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THE CLASSICAL CHALLENGE TO THE AMERICAN CONSTITUTION

THOMAS L. PANGLE*

INTRODUCTION

Until the very recent past, a symposium, especially one sponsored by a law school and published in a major law review, on "Classical Philosophy and the American Constitution Order" would have seemed anomalous, if not downright peculiar. For what, sensible observers might well have wondered, do the two subjects have in common that ought properly to occupy the attention of legal scholars? But in the last few years legal scholarship, especially its more theoretical branches, has undergone a striking change. A deep and manifold dissatisfaction with traditional Anglo-American, mainly positivistic or neo-Kantian, understandings of the moral dimension of law has penetrated the profession. A renewed and often troubled inquiry into the normative foundations of law has come to preoccupy legal scholars after generations of superficial complacency. This inquiry is animated by a skeptical quest for the uncritically or even unconsciously accepted normative presuppositions and biases buried within those long-neglected foundations. The new concerns have partly been inspired by a rather groping and usually second-hand encounter with the most powerful and disturbing currents in German philosophy and legal theory of the twentieth century. American legal scholars have begun to become aware of the superficiality and easygoingness of decent but utterly conventional theorists such as Rawls and Dworkin, in contrast to the depths and theoretical intransigence of such morally dubious figures as Martin Heidegger and Carl Schmitt. As a result, American legal theorists have begun to inquire into or look with real curiosity upon some of the previously neglected or even (from within the old frameworks) incomprehensible developments in political philosophy in America and on the Continent. They have begun to recognize, if not yet fully to appreciate, the awesome challenges to which theorists like Hannah Arendt, Raymond Aron, Alexandre Kojève, Leo Strauss, and Eric Voegelin devoted their lives.

At the same time, American constitutional scholars' interest has focused upon a sub-discipline of American history—the history of Ameri-

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can political thought and especially of the political thought of the decisive Founding period. We have seen the burgeoning of an intense new interest in previously unrecognized or insufficiently appreciated themes of the original and grounding stratum of American political culture. The newly revealing searchlights have been turned on by historians inspired by Hannah Arendt (most notably J.G.A. Pocock) and less influentially by political theorists who studied with Leo Strauss (most notably Martin Diamond and my own teacher, Herbert J. Storing). Both sources have advanced the claim, in very different ways and with very differing interpretations of the historical materials, that a grasp of classical political philosophy and classical republicanism is essential to an accurate conception of the most important moral, theoretical, and political foundations of the American constitutional tradition and order. These controversial suggestions about the previously obscured pathway to the heart of American political thought have begun to have an impact on legal theory and scholarship, especially among those theorists and scholars who have been stimulated or disquieted by the developments I sketched at the outset.

While I welcome and support the renewed attention to classical philosophy as an essential part of any adequate study of the theoretical foundations of the American constitutional order, I wish to begin with a strong word of caution or warning. In trying to comprehend the relation between two such complex and imperfectly understood concepts as "the Founding" and "classical political philosophy," we ought to proceed with circumspection. After all, are any of us really more than beginners when it comes to knowing what "classical political philosophy" (or "classical republicanism") means? If we assume—as do all too many legal scholars, political scientists, historians, and classicists—that we enter this territory possessed of trustworthy maps laid out with scientific skill on the basis of great philological and historical advances achieved in Germany and England in the last century and a half, then I believe we proceed at considerable peril. We have only begun to discover how far we have been led astray by the enormously powerful prejudices we have derived from a classical scholarship that to this day remains still deeply planted in the assumptions of such nineteenth century giants as Eduard Zeller. Zeller is paradigmatic of the way in which Kantian and Hegelian philosophic presuppositions concerning the character of philosophy or reason, the existence of "progress" in "science" and in society, the significance of "historical development" and "historical context" in interpreting texts, and the nature of ethics shape, preform, and distort even very

learned and intelligent readings of the classics.¹

The dangers are especially acute and scholarship especially problematic when the principal focus is placed on thinkers like the Stoics of whom we possess for the most part only exiguous fragments and reports. No doubt important (if necessarily somewhat suppositious) scholarly work has been and is being done to ascertain the doctrines of the Stoics (although this work has thus far failed to take sufficiently into account or appreciate the genius of Xenophon's Socratic writings as the chief "classical" text of inspiration for Stocism); but there is also a temptation to manipulate the fragmentary remains in order to "discover" classical precedent or authority for favorite ideological fashions. A couple of generations ago it was the custom—exemplified in Corwin's "*Higher Law*" *Background of American Constitutional Law*—to claim that the Stoics marked a revolution in natural law to an egalitarian and individualistic prefiguration of Locke and the Founders. However, the current fad is "discovering" women's liberation, "inclusiveness," and advocacy of universal higher education in the fragmentary remains. Poor old Musonius Rufus! *Habent sua fata libelli*.²

If we are to experience the bracing challenge of classical philosophy as it was conceived and intended by the classical philosophers themselves, we must not only undertake our own independent studies of the principal nonfragmentary classical texts, we must also simultaneously attempt to identify and flush out our most blinding, cherished, and hence unquestioned prejudices. My distinct impression is that among American historians and legal scholars who write about and invoke "classical republicanism" there has thus far been too little of both these desiderata.

As leading examples of the prejudices I have in mind, let me mention three of the most prevalent and obfuscatory. First, the notion that Xenophon is not a thinker of the first rank and can therefore safely be neglected in the characterization of classical republicanism or the study of classical political philosophy. This notion appears especially problematic in light of the fact that Xenophon was probably the most widely read and cited classical political theorist at the time of the Founding. Second,

1. Zeller's great work is *DIE PHILOSOPHIE DER GRIECHEN IN IHRER GESCHICHTLICHEN ENTWICKLUNG* (Tübingen 1844-52); the most relevant parts for our purposes have been translated as *SOCRATES AND THE SOCRATIC SCHOOLS* (O. J. Reichel trans. 3d ed. 1962); *PLATO AND THE OLDER ACADEMY* (S. F. Alleyne & A. Goodwin trans. 1876); and *ARISTOTLE AND THE EARLIER PERIPATETICS* (B. Costelloe & J. Muirhead trans. 1897). The best brief account of the history of nineteenth century classical philology is U. VON WILAMOWITZ-MOELLENDORFF, *HISTORY OF CLASSICAL SCHOLARSHIP* (A. Harris trans., H. Lloyd-Jones ed. 1982) (orig. German pub. 1921).

2. E. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1965) (orig. pub. 1928-29). The current fad is exemplified in Nussbaum, *Undemocratic Vistas* (Book Review), *N.Y. REV. OF BOOKS*, Nov. 15, 1987.

the notion that we ought to interpret the dialogues of Plato, the treatises of Aristotle, and the history of Thucydides in the light of our supposed knowledge of a biographical "development" involving reactions to political developments traceable in and through these works. The fact is, these classics never suggest that their, or any theorists' works are to be so interpreted. Third, the notion that Plato, Xenophon, and Aristotle's meaning of "philosophy" and their understanding of the relation between philosophy and society or "community," is similar to, and ought to be interpreted and judged in the light of, the conception of philosophy and its relation to society found in Hume, Kant, Hegel, or Mill.

Bearing these cautions in mind, let me very simply and compendiously state what is the significance of our study of classical political philosophy for our understanding of the American constitutional order. The political thought guiding the Founding, and hence the subsequent constitutional order, emerges out of and in some sense rebels against three complex, diverse, and competing traditions of Western political and republican theorizing. These traditions are: (1) the theocratic tradition rooted in the Bible, (2) the classical republican tradition rooted in classical political philosophy, and (3) the liberal tradition which originated out of a vast rebellion against the first two in a radically new rationalism and politics spearheaded by Machiavelli, Bacon, and Descartes. I would characterize the political thought of the American Founding as occupying, if you will, a tension-ridden field of spiritual and intellectual energy emanating from these three poles of radiation. The attaining of a clear view of the distinctive and even warring forces emanating from these three poles is fundamental to any accurate conceptualization of the Founders' enterprise. Only by such a careful delineation can we begin to understand what truly defines, and in some degree distinguishes, the thought of the various American Founders. That definition consists partly in the Founders' firm agreement with one pole—that of rebellious modern rationalism—over and against the two older poles, but also partly in various Founders' sometimes elegant, but oftentimes awkward, attempts to create new syntheses of ancient and modern rationalist and religious political thinking.

The study I would recommend—a study juxtaposing and contrasting classical, biblical, modern rationalist, and American political thought—is not aimed chiefly at knowledge of the "sources" of the Founders' thought (though some light will indeed be shed on the question of sources); rather, the goal is the knowledge that allows us to define, in order to *judge* the Founders' thought—to describe and to *evaluate* its essential and distinctive character. The comparative study I have in

mind necessarily induces us to once again set in motion, after generations of neglect, the old and deep disputes between the Founders and the authentic classical republican philosophers. These disputes form a subset of the wider and deeper quarrels between the modern rationalist philosophers and the classical rationalist philosophers. Moreover, these deeper quarrels turn to a very great extent, though to an extent that is not at first so evident, on the question of the proper response to the challenge to rationalism posed by revelation and the political theologies rooted in revelation.

In order to facilitate the study I am advocating, my discussion focuses on an issue that illustrates with special vivacity the fruitful and challenging potential of a dialogue between classical philosophy and the American constitutional order. That issue is the relation between republicanism and individual rights.

