
*The Philosophy
and Politics of Freedom:
Classical Solutions to Modern Problems*

Jeanne M. Heffernan

The concept of freedom or liberty has had a central place in the American republic since its inception, as our great founding documents attest. The creedal section of the *Declaration* counts liberty as an unalienable right, divine in origin, whose protection is the very object of government. And, as the *Declaration* has been called the animating soul of the *Constitution*, we are not surprised to find the concept of liberty permeating this document too, from the preamble to the Bill of Rights. It is at the heart of our fundamental law. Yet, while freedom is the core principle of the American republic—championed by left and right alike—it is also the most contested concept in our public life. In classrooms and courtrooms, Americans debate such foundational matters as the nature of freedom and the purpose of politics, and the power to define these concepts in public law is perhaps the most coveted of spoils in the culture war.

DEMOCRACY'S DISCONTENT

As Michael Sandel observes in *Democracy's Discontent*, freedom does not have and has never had a univocal meaning for Americans. Indeed, rival political theories that have competed for primacy as America's public philosophy have invested the concept with vastly different meanings and have in consequence envisioned the role of government in the lives of its citizens in vastly different terms. Sandel notes that procedural liberalism is *the* dominant political theory of our day. Yet, while it enjoys the status of America's public philosophy, and has for the past century, its adequacy is doubtful. Our democracy, according to Sandel, is in a "winter of discontent," not likely to

be turned “glorious summer”¹ by the sun of liberalism, for it cannot remedy the ills that afflict us; specifically, liberalism cannot on its own terms repair the loss of our self-government or the erosion of our communities.² Why not? In Sandel’s reckoning, liberalism’s deficiency stems from the fact that it has an impoverished anthropology and political vision. One best perceives the character of American liberalism and its deficiency, according to Sandel, in contrast to its main rival throughout our history: civic republicanism.

To envision this rival tradition requires of us, who have been schooled in the terms of liberalism, some imagination, for at the center of the conceptual scheme of civic republicanism lies the community of citizens, not the isolated rights-bearing individual. Civic republicans speak in terms of membership in a political community with its corresponding roles, identities, and obligations. In Sandel’s words, the individual in civic republicanism is an “encumbered self,”³ rooted in a web of connections many of which it did not choose.

Freedom and politics follow from this primary anthropology. The tradition of civic republicanism considers freedom as essentially connected to the capacity for self-government and economic self-sufficiency, and it views the cultivation of the virtues necessary for such rule as one of the principal ends of government. Thus politics, whatever else it includes, entails positive action on the part of the state to foster certain ways of life and discourage others.

By contrast, civic republicanism’s challenger and successor, procedural liberalism, weakened, if not severed, both of these connections. In Sandel’s estimation, this change reflects a fundamentally different anthropology. Liberalism works with a “voluntarist”⁴ conception of the self, the self as an individual agent independent of and prior to his ends. It places primacy upon the individual as a bearer of rights and seeks to protect these rights against the encroachments of other individuals or of the state. Freedom is no longer conceived in terms of self-government and economic self-sufficiency, but rather more broadly as the ability to select one’s life goals using the means of one’s choosing so long as those means are not deemed harmful to another.⁵ Relat-

¹ William Shakespeare, *Richard III*, ed. David Bevington (New York: Bantam, 1988), p. 5.

² Michael J. Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* (Cambridge, Massachusetts: Belknap Press, 1996), p. 3.

³ In contrast to the “unencumbered self” embraced by liberalism; see Sandel, *Democracy’s Discontent*, pp. 119, 322.

⁴ *Ibid.*, p. 92.

⁵ American liberalism effectively adopted J. S. Mill’s harm principle: “[T]he sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant” (*On Liberty and Other Essays*, ed. John Gray [Oxford: Oxford University Press, 1991], p. 14).

edly, government in the procedural liberal scheme adopts a stance of neutrality with respect to the life plans of its citizens and largely forsakes its educative, character-building function, in favor of a regulatory one. Reminiscent of Aristotle's description of a mere alliance versus a true polis found in the *Politics*, a liberal state concerns itself with curbing injustice between its citizens, not with habituating them in virtue. Appealing to John Rawls's work, Sandel summarizes the point this way: "The liberal state . . . does not discriminate; none of its policies or laws may presuppose that any person or way of life is intrinsically more virtuous than any other. It respects persons as persons, and secures their equal right to live the lives they choose."⁶

In Sandel's catalogue of the most salient conflicts that have shaped the republic, the disparate character of these theories is strikingly apparent. In the weightiest matters of political economy and social policy, procedural liberalism and civic republicanism have diverged, each relying upon an opposing view of man and the state.

