The Political Turn in Republican Constitutionalism: Left to Right?

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Abstract

In this paper, I examine how the republican constitutionalists have changed their political positions. They agree coherently on positioning them in contrast to pluralists. But Sunstein and other former republicans saw individual rights as institutional products rather than pre-political provisions, self-government of the people as interrelated to their rights, and considered federalism as an arena where self-government would be realized. However, Barnett, a later republican, sees individual rights as natural endowments than artifacts, emphasizes them as holding a higher value than self-government, and views federalism as a system in which individuals would make a free choice. This shift of their position will prove to be described as getting less faithful to the historical tradition, recognizing the deliberative process less active, and perhaps weakening their ambition to provide an alternative to liberal constitutionalism.

Table of contents

1. Introduction

Numerous theoretical studies on constitutional republicanism have been published in the 1980s and attracted the attention of many critics. The culmination was probably a symposium entitled "The Civic Tradition of

Republicanism" held at Yale University in 1988. It was Cass R. Sunstein and Frank I. Michelman who jointly delivered the keynote lectures and developed the position of republican constitutionalism. Unlike liberal constitutionalism based on the Lockean theory of natural rights that has been dominant, they offered a new interpretation of the U.S. Constitution, illuminating it in the light of the civic republican tradition that has been inherited in the history of Western political thought. Their arguments attracted much attention not only in constitutional theory but also in a variety of other areas, generated followers among leading theorists, and were introduced in Japan as well. However, since they did not publish so vigorously on the subject after the 1990s, such a temporary boom may be described as having been somewhat burning down without arousing further controversy.

In recent years, however, new theorists have surged who have defended the U.S. Constitution in the light of the republican perspective. The leading figures in this movement are Randy Barnett, Sanford Levinson,(1) and Mark Levin.(2) Among them, the representative theorist is Barnett, who is attempting to offer a new interpretation of the U.S. Constitution in the name of republicanism, as the title of his book "Our Republican Constitution" indicates.

However, their arguments are not necessarily homogeneous with that of the former republican constitutionalists. There are significant differences among them, especially in their political tendencies. Sunstein, Michelman, and others are generally considered to be politically "liberal" or "progressive." Though simple labeling might not be desirable, they emphasized a different perspective from liberalism as a philosophical position. Barnett, on the other hand, is considered to be "libertarian" or "conservative" in his defense of economic freedom and the market system. Then, have the advocates of republican constitutionalism turned their political position? Has republicanism come to be exclusively designated by the right, not the left? It is the

(1) Barnett admits that the U.S. Constitution is undemocratic in the way Levinson suggests, and Levinson provoked him to write his book and title it "*Our Republican Constitution*." Barnett 2016, p.26.

(2) Levin views the constitutional requirement in which three-quarters of the state must ratify any proposal emerging from the amendments convention as a process of "constitutional republicanism." Barnett 2016, pp.256–57, Levin 2013, p.15.

purpose of this essay to examine that political turn.

In this paper, I examine the political transition by comparing the former and the later republican constitutionalists. The structure of this essay is as follows: in 2. I confirm the consistent position of republican constitutionalism. To this point, both of them prove to share a common stance in positioning them in contrast to pluralism and the majority rule. In the following chapters, I focus on several topics, showing the differences between them: in 3., on individual rights, in 4., on their relationship to self-government, and in 5., on federalism. In 6., I assess their transitions focusing on the historical fidelity, the understanding of the division of institutinal roles, and the possibility of being a promising alternative. Through these considerations, the implications of the transitions will become clearer.

2. Common ground : Contrast to pluralism and the majority rule

Madisonian problem

Republicans, especially American republicans, tend to define their doctrine as hostile to pluralism or the majority rule. There is no difference between the former and the later republicans in this regard. Both see the socio-political situation in the present day as problematic, just like the framers of the U.S. Constitution saw it as equally troublesome in those days. Therefore, they inherit their predecessor's tasks sincerely.

James Madison, often quoted by contemporary American republicans, defended a federal government, a large republic, from a republican viewpoint in *Federalist Papers*, *No.10*. The public welfare of the United States, according to him, was too distorted by the interests and forces of the dominant majority at that time. What was needed to correct those distortions, to placate the tyranny of faction, and to protect the public good and private interests was not a direct democracy, but a republic, governed by representatives. He stated,

> [⋯] as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive

merit and the most diffusive and established characters.(3)

The same advantage which a republic had over democracy was enjoyed by a large over a small republic. In other words, a republic, in which representatives were elected by the mass of the electorate, was superior to a democracy in which a small number of people debated each other directly, in terms of securing excellent human resources and inhibiting the tyranny of faction. Democracy, as opposed to a republic, was thought of as a system in which a subgroup of society sought to realize its own interests through public policy in the name of the public good by means of majority manipulation. To paraphrase in the terminology of later political theory, it may correspond to "interest-group pluralism" as described by Joseph Schumpeter and Robert Dahl, or to the "majority rule" which counts the aggregation of existing preferences as a public good.

Former republican position

Contemporary republicans have tended to take over this Madisonian defense of a large republic and establish it as a political theory that overcomes interest-group pluralism and the majoritarian rule. The former republican constitutionalists aimed to do so.

Sunstein, for example, seeks to put emphasis on deliberation about the public good, as opposed to pluralism and the majoritarian rule. According to him, some theorists of public law has a "pluralist" view of the political life in modern society, in which a system of "aggregating citizen preferences" is used. But it faces the following difficulties. First, it produces unacceptable consequences, such as the subordination of certain social groups, as a result of indifference among the differences in private preferences of individuals and groups and of ignorance of the sources and effects of unjust preferences. Second, it is unable to present an accurate aggregation due to "cycling problems, strategic and manipulative behavior, sheer chance, and other factors" pointed out by public choice theory. The majoritarian rule is indifferent to the diversity or the strength of preferences. Third, it does not place a high value on political participation and fails to cultivate civic disposition neces-

(3) Madison 1787.

sary to support political life, such as "self-development, feelings of empathy, social solidarity." The pluralist view of politics is a generally accurate description of American public life today and is taken for granted by many theorists.(4)

During the drafting of the U.S. Constitution, however, there was an alternative to pluralism that influenced the foundation of American public law. For Federalists like Madison, the primary task of representatives from states was not to deal and negotiate over particular interests of their constituents but to deliberate over the public good. As Madison quoted above, representatives in Congress would be able to consider the common good for all American citizens by keeping a suitable distance from their constituents, rather than realizing their desires and interests as they were.(5) Deliberation has its advantages because it eliminates the unjust interests and preferences that voters might have. The preferences of each person or group are not exogenous to politics, but are a function of existing institutions and practices. They can be listed on the agenda in deliberation, subject to scrutiny and review, and if they are judged to be based on collective bias or prejudice, they will be eliminated as unjust preferences. The republican thought have several advantages over pluralism, besides deliberation: the notion of political equality, which indicates that all individuals and groups should have access to the political process; a direction to universalism, which allows consensus to be achieved through debate and dialogue; and the provision of an arena for citizenship to monitor the actions of representatives and to cultivate civic virtue. In addition to pluralism, this tradition of civic republicanism made an important effect on the Constitution during the drafting period, and the influence of this tradition must be taken into account now that the pluralist view of the Constitution has been dominant.(6) In this way, the for-

(4) Sunstein 1988, pp.1542–47.

(5) Sunstein 1985, pp.45–48. Sunstein, however, does not see the conflict between republicanism and pluralism as fundamental, for he states that "[t]he federalists thus achieved a kind of *synthesis* of republicanism and the emerging principles of pluralism." [italic added by Omori] He also admits that the framer's view of human beings, the institutions, and rights it establishes was also a "hybrid" of pluralism and republicanism, and a "corrective" to the pluralist view of the Constitution. Sunstein 1988, pp.1561–64.

(6) Sunstein 1988, pp.1547–61.

mer republicans characterized their position.[7]

Later republican position

The later republican constitutionalists are not very different from the formers in defending a republican view of the Constitution in contrast to pluralism and the majority rule. Both of them can be said to be pointing in the same direction in trying to inherit Madisonian tradition.

