Virtues and Voices

Lawrence B. Solum

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol66/iss1/9

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
VIRTUES AND VOICES

LAWRENCE B. SOLUM*

[I]t is best when considering the virtues and vices to go back to Aristotle and Aquinas.

—Phillipa Foot

I. INTRODUCTION

This essay explores two ideas that have recently played an important role in discourse about the American constitutional order. The first idea has emerged from the revival of civic republicanism. The republican revival has focused our attention on the classical conception of civic virtue. Our basic social arrangements ought to nourish a citizenry with the characteristics of mind and will that promote human flourishing. The second idea, expressed in critical race theory and feminist jurisprudence, is that we have an obligation as a society and as scholars to attend to excluded voices. The juxtaposition of these two themes offers an opportunity to explore the relationship between classical philosophy and the American constitutional order.

Civic republicanism is a complex set of ideas that has developed

* Professor of Law and William M. Rains Fellow, Loyola Law School, Loyola Marymount University, Los Angeles, California. I am grateful to the participants at the Symposium on Classical Philosophy and the American Constitutional Order at IIT Chicago-Kent College of Law and at a Loyola Law School faculty workshop for comments on an earlier version of this paper. I owe special thanks to Ron Beiner, Don Brosnan, Dick Fallon, Steve Heyman, Sharon Lloyd, Shelley Marks, Chris May, Frank Michelman, Martha Nussbaum, Sam Pillsbury, Jeff Sherman, John Stick, Marcy Strauss, and Paul Weithman for their suggestions.


3. My purpose is not to evaluate whether any form of civic republicanism is accurate as a description of the intentions of the framers of the Constitution. Rather my purpose is to consider civic republicanism as a live theory of how our political order ought to be constituted. Indeed, it may be that creative misreading of the classics will be more fruitful than exhaustive attempts to discover the original intentions of classical authors. See Laslett, History of Political Philosophy, in 6 THE ENCYCLOPEDIA OF PHILOSOPHY 370 (P. Edwards ed. 1967). It is my view that only this sort of normative inquiry— inquiry that searches for truth—can provide meaningful input into the hermeneutic enterprises of interpreting the constitutional text or the intentions of those who drafted and ratified it. See Solum, Originalism as Transformative Politics, 63 TUL. L. REV. 1599 (1989). I adhere to the same view regarding the hermeneutic enterprise of interpreting classical philosophy.
over the course of two millennia; understanding the republican revival requires a recognition that there are many strands in republican thought—that republicanism is itself a contested concept. In order to untangle the strands, I will examine classical moral and political philosophy, especially the work of Aristotle and Machiavelli, in relation to the work of the architects of the republican revival, including Frank Michelman, Suzanna Sherry, Cass Sunstein, and others.

As we begin to untangle republican thought, we encounter a tension within the republican revival. Consider two strands of republican thought. Let me call the first strand the civic virtue thesis. The republican revival does not take preferences for granted; some revivalists appropriate the concept of civic virtue from classical political theory. One of virtue ethics' core insights is that people's characters (or personalities), including their preferences (or desires), are important determinants of the flourishing of both individuals and their communities. Civic virtues are those qualities of character and intellect in citizens and political officials that promote the flourishing of political communities.

I call the second strand of the republican revival the inclusion thesis. This contemporary variant of republicanism seeks to create a public space for a political discourse that will include the voices of those who have been excluded from political discourse and deliberation, such as wo-

10. See Sunstein, Interest Groups in American Public Law, supra note 8, at 31. Some of the revivalists reject the civic virtue thesis. See Michelman, Traces of Self-Government, supra note 6, at 18-19.
men, people of color, and persons with alternative sexual preferences.\textsuperscript{11}

But according to the classical conception, civic virtue was possessed by the few and not the many. The classical account of civic virtue has been used to justify the exclusion of the voices of the many from public deliberation. Thus, these two strands of republicanism seem to be in tension, as the revivalists themselves recognized.\textsuperscript{12} One aim of this essay is to explore the dilemma of trying both to foster civic virtues and include the voices of those who have been excluded from full participation in the American constitutional order.\textsuperscript{13}

Part II of this essay examines the civic virtue thesis by juxtaposing an account of virtue derived from classical philosophy with republican revivalist definition of civic virtue. Part III explores the grounds for the inclusion thesis by comparing work in feminist jurisprudence and critical race theory with Jürgen Habermas's theory of communicative action. Part IV argues that there is a conflict between political implications of the classical account of civic virtue and the inclusionary aims of the republican revival. Part V offers a reconceptualization of civic virtue that may resolve the conflict, and Part VI investigates the implications of this reconceptualization for the continued vitality of republicanism as an aid to understanding the American constitutional order.

