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FOREWORD: TRAVELS FAR AND WIDE¹

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When John F. Kennedy held a dinner for the American Nobel laureates at the White House, he called it the most illustrious gathering in that spot since Jefferson dined alone.² In the uncharted waters where classical philosophy, history, and law meet, the same might be said of our Symposium. Our participants include Gordon Wood, Professor and History Department Chair, Brown University, and author of *The Creation of the American Republic*³—a man who might fairly be called the godfather of the republican revival; William Galston, Professor, School of Public Affairs and Senior Research Scholar, Institute on Philosophy and Public Policy, University of Maryland, and author of an important body of work on liberal virtues, including *Justice and the Human Good*⁴ and the forthcoming *Liberal Purposes: Goods, Virtues & Diversity in the Liberal State*; Ronald S. Beiner, Professor, Department of Political Science, University of Toronto, and author of the influential *Political Judgment*;⁵ Lawrence Solum, Professor, Loyola Law School, Los Angeles, and author of a growing body of work mining Aristotelian insights within the legal tradition, including *The Vices and Virtues of a Judge: An Aristotelian Guide to Judicial Selection*;⁶ Thomas Pangle, Professor, Department of Political Science, University of Toronto, and author recently of *The Spirit of Modern Republicanism*;⁷ Cass Sunstein, Karl N. Llewellyn Professor of Jurisprudence, University of Chicago Law School, author of dozens of articles and the recent *After the Rights Revolution*,⁸ and one of the two or three founders of the republican revival in legal scholarship; all of whom are commented on with enormous grace and learning by Martha Nussbaum, University Professor and Professor of Philosophy and Classics, Brown University, and author, *inter alia*, of *The Fragility of*

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1. HOMER, ODYSSEY, BOOK I (“Tell me, O Muse of that ingenious hero who travelled far and wide after he had sacked the famous town of Troy.”).

2. See, *inter alia*, *The First Jeffersonian*, N.Y. Times, July 1, 1990, § 7, at 11, col. 1.

3. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1972).

4. W. GALSTON, *JUSTICE AND THE HUMAN GOOD* (1980).

5. R. BEINER, *POLITICAL JUDGMENT* (1983).

6. 61 S. CAL. L. REV. 1735 (1988).

7. T. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* (1988).

8. C. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* (1990).

*Goodness: Luck and Ethics in Greek Tragedy and Philosophy.*⁹

So, if any group could produce a unified field theory of the contemporary American order and classical philosophy, this was it. Not surprisingly, no such consensus did emerge. However, the participants did agree in some interesting and revealing ways on what the issues, if not what the resolutions, were. And the issues our symposium participants saw in the inquiry were: exclusivity and inclusiveness, natural virtue and individual dignity, common good and individual autonomy, elitism and egalitarianism. Put another way, they saw the issues of antiquity and modernity. Now a number of participants, indeed, most participants, sought to find some common ground. After all, if classical philosophy is forever lost on the other side of a fault line drawn roughly through the Peace of Westphalia,¹⁰ the participants wouldn't have much to discuss.

Given the common thread of conflict (or at least inconsistency) between the two subjects of the Symposium, it might be interesting to consider the contributions from the standpoint of reconciliationism. I think it is fair to say that Wood and Galston are the pessimists on the application of classical philosophy to modern American law and life, with varying types and degrees of regret. Sunstein and Nussbaum are the optimists, with varying degrees and types of caution. Pangle's formulation of a tradition in great tension between the republican and modernist strains, Beiner's attack on modern liberalism's strong defenses against classical thought, and Solum's reworking of civic virtue as communicative rationality occupy a kind of middle ground on the reconciliation map.

In addition to illuminating the distances between the traditions, Wood's and Galston's exchange serves to sketch in, at least, the outline of American modernism, against which all proposals for revision must be measured. It seems peculiar to classify the "godfather" of the republican revival as pessimistic about the relevance of classicism to American history, yet two aspects of *Classical Republicanism and the American Revolution*¹¹ make this conclusion unavoidable. One, Gordon Wood's pathbreaking work has been and continues to be focussed on the republicanism that evolved through centuries since antiquity, an evolution that greatly changed in shape and form by the time of the American experi-

9. M. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* (1986).

10. See, *inter alia*, Perry, *A Critique of the "Liberal" Political-Philosophical Project*, 28 WM. & MARY L. REV. 205, 211 (1987). The roots of liberal neutrality are often traced to the unresolvable conflicts that produced the wars of religion.

