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# COMMENTS ON CASS SUNSTEIN'S "REPUBLICANISM AND THE PREFERENCE PROBLEM"

THOMAS L. PANGLE\*

## I.

Professor Sunstein's point of departure is a brief criticism of the thesis, which he traces to me among others, that "the American Constitution marked the end of classical politics and the start of a distinctive modern approach."<sup>1</sup> He objects that the division between classical republicans and the American Framers should not be drawn too sharply. The Framers of the Constitution "drew a considerable amount from classical republicanism, especially insofar as they placed a high premium on political deliberation, political virtue, political debate, and citizenship."<sup>2</sup>

So far as I am aware, no competent observer has ever been so foolish as to deny that the Framers drew heavily from classical republicanism. They in fact drew more deeply, and with greater specificity, than appears in Professor Sunstein's rather vague remarks. Classical republicanism inspired the Framers not only in their general concern for civic deliberation, virtue, and citizenship, but also, and more precisely, in their concern for patriotism, fraternity (and hence religious and ethnic homogeneity), ancestral reverence, militia duty (and hence the right to keep and bear arms), and the importance of faith in a providential deity. Incribed over the gateway to American republicanism are the unforgettable words of Publius:

Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established their general liberty and independence.

This country and this people seem to have been made for each other, and it appears as if it was the design of Providence that an inheritance so proper and convenient for a band of brethren, united to each other by the strongest ties, should never be split into a number of unso-

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1. Sunstein, *Republicanism and the Preference Problem*, 66 CHI.-KENT L. REV. 181 (1990).

2. *Id.* at 182.

cial, jealous, and alien sovereignties.<sup>3</sup>

This passage also reminds us of the extent to which the Framers drew from the Biblical tradition, whose continuing importance and strong links to the themes of piety and civil religion in the classical republican tradition Professor Sunstein tends consistently to underestimate.

If we are to avoid missing one another in the night, we must recognize that the issue is not whether classical republicanism was or was not an important element in the thought informing the Constitutional framing. Rather, the real issue is the question that I restate in my essay above.<sup>4</sup> How did the political thought of the differing Founders emerge out of and react to the "three complex, diverse, and competing traditions of Western political and republican theorizing"—the theocratic tradition rooted in the Bible, the classical republican tradition rooted in classical political philosophy, and the liberal tradition originating in a vast rebellion against the first two in the name of a radically new rationalism?<sup>5</sup>

As regards the answer to this truly fundamental question, here I will only add that I think it is demonstrably incorrect to assert that "the framers were hardly . . . believers in a prepolitical sphere of private rights."<sup>6</sup> One must only consider Hamilton's appeal to "that original right of self-defense which is paramount to all positive forms of government;"<sup>7</sup> Jay's appeal to "natural rights" that antedate political institutions;<sup>8</sup> and Madison's appeal to the "state of nature" as the foundation for the principles of justice.<sup>9</sup> Beyond these statements, there is James Wilson's great speech in the Pennsylvania ratifying convention, in which this preeminent Founder summed up what he termed "the principles and conclusions generally admitted to be just and sound with regard to the nature and formation of single governments, and the duty of submission

3. THE FEDERALIST No. 2, at 38 (J. Jay) (C. Rossiter ed. 1961). Compare Madison's solemn reminder that "the kindred blood which flows in the veins of American citizens, the mingled blood which they have shed in defense of their sacred rights, consecrate their Union." THE FEDERALIST No. 14, at 104 (J. Madison) (C. Rossiter ed. 1961). Cf. J. Jay, *Address to the People of the State of New York*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-88, at 70-71, 86 (P.L. Ford ed. 1888).

4. I devoted to this same question much of the book which Professor Sunstein refers to as the basis for his criticism. See T. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* 22-26, 28-36, 43-47, 53, 72-75, 79-82, 85-87, 93, 95, 107-8, 112-14, 124-27 (1988). Professor Sunstein refers to my book, but gives no precise page references or quotations, so it is difficult to see what led him to so simplistic a rendition of the book's thesis.