\section*{II. Civic Virtues}

Although the writings of the republican revivalists frequently refer to the concept of civic virtue, a number of basic questions about this notion have received only scant attention from both those who champion\textsuperscript{14} and those who criticize\textsuperscript{15} the republican revival. I want to probe

\textsuperscript{11} See Michelman, Law's Republic, supra note 6, at 1495; Sunstein, Beyond the Republican Revival, supra note 8, at 1539.

\textsuperscript{12} See Michelman, Law's Republic, supra note 6, at 1495; Sunstein, Beyond the Republican Revival, supra note 8, at 1539; cf. Michelman, Traces of Self-Government, supra note 6, at 29 (noting exclusionary tendency of theories that posit a human telos).

\textsuperscript{13} This essay does not address the relationship between civic republicanism and liberalism. My own work is broadly liberal. See Solum, Faith and Justice, 39 DePaul L. Rev. 1083 (1990). Cass Sunstein contends that the two are not opposed. See Sunstein, Beyond the Republican Revival, supra note 8, at 1567; see also Baker, Republican Liberalism: Liberal Rights and Republican Politics, 41 U. Fla. L. Rev. 491 (1989). My comments about virtue are relevant to those strands of liberalism that incorporate a conception of virtue. See, e.g., S. Macedo, Liberal Virtues (1990); Galston, Liberal Virtues, 82 Am. Pol. Sci. Rev. 1277 (1988).

\textsuperscript{14} See, e.g., sources cited supra notes 6-9.

\textsuperscript{15} For example, Michael Fitts has written a well-reasoned and thoughtful critique of civic virtue reforms of the legislative process that never clearly defines "civic virtue." See Fitts, The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process, 136 U. Pa. L. Rev. 1567 (1988). This lacuna reflects the lack of attention to this issue by the revivalists themselves and not a difficulty with Fitts' critique.
the question whether republican civic virtues are virtues in the classical, Aristotelian sense.

Take, for example, the republican revivalist definition of civic virtue as "the willingness of citizens to subordinate their own private interests to the general good." This formulation has an ambiguity on its surface. Defining civic virtue as a willingness to subordinate private interests does not clarify the way in which the "general good" relates to a citizen's character. This definition leaves open the possibility that "private interests" are given as a persons "own" and virtue involves an act of "will" that "subordinates" these "private interests." But one point of invoking civic virtues is to deny the giveness of private interests and to affirm the natural (as opposed to the willed) sociability of persons. Herbert Storing recognized this point in his discussion of the anti-federalists' conception of civic virtue: "Republican government depends on civic virtue, on a devotion to fellow citizens and to county so deeply instilled as to be almost as automatic and powerful as the natural devotion to self-interest."

This ambiguity in the revivalist definition of civic virtue suggests that we have at least a preliminary motivation for heeding Mrs. Foot's advice and going back to Aristotle. Perhaps if we look to classical philosophy, we may recover a less ambiguous conception of civic virtue.

A. Aristotle's Theory of the Virtues

In order to specify the concept of civic virtue, we ought to know: (1) what the nature of virtue is; (2) what the particularly civic virtues are; and (3) how civic virtues are acquired. My attempt to sketch partial answers to these questions begins with Aristotle's discussion of civic virtue in his *Politics*. Aristotle begins with the question "[w]hether the


17. In Aristotle's terminology, this revivalist definition of civic virtue confuses virtue with continence. See infra text accompanying note 39.

18. See Sunstein, *Beyond the Republican Revival*, supra note 8, at 1549 ("[I]ndividual preferences should not be taken as exogenous to politics.").


virtue of a good person and a good citizen is the same or not."21 Aristotle's preliminary answer to this question is that the two sorts of virtue are not necessarily the same. Different virtues would appear to be appropriate to citizens in different kinds of societies.

Aristotle's observation that the virtues of good citizens and good persons may differ, however, is only a tentative conclusion. Aristotle continues by exploring an analogy between the citizens of a community and the sailors on a ship. The different members of the crew of a ship have different functions but the same goal, the safety of their ship. Likewise, different citizens have different ends, but they share the goal of preserving their community.22

There is, Aristotle continues, at least one kind of community in which there is a close connection between the virtues of the good person and the virtues of the good citizen. In a constitutional order or polity, citizens must have the virtues of both someone who can rule and of someone who can obey. "[H]e should know how to govern like a freeman, and how to obey like a freeman—these are the virtues of a citizen."23 But what are the particular virtues that make for good rulers opposed to those which make for good subjects? "Practical wisdom [phronesis] is the only excellence peculiar to the ruler: it would seem that other virtues must equally belong to ruler and subject."24 In a constitutional order, citizens are both rulers and subjects; therefore, good citizens in a polity should possess practical wisdom, as well as the other moral and intellectual virtues, such as courage and temperance.