I. THE UNCERTAIN LINK BETWEEN REPUBLICANISM AND INDIVIDUAL RIGHTS

Beginning from within the horizon of the American constitutional order, we are almost inevitably inclined to suppose that the relationship between republicanism and individual rights is close and symbiotic. Yet as soon as we step even momentarily outside this horizon, we are immediately compelled to acknowledge that in the historical record the relation between republicanism and individual rights is much more ambiguous than it first appears when viewed from the American constitutional perspective. From its first recorded beginnings in classical Greece, *Republicanism* has been a leading theme of western political thought. But the idea of rights—including *human* rights, *natural* rights, the “rights of man,” rights understood to belong to all human beings as individuals, and understood to constitute the moral foundation of legitimate political authority—only became an established theme in the mid-seventeenth century in Northern Europe and especially in England.

Moreover, the relatively modern rise of the idea of rights to preeminence by no means necessarily entails a preference for republican government. The authors of *The Federalist Papers* were compelled to argue for republicanism in the face of the opposition and authority of “some celebrated authors, whose writings have had a great share in forming the modern standard of political opinions.”³ A fountainhead of this “modern standard of political opinions” is Thomas Hobbes, who may justly claim the honor of being the most powerful and influential theoretical

3. THE FEDERALIST No. 14, at 100 (J. Madison) (C. Rossiter ed. 1961).

originator of the focus on individual rights. Because Hobbes believes that individual rights are fundamental, he is no friend of republicanism. Hobbes forcefully argues that with a view to securing individual rights, the best form of government is a centralized monarchy; whereas republicanism, generally speaking, tends to threaten individual rights. At the head of Hobbes' arguments is an analysis of the relation between the public and the private interest as exhibited in the histories of republics and monarchies. Hobbes begins his analysis by observing that everyone who bears or shares in sovereign political authority,

though he be careful in his politic person to procure the common interest; yet he is more, or no less careful to procure the private good of himself, his family, kindred, and friends; and for the most part, if the public interest chance to cross the private, he prefers the private: for the passions of men, are commonly more potent than their reason. From whence it follows, that where the public and private interest are most closely united, there is the public most advanced. Now in monarchy, the private interest is the same with the public. The riches, power, and honour of a monarch arise only from the riches, strength, and reputation of his subjects. For no king can be rich, nor glorious, nor secure, whose subjects are either poor, or contemptible, or too weak through want or dissention, to maintain a war against their enemies⁴

In contrast, Republics are compelled to demand from their leaders and citizens that they in some measure transcend or even sacrifice what appears to be their private interests. However, given human nature, people either circumvent this demand or seek some kind of compensation. The result is inevitably hypocrisy, dishonest posturing, and covert exploitation of the public. These effects are intensified by republican policymaking which entails, to a far greater degree than monarchic, endless disputes within the plural highest councils. Eventually the disputants start organizing factions and issuing rhetorical appeals to the populace, thus initiating the vicious spiral of hatred, fear, violent instability, and endless insecurity for all. Hobbes' attack on republicanism in the name of rights is not only aimed against the moralistic ancient republican theorists, especially Aristotle, but equally against the radically different, and radically amoral, republican principles of Machiavelli and his followers who have revived admiration for the republicanism of the Romans: "what a beast of prey was the Roman people!"⁵

4. T. HOBBS, *LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL* 122-23 (M. Oakeshott ed. 1960) [hereinafter *LEVIATHAN*].

5. T. HOBBS, *THE CITIZEN: PHILOSOPHICAL RUDIMENTS CONCERNING GOVERNMENT AND SOCIETY* 89 (B. Gert ed. 1978); *LEVIATHAN*, *supra* note 4, at 122-25, 216-18, 221-22. Hobbes explicitly attacks the influence of Aristotelian republican theory, and more generally, "the reading of the books of policy, and histories of the ancient Greeks, and Romans," as a cause of disloyalty to

Later votaries of individual rights did not go nearly as far as Hobbes, but many—including notably Montesquieu and Hume—did raise doubts as to whether republics, with their natural proclivity to faction, tended to secure rights or curb their own tendencies to violate rights as effectively as well-designed monarchies like the English (*i.e.*, monarchies whose *mixed* constitutions included the checking and balancing advantages of a religious establishment, and a hereditary and hence stable nobility, as well as a powerful but legally limited popular representative branch of the legislature). This doubt was one important source of some Anti-Federalists' animadversions against any attempt to establish, in the American context, a consolidated national government that would eclipse the state governments and their greater simplicity and closeness to the people. As the eloquent Patrick Henry stated in the Virginia Ratifying Convention on June 9, 1788:

Tell me not of checks on paper; but tell me of checks founded on self-love. The English Government is founded on self-love. This powerful irresistible stimulus of self-love has saved that Government. It has interposed that hereditary nobility between the King and Commons Here is a consideration which prevails, in my mind, to pronounce the British Government, superior in this respect to any Government that ever was in any country Have you a resting place like the British Government? . . . Where are your checks? You have no hereditary Nobility—An order of men, to whom human eyes can be cast up for relief: For, says the Constitution, there is no title of nobility to be granted.⁶

Similarly, John Francis Mercer, a veteran of the Revolution, a former member of Congress and Governor of Maryland, and a delegate to the Constitutional Convention turned against the Constitution explaining his stand in part as follows:

The most blind admirer of this Constitution must in his heart confess that it is as far inferior to the British Constitution, of which it is an imperfect imitation[,] as darkness is to light—In the British Constitution, the rights of Men, the primary objects of the social compact—are fixed on an immovable foundation and clearly defined and ascertained by their Magna Charta, their Petition of Rights and Bill of Rights and their Effective administration by ostensible Ministers, secures Responsibility And after all Government by representation (unless confirmed in its views and conduct by the constant inspection, immediate superintendence, and frequent interference and control of the People themselves on one side, or an hereditary nobility on the other, both of which orders have fixed and permanent views) is really only a scene of

monarchies and hence a threat to the security of individual rights. LEVIATHAN, *supra* note 4, at 214, 447-48.

6. 5 THE COMPLETE ANTI-FEDERALIST 233-34 (H.J. Storing ed. 1981) [hereinafter ANTI-FEDERALIST].

perpetual rapine and confusion . . . may we never have cause to look back with regret on that period when connected with the Empire of Great Britain, we were *happy, secure, and free*.⁷

Nor were these thoughts alien to the Federalists, though they were less likely than the Anti-Federalists to express publically their doubts about republicanism. That Alexander Hamilton was deeply moved by such doubts is clear from his remarkable speech at the Constitutional Convention on June 18. While

[h]e was sensible [that given public opinion in America,] . . . it would be unwise to propose [a government] of any other form [than republic,] . . . [i]n his private opinion he had no scruple in declaring, supported as he was by the opinions of so many of the wise and good, that the British Government was the best in the world, and that he doubted much whether anything short of it would do in America.⁸

Hamilton joined in "the praise bestowed by Mr. Neckar on the British Constitution, namely, that it is the only Government in the world 'which unites public strength with individual security.'"⁹ "As to the Executive, it seemed to be admitted that no good one could be established on Republican principles."¹⁰ Accordingly, Hamilton went on to propose "that we ought to go as far in order to attain stability and permanency, as republican principles will admit. Let one branch of the legislature hold their places for life or at least during good behaviour. Let the Executive also be for life."¹¹ On June 26, Hamilton "acknowledged himself not to think favorably of Republican Government . . . [despite or because he] professed himself to be as zealous an advocate for liberty as any man whatever, and trusted he should be as willing a martyr to it though he differed as to the form in which it was most eligible."¹²

The doubts concerning the harmony between republicanism and the securing of individual rights (or liberty conceived in terms of such rights) are not obviously contradicted by the history of republicanism prior to

7. *Id.* at 105-6. See also H. Storing, *What the Anti-Federalists Were For*, 1 ANTI-FEDERALIST, *supra* note 6, at 57-59. With a view to the British Constitution's inclusion of strong popular elements, above all the House of Commons and the Jury system, and its arguable grounding in the ultimate popular sovereignty of a Social Compact, England was sometimes understood to be a kind of "republic"—perhaps the best kind of republic insofar as it checked and balanced republican with nonrepublican elements. See 2 J. TRENCHARD & T. GORDON, *CATO'S LETTERS; OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS* 28 (Letter 37, July 15, 1721) (1733); MONTESQUIEU, *DE L'ESPRIT DES LOIS* bk. 5 ch. 19 and bk. 12 ch. 19, in 2 *OEUUVRES COMPLÈTES* 304, 448-49 (R. Caillois ed. 1949-51); ADAMS, *Novanglus*, 4 *THE WORKS OF JOHN ADAMS* 68-69, 106 (C. Adams ed. 1851).

8. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 288 (M. Farrand ed. 1966) [hereinafter *RECORDS*].

9. *Id.*

10. *Id.* at 289; see also *id.* at 86-87 (statements of John Dickinson).