5. Pangle, *The Classical Challenge to the American Constitution*, 66 CHI.-KENT L. REV. 145, 148 (1990).

6. Sunstein, *supra* note 1, at 182.

7. THE FEDERALIST No. 28, at 180 (A. Hamilton) (C. Rossiter ed. 1961).

8. THE FEDERALIST No. 2, at 37 (J. Jay) (C. Rossiter ed. 1961).

9. THE FEDERALIST No. 51, at 324 (J. Madison) (C. Rossiter ed. 1961).

to them."<sup>10</sup> He states these principles as follows:

in a state of nature, any one individual may act uncontrolled by others; . . . amidst this universal independence, the dissensions and animosities between interfering members of the society would be numerous and ungovernable . . . . Hence the universal introduction of governments of some kind or other into the social state . . . . Civil liberty is natural liberty itself, divested only of that part, which, placed in the government, produces more good and happiness to the community, than if it had remained in the individual.<sup>11</sup>

Or, as Wilson says in his inaugural lecture on law of 1790, "Government is, indeed, highly necessary; but it is highly necessary to a fallen state. Had man continued innocent, society, without the aids of government, would have shed its benign influence even over the bowers of Paradise."<sup>12</sup> Wilson's estimate of the views of his compatriots on the nature of liberty and justice is fully vindicated by such fundamental public documents as the Virginia Declaration of Rights:

all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and attaining happiness and safety.<sup>13</sup>

## II.

However, Professor Sunstein's chief preoccupation in this paper is not to contribute to the rediscovery of the authentic philosophic foundations of the American Constitution and republic. Rather, he devotes his energies to showing how the insights afforded by classical republicanism may provide us with a constructively critical perspective on the existing, predominantly liberal American republic, with its neglect of "collective deliberation about character, public values, or the good life."<sup>14</sup>

Sunstein begins by demonstrating that even or especially in a regime as liberal as ours, preferences cannot be understood as simply given, but must be seen as inevitably shaped, directed, or even created by government action and inaction. To illustrate some of the important ways in which the nature of public policy now shapes—or can reshape—prefer-

10. Wilson, *Commentaries on the Constitution*, in *SELECTED POLITICAL ESSAYS OF JAMES WILSON* 172, (R. Adams ed. 1930).

11. *Id.* at 172, 175.

12. Wilson, *The Study of Law in the United States*, in *id.* at 210. The last passage illustrates the link that was sometimes forged, in the thought of the Founders, between the grounding of justice in prepolitical rights and the Biblical teaching on the prepolitical origin of the human condition in a state of innocence followed by the Fall.

13. VA. DEC. OF RIGHTS OF 1776, prov. 1.

14. Sunstein, *supra* note 1, at 182.

ences, he draws on examples from welfare, public health, and environmental and broadcasting regulation. Sunstein reflects intelligently on the sometimes subtle consequences of public policy for preference formation. He appeals to an enriched conception of human autonomy understood not merely as the satisfaction of personal preference but as “decisions reached with a full and vivid awareness of available opportunities.”<sup>15</sup> Throughout, he stresses the inadequacy of relying solely on the forces of the free market, which is minimally regulated with a view to promoting efficiency.

But what exactly is “classical republican” in all of this? The classical republican dimension of this critical perspective becomes visible when Professor Sunstein argues for “an emphasis on the freedom of collectivities or communities” as essential to what he refers to as his “different conception of autonomy.”<sup>16</sup> He offers a persuasive case for the view that participation in politics—even if attenuated, occasional, or rather distant—can broaden, elevate, and refine personal preferences and opinions. When individuals act, and conceive of themselves as acting, in their capacity as citizens, moral aspirations, altruism, and even longings for changes in their own preferences or outlooks are more likely to guide them. Most importantly and most remarkably, individuals may take a longer and sterner view of their own moral deficiencies than they would ever do when acting as participants in the marketplace. Sunstein strengthens the plausibility of these contentions by offering some good reasons for this characteristic purification of motives through the operations of the arena of citizenship—as contrasted with the arenas of production, trade, and consumption animated by the profit motive.

