Sandel, Ontology, and Advocacy

Liberalism and the Limits of Justice by Michael J. Sandel (New York: Cambridge University Press, 1982). Cited in the text as LLJ.


Michael Sandel is generally, and rightly, seen as the United States' leading philosophical defender of communitarianism. His first book, Liberalism and the Limits of Justice, was one of the central works in the liberal-communitarian debate of the 1980's. Sandel's work since has shown a strong continuity of purpose. Liberalism and the Limits of Justice and Democracy's Discontent are deeply connected, even though the former is quite abstract, containing lengthy analyses about the Kantian foundations of John Rawls' work, and is largely concerned with moral philosophy, while Democracy's Discontent is much more concrete, since it is in large part a history of American political thought and how that affected practice. The connection is that Sandel takes Rawls' philosophy to be the best articulation of the dominant public philosophy by which we
live as a nation today. Thus the task of the first book is more than just an explication and critique of the foundations of Rawls’ work; it is also a commentary upon the theory implicit to how Americans think and act politically, even though Sandel does not even gesture (in the earlier work) in this broader direction. The goal of the second book is to show how the difficulties in our Rawlsian public philosophy, which he also calls deontological liberalism, come out in our political practice. According to Sandel, our Rawlsian philosophy occludes important questions; key concerns are left wanting.

For Sandel, the connections between philosophy and practice run very deep. Implicit to every set of human actions is an implicit theory, and a flawed theory will foster harmful or self-frustrating actions. Ultimately, for Sandel, the theory we have of human nature and the human good is crucial for how well we live. Furthermore, since Sandel finds our current public philosophy to be deeply flawed, only a new public philosophy can revive our capacities for self-government. Is Sandel correct in seeing such a close connection between theories of human nature and the human good on the one hand, and the practices and policies we engage in on the other? Sandel assumes that there are very strong connections between what we take to be fundamental for social explanations, or ‘ontological’ issues, and the various practical policies which are advocated. Charles Taylor and Alan Ryan, among others, have argued that a large degree of slack exists between the two levels. Both contend that the liberal-communitarian debate has run together at least two types of issues which ought to be kept separate. On the ontological side, the debate is between “holists” and “atomists,” or perhaps individualists. On the advocacy side there is a whole host of issues, such as whether a nation’s laws should enshrine a particular conception of the good life, how strongly rights should be emphasized and protected, and so forth. The liberal-communitarian debate, they contend, has often run these together. If Taylor and Ryan are correct, the premises of much of the liberal-communitarian debate have been misguided. Thus, in order to evaluate the worth of Sanders thought as a whole, it is necessary to also address a larger question about philosophical argument.
A better way of conceiving the relationship between the ontological and advocacy levels of argument, according to Taylor and Ryan, is that ontology frames, but does not determine, the advocacy issues. Ryan states that the connection is not strong enough to create "relations of implication between a stand on one issue and another; but there are affinities stronger than merely accidental connection between them." Taylor writes that

The relation between these two congeries of issues is complex. On the one hand, they are distinct, in the sense that taking a position on one does not force your hand on the other. On the other hand, they are not completely independent, in that the stand one takes on the ontological level can be part of the essential background of the view one advocates. Both these relations, the distinctness and the connection, are inadequately appreciated....

Ryan has argued that Sandel's work is greatly weakened because Sandel appears to see a tight connection between the two levels. Sandel clearly wants to base his advocacy stands on much broader ontological and methodological issues. Ryan is convinced that this is simply bad theory; Sandel's ontological arguments cannot provide the strong foundation he wants. I will argue that Sandel's positions on these broader conceptual issues about the nature of human beings, moral reasoning and other ontological issues do provide a strong basis for his advocacy stance.

Although it is somewhat misleading, there is a good measure of truth to the initial perception that Sandel's *Liberalism and the Limits of Justice* is his ontological work, while *Democracy's Discontent* is his work of advocacy. At the very beginning of *LLJ*, Sandel announces that "I shall argue for the limits of justice, and, by implication, for the limits of liberalism as well. The limits I have in mind are not practical but conceptual." In contrast, in *DD* Sandel focuses primarily upon what he sees as the practical defects of liberalism. Yet there can be no neat division here, for Ryan is correct in seeing the two levels tightly interconnected in Sandel. In order to show this connection, I will begin with the ontological arguments
from Liberalism and the Limits of Justice and show how they set the
terms for Sandel's arguments in Democracy's Discontent.

Ontology

LLJ is primarily concerned with what Sandel calls deontological
liberalism, and especially with a close analysis and criticism of John
Rawls' A Theory of Justice. Sandel is not concerned with utilitarian
justifications for a liberal society. He strongly implies that he thinks
that Rawls' position is superior to J.S. Mill's, and thus that by
showing the limitations of the strongest contemporary version of
liberalism, he will have shown the limitations of liberalism in
general. By deontological liberalism, Sandel means 'the idea that
"society, being composed of a plurality of persons, each with his own
aims, interests, and conceptions of the good, is best arranged when
it is governed by principles that do not themselves presuppose any
particular conception of the good..."' (LLJ, 1, emphasis in original).
Justice will have primacy to any view of the good, and this is true in
two different ways. First, justice has primacy in that it has an
independent ground of justification. It is derived without reference
to any notion of a human telos or good. The principles of right are
founded without reference to the good. What is most important
about human beings is their capacity to choose, not what they choose
or discover as their ends. This capacity of choice is located in a
subject which is prior to any ends which it chooses. In this concep-
tion of the relationship between a self and its ends, Rawls' theory is
anti-teleological. Second, justice has a moral primacy. The require-
ments of justice, based upon the right, must be met before any other
social considerations, such as utility. Hence the right has a moral
priority to the good. Furthermore, since Rawls takes the right to
speak to what separates us and the good to speak to what unites us,
in placing the right over the good Rawls is asserting that "what
separates us is in some important sense prior to what connects us."
(LLJ, 133)