11. *Id.*

12. *Id.* at 424.

the founding of the United States—as *The Federalist Papers* candidly concede.¹³ Arguably, prior to the founding of the United States one could only with great difficulty associate republican theory and practice with the idea of “human rights” or the “rights of man.” Whether any text that has come down to us from the Greco-Roman world (or any Biblical text) ever mentions what can properly be translated as “human rights,” “natural rights,” or the “rights of man” is doubtful. Concern for certain fundamental rights does figure in classical republican political life and theory. But this is not the chief concern of the classical republic, and insofar as rights are of concern, the rights are mainly rights of *citizens* or specific groups of citizens (*e.g.*, families, neighborhoods, or classes). Typically, these rights are defined by and within a particular legal and political order *or* are the rights of the whole political society vis-à-vis other societies or citizens.

Republicanism thus appears to be a genus of which one relatively new species (to which the American republic belongs) is the republicanism that puts individual rights at the center of attention. What then *does* properly define republicanism *per se*? What new qualification, or supplement to republicanism—as it has been understood for most of its history—was required, *and*, on the other side, what change in the original theoretical understanding of a politics based on individual rights was needed, in order to make possible the close link between republicanism and rights that we find in the American tradition? Is the new American synthesis of republicanism and individual rights altogether successful, or does there remain an important and troubling tension between the two elements of the new synthesis?

II. REPUBLICANISM AS CONCEIVED BY THE FRAMERS OF THE CONSTITUTIONAL GUARANTEE

The Framers were sufficiently confident about the agreed meaning of “a republican form of government” that they included within the Constitution a guarantee of this form to every state, without further explanation.¹⁴ What meaning did they think would generally be understood? Most who commented on this clause at the time of the framing conceived of the guarantee primarily as a bar to monarchy and hereditary aristocracy. More specifically, they generally defined the guaranteed republicanism by the criterion of *popular sovereignty*, or majority rule, expressed and channelled through elected, representative, legislative and executive

13. THE FEDERALIST No. 9, at 71-73 (A. Hamilton).

14. U.S. CONST. art IV, § 4.

institutions checked and balanced by the separation of powers, including an independent judiciary.¹⁵ As James Madison stated in a famous passage of the thirty-ninth *Federalist*, a paper in which he explicitly referred to the Constitution's guarantee of the republican form of government:

If we resort for a criterion, to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour. It is *essential* to such a government that it be derived from the great body of society, not from an inconsiderable proportion or a favored class of it . . . It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified.¹⁶

Madison prefaces this passage with an admission, however, that his definition or criterion for republican government is controversial. In fact, he comes close to admitting that his definition only finds weak sup-

15. THE FEDERALIST No. 43, at 274-78 (J. Madison); Madison, *Vices of the Political System of the United States*, 9 THE PAPERS OF JAMES MADISON 350-51 (R. Rutland ed. 1975) [hereinafter PAPERS]; J. Madison, Letter to George Washington of Apr. 16, 1787, 9 PAPERS 384; Letter to Thomas Jefferson of Oct. 24, 1787, 10 PAPERS 212-14 (R. Rutland ed. 1977); 1 RECORDS, *supra* note 8, at 206 (E. Randolph); 2 RECORDS, *supra* note 8, at 48 (N. Ghorum); T. Coxe, *An Examination of the Constitution of the United States of America*, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, 145-46 (P. L. Ford ed. 1966); *The Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution*, (June 14, 1788), 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 417-28 (J. Eliot ed. 1863); *Letters from a Countryman*, 6 ANTI-FEDERALIST, *supra* note 6, at 71-77, 84. *But cf.* Symmes, *Letter to Capt. Peter Osgood, Jr.*, 4 ANTI-FEDERALIST, *supra* note 6, at 61.

The account of the original meaning of the clause in W. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* (1972), wavers unsatisfactorily between the author's awareness of the considerable, if by no means perfect, precision and consensus of the Founding generation's conception of republicanism, and his wish to clear the way for a judicial activism based on the notion of "protean forms" in the Constitution and an "open-ended intent." *Id.* at 5 n.6. Wiecek admits that "Federalists and Antifederalists agreed on the desirability of republican government . . . and they agreed on its basic characteristics." *Id.* at 72. He then quotes the passages in which Madison and others defined with some precision "republican government"; however, he asserts, without citing any evidence, that "[d]espite the authority [of Madison, these passages do not express] precisely the elements of republican government assured by the guarantee clause." *Id.* at 17-18, 24. On the contrary, and again without adducing evidence, Wiecek proclaims that it was the intention of the Framers to give "an open-ended *command* to posterity that each succeeding generation define anew the character of republican government." *Id.* at 5 (emphasis added). He further states that "the ambiguity of the word 'guarantee' and the phrase 'republican form of government' was so great that they, like the clause itself, were *blank checks* to posterity." *Id.* at 75 (emphasis added).

16. THE FEDERALIST No. 39, at 241 (J. Madison) (C. Rossiter ed. 1961). For kindred characterizations of the meaning of "republican government" in terms of popular sovereignty, see THE FEDERALIST No. 22, at 146 (A. Hamilton), and No. 37, at 227 (J. Madison); as well as T. PAINE, *COMMON SENSE* (Jan. 10, 1776), 2 THE LIFE AND WORKS OF THOMAS PAINE 97-110, 114-22 (W. M. Van der Weyde ed. 1925); T. JEFFERSON, *AUTOBIOGRAPHY*, 1 THE WORKS OF THOMAS JEFFERSON 66-71, 77-78 (P. L. Ford ed. 1904-5); 1 RECORDS, *supra* note 8, at 134-36 (J. Madison) and at 289 (A. Hamilton); and B. Rush, *Letter to J. Adams of July 21, 1789*, 1 LETTERS OF BENJAMIN RUSH 522-24 (L. H. Butterfield ed. 1951).

port in the previous tradition of political theory and history. He concedes, for example, that "Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic . . . [that the same is true of] Venice, where absolute power over the great body of the people is exercised in the most absolute manner by a small body of hereditary nobles"¹⁷ that Poland, and England, have frequently been designated republics, despite the fact that their governments do not rest, except partially, on popular sovereignty (Poland, we may note in passing, included a guarantee of republican government in its Constitution). Madison seems confident that his audience will agree on the 'impropriety' of such undemocratic designations, which he claims "show[s] the extreme inaccuracy with which the term has been used in political disquisitions."¹⁸ Indeed, throughout *The*

17. THE FEDERALIST No. 39, at 240 (J. Madison).

18. *Id.* at 241. The historic role of the guarantee clause in American Constitutional history after the Founding sheds some light on the normative implications of Madison's definition of republicanism. See W. WIECEK, *supra* note 15, at 133-246. It is with regard to questions of race that the clause has been most frequently and revealingly invoked. Abolitionists appealed to the clause prior to the Civil War, and radical Republicans, above all Charles Sumner, looked to the clause after the war as a major source of constitutional authority for Reconstruction, including federal protection for Negro suffrage. On the other hand, Calhoun and others insisted that the clause could and should be construed to protect slavery, since, slavery was a feature of the republican governments in the states at the time of ratification, and therefore, must not be assumed to be incompatible with the guaranteed republicanism. Secondly and more fundamentally, the very notions of justice and republicanism must be understood to be open-ended and changeable with the times or with changes in public opinion. This first part of this argument has some plausibility and finds some support in Madison's remark in THE FEDERALIST No. 43, at 275 that "[i]f the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution." Madison continues speaking in No. 43 as if the clause is meant rather conservatively: "who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers?" THE FEDERALIST No. 43, at 275 (J. Madison); see also THE FEDERALIST No. 39, at 242 (J. Madison), and THE FEDERALIST No. 85, at 521 (A. Hamilton). It is further relevant to note that classical republicanism flourished on the basis of a slave economy, since appeal to classical republicanism in this regard became an explicit part of the slaveholders' interpretation of the guarantee clause, and helps explain the fact that the Constitution of the Confederate States of America included the guarantee clause—understood as a guarantee of republicanism based on slavery (*i.e.*, of republicanism that through open-ended redefinition has metamorphosed into a republicanism that explicitly rejects the principles expressed in the Declaration of Independence). However, the openendedness of the slaveholders' position was its downfall. The republican form of government guaranteed by the Constitution, according to the intention of the Framers (expressed by Madison and the other authorities cited above), is not emphatically either classical or open-ended—above all in its strict majoritarianism and grounding on the natural rights principles of the Declaration of Independence. In his original statement that first called for the guarantee clause, Madison mentions three sorts of minority rules which would to varying degrees violate "Republican Theory" and hence the guarantee; the most severe is the existence of slavery. See 9 PAPERS, *supra* note 15, at 350-51. This position accords with Madison's pregnant observation that "it is admitted that if the laws were to restore the rights which have been taken away, the Negroes could no longer be refused an equal share of representation with the other inhabitants." J. Madison, THE FEDERALIST No. 54, at 337. It would appear then that the Abolitionists have the better case in the final analysis. The contradiction between the persistence of slavery and the guarantee of republican government is best understood as another indication of the Founders' intention to place slavery in the course of ultimate extinction, despite finding themselves

Federalist, Madison sees the more plausible and urgent source of controversy to arise from those who would insist on a criterion for republican government that would be even *more* democratic or popular than his own. Against those who, either out of misplaced enthusiasm for "pure democracy" or a desire to discredit all democracy as unworkable, would insist on identifying democracy with what Madison calls a "pure republic," in which "the people meet and exercise the government in person," Madison defends a *new* sort of representative democratic republic resting on "*the total exclusion of the people, in their collective capacity, from any share in*"¹⁹ government, and thereby making possible the famous "extended" republic whose basic principle, and whose excellence as a cure for the endemic, fatal flaw of democracy—majoritarian faction and tyranny—Madison elaborates in *The Federalist No. 10*.²⁰

Still, other prominent Federalists and Anti-Federalists, while they agreed on the meaning of "republican government" that was intended in the guarantee clause (even though they might doubt whether the clause itself actually effected much of a guarantee), were more candid concerning the innovativeness or break with republican tradition that was implied in this new American democratic or popular criterion for a republican government. The British Constitution, or more generally a mixed constitution that included monarchic and hereditary-aristocratic institutions together with a popular branch of the legislature, continued to be understood by some—most notably John Adams—as a kind of republic in a more traditional sense than was becoming the standard Amer-

compelled to compromise temporarily with the evil. The best account of the Framers' views on slavery, especially in relation to their republican theory, is Storing, *Slavery and the Moral Foundations of the American Republic*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 313-32 (R. Horwitz ed. 1986).