Professor Sunstein concludes that we need to explore ways in which public policy might encourage a somewhat intensified civic consciousness, and a concern for the opening of the opportunity for such consciousness formerly excluded or forgotten segments of the populace. Spotlighting the enormous impact of the broadcasting media on the formation of personal preferences and the provision of information about public life, Sunstein courageously questions the conventional resistance to regulating the broadcasting media through such measures as the “fairness doctrine,” or mild forms of censorship with a view to civic spirit and morals, especially among the impressionable young.

Yet on the whole I am struck by the tepidity and timorousness of Professor Sunstein’s use of the critical perspective afforded by classical

15. *Id.* at 186.

16. *Id.* at 187.

republicanism. I cannot help but wonder whether he has really allowed himself to be exposed to the full challenge—the stern provocation to hard, self-critical reflection—that we modern democrats in fact encounter in the actual texts of classical republican thought. It would be a shame if so rich and challenging an alternative vision of republicanism and autonomy as that afforded by Plato, Xenophon, and Aristotle were to be watered down into a comforting supplement to the fashionable wishes of conventionally correct-thinking American academics. I believe that Professor Sunstein has missed an opportunity to enliven our discussion with a more radical, venturesome, and authentic introduction of classical republican critical theory, directly grounded in the capital texts.

More specifically, even though Sunstein claims to draw his inspiration from classical republicanism, and from the classical republican roots visible in the thought of the Framers, the number of principal themes he fails to touch upon is most surprising. Consider only those themes that are most conspicuously absent: patriotism, and early schooling in inspiring fraternal traditions; the family, and stress on the personal virtues of deference to elders, parental responsibility, and spousal fidelity and chastity;<sup>17</sup> the reduction in the power of the central government, for the sake of increased federalism, local autonomy and responsibility; the morally educative value of military service; and, last but by no means least, the strengthening of religion.

As the symposium discussion disclosed, there is rather widespread ignorance or misunderstanding about this last aspect of classical republicanism, which entails a profound tension between the inescapably faith-based bonds of vigorous republican liberty and the intransigent questioning or skepticism of Socratic philosophy. This ignorance tends to dull, all the more, the fruitful disturbance that authentic classical republicanism creates in our reigning and highly secular intellectual consensus. Such ignorance makes it possible for scholars and students to assimilate classical philosophic rationalism into the radically different philosophic rationalism of the Enlightenment. Such assimilation leads to precisely the sort of obfuscation that veils from us the most unsettling (and there-

17. Given Professor Sunstein's great unease at the thought that the government might actually "regulate" a right so "fundamental to self-actualization or self-realization" as "intimate sexual activity," *id.* at 192-93 (I assume Sunstein does not seriously object to regulation of intimate sexual activity that involves minors or that is nonconsensual), it is worth underlining—as Machiavelli and Montesquieu both do—the importance of chastity as a civic as well as a private virtue in the classical republican tradition. As Machiavelli remarks in a crucial passage in *THE PRINCE*, "whoever reads the life of Cyrus written by Xenophon will then recognize in the life of Scipio how much glory that imitation brought him, how much in chastity, affability, humanity, and liberality Scipio conformed to what had been written of Cyrus by Xenophon." N. MACHIAVELLI, *THE PRINCE*, ch. 14, in 1 *TUTTE LE OPERA* 48 (F. Flora & C. Cordié eds. 1949).

fore provocative) challenges to our self-satisfied confidence that we dispose of an adequate or "progressive" and superior understanding of the nature of philosophy, and of the relation of the philosophic life to politics and civic responsibility.