Barnett defends what he calls "the Republican Constitution" in contrast to "the Democratic Constitution." Although the name is "the Democratic Constitution," it probably follows the "direct democracy" that Madison had disfavored and can be considered a constitutional view of pluralism and the majority rule in effect.[8] According to him, in the democratic conception of the Constitution, popular sovereignty is taken to mean government by the people as a collective body, i.e., government according to "the will of the people." In effect, however, the will of the people is nothing but the will of the majority, so it must be understood as government according to the will of the majority of the people. To sum up this conception, he uses a sound bite "first comes government and then come rights." It means that first there must be established a legislative authority to represent the will of the people, and then the legislative body can decide which rights should get legal protection. Distinctive to this democratic conception of the Constitution is that it is seen as "the living constitution," which is not bound by the dead of the past but is perverted to conform to the will of the majority of the people at any moment. On this conception, since judges are not elected by the majority, they should not actively exercise judicial review to invalidate stat-

(7) Michelman also defends his republican theory of the Constitution in contrast to pluralism. According to him, pluralists see politics as a means of maximizing preferences in the marketplace, but in his republican view of the Constitution, politics is seen as "jurisgenerative," imbuing a "sense of validity" as "our" law. Michelman 1988, pp.1507–15.

(8) It is tempting to understand "republican" in his term "the Republican Constitution" to mean Republican Party, and "democratic" in "the Democratic Constitution" to mean Democrat. Although in many passages he himself may actually mean it that way, he states that both views of the Constitution reflect the difference among the more fundamental worldviews that animate them. Barnett 2016, p.26. In this essay, I will understand them as two currents that run through the history of constitutional politics, distinct from the two major parties in the United States.

utes as unconstitutional, but rather must defer to the elected representatives, that is, the legislative branch.[9] This is the way to accurately aggregate the desires and preferences of the majority of the people and to express the will of the people in the Constitution.

In the republican conception of the Constitution, in contrast, popular sovereignty is seen as consisting of the people as individuals, not as a collective unit. It is not the will of the people as a whole, but the equal protection of individual rights, that the Constitution is supposed to express. To sum up this conception, he uses another sound bite "first come rights and then comes government," reversing the order of the two words in the previous one. That is to say, every person is endowed with inalienable natural rights, and then the government is established to ensure that these rights are guaranteed. The government has raison d'être insofar as it ensures that every person can enjoy his rights. What is the feature of the republican conception of the Constitution is that the meaning of the Constitution must be taken as it is until properly amended, i.e., interpreted according to its original intent. On this understanding, judges, like legislators, are the servants of the people, delegated their duties by the people, and are obligated to protect the Constitution and its rights from violations by the statute. If the legislative branch undermines the original intent of the Constitution, judges should not hesitate to exercise judicial review to invalidate the statute as unconstitutional. That, he says, was the true intent of the framers, who were involved in the drafting of the Constitution. According to him, the democratic and republican conceptions of the Constitution are fundamentally incompatible because they have different worldviews which they assume under their conceptions. And it is the republican conception, not the democratic, that correctly understands and animates the U.S. Constitution.[10]

Thus, the republican constitutionalists, former and later, have defended their position in contrast to pluralism and the majority rule, although their terminology is somewhat different. So far, they have consistently shared the Madisonian interest in protecting the country by the Constitution from the tyranny of faction, and have tried to remain faithful to the tradition of republicanism in the history of the U.S. Constitution. But they have come to

(9) Barnett 2016, pp.20–22.

(10) Barnett 2016, pp.22–28.

embrace a different understanding of constitutional essentials - individual rights, self-government, and federalism - under the common name of "republicanism."

3. Individual rights—Institutional products to natural endowments

As we have seen in the previous chapter, the former and the later republican constitutionalists have taken a similar position. But in effect they differ on some constitutional essentials. The topics taken up here are individual rights, their relationship to self-government, and federalism. They are not chosen arbitrarily but have a contextual significance. I explain at the beginning of each chapter.

The first notion I address is "individual rights." They are a focus of theoretical interest for modern republicans. In the republican tradition, which, as its original name suggests, was strongly oriented toward the public good or *res publica*. This notion was not necessarily compatible with the idea that every person could make legal demands to protect and realize his private interests. Therefore, the classical republicans, who sought to excavate the legacy of the ancient republic and pass it on to future generations, were concerned with how to take the modern conception of individual freedoms and rights in their tradition. Particularly, under the interpretation of the history that republicanism resurged in conflict with the thought of natural rights, a response to the notion of individual rights would be a central concern. It is no different for the former and the later republican constitutionalists.

Former republican view: Institutional products

The former republican constitutionalists saw individual rights as institutional products that were not pre-political but artificially prescribed. They were seen as a mechanism of legal protection that came to be granted for every person's interests after the government had been established rather than as natural benefits that every person was endowed with at birth.

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Sunstein, for example, insists that individual rights are adjusted and organized from the public viewpoint, not to protect existing private preferences as they are. According to him, private preferences should not be seen as pre-existing, pre-given, and fixed beyond the political process. They might have come about as a result of adaptation to one's unfavorable environment

or of being induced and manipulated by others with bad intentions. They are only a function of existing institutional practices, such as legal rules set by governments and customs. They can be critically examined in political deliberation from the diverse perspectives held by other participants and can be improved upon if they are assessed as prejudiced or unjust. They must be examined in terms of what is most beneficial to the community at large, rather than protecting existing private interests as they are. However, even if he emphasizes the public interest, it does not mean that he ignored or disregarded private interests, as classical republicans had done. Modern republicans support the right to freedom of expression and conscience, and never deny the protection of the autonomous sphere of individuals and groups from governmental regulation. In this sense, the republican conception of individual rights is not so different from the liberal one. However, he says,

> [⋯] understandings that point to prepolitical or natural rights are entirely foreign to republicanism. On the republican point of view, the existence of realms of private autonomy must be justified in public terms.(11)

For Sunstein, individual rights are problematic particularly when they are in conflict with economic equality. Among them, property rights are just legally constructed, and therefore there would be no problem in redistributing them if the exercise of the rights resulted in large disparities in the distribution of wealth and property among individuals or groups. Republicans should not hesitate to restrict the property rights of the advantaged in order to take policy measures to improve and enhance the economic position of the disadvantaged. That is exactly what Madison and the other framers of the U.S. Constitution were aiming for.(12) Certainly, some of the rights enshrined in the U.S. Constitution are better viewed as Lockean. Other rights, however, are more republican in color. Constitutional rights are ambivalent and hybrid,(13) so to speak. According to him, republicans stand upon a similar position as liberals in terms of the protection of individual rights, along with

(11) Sunstein 1988, pp.1551.
(12) Sunstein 1988, pp.1551–53.
(13) Sunstein 1988, pp.1561–62.

other constitutional institutions. In both cases, rights are not a pre-political given, but the product of political deliberation.[14] From this view, it can be pointed out that *Lochner v. New York*,[15] in which judges held that a state law restricting the labor hours of a baker was unconstitutional insofar as it violated freedom of contract, erred in interpreting property rights as natural and pre-political rights. In addition, *Bowers v. Hardwick*,[16] in which judges held that state laws regulating homosexual acts were constitutional, can also be criticized for its error in relying on the institutional fact that only heterosexual marriages had been recognized, even though the marriage was just a legal construction.[17] Both were wrong in understanding individual rights as naturally given or taking the status quo as a fixed baseline, simply forgetting that they were institutional products.

Later republican view: Natural endowments

The later republican constitutionalists, in contrast, have come to view individual rights as pre-political gifts rather than as artificial works. They are considered as natural rights that every person has at birth before the establishment of government, rather than legal protection of private interests approved in political deliberation as compatible with the public interest. Barnett's slogan of the Republican Constitution, "first come rights, then comes government," indicates that individual rights are innate to everyone as a pre-political given. They have been understood as such, according to him, throughout the history of the U.S. Constitution, and must be taken as such in our time.

