, it remains possible that the extension of slavery can likewise be judged necessary. While Lincoln argues against the moral basis for the extension of slavery, he leaves room for an argument for extension based on necessity.<sup>48</sup> In certain respects then, Garrison's outlook was more republican than Lincoln's in that he demanded equal participation for Blacks and argued for the correction of racist attitudes.

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<sup>42</sup> Fredrickson 1988: 75.

<sup>43</sup> Quoted in James P. Young, *Reconsidering American Liberalism: The Troubled Odyssey of the Liberal Idea* (Boulder: Westview Press, 1996) p. 122.

<sup>44</sup> It should be noted however, that while Garrison's zealotry can be distinguished from Lincoln's cautious practicality, he praised Lincoln's refusal to compromise on slavery in the Territories and also urged support of Lincoln's war effort. Cf. James M. McPherson, *The Struggle for Equality: Abolitionists and the Negro in the Civil War and Reconstruction* (Princeton: Princeton University Press, 1995) pp. 31,55.

<sup>45</sup> In George Fredrickson's characterization, Lincoln was: "a pragmatic White supremacist in his concept of domestic race relations but indulged a principled egalitarianism in his world outlook." Fredrickson 1988: 66.

<sup>46</sup> Cf. Basler 1981: 304.

<sup>47</sup> Harry Jaffa, *Crisis of the House Divided* (New York: Doubleday, 1959) pp. 48-49.

<sup>48</sup> Cf. also Fredrickson 1988: 67.

Garrison's moralism makes a particularly unhappy companion for Rawls. As Sandel notes, the abolitionists wanted to extend the reach of religious reasoning to other political-moral issues. This is inadmissible according to Rawlsian strictures on public reasoning - Garrison's radical Protestantism would conflict with other comprehensive views. Rawls, then, can claim neither Garrison nor Lincoln as a supporter of public reason: Garrison's extreme comprehensive view cannot be the basis for consensus and Lincoln's view excludes Blacks from political participation.<sup>49</sup> Hence, Rawls must deny that his political conception can account for the justness of abolitionist actions or must broaden his conception of public reason.

This indicates a further weakness in Rawls's conception of public reason. Rawls's reference to the Civil War points to a deeper historical relationship between comprehensive doctrines and public reason than he can account for. The form of public reason current in the United States has its genesis in the zealous assertion of comprehensive doctrines in the public realm. But as we have seen these assertions are not compatible with the Rawlsian conception of public reason. The difficulty is that Rawls's view cannot account for the conditions in the public culture required to ensure the existence of public reason. In the United States public reason is parasitic on comprehensive views of equality and freedom. While Sandel draws attention to the importance of comprehensive doctrines in American history, his one-sided focus on republicanism distorts the complex dialectic of the public political culture of the United States.

## II. The Republican Vision And The New Deal

The Lincoln-Douglas debates are thus an instructive example of the limits of neutralist dogma. Still the twin defeat of voluntarism and neutrality in the Civil War was not final. As noted above, the free labour criticism of slavery shares with republicanism an opposition to the dependence slavery creates. Further, both conceive the wage system characteristic of capitalism as similarly destructive of independence. However, the revolutionary republicanism of the Civil War, based in part on a conception of freedom as self-government, cleared the way for a capitalist revolution whose voluntarist ideology was antithetical to republicanism. As Sandel states: "Abraham Lincoln turned the aspirations of the labourer into a critique of the South ... But the Union victory in the war put to rest the threat to free labour posed by slave power, only to revive and intensify the threat posed by the wage system of industrial capitalism."<sup>50</sup>

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<sup>49</sup> It should be noted that abolitionism came in many forms. James M. McPherson identifies three major groups: Garrisonians, evangelicals, and political abolitionists. It is arguable that Garrisonians had the most effect of these three. Cf. James M. McPherson 1975, *The Abolitionist Legacy: From Reconstruction to the NAACP* (New Jersey: Princeton University Press, 1975) p. 4. Also cf. Fredrickson 1988: 73-80.

<sup>50</sup> Sandel 1996: 183.

However, Sandel does not attend sufficiently to the complex dialectic evinced by these events. The victory of republicanism in the constitutional sphere opened the door to the victory of liberal capitalism in the economic sphere. Further, with the withdrawal of the Union army in 1877 and the decision in the Civil Rights Cases (1883), many of the advances made in terms of Black independence were destroyed. And yet, one of the results of federal non-intervention and neutrality in terms of the problems of race has a distinctively republican cast: an increase in national civic participation by southern Whites. The importance of this result for national unity should not be underestimated, though in the absence of state and federal commitment to Black rights, this dispersal to the states of power over race relations was in many ways disastrous for Blacks.