In the first half of the nineteenth century, American statesmen were preoccupied with the economic design of the new republic. In short, they wrestled with the question of whether to remain largely agrarian with small, contained industry or to follow the path of our rapidly industrializing cousins across the pond. Civic republican and liberal alternatives claimed center stage. For the civic republicans, what was at stake was much more than a narrow economic issue. The choice of economic design was laden with political and social consequences. Why did the civic republicans burden this decision with such gravity? Because they perceived that the manner of economic production shapes character and that the character of a people affects its vision of freedom and politics.

Thomas Jefferson, perhaps the most eloquent exponent among the civic republicans, vigorously opposed large-scale manufactures as breeding grounds of vice. As Sandel explains, wage laborers were not free men in Jefferson's eyes; their economic dependence rendered them servile and the drudgery of their work rendered them susceptible to all manner of vices. The owning class itself would be consumed with avarice, softened by luxury and would encourage a petty acquisitiveness among the citizenry. All of which would corrode the institutions of self-government upon which liberty depended. Hence Jefferson's plea for the state to discourage domestic manufactures and promote instead agrarianism and skilled craftsmanship as modes of production conducive to independence of mind, thrift, industry, and the pride of ownership—traits of democratic citizens.

⁶ Sandel, *Democracy's Discontent*, p. 13.

In contrast to this vision of political economy, the liberal account, so ably defended by Alexander Hamilton, held that the development of large-scale domestic manufactures should proceed apace. The government should aid its development and allow the natural dynamism of industrial capitalism to unfold. It is not for the government to determine which modes of production are worthier than others. Rather, what is paramount is prosperity and fairness.⁷ Liberalism won. Hence the now familiar path of industrialization, wage labor, and the corporate economy—ultimately with protections in place for the worker as contract maker and for the consumer as buyer, but with remarkably little attention to the political and civic effects of the economic process.

While the conflict between civic republicanism and liberalism in the economic arena reveals a striking shift in public philosophies, nowhere is the change more remarkable than in the area of social policy, especially in the jurisprudence of privacy. According to Sandel, one finds in the Supreme Court's reflections on the "right of privacy" a marriage of liberalism's fundamental tenets: state neutrality and individual autonomy.⁸ The story of privacy jurisprudence evinces a dramatic shift from an older, civic republican defense of privacy to a novel, liberal defense. Traces of the older view remain as late as 1965 with the famous contraception case, *Griswold v. CT* in which we find the Court's first explicitly constitutional recognition to the right of privacy. Yet this right is defended upon traditional grounds. The Court does not deny Connecticut's right to adopt a view of the good, or to legislate in such a way as to foster a certain conception of virtue. It does have the right to regulate the distribution of contraceptives, though it does not have the right to regulate their use. But this restriction on state power is not justified on the basis of a "right to use contraceptives"⁹ but rather on the grounds that the social institution of marriage is a privileged sphere that commands a degree of privacy the Connecticut law would violate. Less than ten years later, however, the Court abandons this view and strikes down a law restricting the distribution of contraceptives to unmarried persons. *Eisenstadt v. Baird* now adopts a liberal defense of privacy and "re-describe[s] the bearers of privacy rights from persons *qua* participants in the social institution of marriage to persons *qua* individuals, independent of their roles or attachments."¹⁰ The decision also expands the concept of liberty from the more restricted notion of freedom

⁷ *Ibid.*, p. 124.

⁸ *Ibid.*, p. 91.

⁹ *Ibid.*, p. 95.