In the first place, individual rights carried weight in Thomas Jefferson's draft of the Declaration of Independence, which preceded the U.S. Constitution. He referred to his draft of the Virginia Constitution and the draft in the hand of George Mason, the latter in particular, which clearly stated that "[…] all men are born equally free and independent, and have certain inherent natural rights." In response, Jefferson drafted the famous sentence of the Declaration of Independence. He noted, "[w]e hold these truths to be self-

(14) Sunstein 1988, pp.1567–69.
(15) 198 U.S. 45 (1905)
(16) 478 U.S. 186 (1986)
(17) Sunstein 1988, pp.1579–80.

evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, [...] That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." If we read "consent of the governed" in the second sentence as "consent to the rule of the governors" and interpret it to mean that the governor-representatives can exercise "just power" as long as they get the consent of the governed, we can understand it to mean that the government cannot arbitrarily impose its will on the governed. Rather, as stated above in the second sentence, the government is supposed to ensure that all people are treated "equally" and enjoy "inalienable rights."[18] According to Barnett,

> So, while the protection of natural rights or justice is the ultimate end of governance, particular governments only gain jurisdiction to achieve this end by the consent of those who are governed. In other words, the "consent of the governed" tells us *which* government gets to undertake the mission of "securing" the natural rights that are retained by the people.[19]

The U.S. Constitution has rooted in the spirit of the Republican Constitution found in the Declaration of Independence. While it has experienced a period of misinterpretation as the Democratic Constitution, it has maintained its lifeblood to our days, with the support of its exponents who have rightly interpreted it.

What is distinctive in Barnett's view of individual rights is that, unlike Sunstein, they are seen mainly to imply economic rights. It is evident in his passages where he appreciates the statements of anti-slavery advocates such as Salmon Chase, a lawyer who later served as governor of Ohio and chief justice of the Supreme Court. According to him, denouncements of slavery were focused on the idea of natural rights, especially of ownership, in which every person was both free to work and owned himself. Slavery was an economic system set up in origin to deprive black slaves of their economic rights. The central concept of slavery was labor. Therefore, the 13th

(18) Barnett 2016, pp.31–44.
(19) Barnett 2016, p.43（An emphasis made by the author）.

Amendment, which provided for the abolition of slavery, was thought by abolitionists to allow Congress to protect the economic freedom of slaves, which had been previously denied to them. Moreover, the context that led to the 14th Amendment, which established the privileges and immunities of U.S. citizens, also included a commitment to the natural right to economic freedom. One of the exponents of the amendment, Senator Jacob Howard, cited Supreme Court Justice Bushrod Washington's opinion in *Corfield v. Coryell*,[20] in which he stated that liberties protected by the government are clearly exemplified as "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety." Howard included among the Bill of Rights or a list of natural rights that the states could not infringe upon, the economic right "to make and enforce contracts" and "to inherit, purchase, lease, sell, hold, and convey real and personal property."[21] If property rights were included as one of natural rights guaranteed in the Constitution, then the redistributive measures positively endorsed by the former republican constitutionalists would be disapproved as an infringement on property rights, i.e., a violation of natural rights. In this respect, we see a contrast between the former and the later republicans.

Furthermore, Barnett argues that individual rights should be respected as a natural possession not just because they have a firm foothold in the history of the U.S. Constitution, but also because they are normatively just. According to him, the thought of natural law has been inherited with religious aspects, such as a belief in God, but natural rights are not necessarily so. The idea of natural rights asks not "how should we live?" but "how should society be organized so that every person can live and pursue happiness in contact with others?" It uses the "given-if-then" argument of natural law to identify the scope of freedom that every person can make his own choice. Ethics of natural law indicates how to exercise liberty within the sphere of freedom identified and guaranteed by natural rights, while the doctrine of natural rights only provides a framework for every person's exercise of liberty without telling him how to live or how to exercise it. The sound bite of the

[20] 6 F. Cas. 546(1823)

[21] Barnett 2016, pp.106–09.

Republican Constitution, "first come rights, then comes government," is a modern translation of the natural rights philosophy and is no longer mystical.[22] It is different from a return to the past, a mere revival of natural law.

Thus, the republican constitutionalists have shown this difference in their views of individual rights, and have changed their conception of them from institutional products to natural endowments. In the light of their predecessors, it might be said that their conception of individual rights has shifted from a Madisonian-Lockean hybrid to purely Lockean. However, the difference among them is not limited to their views of individual rights. The shift has also changed their understanding of the relationship of individual rights to self-government, which was originally the focus of the republican tradition.

4. Self-government and rights: internal to hierarchial relationship

For republicans, throughout their long history, the collective self-government of the people has been ideal to be achieved. From Ancient Greece to the time of the drafting of the U.S. Constitution, it remained a consistent goal of republicanism that citizens should participate in the political arena, deliberate together, and decide on the common issues that concern themselves. But for modern republicans, the relationship of collective self-government to individual freedom was a stumbling block. For they were not able to deny possibilities of the conflict between them; the public decisions in a political community may violate the individual freedom to the body, property, and liberty, while the pursuit of the individual's private interest may thwart the collective decision-making process - or a certain social group may satisfy its own interests through public power on the pretext of "common good." Republicans have therefore devoted their theoretical attention to where the optimal equilibrium between them lies, and have managed to explain how they reconsider the end of self-government in relation to individual rights. Likewise, for the former and the later republican constitutionalists, the task has had to be how to reconcile them as constitutional essentials.

(22) Barnett 2016, pp.44–55.

Former republican view: Rights interrelated with self-government

For the former republican constitutionalists, individual rights were regarded as interrelated with self-government, not as an independent goal. They were assumed, interpreted, and approved by citizens themselves through political deliberation. As we have seen in the previous chapter, they were grasped as institutional products from the self-governmental activities which were recognized by citizens themselves through political deliberation. But they can be seen in turn as playing a legal role in limiting political activity so that it does not run amok and operates properly. Without them, political deliberation may not only fail to serve the public interest but also ignore or violate the private interests of every person. Individual rights can work, so to speak, not unilaterally, but in a bilateral manner with self-government.(23)

Sunstein, for example, considers rights as both a result and an input of the deliberative process. The notion of self-government was, according to him, a center of republican concepts in the history of the U.S. Constitution. Madison and the other drafters approved citizenship and political participation to monitor the conduct of their representatives, and at the same time to foster civic disposition, with which citizens had an interest in the good of their community.(24) Their task was to avoid partisan conflict and to protect the public good of the community. That is why they supported a large republic. But besides, fundamental individual rights also play a central role. He states,

> Many rights are indispensable to democracy and to democratic deliberation. If we protect such rights through the Constitution, we do not compromise self-government at all. On the contrary, self-government depends for its existence on firmly protected democratic rights. Constitutionalism can thus guarantee the preconditions for democracy by limiting the power of

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(23) Individual rights may be seen as acting as a constraint external to the political process by the courts for the protection of structural minorities, or as an intrinsic constraint in the process of political deliberation, as an abstract principle subject to interpretation. The former is John Ely's (Ely 1980) understanding of rights, and the latter is republican's, such as Habermas, Michelman, and Sunstein. The former republican constitutionalists stand on the latter and are critical of Ely's theory of judicial review, in which the role of the courts is viewed as opposed to political deliberation.

(24) Sunstein 1988, pp.1555–61.

majorities to eliminate those preconditions.[25]

Classical republicans have been denounced as being hostile to private interests because they require citizens to cultivate civic virtue and to participate in deliberations for the common good. But that is misleading. Along with self-government, republicans have vindicated individual freedom from regulations by the public power of the state. According to him,

> Republican theories are not, however, hostile to the protection of individual or group autonomy from state control. Indeed, legal rights have quite consistently accompanied republican systems. What is distinctive about the republican view is that it understands most rights as either the preconditions for or the outcome of an undistorted deliberative process.[26]

Sunstein is not alone in recognizing the interrelationship between individual rights and self-government. Generally, it is fair to say that this recognition of the interrelationship, or more particularly a "circular relationship" between law and politics, was shared by the former republican constitutionalists. Michelman also says that his "jurisgenerative" politics produces and crystallizes legal norms through a deliberative process, while it is limited by a legal framework, which is itself the product of the process in turn. American constitutionalism, according to him, was based on two assumptions about political freedom. One is freedom of self-government, in which people determine for themselves the norms that govern themselves. The other is freedom under the rule of law, in which people protect themselves from the arbitrary use of public power. These two are often considered as contradictory, but in practice, they prove to be "amounting to the same thing." These must be seen as integrated; the role of politics as law-making and the role of law as correcting the distortions of politics. Law in the government of laws formula "must stand in a circular relation with politics as both outcome and input, both product and prior condition."[27]

(25) Sunstein 1993, p.142.
(26) Sunstein 1988, pp.1551.
(27) Michelman 1988, p.1501. See also Michelman 1986, p.43.