19. *THE FEDERALIST* No. 63, at 387 (J. Madison).

20. *THE FEDERALIST* No. 14, at 100 (J. Madison); *THE FEDERALIST* No. 10, at 81-84 (J. Madison). See also J. Madison, Letter to T. Jefferson of Oct. 24, 1787, in 10 *PAPERS*, *supra* note 15, at 206-19. Madison's implicit characterization of his Anti-Federalist opponents is not in this respect quite fair or accurate. Few Anti-Federalists advocated "pure democracy" or embraced classical republicanism, taking the classical republics as models. Most Anti-Federalists repeatedly attacked what they perceived as the "aristocratic" bent of the proposed regime; they did so, however, in the name of representative government and a version of separation of powers which differed from that advocated by Madison as part of his argument for the "extended republic." The Anti-Federalists largely rested their hopes, not on classical, urban, intensely civic-spirited *poleis*, or "city-states," but rather on libertarian state and local governments that would be simpler, more restricted, smaller scaled, and closer to a more rural, homogeneous, and virtuous populace than the national government proposed and the society envisioned by the Federalists. A few Anti-Federalists, most notably Elbridge Gerry, were severely critical of democracy—"the worst he thought of all political evils." 2 *RECORDS*, *supra* note 8, at 647. See also *Essays by Sidney*, 6 *ANTI-FEDERALIST*, *supra* note 6, at 89-104. By far the most subtle and accurate presentation of the Anti-Federalists' political theory is Storing, *What the Anti-Federalists Were For*, *supra* note 7.

ican notion.²¹ Even regarding ultimate popular sovereignty or a social contract, the most learned Federalists and Anti-Federalists were ready to admit that this criterion, minimally popular as it was, nonetheless represented a democratic innovation. All were familiar with, even if they did not simply accept, the republican theory of Montesquieu, generally acknowledged as the greatest political theorist of the age. The *Spirit of the Laws* defines republican, in contrast to monarchic and despotic government, as the government "in which the body of the people, or only a part of the people, has the sovereign power. . . . In a republic, when the people in a body hold the sovereign power, there is a *Democracy*. However, when the sovereign power is in the hands of part of the people, this gives itself the name *Aristocracy*."²²

Montesquieu's silence about the social contract, as well as his treatment of a strictly aristocratic government as a perfectly legitimate species of republican government, is an echo of the great tradition of classical republicanism rooted in the political theories of Plato and Aristotle and practice in the cities of the Greco-Roman world. As the American Founders were to varying degrees aware, this classical republican tradition was fundamentally *aristocratic*. It did not define republicanism in terms of a social contract or popular sovereignty any more than it defined liberty in terms of individual rights. The classical republicans were aware of the *idea* of a presumed social contract among individuals as the basis of legitimate authority, but Aristotle, in the preeminent classical republican discussion, rejected such a contractual grounding for civic justice and legitimacy as wholly inadequate.²³ Similarly, the classical republicans were familiar with democracy, or government based on popular sovereignty, as one form of republicanism, but they did not regard such government as the sole legitimate form of republicanism, let alone the best form. In Aristotle's classification of regimes, a classification that remained authoritative until the radical innovations of Machiavelli began to gain acceptance, democracy was categorized as the least bad of the fundamentally defective kinds of polity.²⁴

It begins to appear, then, that we were mistaken in our initial incli-

21. See *supra* notes 4 and 5 and accompanying text, as well as *Essays by Sidney*, 6 ANTI-FEDERALIST, *supra* note 6, at 95, and Symmes, *Letter to Capt. Peter Osgood, Jr.*, 4 ANTI-FEDERALIST at 61. See generally Adams, *Defense of the Constitutions of Government of the United States of America*, 4-6 THE WORKS OF JOHN ADAMS (C. F. Adams ed. 1851).

22. Montesquieu, *supra* note 7, at 239 (my translation).

23. ARISTOTLE, POLITICS 1280a7-1281a7. Here and throughout, works of classical philosophy will be cited by the universally recognized section or page divisions. All translations are my own. I have used the Oxford and Budé editions of the Greek and Latin texts.

24. ARISTOTLE, POLITICS 1279a23-b10.

nation to suppose that republicanism is a genus of which the new American type of republicanism, with its stress on individual rights, is a species. The difference between the new republicanism that comes to the fore in the American Founding and classical republicanism is not between species, but over the very definition and nature of the genus. The two types of republicanism dispute the basic principles of republicanism. If the classical understanding of republicanism, which had reigned almost without challenge for two thousand years prior to Machiavelli, did not conceive of republics in terms of the basic categories in which republics were defined by the new republicans of the eighteenth century, what then were the defining principles of republicanism in the classical understanding, and just how do these principles contrast with and thus illuminate the principles underlying the new American republicanism?

III. CLASSICAL REPUBLICANISM

In the classical view the primary concerns that preoccupy and distinguish republican government are freedom and rule—conceived as inseparable. In the republican sense, freedom entails some meaningful degree of self-rule; freedom seems incompatible with being ruled by others. In this view, freedom entails being a citizen of a regime in which one has either direct access to, or eligibility for participation in, sovereign office and the deliberations that authoritatively shape communal life.

However, under the light of self-critical scrutiny this primary connotation of republicanism undergoes a considerable transfiguration. In the first place, not everyone can rule all the time. Rule must be rotated. Thus, freedom entails belonging to a society in which one rules and is ruled. Before knowing how to rule as a republican one must know how to submit to being ruled. One must know how to obey, not under compulsion as a slave, but as a free citizen animated by an inner and voluntary obedience. Therefore, upon closer examination, freedom is *not* incompatible with being ruled, but instead *presupposes* being ruled by having the capacities of character that make one a good and truly obedient follower. Citizens are and ought to be ranked—honored and dishonored—in accordance with their demonstrated capacity for such obedience. But, if there are specific qualities of heart and mind that distinguish one individual *follower* from another, these qualities pale in comparison with the importance and elevation of the qualities that distinguish one individual republican *leader*, or ruler from another. In other words, one must *deserve* to rule. “Equality before the law” (*isonomia*) as proposed by Otanes—a system where all have equal “right” to rule,

where the most responsible offices are filled by lottery, or where no qualification or test is required for the privilege of voting on policy in a sovereign assembly—is as absurd as Otañes attempting to live outside of all rule. Upon reasonable analysis, “equality before the law” or equal republican access to or eligibility for office means equal opportunity to earn the trust of one’s fellow citizens on the basis of proven merit and potential.²⁵

The characteristics that ought to be taken into account in determining political merit are called the virtues, which are well-known both in their nature and their relative ranking to all sensible citizens who have any experience in public life. At the foundation of the list are the virtues reasonably demanded of all citizens, followers as well as leaders. These include a sense of shame or reverence, courage, moderation or self-control, truthfulness, justice, and piety. Then, there are the rarer excellences that distinguish those few who deserve their fellow citizens’ trust and obedience: generosity, noble ambition, pride, justice in the sense of a quasi-paternal concern for the common good, and reigning over all these more strictly moral qualities, a complementary intellectual insight, prudence, or practical judgment and wisdom that crowns what we all call “statesmanship” (politiké).

A sound republic would be one in which the ruling offices are distributed according to virtuous merit, and those possessing this merit would be given the freest and fullest opportunity possible to exercise their capacities. But those who recognize merit in others must possess considerable merit themselves; especially in politics where experience is an important teacher, the recognition of merit depends on the maximum practical experience. Therefore, the best republic seems to be a strict or nonhereditary aristocracy, as in Plato’s *Republic*, in which the few meritorious rulers select their subordinates and replacements from the whole populace who are all open to compete and display their potential merit on an equal basis—starting in the course of their public education in youth.

Actually, as Plato’s *Laws* demonstrates, the rule of the wise and virtuous must be qualified by the principle of popular consent (*i.e.*, by the principle of majority rule). Constitutionally speaking, aristocracy must be “mixed” with democracy. But with what right? What justifies the adulteration of the minority rule of the more public spirited by the self-

25. ARISTOTLE, POLITICS 1276b18-1278b5. Regarding the meaning of *isonomia*, see HERODOTUS, bk. 3, §§ 80-83 and contrast PLATO, REPUBLIC 561e and 563b with SEVENTH LETTER 326d, and THUCYDIDES bk. 3, § 62 and bk. 6, §§ 38-39.

ish power of the majority (rich as well as poor)? The simplest, but for the classics the most decisive, answer is that the majority by virtue of their numbers are superior in *strength* to the minority; the nature of political life is such that in some measure might makes right or, at any rate, might cannot be denied a decisive voice. Still, the might or strength in question pertains to human beings, not animals. It is the might of those who are not simply concerned with sheer strength but with the freedom and dignity that goes along with having some meaningful share in rule.