This section gives a brief and highly selective account of how capitalism which flourished with the destruction of slavery was appropriated as justification for racist ideology. On the one hand, it supports Sandel's claims about the limits of voluntarism and a 'neutralist marketplace' *vis-a-vis* the civic morality of citizens; on the other, contra Sandel, it provides a context which helps situate the republican elements of the New Deal.

### 1. *Background to the New Deal: Capitalism and Racism*

Though the growth of capitalism has substantial roots in the elimination of slavery it was not itself inimical to racism.<sup>51</sup> Herbert Spencer's intellectual legitimation of laissez-faire, voluntarist capitalism dealt a severe blow to Black participation in American civil life. In the thirty years after the Civil War it was impossible to be involved in the intellectual world without coming to terms with Spencer's views which, prior to Darwinism, applied the concepts of survival of the fittest and natural selection to the social-economic realm. Richard Hofstadter states: "Herbert Spencer whose evolutionary philosophy glorified automatic progress, who threw all his authority into support of the thesis that natural economic processes must be allowed to go on without hindrance from reforms was idolized in the United States."<sup>52</sup> Spencer sanctioned only those state functions acceptable to classical liberals, basically those of the nightwatchman state. As Young states, Spencer was opposed to: "poor" laws, state support for education, tariffs, state banking, sanitary supervision, government postal systems, and even protection against medical quacks.<sup>53</sup> This prototypical Darwinism legitimized not only the

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<sup>51</sup> There are at least four reasons why the destruction of slavery removed a major bulwark against industry. (1) Because slaves were not compensated for their labours, slavery generated relatively low consumer demand, as slaves could not be consumers. (2) Slavery, obviously, lacked capitalism's means for engendering a work ethic in labourers Cf. James Oakes, *Slavery and Freedom: An Interpretation of the Old South* (New York: Alfred A. Knopf, 1990)p. 102. (3) As James Young states: "The defining characteristic of capitalism was the separation of the labourers from the means of production and the attendant transformation of labour into a commodity" (Young 1996: 112). In the absence of this separation there was no market for free labour in the south. (4) As land grew scarce, it became explicit that wage labour was more consistent with liberalism than was the free labour ideal which depended on the availability of land.

<sup>52</sup> Hofstadter 1948: 168.

<sup>53</sup> Spencer's views were widely disseminated by his most important American disciple among the intelligentsia, William Graham Sumner. Young 1996: 130-1.

accumulation of wealth by those at the top of the economic order and its resultant privilege but also the appropriateness of the status of those on the bottom: the Blacks. With this "scientific" doctrine of White supremacy the ideology of the South had, in a sense, become the ideology of the nation.

This shared racist ideology was an important aspect of the reintegration of the South into the Union. Reintegration was furthered by the non-interventionist stance of the federal government. The Civil War had been fought primarily to secure the stability of the United States, to unify diverse states under one federal constitution. Northern victory saved the Union but only through the use of force, with the result that although the states were unified, southerners resented the destruction of their wealth and institutions. Ralph Henry Gabriel captures the post-war spirit: "After Appomattox, however, the North and South had different traditions, personified by different heroes. Chancellorsville and Gettysburg had opposite meanings in Wisconsin and Alabama. Wartime emotionalism persisted, moreover, in a hatred that was slow to die."<sup>54</sup> Resentment was heightened by Reconstruction which asserted the federal government's power to determine the legal framework of race relations: southern intransigence was inevitable in the face of the measures enforced by the United States. Gabriel makes the interesting point that the federal government's retreat from intervention was crucial to the re-emergence of southern loyalty to the Union. In 1877 the army was withdrawn. Further, the decision in the Civil Rights cases of 1883 limited the power of congress to interfere in state matters, and in consequence gave the states power over race relations, subject only to the limitation that slavery not be reestablished. Gabriel states: "In 1883, only eighteen years after the surrender of Lee, the Court accepted Calhoun's principle that the disposition of the race problem should be denied to the central government and be left to the local community."<sup>55</sup> This sense of sovereignty over the issue of race restored the relationship of the South as a sovereign state to the Constitution and contributed greatly to national unity.