Thus, the former republican constitutionalists, despite some differences in terminology, shared a view of individual rights as being closely interrelated to self-government.[28]

Later republican view: Rights superior to self-government

The later republican constitutionalists, in contrast, view individual rights not as interrelated with self-government, but as a more important value than self-government. Although self-government has remained one of the central values in the republican tradition, the political goal to be achieved has now become the guarantee of individual rights to body, property, and freedom, which is independent of the deliberative process.

Barnett assumes that individual rights enshrined in the Republican Constitution since it was drafted have occupied a dominant position independent of the legislature, an arena of self-governmental activities. For him, the guarantee of individual rights is left to the courts, while the self-governmental activities are equated with the exercise of sovereignty by the people, united as one, in the legislature. With this understanding, he accuses the exponents of the Democratic Constitution of having repeatedly insisted throughout the history of the U.S. Constitution that the courts should defer to Congress and, in the end, of abandoning the guarantee of rights by the courts as the guardians of the law in favor of people's sovereignty, or the majoritarian rule. Such judicial deference on the democratic view of the Constitution virtually watered down the republican amendments to the Constitution. In infamous *Plessy v. Ferguson*,[29] for example, Justice Henry Brown held that "[a] statute which implies merely a legal distinction between the white and colored races has no tendency to destroy the legal equality of the two races," and that because the legislative majority had

[28] Furthermore, Jürgen Habermas, although not often called a republican, also shares an understanding with Michelman and others. His theory of the "logical genesis of rights" refers to the circular relationship between law and politics and is inspired by Michelman's theory of jurisgenerative politics. See, Habermas 1992. S.153–55(pp.120–22). Once I pointed out the recognitions common to the exponents of participating-deliberation version of republicanism (Omori 2019, pp.48–51) and relied on them to construct a republican theory of law. Cf. Omori 2006, pp.159–231(though not written in English).

[29] 163 U.S. 537 (1896)

ordered a separation, "there must necessarily be a large discretion on the part of the legislature." But this represents judicial deference to the will of the majority at the core of the Democratic Constitution, an omission that overlooks the evils of slavery and infringes on the fundamental freedom of the black minority. This ruling has resulted in another 70 years of black minority servitude.(30)

Since then, Barnett scolds, the U.S. Supreme Court continued to undermine the republican view by upholding the democratic view of the Constitution. The leading figures were James Bradley Thayer, a professor at Harvard Law School, Oliver Wendell Holmes Jr., a Supreme Court Justice and Lewis, Louis Dembitz Brandeis, a Harvard Law School professor and Supreme Court Justice, and other progressive legal scholars and judges. Professor Thayer, to his dismay, established the standard for presuming the constitutionality of a statute that judges "can only disregard" a statute "when those who have the right to make laws have not merely made a mistake, but have made a very clear one ― so clear that it is not an open to rational question" and has upheld erroneous and unjust statutes that do not meet this standard as constitutional. *Plessy v. Ferguson* was the embodiment of this Thayerian deference approach. Justice Holmes, in his famous dissent in the *Lochner v. New York*, followed this deference approach, holding that if a reasonable and impartial person would consider a statute as constitutional, it is, in fact, so.(31) Moreover, Justice Brandeis did not strike down the insurance regulation in the case of *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*(32) by stating that "the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute."(33) According to Barnett, this era, though it would be replaced by a partial revival of the Republican Constitution during the New Deal, was a dark period in which progressive exponents of the Democratic Constitution prevailed. The courts

(30) Barnett 2016, pp.119–23.

(31) Barnett 2016, pp.125–30. Barnett also accuses Presidents Theodore Roosevelt and Woodrow Wilson of supporting the Democratic Constitution that indicates a deference to the legislative branch. Ibid., pp.130–37.

(32) 282 U.S. 251 (1931)

(33) Barnett 2016, pp.149–51.

did not play a role in guaranteeing individual rights, for they supported the self-governmental activities of the legislature by inaction.

The U.S. Supreme Court, according to Barnett, gradually abandoned the deference approach on the democratic view of the Constitution and entered an era of the Republican Constitution. In *the United States v. Carotene Products*,[34] it upheld the rationality of the state law that banned the interstate sale of filled milk as a means of protecting public health. However, in the footnote, it left room for a narrow interpretation of constitutionality in the case, opening up the possibility of making exceptions, such as "the abuse of the rights of a minority by those in the majority".[35] Then *Brown v. Board of Education*[36] was the crowning achievement of the Republican Constitution. Needless to say, the federal court ruled that racial segregation measures in schools violated the Fourteenth Amendment, which provides for the equal protection of the laws. It was a reversal of the Court's attitude, which in *Plessy* had given deference to the legislature on the democratic view of the Constitution. The decision ignited a lot of controversy at the time, but the most well-known argument is Alexander Bickel's "counter-majoritarian difficulty." He argued that there is a fundamental difficulty for unelected judges to strike down as unconstitutional statutes enacted by elected officials. According to Barnett, Bickel's argument can be understood as being based on the democratic view of the Constitution. He ironically reverses Bickel's formulation saying that the problem lies not in the "anti-majoritarian difficulty" but the "majoritarian difficulty." He notes,

> [···] we can label the problem with democratic republicanism as the "majoritarian difficulty": as Madison observed, where the greatest power resides lies the greatest danger to the rights of the people. In a republic, that power resides in a majority of the electorate. An independent judiciary with a duty to protect these rights from being unreasonably restricted by the majority is part of the answer to this majoritarian difficulty.[37]

(34) 304 U.S. 144 (1938)
(35) Barnett 2016, pp.153–58.
(36) 347 U.S. 483 (1954)
(37) Barnett 2016, p.162.

Thus, for the later republican constitutionalists, deference to the legislature, an arena for self-governmental activities, is dismissed as contrary to the proper interpretation of the Constitution. On the contrary, what they recommend on the proper interpretation is that when a statute enacted by a congressional majority infringes on the rights of structural minorities, the independent judiciary must declare it unconstitutional. There is no division of roles or cooperation between the self-governmental activities of Congress and the rights guarantees of the Courts; there is only a disconnect. Individual rights are distinguished from and placed above self-government.

As we have seen, it is fair to say that the republican constitutionalists differ in their understanding of the relationship between self-government and individual rights. They have come to see these two as a hierarchical relationship, rather than a mutual relationship, among separate values. They have been beyond reconciling a modern invention with an ancient ideal, to affirming the superiority of individual rights over self-government. But their transition is not seen only in their theoretical interpretations of individual rights and self-government. They have significantly changed even the understanding of the structure of national government assumed by the U.S. Constitution.

5. Federalism―Local self-government to individual choice

For the republicans, how to design a federal system has been one of the greatest concerns when they tackled with drafting the Constitution. Borrowing bits of the republican thought, both federalists and anti-federalists argued about how to allocate state and federal powers before the political system of the United States had been established. Given this historical background, it is not surprising that the recent republican constitutionalists are still much interested in federalism. As we have seen in the previous chapter, the former republican constitutionalists regarded individual rights as interrelated with self-government, while the later republicans viewed rights as superior to self-government. Along with how to see the relationship between these two, both of them perceive federalism characteristically in their respective ways. The issue of federalism, so to speak, seems to be the light that most vividly illuminates the differences between the former and the

later republican constitutionalists. In what follows, I will try to highlight the difference between their views of federalism.

Former republican view: An arena of self-government

For the former republican constitutionalists, federalism was highly regarded as an institutional mechanism that allows for local self-government. They appraised it as a federation of subordinate political units that can prevent centralization of political power, encourage participation in small communities, and foster civic disposition.

Sunstein, for example, assesses that federalism serves the negative function of preventing the concentration of power in government that restricts the realization of self-government. The U.S. Constitution, according to him, provides various institutional measures to prevent the concentration of power. Along with the separation of powers and bicameralism, the federal system is also designed to function as a restraint and balance among subordinate political units.(38) These constitutional complexes of mutual restraint are necessary to prevent the various social factions from abusing public power in pursuit of their peculiar interests. It would work as one of the bulwarks against the concentration of power.(39) Also, if the governments are mutually vigilant in preventing the concentration of power in the hands of the federal government or any particular state, the citizens of the United States will not afraid of the arbitrary interference of public authorities. The leading republican political theorist Philip Pettit, though he differs from Sunstein and others in his view of republican liberty,(40) also praises federalism in a similar context. According to him, it can limit the arbitrary interference of those in power and protect the "liberty as non-domination" of citizens by widely dispersing power in the same way that the separation of powers and bicameralism have worked.(41) To achieve republican liberty, it is necessary to avoid

四六九

(38) Sunstein 1988, pp.1561–62.