For Kant, these two sense of the primacy of justice hang
together. Its foundational independence secures its moral primacy,
and the foundational independence is secured by Kant's transcen-
dental idealism and his view of the subject. Rawls wants to retain the priority of the right over the good in these two senses, yet without Kant’s very contestable metaphysics. Rawls’ idea of the original position is central to this attempt. In the original position, persons choose the principles of justice that will determine the basic structure of society, and they choose without any knowledge of their place in society. Sandel lays out two ways of interpreting the original position. The one which Rawls favors is that the original position embodies an empirical claim about the circumstances of justice. Drawing upon Hume, Rawls argues that the circumstances of justice involve both objective factors, such as scarcity, and subjective factors, such as different conceptions of the good life. Rawls thus attempts to give justice priority upon an empirical rather than a metaphysical basis. Yet Sandel argues that Rawls’ own formulation of the original position fails. On the opening page of A Theory of Justice, Rawls wrote “Justice is the first virtue of social institutions....” Yet if that is true only because of Humean facts about the conditions of justice, Rawls would have to show that these conditions apply to every society, and apply so strongly that justice becomes the highest virtue. Rawls’ argument also inadvertently implies that justice is a remedial virtue. Far from being the first and foremost virtue of persons and institutions, it really only rectifies “fallen conditions” (LLJ, 31). On Hume’s own account, benevolence is a higher virtue.

Given the empirical conditions of justice, the absence of the circumstances of justice due to, say, strongly overlapping conceptions of the good, must embody a virtue equal to or greater than justice. It follows from this that an increase in justice does not necessarily improve the moral situation. “The breakdown of certain personal and civic attachments may represent a moral loss that even a full measure of justice cannot redeem. Does it go without saying that a rent in the fabric of implicit understandings and commitments is fully morally repaired so long as everyone ‘does what he ought’ in the aftermath?” (LLJ, 33) Persons motivated by benevolence, fraternity or love in their relations toward one another will have little need for a remedial virtue like justice. Yet if one person suddenly begins
to act mainly upon justice, rather than benevolence, others may suspect that they have misunderstood the relationship and also act out a sense of justice, rather than a 'higher' virtue. The moral quality of the relationship suffers. Hence, according to Sandel, "in some cases, justice is not a virtue but a vice" (LLJ, 34).

Sandel has, by this point, achieved two things. First, he has given some considerations against the view that justice is always the first virtue. Second, he has shown the defects of Rawls' favored reading of the original position, which allows Sandel to move the argument, especially the issue of how to read the original position, onto the terms that he wants. The other way to interpret the original position is as a claim about human beings. Sandel persuasively argues that "implied in Rawls' theory of justice is a conception of the moral subject..." (LLJ, 49). Much of Sandel's argument is concerned with the Rawlsian subject and how it cannot account for much of our moral reasoning and self-understandings.

According to Sandel, on the ontological level Rawls is clearly an atomist because he conceives of the self as prior to its ends. That is, our understanding of the self should not emphasize the particular attachments a self may have (for example to a religion, tribe or political cause), but rather the self’s capacity to choose its own ends. We are individuals first and foremost, and the values and goals that we have "chosen" can never reach down to the very core of our identity. This, in turn, has important implications: "As long as it is assumed that man is by nature a being who chooses his ends rather than a being, as the ancients conceived him, who discovers his ends, then his fundamental preference must necessarily be for conditions of choice rather than, say, for conditions of self-knowledge" (LLJ, 22).

Rawls' atomism also affects his understanding of how a self chooses its ends. Sandel argues that the Rawlsian self, bounded in advance, has as its central question, "What shall I choose?" rather than "Who am I?" (LLJ, 153). It merely attends to its needs and desires, weighing their relative intensity, and choosing on that basis. Sandel calls this description of the agent, which emphasizes choice and the will, the voluntarist account of agency. It does not allow the
Rawlsian subject to have second-order desires, or desires about desires. For instance, I may wish that I had more courage or self-discipline. In such moments I am reflecting about what sort of desires I should have, and in doing so I am raising questions about who I am and who I should be. Since Rawls only allows for a subject assessing her own desires, and not reflecting upon the quality of those desires, Rawls' understanding of deliberation rules out second-order desires and is thus an impoverished conception of moral deliberation. Also, for Rawls one person cannot feel another's needs and desires and know their intensity; one can only guess at such things. Hence, for Rawls we are self-transparent, but for epistemological reasons we are largely opaque to one another. In turn this affects how we can speak to one another, even the persons to whom we are closest. Due to the limits of our knowledge of others, we can only take the role of advisors. Since I cannot know what another person feels, but she is self-transparent, I am poorly situated to tell her that her course of action will end up badly for her, perhaps because it will take her away from what she genuinely wants but does not realize she wants.