11. Wood, *Classical Republicanism and the American Revolution*, 66 CHI.-KENT L. REV. 13 (1990).

ence.¹² Gordon Wood is, after all, an historian of the eighteenth century, and it is the eighteenth century species of republicanism that he invokes. As his paper demonstrates, the affective republicanism following the Enlightenment, in which love and benevolence are substituted for more militaristic traits characteristic of the ancient republics, is quite a change from antiquity. But eighteenth century republicanism still remains linked to antiquity, as Wood reflects, in its critique of commercialism, its emphasis on self-governance, and its sacrifice of private interests for the community.¹³ Wood's place at the remote end of the reconciliation line rests most firmly on a second aspect of his work—that is, his unambiguous assertion of the demise of republicanism after the American revolution and its replacement by the “unruly” American republic¹⁴ where even public office, that most sacred of republican cows, was for sale. If republicanism remains an influence in America after this sea change, Wood concludes, it is only in our occasional longings for moderation in the quest for wealth, for country life, and for military types as selfless leaders.¹⁵

Both in commenting on Wood and in *The Use and Abuse of the Classics in American Constitutionalism*, William Galston describes an even wider gulf. At the critical period, he contends, the Federalist Papers rejected Greek practice and theory as warlike, unstable, and inconsistent with prosperity.¹⁶ Although Galston recognizes that the Founders were poised between republicanism, particularly as manifest in their own virtue, and modernity, in the form of egalitarianism and the attendant factionalism they feared, he, like Wood, concludes that the fragile balance tipped to modernity during the period after the Founding.¹⁷ Galston's singular contribution to the debate, paralleling his overall body of work, is to assert the relevance of a structural, rather than a literal, appeal to the classics. Such an appeal, in the case of contemporary American political philosophy, would take the form of articulating the virtues contextual to the regime we have—the regime of egalitarian democracy.¹⁸ But to me the most striking of Galston's insights is not the positive charge, but the forthright description of the loss to egalitarian

12. *Id.* at 19.

13. *Id.* at 23.

14. *Id.* at 36.

15. *Id.* at 37.

16. Galston, *The Use and Abuse of the Classics in American Constitutionalism*, 66 CHI.-KENT L. REV. 47, 49 (1990).

17. *Id.* at 59.

18. *Id.* at 65.

democracy of the political gentleman,¹⁹ who, although bearing unequal gifts, cannot assert a preemptive claim to rule.²⁰

As the contributors come closer to reconciliationism, the strains between the traditions are revealed in greater relief. Thus, at the center of Beiner's and Pangle's papers is a deeply felt expression of how the abandonment of classical ideals has impoverished the modern experience. Of the two, in *The Challenge Classical Political Philosophy Poses to the American Constitution*, Pangle probably comes closer to the pessimists of the Galston/Wood school. After sketching out a narrative of the evolution of political philosophy from republicanism to what he calls the "rights" tradition,²¹ Pangle presents the American founding as a tense interaction among the theocratic tradition of the Bible, classical republican tradition rooted in classical political philosophy, and modern liberal rationalism.²² Pangle asserts that the American "Republicanism of rights"²³ combines two volatile and often inconsistent commitments: to rights and to self-government. The problem with this mixture, he concludes, is that it combines both an ever-increasing trajectory of individualism and the power and responsibility of common governance, while the Founders' wellsprings of public virtue—classical republicanism and Protestant Christianity—are a dwindling resource in modern times.