(39) Sunstein 1985, p.44.

(40) Pettit views political freedom as "non-domination," in which the arbitrary and potential interference of those in power is limited by legal rules, while Sunstein regards it as "self-government," as we have seen. I have once discussed the distinction of their views of freedom, by grouping the neo-Athenian republicans—including Sunstein, Michelman, and Sandel—and the neo-Roman—including Pettit, Skinner, and Viroli. See, Omori 2019.

(41) Pettit 1997, pp.177–79.

coercion from above through centralization, which interferes with the free collective decision-making of citizens.

Besides, federalism is significant for self-government because it facilitates the decision-making of citizens in small political units. Although Madison and other federalists favored large republics because small communities were more prone to the tyranny of factions, there is no doubt that self-government, as republicans have traditionally affirmed, is more likely to be promoted in local, face-to-face communities than in large polities at a national level. Their task was how to hybridize a large republic that would prevent the tyranny of factions on the one hand, with small communities that would allow for self-government on the other. The federal system would provide the best blend between those two demands. As Sunstein puts it,

> At the same time, the federal system would guarantee an arena for citizen self-determination and promote diversity and responsiveness. The considerable role for the states provided a locus in which to satisfy the traditional republican belief in small republics. To be sure, much of federalist thought was based on a rejection of the traditional republican belief in local democracies; but the Constitution that emerged furnished a secure place for self-determination through the federal system, supplementing and complementing national institutions.(42)

This allowance of room for state-level self-government within the federal framework has remained a precious experience in the history of the U.S. Constitution. One of the advantages that the original constitutional system had was "its simultaneous provision of deliberative representation at the national level and self-determination at the local level, furnishing a sphere for traditional republican goals." As Alexis de Tocqueville emphasized, a central republican lesson was "the need to provide outlets for self-determination in the public and private."(43) The republican notion of self-government can permeate society across the public and private spheres through the two- or multi-tiered constitutional structure of the federal system.

(42) Sunstein 1988, p.1562.
(43) Sunstein 1988, p.1578.

Moreover, for the former republicans, federalism was appraised as a way to encourage citizens to participate in politics and to culminate their civic disposition in order to achieve the end of self-government. Among them, Micheal Sandel, who is often mentioned as a communitarian political theorist, argues that the federal system plays a central role in character building by clarifying the original significance of federalism. He argues that it is difficult for modern sovereign states to raise civic consciousness in people, but we cannot expect cosmopolitanism as an alternative to it, which advocates love for universal humanity in a global-scale society. Rather, federalism in the original sense of the word, which relies on smaller communities than states, is a more promising option. In other words, it "suggests that self-government works best when sovereignty is dispersed and citizenship formed across multiple sites of civic engagement." For example, Tocqueville focused on townships, and Thomas Jefferson proposed dividing the countries into wards, local units of self-government which could make participation and virtue cultivation easy. The political insights behind them have not lost their significance today: "the insight that proliferating sites of civic activity and political power can serve self-government by cultivating virtue, equipping citizens for self-rule, and generating loyalties to larger political wholes."(44) They believe that the civic virtues essential for self-government can only be cultivated through the small communities on which original federalism rests.

Thus, the former republican constitutionalists highly regarded the federal system as an essential constitutional institution designed for self-government by restricting the concentration of power and promoting political participation and civic virtue.

Later-republican view: Protection of individual choice

For the later republican constitutionalists, in contrast, the federal system is seen not as a mechanism for self-government but as one for protecting individual rights. It allows for diverse social experimentation and competition at the state level, thereby broadening the range of options and allowing individuals to choose the state to which they belong.

四六七

Barnett asserts that federalism is a system that gives every person the

(44) Sandel 1996, pp.338–48.

freedom to choose where to belong by presenting residence options at the state level rather than the national level. The U.S. Constitution gives the federal government only limited powers over trade with foreign countries and among the states, etc., while reserving other powers to the states. It added a few more amendments, but "the resulting system of federalism has yielded some enormous advantages for protecting the rights retained by the people." It means that the enactment of most statutes affecting the liberty of the people is now in the hands of the state legislatures, not of the federal legislature. This was confirmed by Justice John Marshall in *Gibbons v. Ogden*.[45] He said that the power of the states is "that immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government."[46]

This understanding of federalism means to have opened the way for various social experiments with laws by state legislatures. It allows the 50 states to experiment with different laws and regulations, and to judge their results of what they have done. Of course, the experiment may have some good and some bad results. If the result is good, it will become common knowledge of the whole nation that the other states can imitate and use later. Even if a bad result occurs, the effect will be limited to that state and its people. This is not the case if the experiment is conducted at the national level. If the result is good, it will be surely good for every citizen. But that's a matter of luck. If it is unlucky and unsuccessful, the damage will be far more enormous. The damage would be nationwide, including all the states and their people, and it would take a long time to recover all. It is better to keep social experiments at the local level to increase social plasticity and flexibility. Justice Brandeis, in his opinion of *New State Ice Co. v. Liebmann*,[47] rightly called the states "laboratories of experimentation," even though he was wrong when he wrote his dissent in the direction of restricting people's rights. His word itself is still valid. The variety of laws and regulations allows the states to find the best solution through trial and error. Federalism allows for a "marketplace of ideas" among the states, so to speak, and helps

(45) 22 U.S. 1, 203 (1824)
(46) Barnett 2016, pp.171–73.
(47) 285 U.S. 262, 311 (1932)

in the discovery of truth.

The reason why state experiments under the federal system are desirable is that, in addition to the merits of experimentation in itself and of truth discovery, it is also beneficial to individual freedom. By making every state distinctive, it gives every person the freedom to choose the place of belonging that is most convenient to his conception of the good life. From the citizens' viewpoint, state experiments also mean a competition among states to attract and retain residents. States that provide better services for individual freedom will gain more residents, while those that do not will lose them. Competition among states would give citizens more options by encouraging states to develop better living environments within their territories. Although competition among smaller administrative districts such as counties or cities may offer more variety, the Constitution has chosen the states to be the governmental units. If a policy is determined at the national level, there is only one policy, and citizens have no choice. In the case of the U.S., there are two major political parties, so at best, they only have the choice of voting for Republican or Democrat candidates. For there are large differences in preferences among individuals regarding social policy, it is better to provide as many options as possible.(48) Because

> from the perspective of diversity, it is preferable to have the variety of options provided by fifty state governments than a one-size-fits-all national policy[..]it is far more likely that a person can find a state or municipality with a social environment in which he or she is more comfortable[..]it is best to have as many different communities as possible from which to choose to satisfy the range of individual tastes, preferences, and moral commitments[..]In all these ways, liberty is more robustly protected by confining lawmaking to the state and local levels in a federal system, than by moving all such decisions to the national level.(49)

As long as citizens have freedom of interstate movement, they can decide in which state to live by comparing social policies of states in the viewpoint

(48) Barnett 2016, pp.176–78.
(49) Barnett 2016, pp.178–80.

of their conception of the good life. Such freedom of choice is not possible when a nation imposes a single policy on all citizens. Surely, it could be possible to choose a more favorable nation, but this would impose a huge burden of changing cultural habits, such as learning a new language or keeping up with the neighbors in the host country. This would not be a realistic option. Allowing choice among nations would also reproduce what Thomas Hobbes called "the war of all against all." If every nation adopts only one religion and restricts the beliefs of citizens within its territory, it will bring about another disastrous religious war. Classical liberalism sought to avert such a catastrophe by giving all individuals freedom of religious choice and conscience. Serious matters, which affect everyone's life like the adoption of religion, should not be left to the nation but should be individualized as much as possible. These individual freedoms are much better protected at the local level than at the national level. In this way, the later republican constitutionalists regard federalism as a system that protects individual right to free choice, independent of self-government.

Thus, the republican constitutionalists have a different views of federalism and have come to see it as a guarantee of individual choice rather than an arena for the realization of self-government. Republicans might be said to have changed the view of federalism to the extent which it is more suited to the modern notion of individual rights than to the ancient ideal of self-government.