Although my summary is brief, it should be clear that the account of civic virtue in Aristotle's Politics does not stand on its own; it relies on his theory of moral virtue in his Nicomachean Ethics.25 Before we turn to that, we should observe that there is an affinity between the civic vir-

21. ARISTOTLE, POLITICS, supra note 20, at 1276b17-1277b33 (bk. III, ch. 4). In this passage, I have translated the Greek "arete" as "virtue," unlike Jonathan Barnes and Benjamin Jowett who translate "arete" as "excellence." In addition, I use "person" rather than "man," although this does not represent Aristotle's original (but sexist) meaning. I will continue both practices throughout this essay.

22. See id. at 1276b20; see also Solum, Pluralism and Modernity, 66 CHI.-KENT L. REV. 93 (1990).

23. See ARISTOTLE, POLITICS, supra note 20, at 1277b15.

24. Id. at 1277a26.

tue strand of the republican revival and some recent developments in moral philosophy in the analytic tradition. This revival resulted from a dissatisfaction with modern moral philosophy. Virtue theory started with a critique of approaches to moral theory that legal scholars would call liberal, for example Kantian ethics and utilitarianism. In the 1950s, Elizabeth Anscombe’s essay *Modern Moral Philosophy* was early in calling for a decisive shift away from utilitarian and Kantian approaches to ethical theory. In the 1980s, Alasdair MacIntyre’s book, *After Virtue*, brought this movement to the attention of an audience beyond academic moral philosophers. This revival of virtue ethics provides some of the analytic tools that enable us to make sense of the general notion that underlies Aristotle’s conception of civic virtue.

For Aristotle, the virtues are acquired dispositional qualities; they are potentialities or powers that are states of character or mind. Virtue is acquired through habituation; one learns to be virtuous by performing virtuous actions. Aristotle characterizes the virtues as intellectual or moral, and his views can be sketched by examining these two categories.

The moral virtues are states of character concerned with choice, such as courage, temperance, and justice. Aristotle thought that each of the moral virtues could be seen as the mean between two opposing vices. Courage, for example, is a mean between the vices of timidity and recklessness. Moral virtues, says Aristotle, are acquired as a result of habit; one must act courageously in order to become courageous.

The intellectual virtues are practical and theoretical wisdom. Prac-

26. The connection between virtue ethics and civic virtue has been noted by Donald Brosnan. See Brosnan, *Virtue Ethics in a Perfectionist Theory of Law and Justice*, 11 Cardozo L. Rev. 335, 339 (1989).
31. See id. at 99.
tical wisdom or *phronesis* is excellence in deliberation: the person of practical reason is able to choose good ends and the means to achieve those ends. Practical wisdom operates in the realm of *praxis*—action in particular situations. Theoretical wisdom or *sophia*, on the other hand, operates in the realm of *theoria*: abstract thinking, science, and theory. The intellectual virtues are initially developed by teaching and mature through experience.

The virtues, then, are those characteristics of mind and will that are conducive to a good life. The person who possesses the virtues of temperance, courage, and wisdom will likely flourish, and a society composed of such persons will also flourish. But the person who possesses the corresponding vices of intemperance, cowardice, and stupidity will likely not be happy and will not contribute to the happiness of others.

The role of the moral virtues is illuminated by Aristotle's taxonomy of the relationship between character and action. The *virtuous* person, according to Aristotle, wants to act appropriately and does so without an inner conflict. Aristotle distinguishes a truly virtuous person from someone who is *continent*—one who acts well by strength of will, despite emotions and desires that push in the direction of bad actions. The *akratic* person, who suffers from weakness of will, has emotions and desires that push her toward bad actions; she tries to act well, but fails. Finally, the *bad* person has emotions and desires that support bad action, tries to act badly, and succeeds. The moral virtues, then, are dispositional states that result in emotions and desires which make good action natural. The virtuous person, we might say, has an interest in the good. To act well, the virtuous person does not need to subordinate her interest to the common good.

**B. The Acquisition of Civic Virtue: Aristotle and Machiavelli**

Aristotle's taxonomy allows us to restate the ambiguity in the revivalist definition of civic virtue that served as our point of departure for this discussion. The revivalists define civic virtue as “the willingness of citizens to subordinate their own private interests to the general good.”

40. See sources cited supra note 16.
This definition does not distinguish between civic virtue and civic continence.

A civic continence interpretation of the revivalist definition of civic virtue as "the willingness of citizens to subordinate their own private interests to the general good" would\textsuperscript{41} rest upon an inadequate understanding of the nature of virtue—of what virtues are and of how they are acquired. This impoverished conception is rooted in Machiavelli's account of civic virtue. By going back to Aristotle, we can recapture ideas that suggest a conception of civic virtue that is better suited to republican aims.