Rawls' understanding of the relationship between the self and its ends also rules out a strong conception of community. Sandel lays out three different views of community. The weakest view is where individuals join a community merely to further their own self-interest. This instrumental view can be found, for example, in Robert Nozick's *Anarchy, State, and Utopia.* Rawls' view does not assume that all agents are purely self-interested; some may act out of benevolent or altruistic concerns. Sandel calls Rawls' view the sentimental conception of community. Persons are individuated in advance, but their motivations may be communitarian. A Rawlsian community may even be populated in large part by benevolent citizens who are concerned with one another's fate and who join in a variety of cooperative enterprises. Yet it is precisely because the self is prior to ends its that the claims of the community cannot reach all the way down. The community cannot stand as a good that has not been chosen but which still places legitimate demands upon a person. On the sentimental understanding of community, the com-
community may very well stand as something to which a person has chosen to contribute. What it cannot be, however, is part of the very background out of which the agent chooses. If that were the case, the self would not be prior to its ends, and it is this priority which rules out the possibility of a public life in which, for good or ill, the identity as well as the interests of the participants could be at stake. And it rules out the possibility that common purposes and ends could inspire more or less expansive self-understandings and so define a community in the constitutive sense, a community describing the subject and not just the objects of shared aspirations. (LLJ, 62)

This, the constitutive view of community, is the third and strongest conception. When the reach of the community goes all the way down to the identities of its members, it is at least partially constitutive of who those selves are.

In place of Rawls' atomistic self, Sandel would substitute a holist view. While Rawls separates the self from its ends, and relies upon a voluntarist account of agency to connect that self to its ends, Sandel seeks to attach the self to its ends and argues that often these ends are not chosen. When this is the case, the account of agency must also change from voluntarist to cognitive "since the subject achieves self-command not by choosing that which is already given (this would be unintelligible) but by reflecting on itself and inquiring into its constituent nature, discerning its laws and imperatives, and acknowledging its purposes as its own" (LLJ, 58). Sandel presents the cognitive account of agency as simultaneously presenting a danger and a hope. The danger is that the self will be lost in a sea of ends, not able to sort out the boundaries of the self. The subject becomes a victim of its circumstances and suffers from the dispossession of a radical situatedness. The hope is that the subject will be able to sort these out, in part because of the community the self is shaped by, and will be able to participate in the fixing of the contours of its identity.

Sandel criticizes Rawls' view of the self not only for leading to a flawed description of deliberation, but also that it ignores other morally relevant descriptions of the self. And these other under-
standings of the self, which Sandel calls intrasubjective and intersubjective, complicate the process of cognitive agency. We are at times conflicted and torn, unsure of how to proceed. Often during such periods what is at issue is what sort of person one is or wants to be, and one is torn by different aspects of one's identity. There may be "a plurality of selves within a single, individual human being..." (LLJ, 63). Sandel calls this an intrasubjective conception of the self and it opens the possibility of not fully understanding oneself. Similarly, sometimes the "relevant description of the self may embrace more than a single, individual human being, as when we attribute responsibility or affirm an obligation to a family or community or class or nation rather than to some particular human being" (LLJ, 62-63). The process of self-reflection thus requires an internal sorting out as to who one really is; that is, which attachments are incidental to one's identity and which are central to it. Yet this process also refers outside of the individual because sometimes the moral attachments which are central to one's identity involve an intersubjective self. One may discover upon reflection that one's family ties, or other communal attachments, are central to who one is. It is not that the ties of family have been chosen, but rather that family roles and commitments determine who one is.

Sandel's holist view of the self thus leads to a stronger conception of community than Rawls' `sentimental' account, in that for Sandel the community can reach fully into the self. Sandel's description of it is important for his argument:

a sense of community would be manifest in the aims and values of the participants as fraternal sentiments and fellow-feeling, for example...community would describe not just a feeling but a mode of self-understanding partly constitutive of the agent's identity...For them, community describes... what they are, not a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity. (LLJ, 150, emphasis in original)

Sandel contends that Rawls needs a constitutive conception of community in A Theory of Justice in order to support his difference
principle. According to Rawls, persons in the original position would choose as a distributive principle the maxim that social and economic inequalities are only legitimate if they work so as to benefit the least advantaged members of society. The real effect of the difference principle, as interpreted by Sandel, is that it alters the basis upon which persons claim benefits. Rather than believing that we deserve the benefits that flow from our abilities, we should instead consider our talents as the result of a genetic lottery. Since we do not deserve our talents, just like no one in particular deserves to win a lottery, we should instead consider these talents as a common asset. Nozick agrees that we do not deserve our talents, yet just because it is in some sense arbitrary that someone has her particular talents does not mean that those talents should be considered a common asset. If Rawls wants to take seriously the distinction between persons (which is the reason why Rawls rejects utilitarianism), he should not presume that assets, even when undeserved, are held in common. The lack of desert only argues against individual desert claims; Rawls has not shown why the larger society should be seen as the legitimate repository of individuals’ (undeserved) talents.