So far, I have reviewed the theoretical changes in republican constitutionalism, focusing on individual rights, their relationship to self-government, and federalism. Although I cannot go into the details here, I would like to make some comments on the implications of these theoretical changes.

6. Some considerations

As we have seen, the republican constitutionalists, while agreeing on their position in contrast to pluralism, differ greatly in their views of individual rights, their relationship to self-government, and federalism. From the perspective of the history of thought, republican constitutionalism can be described as an interpretation of the Constitution that has gradually shifted from the

Madisonian and Lockean hybrid to the purely Lockean form. More generally, republicanism may be said to have transformed from a version that reconciled classical republicanism with modern liberalism to one closer to libertarianism, more right-leaning liberalism. In this last chapter, though I cannot make a comprehensive inquiry into this recent shift of republicanism, I would like to briefly review three implications of the shift: historical fidelity, recognition of the division of institutional roles, and prospects as an alternative.

Less faithful to the republican tradition?

First, on historical fidelity. The republican constitutionalists, insofar as they proclaim themselves to be "republicans," somehow inherit the lineage of classical republicanism that has continued since ancient times. The former republican constitutionalists have been relatively faithful to the republican tradition in this respect. Sunstein, for example, explicitly embraces the legacy of Aristotle and James Harrington, considering the belief in deliberation, one of the republican tenets, as widespread in the United States.(50) However, traditional republicanism, with its exclusion and discrimination of the working class, foreigners, and women, its militarism and hero-worship, its celebration of the common good, and disdain for the private interests, has made few laudable claims.(51) Classical republicanism, if it is still attractive to revive, must be stripped of these outdated and immoral elements and reworked to fit the modern context. It is in this context that he goes beyond a mere revival of republicanism and manages to defend "liberal" republicanism. He argues that "[s]ome elements of the liberal tradition are highly congenial to republican conceptions of politics," such as its emphasis on deliberation, political equality, and citizenship; the fact that it does not view private interests and rights as pre-political, but allows them to be subject to critical examination in deliberation; and its belief in neutrality and universality. "[I]n numerous respects republicanism and liberalism are hardly antonyms. Republican thought, understood in a certain way, is a prominent aspect of the liberal tradition."(52) In other words, the way in which the former republican

(50) Sunstein 1988, p.1548.
(51) Sunstein 1988, pp.1539–40.
(52) Sunstein 1988, pp.1566–71.

constitutionalists took over the ideas of classical republicanism was ambivalent, but they tried to be faithful to them, at least insofar as they were compatible with modern liberalism.

The later republican constitutionalist, in contrast, seems not to have inherited the ideas of classical republicanism but goes even beyond being reconciled to liberalism to radicalize it. Barnett certainly tries to interpret the U.S. Constitution as strongly influenced by Jefferson, Madison, and other republican drafters. However, he is also trying to highlight the history of the U.S. Constitution by arguing that its various elements can be traced back to the *Lockean* ideas,(53) and that what it tried to protect consistently in its history was *natural rights*, not self-government.(54) His understanding of federalism as allowing room for individual choice is one of the expressions of his view of constitutional history. Besides, his slogan of the Republican Constitution, "first come rights and then comes government," symbolizes that his view is rooted in the thought of natural rights. In particular, he interpreted the 13th Amendment, which prescribes the abolition of slavery, as prohibiting the deprivation of *economic* rights of slaves. His theory of constitutional interpretation intended to bring Lockean liberalism or radical libertarianism to the fore. It seems to separate the Constitution from the influence of classical republicanism.

However, can we say that this new interpretation of constitutional law, which emphasizes only Lockean influences, is faithful to the tradition of republicanism? Not very likely. It is because original republican thought is often traced back to ancient Greece or the Roman republic and has been regarded as a separate strand of thought from that of natural rights. For example, John Pocock, a representative scholar of civic humanism, has tried to highlight the republican thought influenced by Aristotle and Machiavelli as a different lineage from the Lockean thought, which people have widely accepted as political thought in America. According to him,

> The insistent claim that the American is a natural man and America founded on the principles of nature is enough to demonstrate that, and the

(53) Barnett 2016, p.205.

(54) Barnett 2016, p.31–51, 63–69, others.

pursuit of nature and its disappointments can readily be expressed in the rhetoric of virtue and corruption; for this is the rhetoric of citizenship, and a cardinal assertion of Western thought has been that man is naturally a citizen - *kata phusin zōon politikon*. However, *American social thought has long employed a paradigm, supposedly Locke's*, of government emerging from and highly continuous with a state of natural sociability; and it has been seriously contended that no other paradigm than Locke's has thriven or could have thriven in the unique conditions of American society. In this book *we have been concerned with another tradition, reducible to the sequence of Aristotle's thesis that human nature is civic and Machiavelli's thesis* that, in the world of secular time where alone the polis can exist, this nature of man may never be more than partially and contradictorily realized. Virtue can develop only in time, but is always threatened with corruption by time. In the special form taken when time and change were identified with commerce, this tradition has been found to have been operative over wide areas of thought in the eighteenth century, and to have provided a powerful impulse to the American Revolution.(55)

The conventional wisdom among scholars who have studied their growth has been that the Puritan covenant was reborn in the Lockean contract, so that Locke himself has been elevated to the station of a patron saint of American values and the quarrel with history has been seen in terms of a constant attempt to escape into the wilderness and repeat a Lockean experiment in the foundation of a natural society. *The interpretation put forward here stresses Machiavelli at the expense of Locke*; it suggests that the republic - a concept derived from Renaissance humanism - was the true heir of the covenant and the dread of corruption the true heir of the jeremiad. It suggests that the foundation of independent America was seen, and stated, as taking place at a Machiavellian-even a Rousseauan-moment, at which the fragility of the experiment, and the ambiguity of the republic's position in secular time, was more vividly appreciated than it could have been from a Lockean perspective.(56)

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(55) Pocock 1975, p.527 (emphasis added by Omori).
(56) Pocock1975, p.545 (emphasis added by Omori).

Maurizio Viroli, a renowned scholar of the history of republican thought, also emphasizes that the thought of natural rights is an inherent feature of liberalism and is different from the ideas of Machiavelli and other republicans. He states,

> *A distinctive feature of liberalism that is completely absent from early-modern Italian republicanism, however, is the theory of the natural* (*or inalienable, or innate*) *rights of man.* This doctrine is fundamental, but it suffers from the obvious theoretical weakness that rights are (more or less) respected only when sustained by laws and customs. Rights are thus historical, not natural, and when they are not sustained by laws and customs, they are not rights but moral claims - noble, decent, and reasonable, but only claims. *It is for this reason that Machiavelli*, wiser than later theorists, *had no use for the idea of natural rights* and spoke only of liberty as a good that individuals may enjoy if they have good political and military institutions, if they possess a sufficient degree of civic virtue[..].(57)

Thus, republicanism has been understood as a separate strand from the thought of natural rights. The republican constitutionalists, however, seem to have gradually considered the Constitution in terms of purely Lockean natural rights and have been moving away from the traditional ideas of classical republicanism. The former republican constitutionalists such as Sunstein, who advocated the reconciliation of republicanism to liberalism, might have already begun to break away from the republican tradition. But Barnett and other libertarians made this breakaway definitive. In particular, the classical republicans tended to be hostile to wealth, commerce, and extravagance and never understood economic interests as protected by natural rights. The Lockean understanding of property ownership as individual rights seems to be pouring something different into the ancient tradition - pouring new wine into old leather bags. To call oneself a "republican" and yet espouse a different thought is not only self-deceptive but undermines the brand – if any - of republicanism.

(57) Viroli 2002, p.7 (emphasis added by Omori).

Judicial activism undermining self-government?

Fidelity to republican tradition may be a concern only for historians of political thought. But the role of the courts is another matter. It is because it is directly related to what principle the courts should adopt in resolving the case at hand. The republican constitutionalists, who are interested in constitutional cases as well, have a certain position about the role of the courts. Their view of the judiciary role seems to have shifted toward a lack of respect for political deliberation and self-governmental activities in the legislative branch, along with the Lockean tendency described above. Let us look at this transition below.