¹⁰ *Ibid.*, p. 97.

from surveillance to the much larger notion of freedom to engage in certain activities without government restrictions. "The Court," Sandel writes, "protected privacy . . . not for the social practices it promotes but for the individual choice it secures."¹¹

The most controversial application of the right of privacy occurred one year later in the famous 1973 case of *Roe v. Wade*. Here we see the triumph of the procedural liberal view of individual autonomy and the neutral state. In its decision, the Court affirms the right of privacy to mean the right to make certain sorts of choices free from interference by the state (or husbands or parents). And it uses the language of autonomy to describe the privacy interest at stake. Privacy rights do not depend upon the virtue of the practice engaged in, but rather on the principle that the individual exercises free choice in intimate matters.¹²

In these contests between these rival political philosophies, procedural liberalism won. Its view of liberty and the proper role of government increasingly defines the nature of the American political process. Nowhere is this more evident, according to Sandel, than in contemporary jurisprudence in the areas of family, church-state, and privacy law. For Sandel, this turn of events marks a decline; the retreat of civic republicanism represents the loss of a rich vision of the polity that liberalism cannot supply. Indeed, as Sandel sees it, the American republic is in a crisis. As the subtitle of his book suggests, America is in need of a new public philosophy. Having exposed the weaknesses of procedural liberalism, Sandel concludes that we must refashion a public philosophy more adequate to the complex task of governing a modern polity, and he appeals to the older tradition of civic republicanism to do so.

CLASSICAL SOLUTIONS TO MODERN PROBLEMS

There is another source, as yet regrettably little known, to which Sandel might turn in this task. That is the work of Yves Simon. It holds promise, I think, for offering classical solutions to the modern problems identified by Sandel. I refer to Simon's work as classical in two senses: it not only draws upon the rich heritage of classical learning through the Aristotelian-Thomistic tradition, but it also represents a living engagement in the perennial philosophy. As such, I will argue that Simon's careful analysis of freedom, autonomy,

¹¹ *Ibid.*, p. 97.

¹² *Ibid.*, pp. 99–100.

and authority constitutes a vital resource for thinking about the philosophy and politics of freedom in this new century.

As noted above, Sandel spots the hegemony of liberalism in many places, but especially in contemporary jurisprudence and particularly in the area of privacy law. In this vein, I would like to address a recent Supreme Court case that evinces the strength of that liberal hegemony, that is, the hold it has on the legal imagination, as well as its intrinsic philosophical weakness.

The 1992 decision in *Planned Parenthood v. Casey* is a test case of the topic of this paper, namely, the philosophy and politics of freedom. In it, one sees the logical conclusion of the anthropology behind political liberalism both with respect to its vision of human autonomy and the proper role of political authority. By way of a brief summary, the majority decision in *Casey*, supported by five of the justices, sustained the fundamental right of abortion, first elaborated in *Roe v. Wade*, as a matter of substantive due process. Accordingly, the Court struck down several provisions of a Pennsylvania law that placed certain constraints, such as spousal notification, on the abortion process. What is striking in this case is not simply the fact that the justices admit the fallibility of *Roe*, or that they offer a crudely utilitarian defense of the availability of abortion, though these are striking enough. What is especially noteworthy, as various commentators have pointed out, is the Court's anthropology operative in the now famous, or infamous, "mystery passage."

At the beginning of their decision, the majority solemnly warns that "Liberty finds no refuge in a jurisprudence of doubt." To which Yves Simon would say, "Amen." Then the justices note that although the right to an abortion has been nationally protected for nearly twenty years—recall this is a 1992 decision—"that definition of liberty is still questioned." The Court dutifully supplies us one. Enter the "mystery passage." According to the justices, the Fourteenth Amendment's due process clause protects the freedom to make choices "central to personal dignity and autonomy." Indeed, the Court continues, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."¹³

Time does not permit an extensive analysis of this puzzling passage. Suffice it to say that the passage, and the larger holding of the Court, is problematic on three counts, namely, in its conception of liberty, autonomy, and authority. It is precisely in light of these concepts that Yves Simon's work is so

¹³ *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

illuminating and provides a helpful framework for assessing the claims of the Court in this case.

First, from a Simonian perspective, the Court's view of liberty fails because it is tied to an untenable, radically subjective epistemology. For Simon, the Court has failed to grasp the essential connection between freedom and truth. Simon would affirm what the Court does not consistently affirm, namely, "Liberty finds no refuge in a jurisprudence of doubt." Instead, liberty finds a sure footing only in a jurisprudence of belief, belief in the power of the mind to perceive truth. (Incidentally, this seems to have been the assumption behind the celebrated progressive decisions of the Warren Court.) This is so because liberty is intrinsically connected to truth.