I interpret Ronald Beiner's *The Liberal Regime* as more optimistic regarding the relevance of classical philosophy to the modern order. He does not balk at applying substantive classical insights to criticize the modern liberal regime. Of the several extremely interesting criticisms Beiner makes, surely the richest and most interesting is his insistence on the existence in any regime of the ethos—that creation of moral life based on character formation according to socially bred customs and habit—and his refusal to accept the liberal claim to a neutral ethos. Instead, he describes a liberal ethos of exaltation of the individual, with an unacknowledged but powerful hierarchy of privileged and depreciated roles. Most importantly, he highlights the seriously negative side effect of liber-

19. "Gentleman" is Galston's locution, which is as it should be, because he's talking about ancient categories, which are lost. For the question of whether the aspiration of the best to rule must be limited to the male norm, see Hirshman, *The Book of A* (Aristotelianism as structural feminism) — TEX. L. REV. — (1992) (forthcoming).

20. Galston, *supra* note 16, at 59-61.

21. The broad history of political philosophy which introduces Pangle's essay is generally attributable to Leo Strauss, directly, and through his first generation of disciples. See HISTORY OF POLITICAL PHILOSOPHY *passim* (L. Strauss & J. Cropsey eds. 1987); and especially, Strauss, *Niccolo Machiavelli*, *id.* at 296-318; and Pangle & Tarcov, *Epilogue*, *id.* at 907.

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

23. *Id.* at 161.

alism's purported neutrality—that it stifles theory as a vehicle to criticize the dominant way of life.²⁴

Criticizing Pangle and Beiner and in their own essays, Cass Sunstein, and to a much lesser extent Lawrence Solum, avert their eyes from the harshest vision of the distance between classical philosophy and modernity. Instead, and this is perhaps the most interesting distinction between their contributions and the rest, they pretty much assume that they can pursue and articulate, even if piecemeal, what Beiner calls a “synthetic position”: liberal republicanism.²⁵

Sunstein reminds Pangle of the consistency between democratic self-government and certain rights, like free speech and assembly, that he considers “logical counterparts”²⁶ to the enterprise. In his main piece, Sunstein asserts affirmatively that a liberal community might selectively breach the assumption of the immunity of private preferences and subject those preferences to the collective device of democratic decisionmaking without sacrificing all that is good in liberalism. And he selects several candidates for this process, including the market monism of broadcast communications and the political monism of unitary districts of representation.

Solum, too, explores the ways in which classical philosophy, as reflected in civic republicanism, can function as “a live theory of how our political order ought to be constituted.”²⁷ (Unlike Sunstein, he explicitly foregoes any argument resting on the actual role of classical philosophy in the founding.) Solum sees two possibilities. One is for the revival of a live concept of Aristotelian civic virtue for the project of self-governance. The other is the inclusion of formerly excluded voices—women, people of color, or people of alternative sexual preferences—in the project of self-government, in the interest of communicative rationality.²⁸ Not surprisingly, Pangle, criticizing Sunstein, and Beiner on Solum see the same failing, that is, a too easy reconciliationism.

But the most heroic effort at reconciliationism has to be Martha Nussbaum's Comments. Interestingly, although she is the source of one of the most provocative revisions of Aristotle's political virtue,²⁹ in this instance she first chooses to remind the reader of the importance, particularly to the founders, of another strand of the classical tradition—the

24. Beiner, *The Liberal Regime*, 66 CHI.-KENT L. REV. 73, 84 (1990).

25. Beiner, *Comment on Solum*, 66 CHI.-KENT L. REV. 141, 142 (1990).

26. Sunstein, *Comment on Pangle*, 66 CHI.-KENT L. REV. 177, 179 (1990).

27. Solum, *Virtues and Voices*, 66 CHI.-KENT L. REV. 111 (1990).

28. This is explicitly from Habermas. *Id.* at 123.

29. Nussbaum, *Shame, Separateness, and Political Unity: Aristotle's Criticism of Plato*, in *ESSAYS ON ARISTOTLE'S ETHICS* (A.O. Rorty ed. 1980).

stoics, to whom she attributes the assumption of the universal capacity for virtue quite consistent with liberal democracy.³⁰ But she also finds support for this stoic conception in Aristotle, whose writings she presents as painting an unconventional picture of the general availability of the virtue Aristotle felt was necessary to live a full human life. Finally, she reminds the reader that the classical conception of the passions as complex social products subject to the agencies of socialization like education is similarly consistent with the inclusive version of civic virtue.