1. The Machiavellian Account

Machiavelli's account of civic virtue or virtù\textsuperscript{42} is ill-suited to the purposes of the republican revival. As a preface to my discussion of Machiavelli's account of civic virtue, I note a qualification. Machiavelli does not offer a comprehensive theory of virtue in the same manner as does Aristotle. His views of virtue are scattered throughout writings that are addressed to concrete historical and political concerns. As a result, it is not surprising that Machiavelli's account is itself ambiguous.

Machiavelli's account of civic virtue requires citizens "to prefer the good of their community to all other goods."\textsuperscript{43} Machiavelli maintains that civic virtue can be instilled in the citizenry in two ways. The first is through religion:\textsuperscript{44}

\[\text{As the observance of divine worship is the cause of greatness in republics, so the neglect of it is the cause of their ruin. Because, where the fear of God is wanting, it comes about that either a kingdom is ruined, or that it is kept going by the fear of a prince, which makes up for the lack of religion.}\]

The second method for instilling civic virtue in the populace is the law. Men are easily corrupted, Machiavelli observes, and therefore, the laws should restrain human appetites and deprive men "of all hope of doing wrong with impunity."\textsuperscript{45} "[M]en never do good unless necessity drives them to it; but when they are too free to choose and can do just as they please, confusion and disorder become everywhere rampant. Hence it is

\textsuperscript{41} I use the subjunctive to indicate that I do not claim that revivalists have committed themselves to the civic continence interpretation; rather, they have left the question open.

\textsuperscript{42} I will use "virtue" rather than the original "virtù" in my account of Machiavelli's theory.

\textsuperscript{43} Q. SKINNER, MACHIAVELLI 62 (1981).


\textsuperscript{45} \textit{Id.} at 141. For criticism of this position, see J. FEINBERG, HARMLESS WRONGDOING: THE MORAL LIMITS OF THE CRIMINAL LAW 281, 282 (1988).

\textsuperscript{46} N. MACHIAVELLI, THE DISCURSES, supra note 44, bk. I, no. 42, at 217.
said that hunger and poverty make men industrious and that laws make them good."

When we examine Machiavelli's account of the method by which civic virtue is instilled in the populace, the inadequacy of his conception of civic virtue to the tasks of the republican revival becomes apparent. This conception of civic virtue assumes that presocial human nature is selfish and asocial, and that men must be terrorized into virtuous behavior. But this is an implausible account of virtue. As Joel Feinberg puts it, "Since virtues consist of not merely conditioned inhibitions, but rather of tendencies to act or feel in the right way for the right reasons, it would be ludicrous to inculcate these virtues by intimidation."48

Moreover, Machiavelli's account of social stability locates its source in the structures of government that promote healthy, self-interested class conflict.49 Although Machiavelli's account is readily distinguishable from contemporary theories of interest-group pluralism, his moral psychology seems to have more in common with theories republican revivalists criticize than with positions they espouse.

2. The Aristotelian Account

Machiavelli's account of civic virtue contrasts with that of Aristotle. With Aristotle's general theory of virtue in place, we now have the tools to reexamine Aristotle's account of civic virtue. Aristotle, you will recall, believed that in a constitutional regime, a polity, good citizens should possess the same virtues as good persons. Because citizens must rule and be ruled, they ought to possess the intellectual virtue of phronesis or practical wisdom in addition to the moral virtues, such as courage and temperance.

How does Aristotle's account of the acquisition of the virtues compare with Machiavelli's? Aristotle emphasizes the role of the family in moral education. For Aristotle, a stable relationship between parent and child creates an environment of trust and love which in turn fosters the child's willingness to learn.50

More generally, Aristotle's account of the acquisition of the virtues

47. Id. bk. I, no. 3, at 112.
48. J. FEINBERG, supra note 45, at 282. This is not to say, however, that punishment cannot play a role in moral education. For Aristotle, in order to become virtuous, one must first engage in the actions that would result from virtue. The threat of punishment may help the individual to act virtuously as a step on the road to acquiring the set of motives and dispositions that will make virtuous action natural and hence will eliminate the need for punishment.
focuses on the habituation of character. As he states in his *Nicomachean Ethics*:

> We acquire the virtues by first acting just as we do in the case of acquiring crafts. For we learn a craft by making the products which we must make once we have learned the craft, for example, by building we become builders, by playing the lyre, lyre players. And so too we become just by doing just actions, and temperate by doing temperate actions and brave by brave actions... and in a word, states of character are formed out of corresponding acts.\(^5^1\)