The obvious limit of reunification and the reemergence of Southern loyalty, however, was that it rendered Blacks second class citizens. While reunification helped reestablish the patriotic unity among states, it infringed the universality of the rights of the citizen. But the federal government's retreat from intervention was markedly different from its initial neutrality on the slavery issue. Though the federal government withdrew from interference in race matters, slavery was abolished and the supremacy of the Union had been demonstrated by victory in the Civil War. Whereas secession, which attempted to prevent federal intervention, originated with the southern states, the removal of the Union Army in 1877 originated with a victorious federal government which had proven its authority. The sense of sovereignty over race matters thus drew the South back into the Union and though the race problem still existed, there had been progress in the lives of Black citizens and secession was no longer a viable answer.

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<sup>54</sup> . Ralph Henry Gabriel, *The Course of American Democratic Thought* (New York: Ronald Press Company, 1956) p. 141.

<sup>55</sup> Gabriel 1956: 142.

This brief sketch indicates the difficulty in radically separating the republican and liberal moments in American history. The interventionist policy characteristic of Reconstruction politics usurped the sovereignty of states and thus seems problematic in republican terms. While on the one hand, its substantive commitment to the dignity and humanity of Blacks secures the integrity of Black communities, on the other, its focus on civil rights infringes the republican interest in localized power. The federal neutrality on the question of race, characteristic of Redemption policy, and supported by Spencerian laissez faire ideology, permits state control of matters of race and is consistent with the republican interest in the dispersal of sites of sovereignty. Yet, in this context, neutrality is destructive of the civil rights of Blacks and of the strength of Black communities. A linear account of American history is thus inadequate to the complexities of concrete events. Further, this practical and theoretical nexus of capitalism and racism is a crucial background condition without which one's understanding of the New Deal remains incomplete.

The late nineteenth and early twentieth centuries thus saw the perpetuation of the doctrine of White supremacy in the United States and in its highest office.<sup>56</sup> But Franklin Delano Roosevelt's second New Deal marked a significant transformation of Black participation in the public political culture of the United States. Contrary to Sandel's portrayal, the New Deal is, in principle and in practice, consistent with the republican interest in a politics of the common good, institutional reform, the correction of voluntarism and civic participation.<sup>57</sup> Recognition of the continuing presence of both liberal and republican moments in the history of the United States allows for a more comprehensive account of its public culture and strengthens the basis on which Sandel can refer to republicanism as a possible enrichment of American political life.

## 2. *Keynes and the New Deal*

Sandel focuses on the Keynesianism of the New Deal. He argues that there are three essential aspects to the economic philosophy which underlies the New Deal: (1) the acceptance of consumption as the basis of political identity and economic policy; (2) the rejection of any attempt on the part of government to form or educate individual desires and; (3) the "embrace of the voluntarist conception of freedom and the conception of persons as free and independent selves, capable of choosing their ends for themselves."<sup>58</sup> Moreover, he states: "From the late 1930s to the early 1960s, Keynesian fiscal policy appealed to policy makers as a way of avoiding the intractable controversies among

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<sup>56</sup> Teddy Roosevelt emphasized the racial inferiority of Blacks. In fact the 1913-14 congress enacted the most racist legislation in its history. Woodrow Wilson would not publicly denounce lynching and refused to appear at any Negro school or conference. Harding desecrated racial amalgamation as an impossibility. Coolidge did absolutely nothing to assist Blacks. Hoovers legacy is perhaps best described By Chief Justice Taft who confided that Hoover aimed: "to break up the solid south and to drive the Negroes out of Republican politics." Harvard Sitkoff, *A New Deal for Blacks: The Emergence of Civil Rights as a National Issue, Volume I: The Depression Decade*, (New York: Oxford University Press, 1978) pp. 18-28.

<sup>57</sup> C. Vann Woodward notes this as the foundation of what he calls the second reconstruction. Gunnar Myrdal contends: "this changed the whole configuration of the Negro problem." Sitkoff 1978, 58.

<sup>58</sup> Sandel 1996: 267.

advocate of various reforms and spokesmen for various sectors of the economy."<sup>59</sup> Thus for Sandel, the New Deal is a decisive phase in the the development of the procedural republic.

