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European and U.S. Perspectives on Civic Republicanism

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It is always a great pleasure to learn from my distinguished friend and colleague Professor Jost Delbrück, but it is a special pleasure to learn that U.S. academic neorepublicanism offers a cure for Europe's problems. Such transatlantic confidence salves one's worry about purposelessness and revives one's hope of relevance. Nonetheless, from my U.S. perspective, I think that civic republicanism offers less guidance for the future than Professor Delbrück thinks it does from his European perspective. I will explain my reasons in a moment, but let me emphasize the very large area of agreement between Professor Delbrück and myself. First, though I am less optimistic about republicanism than is Professor Delbrück, I am fundamentally sympathetic with its ideals. Relatedly, the worlds that Professor Delbrück and I would like to see develop are, I believe, substantially similar. I just think that republicanism is too incomplete and too contradictory a collection of ideas to get us there. Indeed, the contrast between a European and a U.S. take on republicanism highlights this paradoxical quality. Because republicanism is so vague and contradictory, we can all find in it what we will; but for the same reason, it offers us limited guidance in coping with the problems of a diverse nation-state.

Professor Delbrück's central concern is that ethnonationalism may be a bar to increased immigration and globalization. In his view, the problem with ethnonationalism is that as a public philosophy it is too culturally specific, too exclusionary, too orthodox: Germany for German persons and German ways, it insists.¹ So Professor Delbrück seeks a countermodel that will allow many cultures to come together, and he finds one in U.S. civic republicanism, with its emphasis on constitutionalism and dialogic politics.² In Professor Delbrück's projected Open Republic, national integration will occur simply through shared commitment to a clutch of general, tolerant

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1. See Jost Delbrück, *Global Migration—Immigration—Multiethnicity: Challenges to the Concept of the Nation-State*, 2 *IND. J. GLOBAL LEGAL STUD.* 45, 55-56 (1994).

2. See *id.* at 59-64.

republican constitutional principles; citizens will then update and apply these principles through public-spirited political dialogue.³ We need nothing more culturally specific than this process to make a nation-state work. Accordingly, republican States can welcome and integrate immigrants from many different backgrounds, and the States can comfortably work with other republican States to solve global problems.⁴

Significantly, in the United States the revival of republicanism has traced an almost opposite path: legal academics have sought in it a cure not for the excessive cultural specificity of ethnonationalism, but for the excessive public emptiness of interest group liberalism. In virtually all recent republican writing, we find a portrait—perhaps a caricature—of liberalism as the political orthodoxy of the twentieth century United States. In this rendition of liberalism, politics is and can be nothing more than the pursuit of individual preference; the job of constitutional government is simply to allow each of us to pursue his own preferences to the greatest extent possible. There is no such thing as a common good or public values—and governments should be barred from acting on any such goals, because the idea of a common good quickly leads to restrictions on individual liberty.⁵ Finding this liberal view of politics empty, republicans have called for a revived public dialogue about communal character. If liberals want to ask, “How can we each best pursue separate ends and stay out of each other’s way?,” then republicans want to ask, “What sort of a community should we be together, in substantive and specific ways?”⁶

We might then imagine a continuum of possibilities here, with ethnonationalism at one end, liberalism at the other, and republicanism in the middle. Ethnonationalism calls for a politics of quite specific content and orthodoxy; liberalism—at its most extreme, and partly in reaction to the poison of ethnonationalism—calls for a politics without orthodoxy and virtually without substantive content. Republicanism blends both worlds.

3. See *id.* at 60-63.

4. See *id.* at 63-64.

5. See, e.g., Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 66-67 (1987); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1507-13 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 544-47 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542-43 (1988); David Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 570 (1991).

6. See, e.g., Horwitz, *supra* note 5, at 66-67; Michelman, *supra* note 5, at 1526-32; Sunstein, *supra* note 5, at 1547-58; Sherry, *supra* note 5, at 551-62; Williams, *supra* note 5, at 585-86, 602-15.

On the one hand, like ethnonationalism, it calls for discussion of shared values; it believes that the condition of the community itself—not just the individuals that make it up—is an appropriate object of concern. But on the other hand, like liberalism, republicanism worries about the risk of orthodoxy. Accordingly, it insists that while a republic must have a character, that character must never be fixed; it must respond to an evolving public dialogue. In addition, individuals must have a variety of rights to ensure their equal and effective participation in that dialogue. In short, neorepublicanism is a blend of somewhat discordant elements—it possesses no ideological purity.