Sandel puts forward two possible defenses for Rawls. The first relies upon Rawls’ distinction between a person and her attributes. Taking individuals’ talents as a common asset does not violate the distinction between persons because it is only individuals’ attributes, not themselves, that is being used in common. Nozick anticipates this defense and asks "Why we, thick with particular traits, should be cheered that (only) the thus purified men within us are not regarded as means is...unclear." With this line of defense, Rawls is reduced to the disembodied Kantian subject that he wants to avoid. The second line of defense open to Rawls would be to rely upon an intersubjective conception of the self and hence the morally relevant description of individuals' talents would attach to a community. In this manner "Rawls might deny that the difference principle uses me as a means to others' ends, not by claiming that my assets rather than person are being used, but instead by questioning the sense in which those who share in 'my' assets are properly described as 'others'" (LLJ, 79)
When Sandal defends, albeit with a new foundation, Rawls' difference principle, he offers two practical reasons why his communitarian defense of the difference principle is superior. First, persons whose talents are being used as a common asset are less likely to find this onerous within a constitutive community because they identify with that larger community. Clearly within contemporary American society many persons resent the material support they are made to give to a welfare state they do not support, even though that welfare state is less generous than the one the difference principle defends. This is a point Sandel brings up again in Democracy's Discontent. Yet here Sandel is clearly concerned not only with the philosophical limitations of liberalism, as he announced at the beginning of Liberalism and the Limits of Justice, but with how the conceptual limitations find expression in practice. The second reason why his communitarian defense of the difference principle is superior is that it leads to an understanding of property rights, the idea of 'guardianship', which Sandel implies is more congenial to a well-functioning society.

From Ontology to Advocacy

Sandel frequently tries to link theory and practice, arguing that the defects in a theory typically are revealed in practice. In his discussion of the Bakke case in Liberalism and the Limits of Justice, Sandel writes, "Dworkin's argument for affirmative action illustrates how these perplexities, identified first in the abstract, find consequence in practice" (138). In the opening pages of Democracy's Discontent, Sandel again connects theory and practice:

My aim is to identify the public philosophy implicit in our practices and institutions and to show how tensions in the philosophy show up in the practice....Attending to the theory implicit in our public life may help us to diagnose our political condition. It may also reveal that the predicament of American democracy resides not only in the gap between our ideals and institutions, but also within the ideals themselves, and within the self-image our public life reflects. (ix-x)
Of course, Sandel does find that the problems largely lie in the ideals.

From the preceding section we can identify several problems which Sandel finds in deontological liberalism. Given the priority of the self over its ends, and the corresponding priority of the right over the good, the proper political structure emphasizes individual choice and state neutrality. In Sandel's language, contemporary liberalism sees us as 'unencumbered selves,' connected to our ends only through our will, and the freedom of that will must be maintained by having a procedural republic. A procedural republic tries to maximize freedom by avoiding favoring any conception of the good life. Instead, it relies upon fair procedures. Yet Sandel favors a conception of the self which is more situated, in which the role of moral goods or the good life is not merely a reflection of choice, but instead often reflects who persons are. We are 'encumbered selves' whose conceptions of the good are often constituents of our identity. The communities, such as families and congregations, which embody those goods thus carry a larger role in our self-understandings than deontological liberalism allows.

Those who are skeptical about strong connections between ontology and advocacy may not see large, practical implications in this debate. Yet Sandel hinges many of his arguments, both philosophical and practical, on the view of the person: "At the heart of this [deontological liberal] ethic lies a vision of the person that both inspires and undoes it... [W]hat makes this ethic so compelling, but also, finally, vulnerable, are the promise and the failure of the unencumbered self' (PR, 83) What are the connections? Why are there strong practical implications in the atomist-holist debate which make: Sandel return "so obsessively to the methodological issue?"

The first connection I want to examine does not, strictly speaking, entail a specific advocacy position. Instead it concerns how we should advocate policies. In his important article "Moral Argument and Liberal Toleration," Sandel disagrees with the way argument is conducted in the procedural republic, which he calls the 'sophisticated' form of argument. In this form of argument the legitimacy of
laws is justified by relying upon a general theory about how strongly we should take rights, and when rights should be able to trump the wishes of the majority. For example, Rawls give priority to the right over the good, so when the majority seeks to restrict certain activities (e.g., abortion or sodomy) these majoritarian preferences should not be allowed to outweigh the demands of justice. If the requirements of justice are met, the laws of the state will be neutral between competing conceptions of the good, thus maximizing an equal liberty for all. In contrast, Sandel puts forward his favored form of argument, the 'naive' form. Here laws are justified at least in part by reference to the moral worth of the activities protected by law, or the immorality of the activities prohibited by law. Laws protecting freedom of speech are thus justified by reference to how political debate is beneficial, hence the importance of protecting speech. Similarly, anti-sodomy laws should be struck down because they strike at the intimacy of same-sex couples. Clearly intimacy for opposite-sex couples is valued, not only in popular culture but also as a cornerstone of marriage. Sandel argues that the valuable aspects of intimacy in opposite-sex couples are also realized in same-sex couples, and that therefore anti-sodomy laws prohibit activity which is often morally worthy:

In favoring the naive form of argument over the sophisticated form, Sandel puts forward two different arguments. First, the sophisticated form promises a neutrality it cannot deliver. Often the case for neutrality is founded upon the voluntarist view of the self described above. What is important about human beings is not what they choose, but rather their capacity to choose. Sandel believes that this favors unencumbered over encumbered selves. That is, some persons cannot understand their core values as chosen; instead the values are put upon one by God, or nature, or family. For example, when Alasdair MacIntyre was asked about his Catholicism he replied, "I believe what I am taught to believe by God, through the Church. And, when God speaks, there is nothing to do but to obey or disobey. I don't know in what other way one could be a Roman Catholic." This is not the language of voluntarism and choice, nor
could it be translated into that vocabulary without loss; it is the language of cognitive agency. The enshrinement of voluntarism is not neutral precisely through its favoring of unencumbered sorts of self-understanding. As will be discussed below, Sandel is greatly concerned in *Democracy’s Discontent* with elaborating how the language of voluntarism has come to the forefront of America’s constitutional law over the last century and how this works against the claims of encumbered persons.

The second argument Sandel gives for the naive form of argument over the sophisticated is the former engages the "moral energies" in a manner that is important for self-governing: communities (*DD*, 24). Sandel presents human beings as creatures for whom moral goods and meanings are tremendously important. We look to our civic life to embody shared meanings. A failure to vest it with, that meaning creates two dangers. One is that citizens will forsake the public realm since they find that it contributes little to their lives. Hence the sophisticated form of argument, by fastidiously trying to avoid the language of the good (even while covertly smuggling in a particular conception of the good), impoverishes the public realm, fostering political apathy and withdrawal. The version of liberalism by which we live thus weakens our capacity for self-rule. The other danger is that the abdication by liberals of a politics richer in meaning opens the door for those who would fill the public realm with a narrow and intolerant form of meaning. If John Rawls or a Michael Dukakis is unwilling to speak to Americans’ preferences about the good, a Jerry Falwell or Pat Buchanan is. It is only by offering a richer, more inclusive form of naive argument that these inhabitants of the public realm can be countered.

The use of one of these forms of argument rather than the other affects not only the conclusions we are likely to reach, it also affects how likely we are to reach conclusions at all. In the strident form of rights talk common in the United States today, rights are invoked in an absolutist manner, which leaves little or no room for compromise. The naive form of argument opens more room for compromise and reconciliation. Also, when various conceptions of the good life are taken to be expressions of mere choice, the motivation to
discuss and debate alternative conceptions is lost. Instead, the different views of the good life held by different persons are taken to be brute facts, not subject to debate because the debate will not get us anywhere nor would challenging another on her views accord her the respect she deserves. Debate over the good life thus withers not only in the public realm but also in the private one.

The second important connection between the atomist-holist debate and advocacy positions concerns the picture of the self and the implications that has for community, citizenship and freedom. Drawing upon the constitutive understanding of community outlined above, Sandel argues:

What is denied to the unencumbered self is the possibility of membership in any community bound by moral ties antecedent to choice.... Such a community-call it constitutive as against merely cooperative-would engage the identity as well as the interests of the participants, and so implicate its members in a citizenship more thoroughgoing than the unencumbered self can know. (PR, 87)

Atomist conceptions of community, whether instrumental or sentimental, rule out strong forms of community and citizenship. For a deontological liberal this is not much of a concern. By placing the right prior to the good, the ability of the self to choose is enshrined as the capacity most worthy of respect and that respect is shown in part by having a state which is neutral between conceptions of the good life. For Sandel the constitutive conception of community is tremendously important. The reasons why concern differing notions of freedom and what it takes to achieve that freedom. The atomist view leads to a negative view of freedom; freedom exists to the extent one is left alone. In contrast, Sandel's holist view leads to a qualified theory of positive freedom. Freedom at least partly consists in self-government. One must be a participant in a community that has a significant say in its own fate. Nor is participation pursued just to further one's self-interest. Instead, Sandel's civic republican politics links citizenship with a concern for the common good. As strongly situated selves, one's own concerns need to extend to others and to
the well-being of the community one shares one's fate with. The proper form of citizenship is hence inseparable from a concern with the common good. This, in turn, requires certain civic virtues: "a knowledge of public affairs and also a sense of belonging, a concern for the whole, a moral bond with the community whose fate is at stake" (DD, 5). If these virtues are crucial to self-rule, as civic republicans such as Sandel believe, then the government cannot be neutral as to the character of its citizens. This is why republican politics has traditionally had a formative project; statecraft needs to be linked to soulcraft.

The next section will summarize the two historical narratives that Sandel gives in Democracy's Discontent. The first is the rise of the voluntarist, unencumbered self in American constitutional law. The second is how the rise of liberalism eclipsed traditional civic republican concerns about the political economy of citizenship and how the basic structures of the economy help form citizens. What is noteworthy in these narratives is how the ontological level frames the advocacy debate. While the ontological level often does not determine specific policies, it is fundamental in setting what concerns are central to the advocacy debate and hence what questions are even raised.