In her summation after hearing all of the presentations, Professor Nussbaum finds much to agree with, particularly in the work of the other reconciliationists, Solum and Sunstein. But the most interesting aspect of the commentary is her disagreement, consistent with her reconciliationism, with Pangle and Beiner—Pangle for overstating the harshness of the classical tradition and Beiner for overstating the impoverishment of the modern.

I think it is no coincidence that the recent literature of legal scholarship has been replete with evidence that lawyers, impatient types that we are, are not going to wait for resolution of these global problems before attempting to bring to bear in the modern American society in which we live the reconciliation that was the subject of the participants' debate. The application of the insights of antiquity—of common purpose and common good, of natural politics and classical virtue—are once again the currency of concrete interpretations and proposals, even if the writers are unaware of their hoary antecedents. Perhaps this symposium will alert these unconscious contemporary classicists as well.

In this Foreword, I wish to call the reader's attention to three of these works: one statutory, one constitutional, and one directed to the behavior of the profession itself. The statutory work focuses, in retrospect predictably, on what was always the political development most threatening to modern liberal pluralism in the United States: the labor movement. In a remarkable series of works, Katherine Van Wezel Stone has been retelling the story of late twentieth century labor law as a liberal regime's fundamentally mistaken choice of industrial pluralism over the competing paradigm of participation in a public community of production.³¹ Although Stone does not articulate the whole vision in any one

30. Nussbaum, *Comments*, 66 CHI.-KENT L. REV. 213, 219 (1990).

31. Stone, *The Legacy of Industrial Pluralism: The Uneasy Relationship Between Individual Employment Rights and the New Deal Collective Bargaining Systems* (on file with *Chicago-Kent Law Review*); Stone, *Labor Relations on the Airlines: The Railway Labor Act in the Era of Deregulation*, 42 STAN. L. REV. 1485 (1990) [hereinafter *Labor Relations*]; Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73 (1988).

place, the foundational mistakes are poignantly reflective of the debate in the Symposium. First, in a series of decisions establishing the role and enforcement of the labor agreement by private arbitrators, the world of labor relations was separated from the larger public world of the community—privatized, if you will. Next, the relations were constructed as a Hobbesian economic war, with bargaining basically dependent on economic pressure rather than legal regulation. Finally, the business enterprise was fragmented into spheres of decisionmaking, with little consideration of the common enterprise. In a genuinely new take, Stone unfavorably contrasts this regime of industrial labor relations with the much-maligned system of railway labor, characterized by stable conditions of employment and publicly-enforced, prolonged bargaining over a wide range of issues.³² The parallels with the Symposium are striking. Like Galston and Wood, Stone's description of the penetration of liberal assumptions into the regulation of industrial labor relations reflects graphically the power and hegemony of the liberal paradigm. Like Beiner, her work details its costs. But most importantly, like Sunstein, she finds room, if one is open-minded enough to the possibilities, for richer visions of the common good within American life and tradition of political freedom.

The second example, one directed to the behavior of the legal profession, comes from the work of legal ethicist Thomas Shaffer, a work tentatively titled *Lawyers and Their Communities*.³³ Shaffer takes up both of the core concerns of classical philosophy: the nature and value of community, and the virtues of a human life and their relationship to community. In his vision of community, he rejects both the American liberal vision and its attempted modification by invocation of republican values. The one, he argues, has as its most benign type the “‘ethical accord between individuals well disposed to one another’”; but “‘the more likely community is an arrangement based on mutual agreement or convenience.’”³⁴ The “republican vision,” he continues, while “more attractive” is “no more persuasive.”³⁵ His argument against American republicanism seems to rest largely on its toleration of slavery and sex discrimination during the period of aristocratic hegemony. He concludes

32. Stone, *Labor Relations*, *supra* note 31.

33. See Shaffer & Shaffer, *Character and Community: Rispetto As a Virtue in the Tradition of Italian-American Lawyers*, 64 NOTRE DAME L. REV. 838 n.3 (1989) [hereinafter *Rispetto*]. The project also includes Shaffer, *The Legal Ethics of Belonging*, 49 OHIO ST. L.J. 703 (1988) and Shaffer, *Lawyers as Assimilators and Preservers*, 58 MISS. L.J. 405 (1988).