In the oral discussion at the Symposium, Professor Nussbaum joined Professor Sunstein in expressing doubts about the centrality of divine sanctions for civic and moral virtue in the classical republican texts. On this basis, she and Sunstein were able to suggest that the Platonic teaching on the need for the "noble lie"<sup>18</sup> or Aristotle's warning about the need for "extreme caution"<sup>19</sup> on the part of political philosophers, could be downplayed or disregarded.<sup>20</sup> At the same time, paradoxically, Professor Nussbaum called for greater attention to the Stoic dimension of classical or Socratic republicanism. However, from the evidence that remains, the Stoics would appear to have been unrivalled in their insistence on the providential sanctions or support for virtue; and it is as such that the leading commentators (*e.g.*, Montesquieu) in the Founding period viewed them. The Stoics, of course, drew on such classic Socratic texts as Xenophon's *Oeconomicus* and account of Socrates' dialogue with Aristodemus (in the *Memorabilia*); the great myths of divine judgment, retribution, and reward in the afterlife with which Plato ends the *Gorgias* and *Republic*; and the elaborate account of divine reward and punishment that is the heart of the civil theology elaborated in the tenth book of the *Laws*. Aristotle in his way insists more strongly than Plato that traditional piety is essential to sound republican orders. Certainly Aristotle's most severe criticism of the *Republic* (the only criticism he repeats) is of Plato's sacrilege, from the perspective of orthodox Greek piety.<sup>21</sup> In his own account of the best regime in books seven and eight

18. PLATO, *REPUBLIC* 414b et. seq.

19. ARISTOTLE, *EUDEMIAN ETHICS* 1216b40.

20. Professor Nussbaum went so far as to suggest, in her oral remarks, that the doctrine of the "noble lie" is presented in only a single passage in Plato (*REPUBLIC* 414b et seq.). See also Nussbaum, *Comments*, 66 *CHI.-KENT L. REV.* 213, 234 (1990). In fact, of course, in the *REPUBLIC* alone there are repeated calls for noble lies, beginning in Socrates' discussion of the primary education of the children (377b-378e). His call continues in his discussion of the difference in education between rulers and ruled (389b-c), in his insistence that a "host of lies" must be told to regulate sexual behavior (459c-d), and culminates in his famous metaphor of the Cave (514a et seq.). The doctrine of the "noble lie" is restated in the *LAWS*, in what may be called the single most important passage in that work. *PLATO, LAWS* 660d-664b. In the *PROTAGORAS*, Plato presents Protagoras as insisting that all wise teachers, beginning with Homer, have had a hidden teaching covered by an exoteric veil. Socrates does not for a moment disagree, and has in fact just previously been teaching a young Athenian about the very great dangers the soul is exposed to by the "marketplace of ideas"—a metaphor Socrates here coins. Subsequently in the same dialogue Socrates presents an elaborate esoteric interpretation of a poem by the great lyric poet Simonides. One proof of the wisdom of Simonides, Socrates indicates, is the covert character of his writing.

21. ARISTOTLE, *POLITICS* 1262a25-33, 1262b28-35.

of the *Politics*, Aristotle takes for granted that the society will worship the traditional gods of the Greeks. And while piety is not listed among the *moral* virtues of the *Nicomachean Ethics*, the discussion in the same work of the higher, *intellectual* virtues is centered on an unconventional but all the more impressive piety. Aristotle's discussion concludes with the promise that the highest god (*Nous*) befriends and cares for those who share with him in intellectual virtue and the contemplative life; it is this promise which clinches the most fundamental argument of the whole work—that virtue is the key to happiness.<sup>22</sup>

In the American constitutional tradition, this massive religious theme of classical republicanism is echoed by the rhetoric of Jefferson, Lincoln, and Martin Luther King. It is no accident, I believe, that above all else the racial problem has brought home to American statesmen this towering need for some substantial infusion of piety into republican politics and political leadership. For it may be doubted whether there exists any other firm and lastingly reliable foundation for the promulgation, among the mass of men, of the active belief in universal human brotherhood and the duties that flow therefrom. As Jefferson asked in his most poignant and anguished public meditation on the racial question: "Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath?"<sup>23</sup>

Yet in another passage, Jefferson could insist that "our civil rights have no dependence on our religious opinions."<sup>24</sup> This striking contradiction or incoherence is an especially glaring testimony to the basic tension between classical republican and liberal republican principles that underlies and stirs the American constitutional tradition.

22. ARISTOTLE, *NICOMACHEAN ETHICS* 1179a23-33.

23. Jefferson, *Notes on the State of Virginia*, Query XVIII, in THOMAS JEFFERSON: WRITINGS 288-89 (M. Peterson ed. 1984).

24. Jefferson, *A Bill for Establishing Religious Freedom*, appendix to *Notes on the State of Virginia*, in *id.* at 346.