The former republican constitutionalists seem to have in origin viewed the judiciary role as somewhat limited. In particular, they were not so ready to allow the courts to review the constitutionality of statutes respecting the political deliberation in the legislature. It was because they emphasized the political deliberation as a core element of republicanism and envisioned the legislative branch as the primary forum for self-governmental activities.(58)

Sunstein, for example, whose position itself has changed and become unclear, at least in the beginning when he was advocating republican constitutionalism,(59) took the position of "judicial minimalism" as a theory of constitutional interpretation.(60) Judicial minimalism, though I leave the details to him,(61) is

(58) However, this was not the common recognition of the judiciary role shared by all the republican constitutionalists. Michelman, for example, thought that the forum for deliberation was the courts, not the legislature. He poked fun at Ronald Dworkin's discussion of Hercules, an ideal judge who would be able to solve every case on principle by himself, and argued that the plurality of justices on the Supreme Court – dialogue *in* court – was "an aspect of judicial self-government." Michelman 1986, pp.73–77.

(59) In the late 1980s, when he was advocating republican constitutionalism, Sunstein criticized the policies during the New Deal period but believed that it was not the judiciary but rather the regulatory administration, that was deviating from the separation of powers and disrupting the division of roles among branches. "The New Deal actors were far too cavalier in their treatment of the problem. National institutions are at best an imperfect arena for obtaining self-determination by the citizenry, and federal control are often excessively rigid and inefficient. The presidency itself, although visible, hardly a forum for republican self-government." Sunstein 1987, p.505.

(60) The relationship between republican constitutionalism and judicial minimalism is unclear in Sunstein's own mind, partly because of the discrepancy in the timing of the publication of these views. I have participated in a symposium with him and commented on his keynote lecture, but was unable to ask in-depth questions on this point.

roughly described as follows. It is a theory of constitutional interpretation that requires judges to interpret the Constitution for a "narrow" range of cases and to make decisions based on "shallow" reasons. When a decision must be "narrow," it means that the judge will focus only on the case at hand before the court and will not make a broad decision that will affect other cases or establish a general rule that would resolve all cases. When a decision must be "shallow," it means that judges should base their rulings on "incompletely theorized agreement" on contested constitutional issues, not touching on deep political or religious commitments that cause irreconcilable conflict among people. The point of this theory is to ensure that the court should allow room for political deliberation by limiting its own role. "There is a relationship between judicial minimalism and democratic deliberation. Of course minimalist rulings increase the space for further reflection and debate at the local, state, and national levels, simply because they do not foreclose subsequent decisions."(62) The judges must remain silent and leave the solution open for later discussion, which will take place outside the court, rather than stepping in and disturbing the discussion. "Cautious judges can promote democratic deliberation with more minimalist strategies, designed to bracket some of the deeper questions but also to ensure both accountability and reflection. Many minimalist decisions attempt to ensure more in the way of democracy and more in the way of deliberation."(63) The court itself must not be a forum for deliberation but must adhere to certain principles in order to keep deliberation open in other branches. "The basic principles of justiciability are designed to limit the occasions for judicial interference with political processes. These principles - involving mootness, ripeness, reviewability, and standing - say that judges can intervene only at certain times and at the behest of certain people. In this way the principles are obviously an effort to minimize the judicial presence in American public life."(64) His theory of constitutional interpretation at this point seems to have implied an attitude of judicial deference and the possibility of leaving broad opportunities for self-

(61) About the explanation by Sunstein himself, see Sunstein 1999, pp.10–14.
(62) Sunstein 1999, p.4.
(63) Sunstein 1999, p.26.
(64) Sunstein 1999, p.39.

government in the legislature.

However, Sunstein later modified his position on judicial minimalism to emphasize that he was not a defender of judicial deference. According to him, judicial minimalism is not a general canon that should be applied to all constitutional cases, but rather a situational standard that may be or may not be applied to some cases. As Justice O'Connor stated, "[n]one of this means that minimalism is always appropriate in constitutional cases. When the area requires a high degree of predictability, and when the Court has had a great deal of experience with the area, width might well be justified. The same conclusion follows if the Court, notwithstanding its lack of experience, has good reason for confidence in a wide ruling. The only point is that in many frontiers cases, the very arguments that justify standards will justify minimalism as well."(65) Judicial minimalism is now reduced to one of the first-order positions, and whether to adopt minimalism is considered to be the second-order meta-judgment. He calls the second-order position "perfectionism." From its perspective, minimalism must be adopted only when the court deems it appropriate to render a narrow and shallow judgment. In other cases, it may be better for other first-order standards, such as originalism or Thayerism, to be adopted.(66) It all depends on the case, i.e. case by case. The point of this post-minimalism is that it partially acknowledges that judges may, *in some cases*, challenge and interfere with political deliberations in the legislature. "But where there is no problem from the standpoint of self-government, and no unjustifiable inequality, I believe that judges should usually give democratic processes the benefit of the reasonable doubt."(67) This seems to admit that the courts are only a few steps away from their boundaries in front of the legislative branch. This idea almost seems to concede that the courts can overstep the proper role-model and actively intervene in the legislative process.(68)

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(65) Sunstein 2006, p.1914.

(66) Sunstein 2007, p.2880.

(67) Sunstein 2007, p.2883.

(68) In this regard, I asked him a question in my comments at the symposium mentioned above. My question was whether his minimalist interpretive strategy could make the division of roles between the judiciary and the legislature work. See Omori 2012. As I remember, his reply at that moment was "you are right that minimalism doesn't work, and if I add to your opinion… ," but his reply published later was as simple as the following.

The later republican seems to have further strengthened the tendency to transcend judicial minimalism. Barnett welcomes the judicial review of statutes and urges the protection of individual rights by the courts. In his view, the Supreme Court has been too deferential and has failed to fulfill its proper role of guaranteeing individual rights. According to him, advocates of the Democratic Constitution such as Thayer, Roosevelt, Holmes, and Brandeis have consistently preached judicial deference to other branches since the New Deal. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.,[(69)] the Supreme Court held that a federal court must defer to the legal interpretation made by those government agencies, the Environmental Protection Agency's interpretation of a provision of the Clean Air Act Amendments of 1977.[(70)] In *Williams v. EPA, Inc. In Williamson v. Lee Optical*,[(71)] the Supreme Court also held Oklahoma's law preventing Lee Optical from selling eyeglasses at low prices to be constitutional and adopted an extreme deference standard.[(72)] And many others. "Obtaining the benefits of federalism requires federal courts to develop doctrines that identify the outer limits of Congress's enumerated powers, as the Supreme

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It is important to see that minimalists do not necessarily defer to the democratic process; they do not adopt a strong presumption in favor of whatever the legislature decides. Those who believe in a consistent policy of judicial restraint, or who favor respect for whatever legislatures do, are not minimalists in the sense that I understand them here. Consider in this regard the remarks of Hidetomi Omori, who perhaps misunderstands me on this point[..]. Minimalists are willing to strike down the outcomes of legislative processes. The key point is that when they do so, they seek to rule narrowly and shallowly. Sunstein 2012, p.93.

I understood his reply to mean that there is a difference in dimension between a court's decision to invalidate statutes on the one hand, and the scope and reasons for that decision on the other. However, I have seen many criticisms that the minimalism is a defense of judicial negativism, and I cannot shake the impression that the strategy of minimizing the breadth of the subject matter and the depth of the reasons may weaken the power of the judiciary to invalidate a large amount of statutes, at least empirically, if not theoretically. In any way, the partial abandonment of judicial minimalism seems to imply a shift from judicial deference to the active judiciary – and thus interference in the legislative process.

(69) 467 U.S. 837 (1984)
(70) Barnett 2016, pp.217–18.
(71) 348 U.S. 483 (1955)
(72) Barnett 2016, pp.222–23.