First, the child acts virtuously, perhaps because her parents require her to do so, and then she becomes virtuous. As the child develops, she acquires the critical capacities that allow her to begin acting for the right reasons. She acts virtuously *because* virtuous action is part of and facilitates a good life. The fear of punishment drops away as the primary motive for virtuous action. Children begin to ask why they should act in such and such a way; through their parents’ explanations they begin to understand and internalize the right reasons for virtuous action.\(^5^2\)

Recall that for Aristotle, the civic virtues of citizens in a polity are the same as the virtues of good persons generally. Thus, the key to civic virtue is moral education, which takes place in the family and in the schools. But this is not the whole story for civic virtue. *Phronesis* or practical wisdom requires experience. For the moral and intellectual virtues to serve their function in the civic context, moral education must be supplemented by civic education and experience in civic life. Specialized civic functions, such as legislating or judging, may require further education and experience.

This account of civic virtue can be illustrated with a particular example, that of judicial virtues, those characteristics of intellect and character that are required for someone to be a good judge.\(^5^3\) An excellent judge must possess certain qualities of character and intellect. In the judicial context, *sophia*, or theoretical wisdom, translates into judicial intelligence—the ability to engage in abstract legal reasoning. Judicial wisdom, the form of *phronesis* specific to the task of judging, is the practical ability to make good decisions in particular situations—to understand what will really work and what is really worth aiming for in the individual case. Sometimes judges must be courageous—they must make decisions that will be unpopular and that may subject them to public scorn or

---

52. See N. Sherman, *supra* note 50, at 157-64.
even personal danger. More particularly, an excellent judge must have a sense of justice, and a good judge must have judicial integrity—care for the consistency and coherence of the law. These virtues are the same as the virtues of a good person, although they take on special forms and significance in the context of judging.

The judicial virtues are a particular form of civic virtue. If we step back and take a wider survey of the landscape, we can make some observations about the civic virtues that citizens and public officials must possess if a society is to flourish. Some level of virtue is required in most citizens if a society is to flourish.

Frank Michelman, a revivalist who has not endorsed the civic virtue thesis, has articulated a version of republican theory that stresses the importance of self-government as a republican ideal. But something more than minimal virtue seems to be required in a democratic constitutional order in which the people give the law to themselves. Meaningful self-government seems to require a fairly high level of both moral and intellectual virtue. Moral virtue seems to be essential if we are to be able to accept collective decisions as our own, and to modify our own desires and emotions accordingly. True self-government requires more than collective decisionmaking and the implementation of these decisions by collective institutions. Self-government requires individuals who are autonomous in the sense that they have the ability to shape their own desires and emotions in response to collective decisions.

54. See Michelman, Law's Republic, supra note 6, at 1500.

55. In order for participatory self-government to be meaningful, the participants, the citizens of a republic, must have a set of capabilities that enable them to form preferences, to assess alternative courses of action, and to exercise political judgment. For this reason, I do not think that republican revivalists can escape the tension between the civic virtue thesis and the inclusion thesis by simply excising the concept of civic virtue from republican theory. Consider the possible strategies for formulating republicanism without civic virtue. A first possible strategy would be for revivalists to argue that all persons (or almost all) have developed the necessary capabilities for meaningful participation, irrespective of the social conditions that shaped their development. It might be thought that such capabilities are inherent in human nature. This seems doubtful. Perhaps it could be argued that under existing social conditions, the capacities for meaningful participation are sufficiently nurtured to enable meaningful self-government; expressed differently, the minimum threshold level of civic virtue for republican government has already been exceeded by all or almost all citizens. Again, this empirical proposition does not seem likely to be true. A second possible strategy would be for revivalists to argue that meaningful self-government does not require any particular development of intellectual or emotional capacities on the part of most or even many citizens. Some theories of government might be compatible with the second strategy; one might view democracy as analogous to a market mechanism that does not require every individual consumer to possess a high level of intellectual development and that takes existing preference structures as given. Those theories, however, seem inconsistent with republicanism. The point of this discussion is simply to note that the republican revival cannot simply abandon the civic virtue thesis; some account must be offered in its place.


It is through rational dialogue, and especially through political dialogue, that we clarify,
Moreover, democratic self-government would seem to require a relatively high level of intellectual virtues. Given the complexities of modern life, meaningful participation in public policymaking would seem to require citizens to possess a good measure of theoretical wisdom. And, as Aristotle points out, governing requires *phronesis* or practical wisdom. Ronald Beiner's work suggests that we might look to *political judgment* as the specifically civic form of *phronesis*.57

My attempt to sketch an Aristotelian account of civic virtue has been brief, but I hope that I have made the following claims at least plausible: the form of civic virtue required by republican theory is best understood on an Aristotelian model; and the level of virtue that citizens must possess for a democratic polity to flourish is relatively high.