Advocacy

According to Sandel, the modern Supreme Court is the clearest governmental expression of the procedural republic. Over the last century our constitutional discourse has seen more traditional republican concerns supplanted by liberal preoccupations. There are three key components of the legal practice of the procedural republic: the priority of individual rights, the ideal of the neutral state, and taking persons to be unencumbered selves (DD, 28). Clearly the first idea, the priority of at least some individual rights over the wishes of the majority, goes back to the Founding era. In this, Sandel admits, our basic framework of government "gestures toward the liberalism of the procedural republic, but only from a distance" (DD, 33). Sandel wants to show that much of the American political tradition is best interpreted as civic republican. Our consti-
tutional foundations and the debates and concerns of succeeding
generations fall into line with traditional republican concerns about
the character of citizens, whether economic structures improve the
characters of those citizens and equip them with the virtues neces-
sary for self-government, and the dispersion of political power to
more local levels of government where citizens can more readily
understand and identify with that government.

Sandel is largely convincing in this goal. For example, even
though the Anti-Federalists argued for a bill of rights, it was not for
reasons typical to the procedural republic. Instead, they were
worried about preserving the power of the state governments.
Sandel does have a more difficult time with some of the leading
Federalists. Madison wanted, but did not get, a "universal veto" for
the federal government over laws passed by the states. As Sandel
himself notes, this power was gradually seized by the federal
government, largely in an effort to protect individual rights. In this
way, Madison anticipated one of the hallmarks of the procedural
republic. Similarly, Madison proposed as part of the Bill of Rights
an amendment that would have protected certain rights against state
governments: "No State shall infringe the equal rights of conscience,
nor the freedom of speech, or of the press, nor of the right of trial by
jury in criminal cases" (quoted in DD, 37).

The Bill of Rights played a negligible role for the first 80 years
of our constitutional history. It was with the addition of the 14th
Amendment in 1868 that this changed. Sanders discussion of the
14th Amendment reveals how sharp the differences between the
civic republican and liberal views of government can be. The
Supreme Court interpreted the 14th Amendment so that rights
functioned as "trumps," even over the wishes of strong majorities.
"Liberty no longer depended on dispersed power alone, but found
direct protection from the courts" (DD, 42). With the growth of
rights as trumps came the growth of the power of the national
government. This first occurred with the Supreme Court striking
down economic regulations, such as a minimum wage for female
workers and a law setting the maximum number of hours a week that
bakers could work.
The second legal practice of the procedural republic, the ideal of state neutrality, did not become the norm until after WWII, but Sandel finds intimations of it early in the 20th century in the dissents of justices Holmes and Brandeis. For example, in Holmes' writings Sandel finds the idea that not only "should judges bracket their own moral and political opinions when reading the Constitution; they should read the Constitution as itself bracketing such questions" (DD, 45). Nor did Holmes take this view in a civic republican direction, as he could have, by affirming that the neutrality of the federal government is consistent with allowing state governments to take substantive moral and economic positions. Even though Holmes neither affirmed nor denied such a view, the Court subsequently took the view that government neutrality applied to all levels of government. Given this neutrality, however, how are we to decide which rights are more important? How are rights to be ranked? Are civil rights or economic rights more important? Sandel takes justice Harlan Stone as moving the modern Supreme Court forward in its solution to these problems of jurisprudence in the procedural republic. Stone emerges, on Sandel's reading, as a proto-Rawlsian, laying out Rawls' two principles of justice. Just as Rawls gives priority to certain political and civil rights, so too does Stone, arguing that the Supreme Court needs to give priority to those rights which facilitate participation in the democratic process. Then as Rawls has his difference principle, Stone also defends economic intervention so that freely choosing selves might be assured the economic prerequisites for meaningful choice.

Sandel traces the third element of the jurisprudence of the procedural republic, that of treating all persons as unencumbered selves, through the example of religious freedom. Again, the ontological background frames the advocacy issues. The older, civic republican tradition saw religious faith as potentially reaching deep into personal and even communal identity. The sharp debates over the public role of religion during the Founding obscure the important shared background of the participants in the debate. On one side were those who favored such things as only allowing Protestants to hold public office, general taxation to support the teaching of
Christianity, and other decidedly non-neutral policies. On the other side were those like Madison who argued that the separation of church and state was beneficial to both state and religion. Both sides were sensitive to the shaping of citizens’ character, and neither side argued for what we would now call freedom of religious choice. Even Jefferson, the defender of the wall of separation between church and state, argued that religious belief was not a matter of choice but rather of evidence and persuasion. On this view, persons are not freely choosing their faith; there is not the wall of separation between the self and its ‘freely chosen’ ends. Instead, persons are often encumbered by their beliefs, as MacIntyre expresses in the quote above. Religious liberty, on this view propounded by Jefferson and Madison, allows persons to meet their religious duties rather than express their religious choices. Sandel describes the civic republican view as follows:

What makes a religious belief worthy of respect is not its mode of acquisition—whether by choice, revelation, persuasion, or habituation—but its place in the good life or, from a political point of view, its tendency to promote the habits and dispositions that make good citizens. Insofar as the case for religious liberty rests on respect for religion, it must assume that, generally speaking, religious beliefs and practices are of sufficient moral or civic importance to warrant special constitutional protection. (DD, 66)

The advocacy debate in the republican tradition thus turns on the question of what is most conducive to better citizens: the establishment of state churches in order to encourage good morals, or the separation of church and state in order to encourage reflection rather than the hypocrisy of a public expression of a faith not privately believed in?