The fact that some men are superior, sometimes vastly superior, in the moral and intellectual qualities that constitute the capacity to be a statesman, to care for the community as a whole, does not utterly eclipse the more modest talents and attainments, and hence deserts, of the vast majority of ordinary folk in a decent republican society which makes provision for education, as well as for relief from blinding poverty, and imposes restrictions on acquisitiveness. The few who genuinely care about the good of the whole citizenry will seek to give opportunity for virtuous action and some substantial political responsibility to the majority. However, this view of the majority's claim only underlines the degree to which consent or majority rule is a distinctly secondary and second-ranked principle of legitimacy. The first-ranking and sovereign principle is *virtue*; therefore, consent must justify itself at least partly in terms of aspiration to and qualification for virtue. Strictly speaking, "popular *sovereignty*" is always an abridgment of civic justice (*i.e.*, of the sovereignty of the just).²⁶

The preeminence of virtue over consent, as well as the redefinition of freedom and rule in terms of virtue, is more profound when we observe that the virtues which qualify men for rule cannot be adequately comprehended as means to other ends. The virtues do indeed function as means to ends like collective security and prosperity, and the duties the virtues dictate do indeed compete with and compel the sacrifice of private interests and gratification; however, the virtues are also central to the fulfillment and perfection of human existence. While virtue does not guarantee, and may not even wholly constitute happiness, it can be the heart of happiness.²⁷

Yet this contention that virtue is the heart or core of happiness is controversial. Many people doubt the centrality of virtue to human hap-

26. PLATO, LAWS 756e-758a; *cf.* ARISTOTLE, POLITICS 1281a23-38; ISOCRATES, *Areopagiticus* 21-22, 60-63, 69-70.

27. PLATO, APOLOGY OF SOCRATES 30b and LAWS 631b-d; ARISTOTLE, NICOMACHEAN ETHICS bk. 1.

piness. These doubts are rooted in the observation of troubling facts.²⁸

Initially, there is the observation that the security, prosperity, glory, and even beauty of the republic as a whole and of individuals sometimes seems dependent upon actions and men who are not virtuous. For example, Thucydides does not let us forget any more than does Plato that the splendor of Periclean Athens was founded on an immoderate and delusionary imperialism. Nor is it clear that the Sparta which presented itself as the alternative, which opposed and finally crushed Athenian imperialism, was itself an unambiguous agent of moral purity or republican liberation.

The second observation is that virtue is not natural but dependent on early childhood habituation, which requires the support of the coercive, awe-inspiring, and frightening authority of the law—written and unwritten. Indeed, the support from the law and legal sanctions seems required for all or almost all decent citizens throughout their lives. Nowhere is the dependence of moral virtue on coercive law, enforcing communal morals through punishment, more vividly highlighted than in the closing pages of Aristotle's *Nicomachean Ethics*—a passage which “naturally” includes a rather high praise of Sparta. That virtue is not natural in the sense of being spontaneous is compensated by its naturalness in the higher sense of completing or actualizing the natural human potential. Yet, if moral and civic virtue is “law-bred,” or dependent on the external compulsion of law-enforced fear, shame, and honor, the question arises whether such virtue can be the true response to humanity's deepest natural needs.²⁹

John Adams was certainly correct to stress that republicanism has always been closely associated with the rule of law, but it is doubtful whether he understood the problematical character of this assertion in the context of classical republican political theory.³⁰ The rule of law is distinguished from the rule of men. This distinction indicates the unreliability or untrustworthiness of men unrestrained by coercion. Aristotle's classic and complex argument for the rule of law is opposed and dialectically illuminated by an even more powerful argument for the rule of one truly superior man whose virtue and wisdom ought not to be trammelled

28. The most profound and delightful introduction to the difficulties is XENOPHON'S EDUCATION OF CYRUS—Machiavelli's favorite work of political theory. See also PLATO, LAWS 627a-d, 638a-b, 706a, 707d, 770e, 936b.

29. PLATO, LAWS 631d-632c, 643e-645c, 653a-657b, and above all 875a-d; ARISTOTLE, NICOMACHEAN ETHICS bk. 2; ISOCRATES, AREOPAGITUS 14, 40; XENOPHON, EDUCATION OF CYRUS bk. 1, ch. 2; THUCYDIDES bk. 7, § 86 at the end.

30. Adams, *Defence of the Constitutions of Government of the United States of America*, 5 THE WORKS OF JOHN ADAMS 453 (C. Adams ed. 1851).

by the necessarily inflexible and crudely general strictures of even the best law. But the argument for law is enhanced by the recognition that such men are extremely rare. The argument includes the recognition that most men who are conventionally or for most purposes called "virtuous" are at best imperfectly or incompletely virtuous—and hence in need of the threat of lawful punishment to keep them on the straight and narrow. Yet the rule of law cannot replace or escape reliance upon the rule of men, not only because men must apply the laws but, above all, because somebody has to make the laws. At the founding of any political order, the "lawgiver," in the supreme sense, is perforce someone who is unregulated by law. The founding calls for a man or men of pure virtue. But civic or moral virtue, as we have seen, is the product of lawfully sanctioned habituation in early childhood. Does not the existence of a truly virtuous lawgiver presuppose an already established sound legal system in which the future lawgiver has grown up and learned virtue?³¹

The fundamental problem is "solved," but at the same time deepened by the introduction of the divine law, or alternatively, the "natural law" conceived as the reasonable edict emanating from a divinely ordered cosmos. Neither in history nor in literature has a classical republic existed which has not been grounded on an established civil religion. Whatever its other tenets, this religion must include the belief that the laws are sanctioned by and derivative from super-human punitive authority.³² The combination of human and divine law, lawgiving and prophecy, lends awesome force to law and virtue. But sooner or later the need to appeal to such support cannot help but raise two very difficult questions. Why does civic and moral virtue need such massive external support? Who or what are the true God(s), and how do we know?

These grave questions are the conundrums, arising directly out of serious reflection on the moral-political life, that open the door to political philosophy in the classical republican (Socratic) sense. In this sense, the political philosopher is a man who intransigently raises, and having raised, never ceases grappling with the question, "What is virtue?"—what is the nature and essence of virtue, of truth as opposed to apparent

31. ARISTOTLE, *POLITICS* 1283a23-1288a32.

32. PLATO, *LAWS* 708b-724b; *REPUBLIC* 427b-c, 540b-c, 614a-end; *GORGIAS* 523a-end; *XENOPHON*, *MEMORABILIA* b. 1, ch. 3, §§ 1-4 and ch. 4; *OECONOMICUS* chs. 5-7, 11, 21; ARISTOTLE, *POLITICS* 1262a25-35, 1328b11-13, 1329a27-33. As Montesquieu stressed in *DE L'ESPRIT DES LOIS*, bk. 24, ch. 10, "De La Secte Stoique," the notion of a divinely ordered providential sanction for moral law and political life is given special prominence in the reports and fragments of the Stoics. The Stoics seem to have gone farther in this direction than the original Socratics, but they unquestionably built on the strong roots of the Socratic dialogues. *DE L'ESPRIT*, *supra* note 7, at bk. 24, ch. 10.

virtue such as would explain its relation to happiness, God, and to human nature and its needs? This question or set of questions does not meet with a quick or simple answer. Rather it opens up an awakened and fully rational alternative which indicates a human and social way of life that lies above and beyond even the life of the lawgiver, not to mention the statesman or the citizen. The classical republican philosophers insist that the actual experience of this life of philosophy reveals that human nature is so constituted as to find its bliss in thinking and in the genuine self-knowledge that comes from thinking. Therefore, the philosophic life exemplifies a kind of virtue which is truly and radically non-utilitarian, inasmuch as it seeks no end beyond the practice of the virtue or excellence itself. This practice affords a life so rich in its endless preoccupation with unraveling the mystery of human existence that the philosopher finds himself looking back on all political life and ambition as if upon life in a cave—to recall Plato's famous image.³³

Yet there is serious disharmony, as well as mutual need and benefit, involved in the relationship between philosopher and statesman or citizen. As we have observed, philosophy evolves from a puzzled questioning of the meaning and purpose of law or lawfulness. This questioning of law, however positive or reinforcing it may be of law in the final analysis, is nonetheless necessarily disturbing to obedience to law. For such obedience is only rarely and partially a matter of reasoning. As Aristotle stated in a passage of the *Politics* underlined by Thomas Aquinas, "the law has no strength to exact obedience other than habit, and this does not come into being except through lengthy passage of time." The philosopher's activity poses the danger of undermining the traditions, bonds, and healthy limits on thought that support the strongest lawful republican communities and the most lawfully dedicated republican leadership. Decent citizens can be deeply disoriented by philosophy, and the insights