## III. Excluded Voices

The republican revival has been marked by attention to the value of rational dialogue.58 In this section, I explore a corollary to this commitment, inclusion of the voices of the poor, women, people of color, persons with alternative sexual preferences, and others who have been excluded from full participation in political dialogue in the public sphere.59 This exploration will begin with an examination of the way the issue of exclusion has been raised by feminists and critical race theorists in the legal context. I will then turn to Jürgen Habermas's theory of communicative action as the basis for my argument in favor of the inclusion thesis.

### A. Excluded Voices and the Difference Thesis

The problem of excluded voices has received considerable attention in the currents of legal scholarship referred to as feminist jurisprudence60

---

57. See id. at 6-7.
58. See, e.g., B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 4-6, 358-59 (1980); Michelman, Traces of Self Government, supra note 6, at 4, 32-33 (1986); Sunstein, Legal Interference with Private Preferences, supra note 8, at 1129, 1154-58.
59. For republican awareness of exclusion, see Michelman, Law's Republic, supra note 6, at 1495; Sunstein, Beyond the Republican Revival, supra note 8, at 1539.
That the voices of the poor, women, people of color, and persons with alternative sexual preferences have been excluded from equal participation in public dialogue in the American constitutional order cannot be doubted. Although the first amendment freedom of speech guarantees formal equality of communicative opportunity, it could hardly be contended that real equality exists. Those who control the means of communication simply have greater opportunities to participate in public political dialogue. This inequality exists even though rich and poor alike have the freedom to buy thirty-second spots on network television.

Of course, it could be argued that the exclusion of the voices of some groups does not distort public discourse if the concerns that they would voice, the substance of their points, are represented by others. One response to this possibility are represented by the difference thesis: the claim that the excluded voices would articulate points of view that are different from those represented in existing political discourse. Mari Matsuda expressed one aspect of the difference thesis as follows: "The normative intuitions of those on the bottom are often different from the intuitions of those on the top." If the voices of the disempowered are excluded from the public sphere, and if these voices are different, then the legitimacy of democratic self-government, whether of a liberal or republican stripe, seems at least intuitively to be endangered. Silenced voices are not compatible with the models that capture the essence of the freedom of speech, the town meeting, and the marketplace of ideas. My next task is to explore this intuition that excluded voices are inconsistent with self-government.

**B. Inclusion as Communicative Rationality**

There is a rationale for listening to the voices of the poor and the oppressed—those who have traditionally been excluded from discourse in the public sphere—that does not feature in the writings of critical race theorists. The core of the argument is the proposition that listening to

62. See, e.g., Carreras v. City of Anaheim, 768 F.2d 1039, 1043 (9th Cir. 1985) ("The doctrine of the public forum achieves a central purpose of the freedom of speech—the goal of equality of communicative opportunity.").
64. See A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24-25 (1948).
excluded voices is required for rational consensus. I will develop my argument for this proposition by exploring Jürgen Habermas's theory of communicative action. In this paper, I can only sketch the outlines of the theory. Of course, Habermas's theory has tremendous breadth. Any brief summary risks either oversimplification or inaccessibility. Moreover, I will pass over an enormous secondary literature criticizing, defending, and elaborating on Habermas's themes.

66. My incorporation of ideas from both Aristotle and Habermas raises the question whether their perspectives are fundamentally incompatible. Habermas is sometimes seen as a Kantian thinker, whose emphasis on rationality might be seen as incompatible with Aristotelian naturalism. Resolution of this question is far beyond the scope of this paper, but two observations are appropriate. First, Aristotelian virtue theory calls our attention to the development of human personality. This may be inconsistent with Kantian notions of personhood (I am far from sure of that!), but Habermas sees his own work as consistent with the naturalist view that moral consciousness develops. Indeed, he relies heavily on Kohlberg's theory of moral development. This suggests that Habermas's view of rationality does not rest on Kantian premises about the nature of rationality which may be inconsistent with a naturalist approach. Second, Habermas's conception of rationality is intersubjective. Habermas's emphasis on communicative rationality suggests that his rationalism might be developed in a manner that is compatible with Aristotle's picture of humans as social creatures.