However, Sandel's account of the New Deal is one-sided. There are explicit republican elements in the New Deal which he ignores. A consideration of Keynes's social-political philosophy indicates its compatibility with civic republicanism. First it is not clear that for Keynes "consumption is the sole end of economic activity".<sup>60</sup> Keynes argues, for example, that once humans are securely employed in the economic realm, they will be freer to pursue what he called the highest objects of life: love, beauty, truth, timeless contemplation, and the pursuit of knowledge.<sup>61</sup> We shall have, he states: "most sure and certain principles of religion and traditional virtue. We shall value ends above means."<sup>62</sup> In fact, Keynes conceived the whole economy as directed to a common good. He states: "The state is a sovereign body of which the purpose is to promote the greatest good of the whole."<sup>63</sup> On this basis, Keynes wanted to prevent market forces from interfering with what is fit and proper in the interests of social stability and social justice.<sup>64</sup> And he argues, for example, that savings and loans should not: "be left entirely to the chances of private judgments and private profits."<sup>65</sup> Therefore, it is arguable that Keynes conceived distinct limits to individualism and voluntarism. Second, while a self-proclaimed conservative on certain matters, there are, contrary to Sandel's suggestion, important institutional reforms which Keynes believed necessary. Principally he argued for: (1) a central institution to control currency and credit; (2) the regulation of savings and investment and; (3) the control of population size. Finally, Keynes thought that the economy required communal and moral direction. He states: "What we need is the restoration of right moral thinking, a return to proper moral values in our social philosophy."<sup>66</sup> He envisioned the control of investment by a group of public spirited disinterested individuals.<sup>67</sup> Further, he thought that: "Planning should take place as much as possible in a community in which as many people as possible share your own moral position."<sup>68</sup> Thus Keynesianism is, in principle, more conducive to a republican sense of community than Sandel allows.<sup>69</sup>

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<sup>59</sup> Sandel 1996: 263.

<sup>60</sup> Sandel 1996: 268.

<sup>61</sup> Allan Meltzer, *Keynes's Monetary Theory: A Different Interpretation* (New York: Cambridge University Press, 1988) p. 34.

<sup>62</sup> Quoted in Meltzer 1990: 36.

<sup>63</sup> Quoted in Meltzer 1990: 59.

<sup>64</sup> Meltzer 1990: 36-7.

<sup>65</sup> Quoted in Meltzer 1990: 38.

<sup>66</sup> Quoted in Meltzer 1990: 37.

<sup>67</sup> Meltzer 1990: 10.

<sup>68</sup> Quoted in Meltzer 1990: 38.

<sup>69</sup> Further, Sandel and Keynes have a similar conception of the role of ideas. Early in *Democracy's Discontent* Sandel states: "Political institutions are not simply instruments that implement ideas independently conceived; they are themselves embodiments of ideas." (Sandel 1996: ix) Compare Keynes's suggestion at the end of *The General Theory of Employment, Interest and Money*: "the ideas of economists and political philosophers, both when they are right and when they are wrong are more powerful than is



### 3. *The New Deal and the Regulation of Choice*

By contrast with Sandel's portrayal, Roosevelt's New Deal is in certain ways a correction of voluntarism. Government and politics were seen to play an essential role in the economy, to be a correction of laissez-faire. In 1941 Roosevelt states: "The liberal party is a party which believes that as new conditions and problems arise beyond the power of men and women to meet as individuals it becomes the duty of government to find new remedies with which to meet them."<sup>70</sup> While Sandel is correct that one of the goals of the New Deal was to secure freedom of choice for consumers, there was likewise a clear sense of the limits of mere choice. As James Young states: "By the time the reform impulse was exhausted in the early days of Roosevelt's second term, the relation of the U.S. government to the society and the economy had been transformed. A welfare program that emphasized work over the dole was established. There were extensive new regulations covering the banking and securities industries. In one way or another, industry was also widely regulated. Unemployment and wages-and-hours legislation were passed, and the social security system was established."<sup>71</sup> Though the reform phase of the New Deal ended, it is thus arguable that it accomplished lasting and important changes and a context in which voluntarism and self-interest can be regulated. Ralph Henry Gabriel makes a similar point, arguing that Roosevelt emphasized both a new and an older conception of the free individual. Gabriel contends that the Wagner Act vastly strengthened unions giving protection to collective bargaining.<sup>72</sup> Collective action is sanctioned for the protection of worker-consumers. However, he also indicates that in the New Deal agricultural policy, the Jeffersonian theory of individualism prevailed. Gabriel notes two specific measures in support of his view: "(1) the limiting of benefits going to any one enterprise and (2) the upholding of the established limitation of farms in irrigated areas to one hundred sixty acres."<sup>73</sup> These measures gave preference to small farms, as opposed to corporate farms and they supported the independence of the individual farmer. This interest in independent farmers cannot adequately be described in voluntarist terms. For the voluntarist it makes no difference whether one is employed by a corporation or on one's own farm.