33. XENOPHON, *OECONOMICUS* chs. 6-7, 11-12; *APOLOGY OF SOCRATES TO THE JURY* §§ 5-9; *PLATO REPUBLIC* bks. 6-7; *LAWS* 803c-804b, 961a-969d; *ARISTOTLE, NICOMACHEAN ETHICS* 1152b1-3, 1177a12-1179a33; *POLITICS* 1323a14-1325b31. Perhaps the most important contribution made to our understanding of Socratic philosophy by the reports and fragments of the Stoics is the overwhelming impression they deliver of the meaning of Socratic philosophy as a distinctive way of life constituted by an extraordinary self-sufficiency, self-possession, and self-control. What is most conspicuously unSocratic in the Stoics and their predecessors, the Cynics sprung from Antisthenes, is the relative absence of the philosophic moderation distinctive of Socrates. In the pride or freedom of speech with which the Stoics and Cynics tended to proclaim their superiority and insist on the moral imperative to live as a philosopher, they exhibit a moralism and lack of irony or humanity that is quite alien to the Socrates of Xenophon and Plato. Plato is twice reported to have said that Diogenes represented "Socrates gone crazy [*mainomenos*]." *DIODEGENES LAERTIUS, LIVES OF THE EMINENT PHILOSOPHERS*, bk. 6, § 54; *AELIAN, VARIA HISTORIA*, bk. 14, § 33. To the question, "what is noblest for humans," Diogenes is reported to have replied, "license of speech." *DIODEGENES LAERTIUS, LIVES OF THE EMINENT PHILOSOPHERS*, bk. 6, § 69.

and questions of philosophy can sometimes be misused for evil ends by unscrupulous counterfeit philosophers or "sophists." As Aristotle says in his *Eudemian Ethics*:

it ought not to be thought superfluous for a statesman to engage in the sort of theorizing by which not only the "what" but also the "why" becomes clear. For this is the philosophic mode of investigation in each matter. Yet there is required great caution here. For there are certain people who, because philosophy is thought to consist in discoursing rationally and in no way at random, get away with delivering arguments that are improper for the practical matter in hand and empty, . . . and so it comes to pass that experienced and capable men are taken in by people who neither possess nor are capable of architectonic or practical thought.³⁴

The truly "architectonic" political philosopher must take responsibility for these dangers. He must philosophize in a manner or communicate and publicize his philosophic speculation with a caution that accords with the gravity of the threat his thought might otherwise pose to republican freedom and virtue. The Socratic response exemplified in the treatises of Aristotle is the "loving rhetoric" or "erotic rhetoric" Socrates teaches in Plato's *Phaedrus*. This mode of public and private communication mediates between philosophic skepticism and civic commitment. Through this mode of communication, the Socratic philosopher leads some of the young toward sharing his life, while he attempts to influence their less thoughtful but nonetheless serious and teachable comrades and elders and guide them toward a more sober, gentle or humane, and clear-sighted execution of their political duties.³⁵

But this most radical dimension of classical republican political philosophy to which we are now attending casts an even longer shadow over our initial assumptions or impressions regarding the virtues which qualify men to rule in a republic. Those men who are most truly qualified to rule, because they are the most aware of the problematic character of human existence and are so preoccupied with virtuous activity and friendship that they are immune to any temptations to divert their lives from virtuous activity, practice a kind of virtue which leads them to wish not to have to assume the burdens of rule and leaves them unapt to attract the recognition or assume the leadership of large numbers of necessarily unphilosophic citizens. In the best case, their most appropriate public role (as adumbrated in Plato's *Gorgias*, depicted in Plato's *Laws*,

34. 1216b37-1217a6.

35. PLATO, *REPUBLIC* 487b-502c, 517d-521b, 549c-d; *LAWS* 803c-804b, 886c-894a, 967b-c; XENOPHON, *MEMORABILIA* bk. 1, ch. 1 and bk. 4, ch. 6; ARISTOTLE, *POLITICS* 1269a20-22; THOMAS AQUINAS, *SUMMA THEOLOGIAE* I-II, ques. 97, art. 2.

and manifested in Aristotle's *Ethics* and *Politics*) is to give some crucial general advice to decent, politically ambitious, and talented men engaged in framing laws or reforming republics under law.

This means to say, however, that those citizens who are rightly regarded as "the serious ones," "the respectable community leaders," and "the gentlemen," are revealed on closer and more precise analysis to be characterized by defective, if nonetheless considerable and rare, virtue. They now appear to be men who have not taken seriously enough the problems that come to sight in a careful critical scrutiny of the life-experience of virtue as ordinarily or primarily understood. These men, even in the best case, are therefore not entirely reliable: their virtue is somewhat fragile or exposed to bafflement or temptation.³⁶ In this light, the republican "mixed regime" of which we spoke earlier assumes a claim that is in one sense stronger, and in another sense more disappointing.

Given the fact that full or genuine wisdom consisting of self-knowledge and knowledge of ignorance belongs to a few rare marginal philosophers like Socrates, who are neither easy to identify nor easy to draw into competition for rule, republican life is compelled in almost all actual situations to substitute some kind of approximation to wisdom or virtue. On the other side, since popular consent is necessarily consent of the less wise or less reflective, it is always colored by deception and self-deception. The complex task of constitution-making and ruling in the classical republican understanding, consists of weaving together the necessarily impure simulacra of the twin roots of political authority—wisdom and consent. As a result, the art of political or civic *rhetoric*, understood as the art of conveying noble and beneficial opinion rather than knowledge, stands at the very forefront of classical republican theory. It is through "the noble art of civic rhetoric," whose highest aspirations were first sketched in Plato's *Gorgias* and whose richest exemplification is seen in the preludes to Plato's *Laws*, that the wisdom that is politically possible and the consent that is politically necessary are combined and elevated under the somewhat distant guidance of philosophy. One may say that it is through their teaching on political rhetoric that the classical political philosophers attempt to make their biggest contribution to improving and guiding republican statesmanship and lawgiving. One sign of this characteristic thrust of classical republican theory is that those individuals who most successfully combined classical

36. PLATO, REPUBLIC 619c-d; XENOPHON, EDUCATION OF CYRUS bk. 1, ch. 5, §§ 7-end; bk. 5, ch. 1; bk. 6, ch. 1.

republican theory and practice were themselves great teachers of rhetoric (Isocrates, Xenophon, and Cicero).

IV. THE THEORETICAL BASIS OF THE MODERN FOCUS ON RIGHTS

We are now in a position to appreciate what is truly distinctive in the modern stress on individual rights. The modern political theory of rights may be said to begin from a radicalization of the problems concerning the naturalness of virtue, and of obligation grounded in the demands of virtue that we have just traced in classical republican thought. The new liberal thinking rejects, as unrealistic, the classical republican attempts to contend with these manifest difficulties. In particular, the classical attempt to subordinate the naturally self-regarding passions to self-transcending habit or convention, backed up by the fear of divine as well as human punishment, is replaced by or drastically subordinated to a new proposal for an alliance between reason and passion. Reason ought to be viewed, not as somehow constituting the end or purpose of human existence, but instead as the marvelously effective servant of the passions. More precisely, reason is best understood as the servant of the strongest self-regarding passions, which, when enlightened by their servant, point toward forms of competition and cooperation that bring about "the common benefit of each"³⁷ [a striking phrase coined by Machiavelli and then imitated by Locke]. Modern liberal thought certainly does not preclude discussion of or concern for a kind of civic duty and virtue, but civic duty and virtue are reinterpreted as those limitations on behavior that can be reasonably shown to advance, in the long run and for most men, the satisfaction of their strongest passions.

The thinker at the forefront of this new interpretation is Machiavelli. Given the frightening boldness of Machiavelli's moral teaching, it is little wonder why his most sober liberal successors disavow his paternity. They build, however, on Machiavelli's foundational innovations—even as they reject his political teaching in the strictest sense. Machiavelli's works bespeak an apparent neutrality in the age-old dispute between monarchy and republicanism. This neutrality is not only evident between the *Discourses* and the *Prince*, but more shockingly within each work. In retelling the rise and fall of Appius Claudius, the failed subverter of the Roman republic at its finest hour, Machiavelli does not hesitate to show how Appius ought to have acted, and what is

37. N. MACHIAVELLI, *DISCORSI SOPRA LA PRIMA DECA DI TITO LIVIO* bk. 1, Introduction, beginning (my translation); J. LOCKE, *ESSAYS ON THE LAW OF NATURE* 206 (W. von Leyden ed. 1954).

worse, how future "Appiuses" ought to act in order to succeed in enslaving their fellow citizens in a brutal tyranny. Machiavelli has the audacity to blame Appius for having failed in his attempt to enslave his fellow Romans. How is this seemingly inhuman detachment from love of freedom possible? On closer inspection, this neutrality is the result or expression of a drastic reconception of political life, both monarchic and republican. According to Machiavelli, there is no difference between a healthy republic and a healthy monarchy except in the appearance that appeals to those filled with adolescent moral and political naiveté. A healthy monarchy is just a republic that has temporarily come under the domination of its strongest citizen, who will sooner or later fall to a rival. A healthy republic, like the Roman at its best, is a monarchy with many rival kings each of whom ought to be scheming and working to liquidate his competitors. In that way, a veritable dynamo of conquering power can be built up in either a monarchy or republic, and thus, the people who constantly prepare for offensive war and seek every opportunity to expand their dominion are truly free, secure, rich, glorious, and long-lasting. The model for Machiavelli is always the lupine Roman republic. In other words, politics at its best or truest is a wolfpack, or rather, to use Machiavelli's own image which he stated he borrowed from Ferdinand, a flock of fighting birds of prey.³⁸

Perhaps no thinker has gone so far as Machiavelli in celebrating the beneficent effects of unleashed and ruthless human selfishness. No wonder his successors recoiled from the outcome of his thinking. Yet they could not help but be impressed by the daring and credibility of his analysis. They sought in different ways to domesticate or humanize his basic insights. In particular, Locke and Montesquieu succeeded in profoundly transforming Machiavelli's basic insights into the foundation for a new moral code.