But this connection, Simon laments, was ill-perceived by liberalism, the basic philosophical foundation behind the *Casey* decision, because it adopted a faulty view of liberty as a whole. In general, according to Simon, liberalism has misunderstood freedom as indeterminate choice. Man is free because he can choose x, y, or z, irrespective of the character of the objects chosen.¹⁴

But, as Simon notes, "[T]he charms of indetermination are often mistaken for those of freedom."¹⁵ Freedom conceived as indeterminate choice constitutes only a pale reflection of full freedom. It constitutes, what Maritain would call, initial freedom, that is, freedom in its primitive stage, as opposed to terminal or developed freedom.

A brief remark about Simon's anthropology is in order here. Essential to Simon's view of man is the notion that human beings have a nature and that it is in our nature to be oriented toward an end, namely, happiness. Corre-

¹⁴ Yves Simon supplies a rather humorous and perhaps exaggerated example of this view drawn from the youthfully romantic travel diary of René de Chateaubriand who relates: "Many boast of loving liberty, yet almost no one has a proper understanding of it. When, in my travels among the Indian nations of Canada, I left the European settlements and found myself, for the first time, alone in the middle of a sea of forest, a strange revolution took place in my soul. In the kind of delirium which got hold of me, I was not following any track; I was going from tree to tree, to the right and to the left indifferently, and I was saying to myself: here, there are no more ways to be followed, no more cities, no more narrow homes, no more presidents, republics or kings, above all, no more laws, and no more men. Men here? Yes, a few good savages who do not bother about me anymore than I do about them; who—again like me—wander freely where thought drives them, eat when they want to, and sleep where and when they please. And to test whether I was at last reinstated in my original rights, I elicited a thousand acts of will which infuriated the tall Dutchman who served as my guide and who, in his soul, believed that I was crazy." To which Simon wryly adds, "Who would disagree with the Dutch guide?" (Yves R. Simon, *Freedom of Choice* [New York: Fordham University Press, 1992], pp. 2–3).

¹⁵ Simon, *Freedom of Choice*, p. 121.

spondingly, our will is by nature oriented toward the good, the absolute good, and finds itself attracted to partial or limited goods insofar as they instantiate some degree of the *bonum in communi* or comprehensive good.¹⁶ Now initial freedom includes the possibility of choosing rightly or wrongly. Herein lies its deficiency. Freedom is the power to make a choice between the means offered to our action. But there are authentic means, means that lead to our end and inauthentic means, illusory means that lead us away from our end. But, “[f]reedom to choose illusory means is itself only an illusion of freedom, for a means which does not lead to the end is not a means.”¹⁷ Here is where truth comes in. The will cannot be protected from choosing illusory means, of making wrong choices, if the intellect is clouded by error. Thus, Simon insists, “All of our real freedom is contained within the limits of our knowledge of truth.”¹⁸ The High Court notwithstanding, liberty does not flourish, but rather founders on the shoals of skepticism and subjectivism.

The second count on which the *Casey* decision fails is in its view of autonomy. Behind the Court’s reaffirmation of *Roe* lies a conception of autonomy tinged with the individualism that informs the Court’s understanding of liberty. The individual agent’s reasoning and decision is paramount. As the justices put it: “The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”¹⁹ Yves Simon also places a primacy on autonomy, but he defines it in a very different way. Autonomy, for Simon, is not the state of initial freedom, as the Court supposes it to be. It is not the ability to choose x, y, or z in conformity with what we subjectively prefer. Rather, it is the state of fullest freedom whereby the moral law has been interiorized and definitively guides our decision-making. Simon regards such autonomy as “a vocation and a conquest.”²⁰ It is what our nature calls us to, but its achievement is arduous. In this condition, one that we only fitfully and gradually approach, our intellect makes sound judgments as to what is to be done, and our will virtuously adheres to those judgments. The spontaneous inclinations of the agent coincide with the demands of the moral law. Far from eliminating freedom of choice, as some might suspect, this adherence of the mind and will to the good in the state of terminal liberty, opens up the field of action, for within the limits of the good, there are many possibilities for choice. Simon appeals to St.

¹⁶ *Ibid.*, p. 23.