### 4. *The New Deal and Black Civic Engagement*

In terms of Black rights, the New Deal was anything but neutral. Its economic interventionism was extremely controversial in the South. Moreover, it marked a significant improvement in the lives of Black citizens. Sandel contends that the Civil Rights movement of the mid-fifties to the mid-sixties was in essence a republican movement. He states: "To assimilate the Civil Rights movement to the liberalism of the

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commonly understood. Indeed the world is ruled by little else." John Maynard Keynes, *The General Theory of Employment Interest and Money* (New York: Harcourt, Brace and World Inc., 1935) p. 383.

<sup>70</sup> Quoted in Young 1996: 170-71.

<sup>71</sup> Young 1996: 169-170.

<sup>72</sup> Gabriel 1956: 433.

<sup>73</sup> Against the Central Valley Reclamation Project which wanted the removal of this limit. Gabriel 1956: 433.

procedural republic is to miss its most important lessons for our time. More than a means to equal rights, the movement itself was a moment of empowerment, an instance of the civic strand of freedom."<sup>74</sup> By contrast with Sandel's account, however, the civic strand of the Civil Rights movement was profoundly influenced by the civic strand of the New Deal. To accept the republican nature of the struggle of Martin Luther King and the SCLC is to accept the republican influence of Franklin Roosevelt and the New Deal.<sup>75</sup> The New Deal opened the door to the Civil Rights movement.<sup>76</sup> By contrast with Sandel's focus on the neutrality of the second New Deal and its preference for the spending solution over "drastic institutional reforms", the second New Deal was more controversial than the first, with regard both to institutional reform and to civil rights. Initially the New Deal had little to do with race and did little to change the status of Black citizens. FDR did not want to jeopardize economic bills required for national recovery and thus, in order to placate Southern interests, he could not defy the southern dominated congress on racial matters and capitulated to their resistance to programs which would jeopardize their control of southern political and economic policy. Sitkoff states: "The leadership elites in Dixie looked askance at new federal programs that reduced dependency and paternalism in their domains, raised wages, aided the labour movement, skirted local government, and extended the New Deal to those indigents previously unassisted."<sup>77</sup>

To justify their resistance to the New Deal, southern politicians criticized its interference in race matters. The New Deal's support for Blacks was intolerable to southern prejudice. Southerners argued that the New Deal was an attempt to overturn White supremacy, and in the North White supremacy thus became explicitly aligned with conservative economic policies which were now out of vogue.<sup>78</sup> This relationship between economic reform and civil rights reform was made explicit with the result that Southern Democrats supportive of the New Deal were edged towards concern with Black issues.<sup>79</sup> Further, federal intervention which began as economic reform turned back judicial precedents such as *Slaughterhouse* and *Cruikshank*, as the Roosevelt-stacked Court broadened the regulatory powers of the national government.<sup>80</sup> As Sitkoff states:

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<sup>74</sup> Sandel 1996: 348.

<sup>75</sup> The SCLC refers to the Southern Christian Leadership Conference.

<sup>76</sup> It is important to keep in mind the extraordinary influence of Eleanor Roosevelt. Long before the Roosevelt administration adopted serious policies for the improvement of the lives of black citizens, she kept the black voice alive in the halls of government and in the press. Cf. Sitkoff 1978: 59-62.

<sup>77</sup> Sitkoff 1978: 102.

<sup>78</sup> This mirrors the alignment of White supremacy and laissez-faire capitalism found in Spencerian views

<sup>79</sup> For a detailed analysis of this development and the rift it caused in the Democratic Party cf. Sitkoff 1978: 102-138. The growing importance of the Black vote enabled Roosevelt to survive this rift. Sitkoff 1978: 84-101.

<sup>80</sup> In the *Slaughterhouse Cases* some butchers claimed that a Louisiana law which granted a monopoly on the slaughtering business violated their Fourteenth Amendment Rights. The Supreme Court rejected their claim because such a precedent would "fetter and degrade State governments ... in the exercise of powers heretofore universally conceded to them." (*Slaughterhouse Cases* 83 U.S. 36,78 (1873). In *Cruikshank* the Supreme Court dismissed nearly 100 indictments against Whites involved in the Colfax Massacre arguing that the Fourteenth Amendment authorized no power for Congress to enact: "laws for the suppression of ordinary crime within the States.... That duty was originally assumed by the States; and it still remains there." *United States v. Cruikshank* 23 U.S. 710 (1876).