For that reason, republicanism reveals very different aspects when viewed from Professor Delbrück's European perspective and my U.S. one. If your chief fear is revived ethnonationalism, if the specter that haunts you is violence by neo-Nazi skinheads, then the virtue of neorepublicanism is that it promises tolerance for difference. You might adopt it as a model to thin out your country's overly robust public dialogue. But if your chief fear is liberalism's disregard for the losers in our individualist society, if the specter that haunts you is the homeless on the streets of our cities, then the virtue of neorepublicanism is that it promises a social conscience. You might adopt it as a model to thicken your country's overly diffuse and uncompassionate public dialogue. What Germany may need is less discussion about communal solidarity, but what the United States needs is more. From our different starting points, we may meet in the middle—that territory marked out by civic republicanism.

I would love to let the matter rest there, but I feel unable to do so, because that middle ground, I am afraid, is inherently unstable. Republicanism is not just complex; it is contradictory and paradoxical.⁷ To illustrate, let me return to the first two elements of neorepublicanism as Professor Delbrück lays them out,⁸ borrowing from Frank Michelman's now classic article, *Law's Republic*.⁹ First, a republic must be ruled by its citizens; democracy is the basis for governmental legitimacy. But second, a republic must be ruled, in the old gender-specific maxim, not by men (not by citizens) but by laws—a reminder that power, even democratic power, must not be used in arbitrary, oppressive ways. Nevertheless, if democracy

7. I explore some of the following ideas in an expanded form in Williams, *supra* note 5.

8. See Delbrück, *supra* note 1, at 60-61.

9. Michelman, *supra* note 5, at 1498-1503.

really is the key to legitimacy (the first element), then democratic power should always prevail—but that would mean rule by men, not laws, in violation of the second element. Conversely, if one seeks to limit democratic power on the ground that it is arbitrary (the second element), then one invades citizen self-rule, in violation of the first element. The two precepts are contradictory, and yet republicanism insists that we adhere to both of them in their absolute form. At its root, republicanism—like most of us—simultaneously loves and fears popular politics. There is no real alternative to democracy in the modern world, and yet we all have seen democracies act in hateful and oppressive ways.

In this middle ground, in loving and fearing democracy, republicans always face temptations on either side. If one contemplates too long the danger of democratic excess, of oppression of minorities in the name of an ethnic majority, then one might flee from ethnonationalism through republicanism all the way to minimalist liberalism. Under such circumstances, liberalism's siren call of a neutral and empty politics might prove irresistible. Conversely, if one contemplates too long the hollowness and hardheartedness of U.S. liberalism, one might begin to find attractive the kind of communal unity and support promised by ethnonationalism. Republicans are always halfway down the slippery slope, scrabbling for a fixed handhold.

A revived republicanism must find some way to inhabit this middle ground: it must both endorse some form of strong democracy and simultaneously second-guess it. How might we accomplish this delicate task? For early U.S. republicans, the answer was fairly direct: governments must govern in the interests of the People. Most significantly, the body of the People—the self-governing citizens—must all have fundamentally the same interests, so that it is possible to set policy in the interests of the whole. Otherwise, if groups of citizens have systematically different interests, then inevitably some will win and some will lose. For classical republicans, that kind of majoritarian game of winner-take-all was the definition of oppression. How can there be a common good if we have little in common? If we are all the same, however, then the two elements of republicanism need not conflict: the body of the People will always enact laws in the interests of the body of the People, and so there is no danger of

democratic oppression. We can have rule by men and by laws, because they are the same thing.¹⁰

In this regard, I think that historical republicanism shares much with some strains of ethnonationalism. Both prize unity and worry about difference. Both deplore change and wax nostalgic for a mythical golden age of simplicity. Most important, both adopt essentially the same strategy in response to the problem of government: because oppression is always a lurking risk in a diverse polity, polities should be relatively homogeneous. It is true that republicanism and ethnonationalism use somewhat different standards to judge homogeneity. The former imagines a nation composed of citizen-farmer-soldiers, united principally by their daily circumstances of living.¹¹ The latter imagines a metaphysical Volk, united by language, ethnicity, symbols, and memory.¹² But both desire homogeneity, perhaps for some of the same political reasons. Nor, I should add, is that admiration of relative homogeneity confined to those two thought systems; it lies at the root of the international law doctrine of the self-determination of peoples.¹³ The fundamental premise is that democracies work best when they rest on shared values. When possible, political lines should, in a rough sense, follow cultural lines.

Professor Delbrück does not, of course, have that kind of homogenizing republicanism in mind. In fact, he looks to republicanism to deal with increasing diversity, not homogeneity, in European nation-states. He is interested, in other words, not in eighteenth century republicanism but in neorepublicanism—the revival and modification of these old ideas by a group of U.S. law professors.¹⁴ We have looked for a way to talk about the common good while praising pluralism; to unite the citizenry in compassion and solidarity while forestalling orthodoxy; and to blunt the excesses of both liberalism and nationalism. We have returned at this point to the unstable ground, to the republican paradox: how do you both believe in democracy and distrust majorities?