In contrast, on the voluntarist view we are unencumbered selves who should be free to choose our religious beliefs and practices. It would seem that the voluntarist view provides a more solid grounding for religious freedom. After all, it was those in the republican tradition, such as Samuel Adams and Patrick Henry, who called for
America to be a Christian Sparta, and who supported taxation to pay
for the teaching of Christianity in order to "correct the morals of
men, restrain their vices, and preserve the peace of society" (quoted
in DD, 57). Yet according to Sandel, this is not the case. The
voluntarist framework aspires to neutrality and promises greater
freedom. It delivers neither. Religious 'choices' or 'preferences' are
placed on par with other preferences and choices in order to assure
state neutrality between conceptions of the good life. Yet what
results from this is that persons who see themselves as engaged in
obedience to a dictate of their God are in fact treated as persons who
have chosen a belief or practice. So, for example, an Orthodox Jew
who was ordered not to wear a yarmulke while at work in an Air
Force clinic lost his case before the Supreme Court. Judge Rehnquist,
writing for the majority, described the religious duties at stake as
"desires," "interests," and "personal preferences" (quoted in DD,
69). The self-understandings of encumbered selves are translated
into the voluntarist terms that the courts use, but this translation is
not neutral nor does it permit the greater religious liberty that the
voluntarist conception promised. Instead, religious freedom is placed
on a par with all other 'free' choices, rather than being given a special
role due to the depth of its moral significance.

The ontological background on the religious freedom issue in
one way merely structures the advocacy arguments. Civic republic-
icans argued with each other, for instance, over whether to favor a
specific religion or instead to favor the separation of church and
state. Similarly, liberals argue with each other about how far reli-
gious protections should extend and how they are best secured. Yet
in another way the ontological background is of tremendous impor-
tance. The form of justification for the political practices plays a key
role in the shaping of those practices. If the justification of the
separation of church and state is that it is beneficial for the society
at large, that it protects both the rights of conscience and the purity
of religion, certain issues come to the fore that do not come forward
on the liberal view. Madison, for example, favored having military
chaplains paid out of private monies rather than by the state. The
independence of the the clergy would thus be facilitated; religious
denominations would have a greater ability to speak out critically about U.S. military actions. One of Sandel's examples of the importance of the background assumptions concerns the Supreme Court's ruling that nativity scenes set up by local governments are permissible. Such a ruling "came at the price of denying the sacred meaning of the symbol it protected" (DD, 71). In effect, the ontological background frames what is deemed to be important. As such it helps to set what questions will be asked in the realm of advocacy. And even though adherents to a single tradition, whether liberal or civic republican, will disagree with one another over policy issues, the ontological background often sets a policy that all adherents to the tradition will agree upon, even if they disagree over the specifics of how to enact it.

An excellent example of this comes from Sandel's history of the transition from a traditional republican political economy of citizenship to our current liberal political-economic discourse. Sandel shows how what he calls the "formative ambition," that is, the belief that government must be attentive to the virtue of its citizens, shaped the debates over political economy through much of America's history. Whether one argued for an agrarian republic or for the importance of domestic manufacturers, the terms of the argument were always geared toward what would tend towards making better citizens and furthering the cause of self-government.

The historical context which gave rise to the Progressives in many ways parallels our own. The tremendous economic and social changes of the late 19th and early 20th centuries were bewildering to many, and there was a concern with the erosion of community and traditional values. There were two types of responses put forward by the Progressives. The first, articulated forcefully by Louis Brandeis, before he was on the Supreme Court, defended greater decentralization. For Brandeis there was a "curse of bigness" that attached to big government and big business. The rise of large corporations threatened to overwhelm democratic institutions; indeed, this was already happening in that large industrialists were buying off state legislatures and engaging in other abuses. For Brandeis the solution was to break up the trusts, restore competition and try to place local,
independent businessmen on a level playing field with larger competitors. For larger corporations Brandeis favored industrial democracy. The way corporations are run, where a few regard their workers as "slaves" and as "something to be worked out and thrown aside" ultimately contributes, Brandeis wrote, to "physical and moral degeneracy" (quoted in DD, 212). Workers need to have a vote in management decisions. Brandeis clearly belonged within the republican tradition, yet so too did Herbert Croly and Theodore Roosevelt, who proposed a very different vision of a Progressive response to big corporations. They argued that the modern economy tended towards bigness and this simply had to be accepted. Hence they broke with the traditional republican project of decentralization, yet they retained the formative project. The way to counteract big business was with big government. Since large corporations now worked on a national level, only the national government was equipped to regulate them and keep democratic power superior to the power of an elite few. Yet in order for Roosevelt's "New Nationalism" to work, citizens' identities would need to be directed more towards the nation as a whole. Croly, in his work *The Promise of American Life*, repeatedly wrote about the need to inspire in citizens a greater sense of national identity and national purpose.