"The growing acceptance of the idea that the federal government had the right and the duty to intervene on behalf of the economic well-being of its citizens led to the corollary that the federal government had the obligation to protect the lives and constitutional rights of the Afro-Americans"<sup>81</sup>

Crucial to this reform and to the advancement of Black rights was what Sitkoff calls the federalization of the Bill of Rights. Whereas the Slaughterhouse cases in 1879 had relegated the protection of civil rights to the states and the Civil Rights Acts of 1883 had ended federal enforcement of the 14th Amendment, the decision in the Scottsboro case marked the first time in the twentieth century that the Supreme Court asserted its power to supervise the enforcement of justice to Blacks in the states by investigating the evidence of discrimination itself.<sup>82</sup> Likewise, in a footnote to the 1938 opinion in *Carolene Products*, Harlan Stone highlighted the Court's direction by asserting that laws involving the bill of rights required more exacting judicial scrutiny.<sup>83</sup> Further, in *Lane v. Wilson* 1939, the Court invalidated Oklahoma's attempt to keep the grandfather clause. Judge Frankfurter states that the Fifteenth Amendment: "nullified sophisticated as well as simpleminded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the coloured race although the abstract right to vote may remain unrestricted as to race."<sup>84</sup> As Sitkoff notes, this asserted that: "the Court would look beyond the letter of the law to ferret out discrimination."<sup>85</sup> Whereas the separate but equal doctrine was consistent with the Bill of Rights in theory, in practice it was the basis of racial oppression. The interventionist, non-proceduralist approach of the Roosevelt Court signalled the demise of *Plessy v. Ferguson* and its separate but equal philosophy.<sup>86</sup> Thus by contrast with Sandel's view, dramatic institutional reform was an important facet of the New Deal, as the federal government asserted its authority in both the economic and racial jurisdiction of the South. Moreover, the New Deal was concerned not just with fairness of procedure but with the practical outcomes for citizens.

The reform of the laissez-faire economy likewise reveals a substantive interest, especially in relation to the status of Black citizens. The New Deal originated, of course, in response to the massive unemployment and financial chaos brought on by the collapse

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<sup>81</sup> Sitkoff 1978: 272.

<sup>82</sup> Nevertheless as Sitkoff points out the distance to be travelled was apparent in that on the same day the Court unanimously upheld the right of a political party to White-only primaries. Sitkoff 1978: 328.

<sup>83</sup> Here the Supreme Court upheld a federal law which banned interstate commerce in adulterated milk declaring that regulations affecting ordinary commercial transactions would be presumed constitutional as long as it had a rational foundation. In his famous footnote he indicated grounds for expanding judicial review. *Carolene Products Company v. United States*, 304 U.S. 144, 152 n.4 (1938) Cf. also Sandel 1996: 47.

<sup>84</sup> *Lane v. Wilson*, 307 U.S. 268 (1939).

<sup>85</sup> Sitkoff 1978: 237.

<sup>86</sup> In *Plessy v. Ferguson*, Homer Plessy sued a New Orleans railroad which forced him to leave a Whites-only car. He argued that segregation was illegal under the Fourteenth Amendment. The Supreme Court decision established the separate-but-equal doctrine ruling that separation of the races is within the bounds of the Constitution so long as equal accommodations are made for Blacks. *Plessy v. Ferguson* 163 U.S. 537 (1896)

of industry and the economic system during the Great Depression. Left to itself, the free play of individual interest produced an inherently unstable economy with dramatic effects on the political and socio-economic lives of all citizens. One could no longer have faith in the combination of laissez-faire and survival of the fittest to provide a workable social order. Both rich and poor were devastated by the economic collapse. The depression marked a practical demonstration that laissez-faire capitalism was not a natural order, success in which was a measure of the virtue of citizens; even those who were successful and were judged to be the fittest suffered during the depression. By contrast with the Spencerian laissez-faire hierarchy of race, the New Deal implicitly recognized a universality of suffering; all humans, black and white, were thought to have the same needs. Sandel characterizes the Civil Rights movement as a moment of self-government and civic engagement; the active participation of Blacks in their own political fate. It is undeniable, however, that the New Deal saw significant advances in Black participation in government. Sitkoff contends that the Works Progress Administration, for example, made Blacks feel included.<sup>87</sup> He quotes a Black respondent in an interview with Studs Terkel: "It made us feel like there was something we could do in the scheme of things."<sup>88</sup> Not only did the WPA empower individual Blacks but it was central to the survival of Black communities, rivalling agriculture and domestic labour as the main source of income for Blacks.<sup>89</sup> Moreover the WPA Education Program taught almost two hundred and fifty thousand Blacks to read and write. The Federal Music Project and the Federal Theatre Project conserved and enhanced Black culture by recording and publishing Black folk music, holding music classes for Blacks and employing Blacks in the production of dramas which portrayed the lives of Nat Turner, Harriet Tubman, Pierre Toussaint. Further, as Gunnar Myrdal argues, the tripling of Blacks in the civil service (mostly in the lower ranks) and the appointment of over one hundred Blacks to administrative positions were "the first significant step toward the participation of Negroes in federal government activity."<sup>90</sup> The Black Cabinet also raised the level of Black participation and interest in government by initiating Blacks into the maze of civil service organizations and by initiating an end to discriminatory hiring by civil agencies.<sup>91</sup>