10. See Williams, *supra* note 5, at 568-69, 577-79, 603.

11. See *id.* at 569, 579.

12. See Delbrück, *supra* note 1, at 49-50; E.J. HOBBSAWM, NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY 101-30 (1990).

13. See, e.g., Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1543-51 (1991).

14. See sources cited *supra* notes 5 and 6.

And distrust them we must, because in a diverse society, oppression is again a possibility. There is a reason that Bosnians don't want to live under Serb rule, that Kurds don't want to live under Iraqi rule, that Native Americans don't want to live under congressional rule, and that some African-Americans believe that the federal government will never adequately reflect their interests. If you rid yourself of a robust cultural identity, then you must find something to put in its place. If you don't, government becomes simply the raw pursuit of self-interest, the domination of the weak by the powerful. But if, on the other hand, you do keep a robust cultural identity, government can become the domination of outsiders by insiders. I am told that in Russia, they tell a joke about government: "What is the difference between communism and capitalism?" The answer is: "Communism is the exploitation of man by man, and capitalism is the reverse." The same seems to be true here. We cannot safely live with a notion of the common good, but we cannot happily live without one.

I am not sure how much neorepublicanism helps us resolve these contradictions in a positive sense. Certainly, no modern neorepublican has formulated an answer to the republican paradox that deserves to be called a "model," with all the clarity, specificity, and definition that that word connotes. Professor Delbrück suggests that the answer to republicanism's contradictions may lie in a third element, the marketplace of ideas.¹⁵ We begin with a constitutional framework—the rule of law not men. But if the frame is fixed and unchanging, it would deny the principle of citizen self-government. So republicanism urges us to engage in a public-spirited and diverse dialogue that will, in Professor Delbrück's words, "exercise[] a function of constitutional policymaking and, ultimately, of molding the constitution itself."¹⁶ Such a dialogue may preserve citizen self-rule, but it seems to have abandoned the other principle—the rule of law not men. If the constitution is nothing but what a diverse citizenry says it is in open debate, then how have we blunted the danger of democratic tyranny?

Ultimately, neorepublicans solve this problem by a simple act of will and imagination. They offer us a portrait of a dialogue in which all citizens participate, bring their diverse views to bear, and come to understand the views of others. Through this dialogic process, a common good emerges out of diversity because our ends, desires, and views all come closer

15. See Delbrück, *supra* note 1, at 62.

16. *Id.*

together.¹⁷ Such a process, neorepublicans explain, is what politics should be about, and to my mind, that goal is exactly the right one. But so far, republicanism has offered distressingly little to explain how we can secure such a magic dialogue and such a virtuous citizenry.¹⁸ If we have already been formed by a virtuous republic, why then are we all likely to behave virtuously? But if we are not there yet—if we live in a society that prizes either ethnic bigotry or the raw pursuit of self-interest—then we are likely to reflect those attitudes instead.¹⁹ Under present circumstances, we can only live with republicanism's paradoxes and hope for the best; we must believe in the People or they will never learn the habits of political virtue, but we cannot really believe in the People because they so often act in oppressive ways.

So, in the end, the chief present virtue of neorepublicanism may be primarily negative: it tells us not to oversimplify. Political life is not exclusively about individual interest, or rights, or protection from government, as liberals would have it; it is not exclusively about communal interest, or solidarity, or shared values, as some ethnonationalists would have it. It is about all of those things and much more besides. Citizens of the United States and Europe can learn from each other, but ultimately we must balance those elements in particular contexts, facing each situation as it comes and using the cultural resources available to us. Neorepublicanism maintains above all that our salvation will come not from some formula or some propositional political theory but from ourselves—the will and character of the citizenry at any given moment in time. We can only hope that these are enough.

17. See Michelman, *supra* note 5, at 1526-27; Sherry, *supra* note 5, at 576-79; Sunstein, *supra* note 5, at 1548-58; Williams, *supra* note 5, at 602-05.

18. Significantly, Professor Michelman, on whom Professor Delbrück principally relies, does not claim that such a dialogue is possible; rather, he simply argues that it is a central and necessary element of our constitutional tradition:

“Rather than claiming to establish unconditionally that republican constitutionalism is possible for us, or that we can coherently hold to both commitments, my strategy has been to start with the actual, problematic experience of the dual commitments (I trust that the experience is widely shared by readers) and from it derive a normative idea of dialogic constitutionalism as consistent, at least, with this problematic experience.”

Michelman, *supra* note 5, at 1527.

19. Republicanism itself—at least historical republicanism—rests on the view that virtuous citizens are possible only in a virtuous republic. See Williams, *supra* note 5, at 564-65.