Even though Brandeis and Croly disagreed over how the Progressives should respond to the fundamental changes of their era, they shared a republican tradition that framed their arguments. It shaped what questions would be paramount (e.g., how to preserve self-rule in the face of industrialization and the rise of large corporations), and what sort of arguments could be given about the central questions (e.g., does the curse of bigness have to be accepted). They thus shared the formative ambition that statecraft should involve soulcraft, even while disagreeing over precisely what form this statecraft should take. In the procedural republic there is also a shared background which sets the terms of debate. On the one side are those, such as Milton Friedman and Robert Nozick, who argue that freedom is maximized by having a small state with low taxation. On the other side are those, such as Lyndon Johnson and John Rawls; who have argued that there are important material prerequi-
sites to freedom, and therefore the state has an important role to play in ensuring that citizens have enough to pursue their own freely chosen view of the good life. Neither side of liberalism, however, is willing to accept the formative project, nor do they even raise the question of what economic arrangements foster self-government.

As these examples of the political economy of the Progressives and contemporary liberals suggest, the ontological background plays a critical role in setting the terms of debate. The sort of debate about economics found in America today is strikingly different today than it was a century ago because we operate with a different background conception of the person as a freely choosing, unencumbered self. For that sort of person the key questions involve how to maximize the area that person can choose in, and whether the state providing material benefits helps or hinders that self in its pursuit of its self-chosen ends. Economic discourse is not moral discourse; it concerns practical questions of growth and redistribution. On the civic republican conception, persons are largely shaped by the sort of institutions they inhabit, which entails a concern for what sort of citizens are being made by our central economic and social institutions. Furthermore, citizens should be concerned with self-government, since it is essential to freedom, but this means that they need an expansive self-understanding, a concern with something larger than themselves. Governmental policies must keep these concerns in mind and try to cultivate the proper sort of citizens, perhaps not by direct intervention but rather by indirect policies that try to preserve the health of the intermediary organizations of civil society. These institutions in turn help citizens to discover their proper ends, a concern which shows that a cognitivist rather than voluntarist conception of the self is clearly at work in the civic republican tradition. Ultimately this leads to a different type of debate about matters of political economy. Redistribution may still be important, but the central question becomes one of how the basic structures of the economy affect citizens, especially whether or not they cultivate the habits and dispositions essential to self-government. The ontological background thus frames the debate in ways that cannot help but have important practical or advocacy implications, even if it does
not in itself set the policies in their entirety.

Conclusion

In the 1950's there was a claim that the West had reached the 'end of ideology'. That claim itself had a deeply ideological bent. The claim that ontology and advocacy are only weakly linked is itself ideological, or perhaps a piece of advocacy. It is not just a descriptive and neutral claim about how philosophy and practice are linked or not linked. Instead, it smuggles into such an allegedly neutral description the idea that deep facts about human nature do not have practical ramifications. For some philosophical positions, seeing a great deal of slack between ontology and advocacy is perfectly appropriate: Clearly this is the case for the Rawls' later formulation of liberalism found in his second book, or for Richard Rorty's politics. Yet it is inappropriate for the position of Sandel, Alasdair MacIntyre, and others. Furthermore, to criticize Sandel, as Ryan does, for seeing a tight connection between the two levels of argument is to criticize him for not philosophizing as a certain type of liberal. This is permissible, of course, except that Ryan presents Sandel as making a general philosophical mistake. But Sandel is not making such a mistake. Instead, Sandel presents a well-thought out description of human beings; it is a strongly holist view with practical implications. And from Sandel's perspective it is appropriate to make such connections. As far as I can tell, this does not implicate Sandel in errors of logic or generic philosophical mistakes.

Strong claims about the nature of human beings, that, for example, we have a certain telos or a law given to us by a divine being, will almost always have strong practical implications. From within this sort of philosophical perspective, a closer connection between the ontological and advocacy levels is natural. In order to show that ontology and advocacy should not be tightly linked it would be necessary to show that claims that human beings have a determinate nature or telos are always false. Yet Ryan has not even tried to argue this, nor does Taylor want to. Sandel does make important claims about human nature, claims that are virtually certain to have important practical ramifications.
NOTES

2. Alan Ryan, "The Liberal Community" in *Democratic Community: NOMOS XXXV*, ed. by John Chapman and Ian Shapiro (New York: New York University Press, 1993), p.99. See also his "Communitarianism: the Good, the Bad, and the Muddy" *Dissent*, Summer, 1989: 350-354. Sometimes it appears that Ryan is suspicious of strongly linking the ontological and advocacy levels of argument because he dislikes the abstractness of the former. When he describes the form of communitarianism that he is most sympathetic to, he writes, "It is...the one piece of communitarian thinking that-partly because it comes without contentious philosophical trappings-manages to put forward an attractive political position...." (p.354)
4. See Ryan, "Republican Nostalgia" *Dissent*, Winter 1997: 119-124. Taylor has defended Sandel against this objection (see "Cross-Purposes", pp.161-2), but on my reading Taylor's defense is misguided. Sandel sees the two levels as closely connected, and so while the argument in *Liberalism and the Limits of Justice* is almost entirely on the ontological level, Sandel clearly sees this as having strong implications for advocacy.
7. Sandel is persuasive about the conception of the person implicit to Rawls' *A Theory of Justice*. Rawls has since reformulated his position and now insists that his theory of justice as fairness is only political, not metaphysical.
9. See A Theory of Justice, section 46.
13. "Interview with Alasdair MacIntyre" Kinesis: Graduate Journal in Philosophy, p.43.
15. For an example of this that verges on self-parody, see DD, pp.292-3.