Increased political participation significantly strengthened the power of the Black vote. In 1934, the vision among the Black leadership of the Black vote as a "balance of power" was becoming a reality as a majority of Blacks voted Democrat for the first time, thus switching allegiance from the GOP.<sup>92</sup> No longer hamstrung by devotion to the Republican party, Black voters would now be courted by both parties. A quotation from a *Time* article of 1936 is indicative of growing Black influence: "In no national election

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<sup>87</sup> This sense of inclusion grew when Roosevelt issued Executive Order 7046 which stipulated that there shall be no discrimination between otherwise qualified workers in the WPA. Discrimination persisted, but the number of Blacks on relief and the money they earned increased. Sitkoff 1978: 69.

<sup>88</sup> Sitkoff 1978: 70.

<sup>89</sup> Sitkoff 1978: 71.

<sup>90</sup> Sitkoff 1978: 76.

<sup>91</sup> The Black Cabinet is the name the press gave to The Federal Council of Negro Affairs. It was composed of many young college educated Blacks and veterans of the civil rights movement. They focussed government interest in civil rights. Cf. Sitkoff 1978: 78-9.

<sup>92</sup> Sitkoff 1978: 89.

since 1860 have politicians been so Negro minded as in 1936."<sup>93</sup> Further, grassroots protest indicates the growing activity of Blacks in American public political life.<sup>94</sup> Perhaps the most significant protest march, however, was one that didn't take place: the proposed March-on-Washington.<sup>95</sup> Sitkoff states: "More than any other single leader, organization, or event, Randolph's electrifying effort in behalf of the March-on-Washington catalyzed the supporters of civil rights into a mass movement that could not be ignored."<sup>96</sup> Randolph's militancy brought a radical edge to the Black Civil Rights movement which mobilized Blacks to a greater degree than the gradualism of the NAACP. His efforts legitimized a more combative approach to civil rights matters and gave rise to a more aggressive Black leadership.<sup>97</sup>

By contrast to Sandel's view, then, the voluntarism of the New Deal did not exclude a republican interest in civic engagement and the common good. The republican moment of American politics thus extends well into the twentieth century and the New Deal cannot be adequately characterized as a decisive moment in "the victory of the procedural republic".

### Conclusion

By contrast to the one-sided approaches of Sandel and Rawls, recognition of the dual moments of American public political life is important both historically and normatively. Sandel has an almost Whiggish conception of American history. He portrays this history as a decline from first principles, the gradual subordination of republicanism to liberalism as the official public political doctrine. The result of this decline, on his view, is a public life devoid of the civic virtues required to maintain an adequate sense of community. He looks to the redemption of this fragmented and discontented public life in a retrieval of republican-communitarian first principles. Rawls, by contrast, has an almost "Progressive" view, according to which the key to the stability of American public life consists not in a return to a republican notion of civic virtue but rather in the continuance of liberal tradition. Implicit in Rawls's sketchy account of liberal history is the view that this history is the development of a common public life made possible by the overcoming

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<sup>93</sup> Sitkoff 1978: 91. Cf. *Time*, vol XXVIII (Aug 127, 1936) p. 10.

<sup>94</sup> Protests against decisions in the Scottsboro and Herndon cases, and against the eviction of Blacks in Chicago unified Whites and Blacks under the aegis of the communist party. A banner at a funeral procession for Blacks killed in a protest over the evictions read: "NEGRO AND WHITE WORKERS UNITE TOGETHER". Sitkoff 1978: 154.

<sup>95</sup> In response to the exclusion of Blacks from the defence program, the idea of a march on Washington was raised at a meeting of various civil rights groups in Chicago. From the early estimates of between five and ten thousand marchers, by June, A. Philip Randolph was predicting one hundred thousand protesters. In the face of this threatened march, Roosevelt signed Executive Order 8802 which put into effect an end to discrimination in defence agencies. In return the march was cancelled. But the result of the political force which secured Roosevelt's capitulation went far beyond the executive order. Sitkoff 1978: 316.