The first step in constructing the new moral catechism is to bestow moral primacy on those passions which are by nature irresistible and therefore blameless. These are the passions by which all men are driven, and therefore, all men can be said to be equally endowed with inalienable "natural rights" to seek the gratification of these passions. More specifically, all human beings may be said to have natural rights to pursue security and liberty—especially the economic liberty to labor and acquire for themselves material wherewithal or property. Moreover, all human beings naturally pursue happiness, although the content of happiness is so diverse and so elusive that it is a mistake to suppose that anyone can

38. N. MACHIAVELLI, *DISCORSI SOPRA LA PRIMA DECA DI TITO LIVIO* bk. 1, chs. 40-46.

or ought to dictate another's goal in this respect. Human beings have a right, inherent in their nature, to pursue happiness as they see fit so long as they respect the same right in others.

Natural duties or laws are secondary to natural rights or claims. Natural duties and laws are defined as those imperatives which dictate the best means to secure and promote natural rights. The preeminent natural duty is to join, or join in constructing, government. Government is best understood as the rationally constructed artifice by which individuals contract with one another to create a collective police power that will limit everyone's pursuit of the objects of their passions so as to make the pursuit more secure for all. In practice, how is this police power organized and operated, and how are the citizens' passions to be schooled in the new, enlightened self-interest guided by reason? The great series of arguments and debates over the answers to these questions animate the whole history of modern liberal political philosophy.

Perhaps more than any subsequent thinker, Hobbes stressed the need for education—an intellectual or scientific, rather than a moral and habitual sort. The citizenry must be enlightened about the true, if somewhat frightening, principles of human nature: the strength, selfishness, or competitive character of the passions, the subordinate but decisive guidance given by reason, and the artificiality yet necessity of law and politics as a cure for the sickness of man's natural condition. This doctrine, as laid down in the philosophic treatises of Hobbes himself, is to be promulgated primarily in universities and is to flow thence, through the pulpits, schools, and public offices to the populace. Thus, the people will grasp the reasons for the onerous burdens and restraints imposed on their passions by law and government; they will understand why government must be authoritarian, ideally a centralized monarchy, in order to drastically limit the natural drift of human selfishness and competitiveness toward civil war. In other words, people will learn that for their own protection their innate or natural equality requires the drastic inequality of political power artificially instituted by their presumed consent in the social compact.³⁹

Mass enlightenment or education in this new scientific and philosophic sense remains a keynote of liberal thought. But it is very much supplemented and reformulated by Hobbes's successors, in the light of their insistence on the need for better fences against governmental oppression, as well as greater concessions to widespread human pride or ambition—both of which considerations dictate a much less restrictive

39. See especially *LEVIATHAN*, *supra* note 4, at 465-67.

distribution of political power. Later liberal thinkers argue that the considerable increase in people having some share in political power can be made workable or safe by an elaborate division and channelling of governmental powers and economic pursuits which constructively check and balance natural human competitiveness. Locke and Montesquieu propose a series of famous institutional schemes: representative government; separation of powers; "mixture" or regularized antagonism of popular, hereditary-noble, and monarchic governmental bodies; and federalism. By these devices, even selfish and imperfectly enlightened pursuits of power can constructively compete. They further argue that the competitive, commercial, or free-enterprise economic system, once liberated and protected, can wean even the most spirited men away from the thirst for militaristic vainglory and toward the creation of vast new sources of collective welfare, security, and comfort.

Locke and Montesquieu concede, however, that these proposal by no means obviate a considerable degree of economic as well as political inequality among the citizenry. Given the principled universal equality and the liberty at the foundation of the modern liberal political teaching about rights, what is to ensure that the mass of men will not grow restive under the unequal distribution that results from the protection of the equal liberties embodied in natural rights? This question intensifies if we keep in view, as Locke insists we ought, the power of the selfish, indeed dangerously selfish, passions animating all men by nature. Moreover, the question becomes acute when we recognize the threat posed by the human imagination, with its tendency to inflate and distort the original, simple passions through religious, heroic, and erotic fantasies, hopes, and fears.⁴⁰ As individuals within the mass, human beings can be brought to their senses by grave threats or times of emergency, but what is to keep them in their senses as the more routine years pass, especially in a flourishing commercial and liberal society? Such a society, we must add, will tend to accumulate ever greater sources of administrative, economic, technological, and military power whose irrational and destructive potential becomes greater as the years go by. The problem of mass education remains pressing, despite or even because of the efficacy of economic and institutional provisions.

In the case of Locke the problem is especially striking. Lockean liberalism not only depends on the persistence of respect for the rights of

40. See especially J. LOCKE, *TWO TREATISES OF GOVERNMENT* bk. 1, § 58; *SOME THOUGHTS CONCERNING EDUCATION* §§ 103-105, 110, 119; *ESSAY CONCERNING HUMAN UNDERSTANDING*, bk. 1, ch. 3, §§ 3, 9, 13.

unequally distributed property, and respect for never-ending hard labor and the burdens of familial responsibility. In addition, by virtue of his doctrine of the right to revolution, Locke stands at the opposite pole from Hobbes among the founders of the tradition of rights-based politics. This right provides the majority with the right and duty to rise in violent and dangerous rebellion to depose a government that is aimed at the long-term enslavement and exploitation of the populace. But what will incline the people, or individuals, to the heroism that the exercise of this right may well entail, and what will prevent the people from abusing the right in fits of mass hysteria or under the delusions bred by soak-the-rich demagogues?

Locke's works provides us with two powerful answers. The first is a new popular religion: a Christianity reinterpreted and transformed to provide other worldly sanctions for obedience to the laws of reason or nature dictated by Locke's liberal political philosophy. Locke devoted a large and very influential portion of his published writings to the creation of such a radically liberalized Christianity. The major difficulty is that the extraordinarily prosaic and almost transparently secular nature of the new "reasonable" religiosity renders rather questionable its capacity to bring authentic religious fervor to the support of the commands of Lockean reason.

The second Lockean answer is a new stress on moral education, outlined in Locke's famous treatise, *Some Thoughts Concerning Education*. The character that is the goal of Locke's new system of character formation is considerably less austere, self-transcending, or public spirited than the character aimed at by the moral education envisaged in classical republicanism. Moreover, Locke views moral education as a private matter. Government is within its rights when it provides basic technical public education, but when government attempts to take on direct responsibility for the character formation of its citizens, it interferes with the sacred private sphere of basic individual rights to liberty and to the pursuit of happiness. Besides, Locke argues, parents, and tutors personally selected and hired by parents, are the appropriate directors of their own children's spiritual development. But this means that Locke's education is restricted to a small minority, those few whose parents are financially able to afford the leisure and the tutors necessary for a fully elaborated education.

Therefore, it is not surprising that Locke's greatest liberal successors, Montesquieu and Hume, rely on less exclusive in the private home sources of popular education for the proper functioning of the new liberal institutions. Both Montesquieu and Hume stress the importance of sub-

political, climatic, and historical forces shaping a "general spirit of a nation"—a national character that welds human beings of all social strata into collectivities rooted in shared traditions, habits, customs, opinions, and beliefs. National characters resulting from generations of shared cultural and natural environments may either be well-disposed or ill-disposed to assimilate the new liberal principles and the modes of behavior those principles require. In other words, Montesquieu and Hume force us to confront the question of the degree to which the successful operation of enlightened self-interest requires preexisting habits and inner sources of discipline, trust, and fellowship or social solidarity that are not themselves the product of enlightened self-interest. Accordingly, both thinkers are less sanguine than either Hobbes or Locke as to the degree to which liberal political systems and principles are likely to spread and take root throughout the world. Both thinkers are more troubled by the fragility of the institutional checks and balances, and the nascent economic freedoms which are beginning to mark England, Holland, and even France in the eighteenth century. More specifically, regarding the protection of liberty and rights in England, both Montesquieu and Hume stress, as we began by noting, the critical role played by the religious establishment, the hereditary nobility, and the monarchy within the mixed constitution of England. Montesquieu implicitly, and Hume explicitly, indicate grave reservations about the doctrines of the social contract, the right to revolution, and even human rights. Both philosophers worry that the incautious promulgation of such libertarian and egalitarian teachings might tend to contribute to a breakdown of the traditional senses of reverence, deference, civility, responsibility, and allegiance that have been built up over generations and that serve as the cement preventing the disintegration and atomization of what these thinkers conceive to be, after all, essentially artificial civil societies.

V. THE PROBLEMATIC AMERICAN REPUBLICANISM OF RIGHTS

This sketch of the previous liberal tradition puts us in a position to appreciate the daring, and by the same token the problematic character, of the American attempt to join republicanism and rights.