¹⁷ Yves R. Simon, *Freedom and Community*, ed. Charles P. O’Donnell (New York: Fordham University Press, 2001), p. 4.

¹⁸ *Ibid.*, p. 4.

¹⁹ *Planned Parenthood v. Casey*.

²⁰ Simon, *Freedom and Community*, p. 18.

Thomas in explaining this phenomenon. The will, according to Thomas, is not naturally determined with respect to particular goods. And this is a perfection. "The more a being is elevated in the ontological hierarchy, the more it is self-sufficient, and independent of the particular means in the achievement of its perfection."²¹ Thus, for Simon, the more perfectly man conforms to his ontological status as a free, creative agent, the greater the plurality of means open to him. Enlightenment, he contends, increases our amplitude of choice. It rules out illusory means and multiplies genuine ones. Hence, the glory of the autonomous individual is precisely his ability to reflectively evaluate in freedom a whole range of means to achieve his end.

But this deliberation is not carried on in isolation. For Simon the quest for autonomy is pursued in community, and the moral law with which autonomy accords concerns not the isolated individual, but the person in community. Thus, autonomy is essentially related to the common welfare. To achieve the common welfare, Simon observes, requires authority. In a community of a certain type and size, it requires *political* authority. It is important to note that in Simon's view political authority and personal autonomy do not in principle conflict but rather complement one another.²² Each is necessary for a healthy polis. According to Simon, the principle of authority entails that some organ of the community must choose the means to the common good when those means are plural; it must, in short, will both formally and materially, the conditions of the common welfare. The principle of autonomy or subsidiarity entails that whenever a task or decision can be satisfactorily achieved by the initiative of the individual or small social units, it should be, in order that the capacities of intellect and will in such persons or groups be developed most fully. Political authority, then, in its most basic function does not substitute for the judgment and decision of its citizens in areas within their competence.²³

This leads us to the third count on which the *Casey* decision would fail for Simon. The decision offers an inadequate picture of the role of political authority. (Indeed, in light of its radically subjective view of freedom and knowing, the Court undermines the legitimacy of law and its own legitimacy as a definitive interpreter of law.) In stark contrast to the picture of the state

²¹ Yves R. Simon, "Beyond the Crisis of Liberalism," in *Essays in Thomism*, ed. Robert Brennan (New York: Sheed and Ward, 1942), p. 412, n. 9.

²² Yves R. Simon, *Philosophy of Democratic Government* (Notre Dame, Indiana: University of Notre Dame Press, 1993), p. 71.

²³ Yves R. Simon, *A General Theory of Authority* (Notre Dame, Indiana: University of Notre Dame Press, 1980), p. 57.

outlined in *Casey*, Simon invests the state with genuine authority to determine the conditions of the common good. Pursuant to its essential function, political authority will proscribe by law certain actions as inimical to the general welfare. A law restrictive of abortion, like the Pennsylvania law in question, arguably fits this description. But this need not, in principle, impinge upon personal autonomy; rather, assuming it is just, the law works to remove certain bad choices as possible courses of action and in so doing, in Simon's words, actually delivers human freedom from "its heaviest burden."²⁴ It removes illusory means to the end, thereby freeing the will from its possible irresolution and from the dangers of choosing wrongly.²⁵ Good law thus assists the individual and the community; it encourages the cultivation of virtue requisite to autonomy and in so doing fosters the development of a community of free men—the great desideratum of social life.

In summary, then, Simon's understanding of liberty, autonomy, and authority serves as a vital resource for assessing the deficiencies of liberalism as evidenced in contemporary jurisprudence. But the value of Simon's work is not merely critical. Indeed, it has much to contribute positively to the task to which Michael Sandel and others have urged us, the refashioning of a public philosophy to guide the American republic in this new century. A public philosophy grounded in Simon's Thomistic anthropology and political vision would reinvigorate the crowning values of the republic—life, liberty, and happiness—immortalized in Jefferson's *Declaration*. It would, I think, in the first place, protect life in its every stage; it would also safeguard liberty as the capacity to realize the good, and, finally, it would enshrine happiness as the *telos* of personal and social life and confirm its place as the polestar of democratic politics.

²⁴ Simon, *Freedom and Community*, p. 43.

²⁵ *Ibid.*, p. 55.