70. A representative sampling of the critical literature is contained in HABERMAS: CRITICAL DEBATES (J. Thompson & D. Held eds. 1982); see also COMMUNICATIVE ACTION (A. Honneth & H. Joas eds. 1991); THE COMMUNICATIVE ETHICS CONTROVERSY (S. Benhabib & F. Dallmayr eds.)
Habermas’s theory of communicative action borrows from speech act theory. Persons use language to act—to coordinate behavior through rational agreement. Promises, assertions, and orders are all examples of communicative actions. When one engages in a speech act, one implicitly raises validity claims—to comprehensibility, truth, sincerity, and right. When I ask you to close the window, I am explicitly making a claim (1) to truth, that there is a window and that it can be closed, (2) to sincerity, that my request is sincere, and (3) to right, that it is appropriate for me to make such a request of you. Engaging in the request pragmatically commits me to redeem any of these validity claims should you challenge it. Redemption occurs in rational discourse; we seek to reach an agreement or consensus on the challenged validity claim. Our search is rational in the sense that we seek agreement based on the force of the better argument, and we rule out coercion or deception.

Habermas’s theory can be understood as an attempt to develop a communicative conception of rationality. Such a communicative conception contrasts with a subjective (or Cartesian) view. According to the subjective conception, rationality is understood as a property of an individual’s isolated deliberation. The communicative conception views rationality intersubjectively; rationality is a property of agreements among persons. The key concept is the idea of a rational consensus.

Habermas argues that a rational consensus is one that results purely from the force of the better arguments, and not from constraints on communication. The absence of such constraints can be elucidated in terms of the formal structure of the communicative situation. A communicative situation is structured without constraint only if it is open to all with the ability to communicate, it provides equal opportunity to engage in communication, and the participants are motivated solely by a cooperative search for truth or right. These conditions are met in the ideal speech situation.71

The ideal speech situation can be defined more precisely by identifying three rules that formalize its conditions.


(1) Rule of Participation. Each person who is capable of engaging in communication and action is allowed to participate.

(2) Rule of Equality of Communicative Opportunity. Each participant is given equal opportunity to communicate with respect to the following:
   a. Each is allowed to call into question any proposal;
   b. Each is allowed to introduce any proposal into the discourse; and
   c. Each is allowed to express attitudes, sincere beliefs, wishes and needs.

(3) Rule against Compulsion. No participant may be hindered by compulsion—whether arising from inside the discourse or outside of it—from making use of the rights secured under (1) and (2).72

As Thomas McCarthy puts it, the ideal speech situation can serve "as a guide for the institutionalization of discourse and as a critical standard against which every actually achieved consensus can be measured."73

The formal model of the ideal speech situation can provide a basis for justifying the inclusion thesis. My argument for the inclusion thesis begins with the rule of participation. The rule of participation formalizes the notion that an agreement cannot count as rationally motivated if it can be demonstrated that it was only reached because someone who would have disagreed was excluded from the process of deliberation. The exclusion of women, people of color, and persons with alternative sexual preferences from political discourse provides a basis for criticizing the rationality of any consensus reached in their absence.

Moreover, total exclusion is not necessary for violation of the rules constituting the ideal speech situation. The rule of equality of communicative opportunity rules out communication where one participant or group of participants is not allowed to engage in the same quantity or quality of speech acts. Participants must have the same opportunities to initiate and perpetuate communication. A historical pattern of unequal communicative opportunity for women, people of color, and persons with alternative sexual preferences provides the grounds for calling into

72. This formulation is based on one suggested by Robert Alexy and adopted by Habermas. See J. Habermas, Moral Consciousness and Communicative Action, supra note 68, at 89; Alexy, Eine Theorie des praktischen Diskurses, in Normenbegründung und Normendurchsetzung 40-41 (W. Oelmüller ed. 1978); R. Alexy, A Theory of Legal Argumentation 119-24, 193 (R. Adler & N. McCormack trans. 1989). The names given the three rules are mine.

73. T. McCarthy, The Critical Theory of Jürgen Habermas, supra note 69, at 309.
question any consensus reached on matters in which they have an interest.

Thus, the exclusion of the voices of the disempowered is inconsistent with communicative rationality. In particular, such exclusion is pragmatically inconsistent with the claim that our treatment of these groups is just or justified. I now take up my central question, the relationship between the civic virtue thesis and the exclusion thesis.

IV. THE CONFLICT BETWEEN VIRTUE AND VOICE

As the revivalists themselves have noted, there seems to be a contradiction between the two strands of civic republicanism. If we really value civic virtue, then we ought to attend to the voices of the virtuous. We should heed the advice of those who are courageous and wise. Moreover, we have reason to pay less attention to vicious voices. We would not expect good counsel from those who are cowardly, intemperate and foolish. This is not to say that we have affirmative reason to silence those who lack virtue, but it is to say that we seem to lack affirmative reason to ensure such voices an equal hearing.