The Framers' liberalism departs from the greatest previous forms of liberal or rights-oriented theory and practice in the degree to which it is married to a continuing dedication to popular self-government—seen partly as a means to securing rights, but partly as an additional end, as an essential additional manifestation of human dignity. But the American notion of self-government is decisively colored by the basic liberal

principles of the social contract. The American notion of republicanism introduces the egalitarian, libertarian, or popular-sovereignty principles of the underlying social contract directly into the constitutional organization and administration of the government. In the public pronouncements of the most prominent American Founders, apart from John Adams who in this key respect appears to be an anachronism, they ignore or jettison, to a large extent, the cautions and qualifications that had been the great theme of Hume, Montesquieu, Blackstone, and other eighteenth century liberals. The Americans insist on a government not only of and for, but to a considerable extent by, the people. To be sure, the Americans seek to construct, on a strictly popular basis, institutions that will play a role similar or at least akin to the role played by the nonpopular institutions of the English mixed constitution. Also, the Founders retain the great principle of a representative government, as opposed to a direct democracy. But they make the representative government much more directly responsible to, and therefore much more directly under the control of, the people than had been the case in previous systems dedicated to the protection of individual rights. Besides, in the two subsequent centuries, the system and the outlook they set in motion has developed far in an even more popular and individualistic direction than their original plan envisaged.

America's *republicanism* departs from previous forms of republicanism by taking as its chief goal the protection and fostering of individual or private rights and liberties. As a result, the Americans are at most only the distant heirs of the English republican tradition—the twofold tradition looking back to John Milton on the one hand, and Algernon Sidney on the other. The American Founders largely leave behind the austere blend of Isocratean classical republicanism and Calvinist political theology expressed so eloquently in Milton's *Areopagitica* and *Of Education*. They stand closer to Sidney's *Discourses Concerning Government*, but they eschew even the softened militarism and imperialism of Sidney's much mitigated Machiavellian vision, while laying aside the classical reservations against popular sovereignty voiced by Sidney in the name of the claims of virtue. The American Founders do not characteristically echo Sidney in speaking of the people's duty, under Natural Law, to elect their virtuous superiors as rulers or representatives.⁴¹

Nevertheless, as republicans, Americans do continue to express from afar a sense of kinship with the classical republican tradition. They

41. A. SIDNEY, *DISCOURSES CONCERNING GOVERNMENT*, § 10 at 24, § 13 at 29, § 16 at 38-39 (1698 & photo. reprint 1979).

give expression to a genuine admiration for the improbable self-overcoming exhibited by Plutarch's heroes and fostered by the cities those heroes inhabited and defended. Nor is this glance back to the classical republics merely perfunctory. The Founders certainly restate, at important junctures, some of the principles of classical republican political teaching. They are concerned with recruiting men of virtue for public office under the new Constitution. They appeal to the proud, watchful, and fair-minded spirit of the people as the final bulwark against tyranny. They rely on the sturdy self-sufficiency and independence of the yeomanry to make up the moral backbone of the population.⁴² But they integrate these classical or quasi-classical elements into a framework which makes very little provision for the inculcation or fostering, or even the preservation, of these crucial excellences of character.

The question looming from the beginning which has grown even larger as our constitutional system has evolved, especially in the last forty or fifty years, is whether and how the system provides for the moral and civic education of a people becoming more fragmented in every sense—even as it is given more and more power and responsibility.

The form this question took in the Founding period is instructive. Those who did address the problem of preserving and fostering a reliable popular civic ethos continuously returned to two sources for guidance and inspiration—the classical republics and Protestant Christianity. They did this despite the Founders' tendency to be rather free-thinking. They also did this while exposing the classical republics to excoriating criticism for their failure to protect individual rights, especially acquisitive property rights, for their anti-commercial, Stoical, or moralistic austerity, and for the religious "superstition" that stained, in the Americans' eyes, their councils and public actions.

In other words, during the Founding period, Americans tended to try to imitate or evoke the classical virtues, if only in diluted versions, while condemning or drastically subordinating the classical principles and practices that produced or attempted to produce those virtues. Americans celebrated the Revolution's spirit of brotherhood in arms, sacrifice of life, and martial manliness, while also creating a society in which commerce was to reign supreme, explicitly displacing old-fashioned heroic republicanism. They tried to instill reverence for constitutional law and tradition, while insisting that the law could draw its only

42. See especially *THE FEDERALIST* No. 1, at 35 (A. Hamilton), No. 2, at 38 (J. Jay), No. 14, at 104 (J. Madison), No. 39, at 240 (J. Madison), No. 52, at 329 (J. Madison), No. 57, at 353 (J. Madison), and No. 84, at 514 (A. Hamilton).

legitimacy from its service to the welfare of individuals. They assumed the names of Plutarchian heroes as pen-names while deploring and distancing themselves from the decisive aristocratic dimension of Plutarchian republicanism.

The slender threads that once linked the new, rights-oriented republic to the ancient republican tradition have become increasingly frayed and tenuous. The checks these threads provided on the more powerful mainsprings of the American republic have become weaker and weaker. For several generations now we have been witnessing and experiencing the process by which the American republic, led by its "advanced" elites, has been radicalizing and making ever more unqualified both its liberal or libertarian and its democratic or egalitarian nature. The resulting changes in our public and private life are troubling. The question is not the survival of the system and the republic, at least in the foreseeable future, but the shrinking of the spirit, the shriveling of the heart, and the banalization of existence which seems to loom around us.

This is not to deny the glowing embers of a unique and strong national spirit warming American public life. The victory of the Free World over Communism is not merely a manifestation of the rottenness of Marxism; the victory is also a tribute, despite all the lapses and mistakes, to the resolve, patience, steadfastness, and the prudence of the American electorate and its Cold War leadership over many years. The Civil Rights movement has eradicated or greatly diminished longstanding civic vices through the victory of admirable civic virtues such as fraternity, fairness, courage, and compassion. Americans can take pride in the American economy, whose resilience partially testifies to the citizenry's hard work, discipline, commitment to education, and respect for talent and initiative. But these and other justifiable sources of pride are shadowed by a pervasive malaise that grips the vitals of the nation.

One does not need to look far for symptoms of the debility to which I refer: the political apathy and disenchantment of the American citizenry borne out by steadily decreasing voting and steadily increasing disrespect for elected representatives; the powerful disinclination on the part of those representatives to shoulder the responsibilities and run the risks associated with governing the nation and facing the harsh choices such governing requires; the disintegration of the family and the dissolution of relations between the sexes manifested in rampant sexual promiscuity, staggering rates of divorce, child abuse, child abandonment, especially by divorced and unmarried fathers, single parent households, and households in which marriage has been unknown for generations; the ever dwindling interest in or appreciation of serious literature, history, and

the arts, which are more and more replaced, especially among the best educated young people, by fascination with brutal, sentimental, or escapist and mindless modes of entertainment; the appalling prevalence of drug consumption which induces a growing number of civic leaders on the Left and Right to call for a surrender in the "drug war" and the legalization of drugs.

Never has there been so much chatter about "community," "bonding," "empathy," "nurture," and "gentleness," and never has there been so icy and thorough a disconnectedness between women and men, generations, fellow citizens, workers and neighbors. With the erosion of the supports in tradition, religion, and reason for shared ties of reverence and meaning, "individualism"—the word coined by Tocqueville as the name of the peculiarly American pathology he so presciently diagnosed—becomes more and more the hallmark of American existence. Americans increasingly find themselves cast upon nothing but themselves in a floating anomy of lonely crowds denuded of trustworthy affective and intellectual sources of human fellowship. Speaking about the "state of almost unbearable, though mostly inarticulate, agony [he finds] young people in our society are living in," Christopher Lasch goes on to say:

They experience the world only as a source of pleasure and pain. The culture at their disposal provides so little help in ordering the world that experience comes to them in the form merely of direct stimulation or deprivation, without much symbolic mediation

. . . .
 . . . We have failed to provide them with a culture that claims to explain the world or links the experience of one generation to those that came before and to those that will follow.⁴³

In darker moments, one cannot help but wonder with trepidation whether the country might not be entering upon an irreversible trajectory. Is our culture not gathering a rather frightening momentum? Throwing themselves into essentially unpleasant or stultifying work with a view to the accumulation of greater material satisfactions and petty signs of prestige to which they become ever more grimly enthralled, seeking escape in mindless music, sports, travel, and short-lived, gripping diversions of all kinds, and convulsing periodically with fantastic longings for revelatory erotic or religious experiences; may not future generations of Americans lead increasingly fragmented and purposeless existences in a world of unprecedented materialism, desperate personal isolation, and inner psychological weakness verging on collapse? Or perhaps will the

43. Lasch, *The I's Have it for Another Decade*, N.Y. Times, Dec. 27, 1989, at A23 ("Op-Ed"), col. 5.

inspiring rebirth of enthusiasm for *both* individual rights *and* republican self-government in Eastern Europe—for freedom not only in a negative but also in a more positive, civic or virtuous sense, with all the rich challenges and stern but uplifting responsibilities this implies—infect us here in America with a renewed aspiration to recover the full meaning of both our dedication to human rights and our dedication to republicanism? These seem to me to be among the most urgent questions of the coming century.