<sup>96</sup> Sitkoff 1978: 316.

<sup>97</sup> Sitkoff 1978: 333.

of sectarian comprehensive differences. All that is required, then, to secure the stability of the liberal state is for citizens to accept common non-comprehensive criteria for public political discussion. On his view, citizens must agree to use public reason in their political debates, to accept political criteria for the solution of political disputes.

Both of these accounts are inadequate to the public political culture of America. First, American history cannot adequately be described as the progressive victory of neutrality. Secondly, its public life can be invigorated neither by a return to a republican sense of participation through the dispersal of sites of sovereignty nor by the acceptance of an overlapping consensus on a political conception of the state. American history suggests instead that republicanism and liberalism exist in a continuous dialectic with each other. The Lincoln-Douglas debates and the Civil War exhibit a conflicting mixture of these moments. Civil conflict was engendered by a division between the constitutional assertion of the universal rights of the citizen and sovereign southern states whose culture, founded on slavery, denied this universality on the basis of race. The public culture was torn between respect for the cultural integrity of the south, instantiated in the Constitution, and a sense of the inadequacy of slavery to the concept of freedom underlying the Constitution. Post Civil-War America attempted to reconstruct southern culture in terms of the new reality of emancipation. But the protection of individual rights could not transform the racism of southern communities. Federal intervention in the protection of Black rights was anathema to southern interests which traditionally had authority over race relations. The dispersal of power in the removal of troops and the reemergence of southern sovereignty over race, while respectful of southern communities, was disastrous for Black rights: Jim Crow laws everywhere infringed the spirit if not the letter of the Constitution.

The federalization of the Bill of Rights, which begins with the New Deal and culminates in the Civil Rights movement of the sixties, represents a very determinate unification of the liberal and republican moments of the American polis. Beginning with a concern with the universal reality of need, with the vast human suffering caused by the Great Depression, the New Deal moved to a concern with universal rights. To satisfy needs and rights it adopted a consumerist ideology and upheld the rights of Black individuals, for example, against southern states but it also bolstered communities and encouraged participation in self-government. The New Deal promoted a role for government beyond the protection of individual interest as expressed in a laissez-faire economy. Over and against the proceduralism and contractualism of the *Lochner* court, it looked to transform the conditions of the working lives of citizens, recognizing that real freedom is more than the choice to sign a contract. The New Deal promoted a sense of the national American community inclusive of Blacks and Whites and asserted the role of this national community in regulating and correcting the choices of consumers in the market-place.

Sandel thus misses an opportunity to draw on the substantive moment of the New Deal, because he adheres to a one-sided account of American history. As a result, his suggestion that the malaise in self-government can be rectified by the dispersal of power

to smaller sites of sovereignty is only a partial solution. What is further required is the education of particular communities to a sense of their basis in human freedom. Unless particular communities recognize the universal right of human freedom, the dispersal of power will result in prejudiced exclusion of minority groups. Moreover, Sandel is unclear as to how exactly a sense of national community will be created from this dispersal. He recalls the Tocquevillean view that: "Practising self-government in small spheres impels citizens to larger spheres of political activity as well" (Sandel 1996: 347). Exactly how this occurs Sandel never elucidates. What needs to be recognized and further explored is the way in which the national community already underlies the particular sites of sovereignty, and protects them from illegitimate intrusion; how the Black community, for example is supported by the liberal interest in the Bill of Rights. Together with the recognition of the role of federalism in the lives of particular communities, one must acknowledge that legal restraints and protections cannot educate and correct the comprehensive moral ideals and prejudices of particular citizens and communities. The full enactment of Black civil rights in the south demanded the moral conversion of the nation, a response in part to the dignity of Black protest, and Martin Luther King's insistent interpretation of the necessary social manifestation of Christianity. So far as citizens and communities are racist in their souls, civil rights remains a partial accomplishment and the public reason of a Rawlsian overlapping consensus will fail to correct their prejudiced comprehensive presuppositions.

The union of community and individual, of rights and participation, is already implicitly accomplished in the United States, in the public institutions which hold together the moments of republicanism and liberalism, for example, in a Congress which unifies and differentiates the principles of individual and community (in the House of Representatives and the Senate). To overcome the contemporary discontent is not to adhere to one side or the other but more clearly to spell out and adhere to their relation. Any attempt to conceptualize the ethical spirit which animates the public political culture of the United States must articulate both moments: respect for individual rights and the integrity of community; respect for the freedom to revise and to participate in self-government.