Court was attempting, however imperfectly, to do before 1937, and has tepidly done since 1995. And the Court must overcome its reluctance to enforce the separation of powers within the federal government[...]."[73]

The purpose of the judiciary interference in other branches, as set forth by Barnett, is not to achieve self-government or promote political deliberation, but rather to guarantee individual rights. Judges need to determine whether a statute that may infringe on individual rights is within the power of Congress or state legislatures in light of the due process of law provided by the 14th Amendment. If the statute deems outside the scope of congressional power and unduly infringes on personal rights, then the court must invalidate it. If the courts presume that the legislative branch has acted properly and give deference to the evaluation of the statute, the protection of individual liberty afforded by the Republican Constitution will be weakened or lost altogether.[74] The prospect of vindicating individual rights through the democratic process was "entirely fanciful." Only by empowering the individual to bring suit before the courts that will require government regulators to justify their restrictions on liberty as rational can these rights be effectively protected.[75] So, rather than defer to the legislature, the courts must critically examine whether the statute treats one group differently from another in light of the constitutional provision.[76] The question here is not whether judicial vindication of rights would result in well-functioning of political deliberation in the legislature. The purpose is that it will place individual rights higher than self-government.

In this way, if we examine the changes in the republican constitutionalist's understanding of the judiciary role, it proves that they are almost parallel to the shift from the compatibility of self-government and individual rights to the superiority of rights, as seen in chapter 3. It shows that they have abandoned the interactional relationship between rights and self-government, and have come to consider only the guarantee of rights as the role of courts. Their transition may indicate a gradual departure from the republican ideal of self-government in the deliberative process.

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(73) Barnett 2016, p.224.
(74) Barnett 2016, pp.224–29.
(75) Barnett 2016, p.233.
(76) Barnett 2016, p.240.

Assimilation to liberalism?

Third, on the possibility of being a promising alternative. Republicans often recognize that their thought, whose origins date back to the classical period, has gradually lost its influence in public life since the advent of liberalism in modern times. They sometimes believe that modern liberalism brought about many of today's pathologies and that the clues to solving them are embedded in the republican tradition, which they hope to revive in various forms. In their view, republicanism is often formulated in terms of how it differs from liberalism as a renewed alternative. In other words, republicans planned to work out an innovative political or constitutional vision that would set their thought apart from liberalism.

The former republicans in origin had a strong sense of presenting an alternative to liberalism. Sandel, who is usually seen as a communitarian theorist hostile to liberalism, opposes republicanism to liberalism in his view of freedom. According to him, in the liberal view, freedom is opposed to democracy and is defined as a constraint on self-government. Every person is said to be free as long as he is not bound by the majority rule. In contrast, republicans understand freedom as a result of self-government. People are free insofar as they belong to a community in which they share their destiny and participate in the decisions of the common good.(77) Pettit, who is seen to be neo-Roman and does not adopt the neo-Athenian view of freedom as self-government, also symmetrizes the republican view of freedom with the liberal one. According to him, liberal theorists have a view of freedom as non-interference, because they recognize actual and physical interference as an infringement on freedom. Republicans, on the other hand, present a view of freedom as "non-domination," in which freedom is violated by the mere presence of potential or arbitrary interference, without any actual interference.(78) In any case, republicans boasted that their interpretation of freedom was different from the liberal one and that they could identify the non-free situation differently from the liberal way.

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(77) Sandel 2016, pp.25–28.

(78) Other republicans, such as Jean-Fabien Spitz and Quentin Skinner, have also proposed a republican view of freedom, the "absence of dependence," in contrast to the liberal view. See Spitz 1995, pp.179–200, Skinner1998, pp.69–70.

However, the republican constitutionalists gradually relaxed their strict rivalry with the liberals. Already in Sunstein, republicanism was seen as compatible with, not opposed to, liberalism. He advocates the position of "liberal republicanism" stating that the republican position he defends is not anti-liberal at all.(79) Republican elements, among which he raises as deliberation, political equality, universalism, and citizenship, have had a strong influence on the liberal tradition.(80) The opposition between liberal and republican ideas is generally false, and some elements of the liberal tradition are quite homogeneous with the republican view of politics. In many ways, republicanism and liberalism cannot be antonyms, and republican thought, when properly understood, is a prominent aspect of the liberal tradition.(81) Thus, he saw republicanism as more integrative with liberalism than before. Up to this point, however, the republicans were still conscious of the fact that the two positions had in origin been contrasted.

The later republican constitutionalists, however, taking this trend further by completely melting the contrast between the two positions. It is true that Barnett tries to defend the Republican Constitution in contrast to the Democratic Constitution and that the supporters of the latter are seen as the so-called progressives, "liberals" in the political sense. However, the real content of democratic constitutionalism seems interest-group pluralism or the majority rule, which is the principle of action that drives realpolitik, rather than liberalism in the philosophical sense. Thus it is not liberalism but rather pluralism that he envisioned as a position in contrast to republicanism. On the other hand, what he is trying to defend in the name of the Republican Constitution is not self-government or political deliberation, but the basic freedoms and individual rights as we have seen. From this perspective, we might say that the ideas under the Republican Constitution he supports is not a republican strand but a liberal one. Moreover, given his understanding of individual rights as centered on property rights and his praise of interstate competition under the federal system as a free market, it would seem that the position he defends could be considered a right-leaning theorist for liber-

(79) Sunstein 1988, p.1541.
(80) Sunstein 1988, p.1558.
(81) Sunstein 1988, pp.1566–70.

alism, i.e. libertarianism. If that were the case, he should have called the interpretation of the Constitution he defended as "Libertarian," not "Republican." Calling the interpretation of the Constitution "republican," although in fact libertarian, is not only misleading but seems to be a misrepresentation of republicanism.

In this way, the republican constitutionalists are gradually loosening, and eventually melting down, the difference between republican and liberal constitutionalism. It may weaken the ambition and willingness of republicans to tackle the task it set out in origin; to solve the difficulties yielded by liberal projects or to come up with solutions and constitutional views that differ from liberalism. Such a shift in republicanism seems to be chipping away at its critical base by assimilating itself into liberalism.

Of course, how to view the relationship between republicanism, which inherits the legacy of the past, and liberalism, which holds its position as a public philosophy in contemporary political culture, is one of the central issues on which the republican theorists still disagree. On the one hand, some of them see it as a decisive opposition, such as Sandel, and on the other hand, others see it as a reconciliation, such as Sunstein. Moreover, others understand that republicanism provided the soil for the emergence of liberalism. I believe that this understanding is more appropriate, though it is not quite so simple and requires a careful and thorough examination of the history of thought. The relationship to liberalism is a conundrum that would continue to plague republicans. But I am not comfortable with using the label "republican" for the understanding of the Constitution that has libertarian undertones, as Barnett does. It is not only because it is a departure from the republican tradition, but also because it seems to close the way to a more promising understanding of the law than that offered by liberal constitutionalists.

7. Interim conclusion

In this paper, we have examined the shift of republican constitutionalism. I do not repeat the summary here, for I put it at the beginning. Please refer to it.

The position of republican constitutionalism, which emerged in the field of constitutional theory in the late 1980s, drew the attention of many critics for a while. But since then, it has faded away partly because the leading theorists

did not publish so vigorously on the subject after the 1990s. Barnett's work, "Our Republican Constitution," was expected to be a re-telling of republican constitutionalism and to herald a new revival of republicanism. But it has been somewhat disappointing. He wrote the book with an awareness of the political issues that were being debated in the U.S. at the time of its publication (the pros and cons of the so-called Obamacare), as stated in the preface and other passages. It may be a "political" work - in the sense of a commentary on current public events - rather than a study to develop a philosophical reflection on republicanism.

However, I cannot help but feel uncomfortable that the central concepts of "the Republican Constitution" and "the Democratic Constitution," which he uses as a device for his argument, are being used for convenience with a political agenda. He denounces that progressive Democrats opportunistically misused their democratic conception of the Constitution for other political purposes. On the contrary, he states, "[m]odern-day Republicans can be just as opportunistic about republicanism as Democrats are about democracy," even promoting that they use the apparatus of their constitutional theory for political convenience.(82) This kind of argument raises the suspicion that the argument on judicial deference may also be changing opportunistically depending on the political inclinations of the Supreme Court - conservative or liberal. Such an argument does not seem to be a sincere and honest attempt to carry on the tradition of republicanism, but an act of self-destruction that arbitrarily distorts that tradition for political expediency.

Republican constitutionalism has been and will continue to be a significant position that sets forth a different view of the Constitution from liberal constitutionalism. Along with Lockean and Madisonian ideas, it interprets the Constitution not only as protecting individual rights but as providing for self-government and political deliberation. For this not to end up as a temporary boom, we hope that it will be taken over seriously as a sincere theoretical effort, regardless of political trends.

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(82) Barnett 2016, pp.219–221

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