34. Shaffer, *Rispetto*, *supra* note 33, at 880 (quoting Powell, *Persons in God* (1988) (unpublished)).

35. *Id.* at 881.

that "the republican aspiration never counted for as much in the American conscience as prosperity, imperialism, and regional economy"³⁶ and was meaningless by the time significant non-English immigrants arrived.

Shaffer's preferred examples of community are "'mediating associations' that justify describing themselves with family metaphors and that can stand between the person and the jurisdictions in which law and the accidents of geography place him."³⁷ His communities have value because they are the institutions within which people make moral decisions, which are, according to his vision, less acts of choice than acts of coming home. In his most recent project (with Mary Shaffer, who is not a lawyer), he examines a moral value called "rispetto." Rispetto, a product of Italian-American legal ethics, functions to mediate between the assimilationist claims of the professional community and the individual and family history of parochialism. Like classical virtue, rispetto is a habit of character, including a sense of place, independence, courage, self-respect, and respect for the space of the outsider.³⁸ Like the classical virtues, the virtue emerges from a particular community at a particular place and time, with strong homogeneity and a common experience of moderate scarcity. Thus, like our Symposium refuseniks Galston and Wood, Shaffer doubts whether modern American life can support a classical vision of community. Shaffer's solution is both a compromise—to think smaller, preferring communities to community—and a most ambitious reconciliationist project, adding the quest for substantive virtue within small communities to the aspiration for community simple.

Finally, Susan Bandes has recently gathered together the growing tide of arguments criticizing the central tenet of American legalism, the negative constitution.³⁹ The concept of the Constitution as imposing only negative obligations on government has deep roots, resting on a well-established reading of constitutional text and original intent as well as on a current understanding of the common-law background.⁴⁰ And it has powerful contemporary support, based on assertions of institutional capabilities and the fear of the slippery slope into totalitarianism.⁴¹

Against this modern world view, Bandes asks questions clearly

36. *Id.*

37. *Id.* at 883.

38. *Id.* at 845, paraphrasing Francis Femminella, *The Ethnic Ideological Themes of Italian Americans*, in *THE FAMILY AND COMMUNITY LIFE OF ITALIAN AMERICANS* 115-16 (R.N. Juliani ed. 1983).

39. Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990).

40. *Id.* at 2308-18. Bandes' report of the contemporary retelling of the common law may be correct, but it is far from the only reading of that material. See Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, — DUKE L. J. — (1992) (forthcoming).

41. Bandes, *supra* note 39, at 2326-42.

linked to the debate over classical philosophy and American constitutionalism. First, she reviews positivist assumptions of originalism, which support the interpretive model of the negative constitution. The constitutional enterprise, Bandes reminds us, could be, and for large portions of American history has been, quite a flexible one, with many possibilities not clearly contemplated in 1787. Next, she invokes the important new insights of recent constitutional scholars from the civic republican movement. These scholars, including Symposium participant Cass Sunstein, have bade us to remember that any baselines against which government action or inaction is measured are themselves the result of conscious value-laden choices. Finally, and most importantly, she invokes the very classical insight that negative liberty is not a state of nature, but a relinquishment of all the possibilities of collective, governmental action to establish and maintain a different social order.⁴² The question at hand, Bandes concludes, is not the negative/positive or penalty/subsidy debate of the current Supreme Court, but a much more elevated one: “[W]hat must we have in order to be free?”⁴³

Labor unions, Italian-American lawyers, constitutional baselines. Communities of production, communities of history, communities of citizenship. In the world of contemporary legal theory, the American liberal consensus is breaking up, and a new odyssey is under way. Our Symposium addresses the relationship between classical philosophy and the American constitutional order. What better place to start the journey than from the original port?

42. *Id.* at 2342-47.

43. *Id.* at 2347.