The classical approach, however, seems to maintain that persons who are excluded or oppressed are vicious. Aristotle’s discussion of the virtues of women and slaves are illustrative of classical views. Aristotle appears to agree with some feminists and critical race theorists when he says that the voices of women and barbarians are different. From this premise, however, he drew conclusions that most advocates of the difference thesis would find to be anathema. As Aristotle put it in his Politics, “[T]he temperance of a man and of a woman, or the courage and justice of a man and of a woman, are not, as Socrates maintained, the same; the courage of a man is shown in commanding, of a woman in obeying.” Indeed, Aristotle, echoing Sophocles, maintained, “Silence is a woman’s glory.” In the case of natural slaves, “the slave has no deliberative faculty at all.” Indeed, Aristotle contended that none of the members of the working class should be admitted to full citizenship, because they are incapable of developing the same virtues as are citizens.

74. See ARISTOTLE, POLITICS, supra note 20, at 1260a20.
75. Id. at 1260a30; see also id. at 1277b23 (“[A] woman would be thought loquacious if she imposed no more restraint on her conversation than the good man.”).
76. Id. at 1260a12.
77. See id. at 1278a7-11:

The best form of state will not admit [the artisan class] to citizenship, but if they are admitted, then our definition of the excellence of a citizen will not apply to every citizen, nor to every free man as such, but only to those who are freed from necessary services. See also id. at 1278a21 (“[N]o man can practise [virtue] who is living the life of a mechanic or
The incompatibility of Aristotle's conception of the virtue of women and slaves with the inclusion of excluded voices could hardly be made more explicit. Aristotle would silence those who speak in a different voice. If my argument about the nature of civic virtue has been convincing, and if Aristotle is right about the distribution of the virtues, then those whose voices are excluded simply do not possess civic virtue, and hence they are not qualified for citizenship. For this reason, the civic virtue thesis seems to be incompatible with the inclusion thesis.

The revivalists can make an immediate reply to one aspect of the incompatibility that I have identified. Aristotle's views concerning women and natural slaves are implausible. The notion that women and barbarians are incapable of developing virtuous characters rests on what might be called "bad essentialism." There is nothing inherent in the nature of women or people of color that makes them incapable of courage, temperance, or practical wisdom.

But this is not a full response to the argument that the disenfranchised are less virtuous than others. Part of Aristotle's argument can be restated in terms that have a plausible ring, even to modern ears. Aristotle maintained that leisure was necessary to full development of good character. In its strongest form, Aristotle's claim is inconsistent with common sense. We don't believe that a life of leisure is necessary to the development of a good character. Indeed, in the wake of Protestantism, we are perhaps inclined to believe that too much leisure is bad for character. But we do believe that extreme poverty, poor education, and a lack of opportunity to exercise political judgment stifle the development of human character. Indeed, this belief about the relationship between oppression and the stifling of human potential is one of the reasons we are so concerned about social injustice. Aristotle's views about the relationships between wealth and virtue are, in part, correct.78

78. I want to be explicit about what I accept in Aristotle and what I do not. I do not agree that women or people of color (the modern equivalent of Aristotle's conception of barbarians) are inherently less capable of developing the virtues than are European (the modern equivalent of Aristotle's Greek) men. That conclusion is repugnant. I do agree with Aristotle that the development of the virtues is, in part, a function of their exercise. To the extent that women and people of color have been excluded from opportunities to participate in political discourse and decisionmaking and in
This, then, is the challenge for republican revivalists: how do we reconcile the desire to create a polity of citizens who possess the civic virtues with the goal of including excluded voices? How do we reconcile virtue and voice?

V. RECONCILING VIRTUES AND VOICES

Consider two strategies for reconciling the concern with civic virtue with a commitment to include excluded voices. Both strategies involve a reconceptualization of the classical accounts of civic virtue. The first strategy is to develop a notion of the communicative virtues. The second strategy is a recognition of the virtues of the excluded in an imperfectly just society. My exploration of these strategies is necessarily tentative. My hope is to provide reasons for believing that one or both of these strategies are worth pursuing—that there are plausible candidates for an understanding of civic virtue that are not only compatible with, but actually supportive of, the inclusion of excluded voices. I do not claim to provide you with reasons that are sufficient to establish that either strategy will ultimately work; rather, my claim is that both strategies are worthy of consideration before reaching firm conclusions about the consistency of the inclusion thesis and the civic virtue thesis.

A. Communicative Virtues

The first strategy can be considered an adaptation of Habermas's program for the reconceptualization of rationality as intersubjective or communicative. My suggestion is that we pursue a communicative conception of civic virtue. Such a conception might have three components. First, we might look at the virtues of groups or communities that emerge through communication. Second, we might examine those qualities of individual character that facilitate good communication. Finally, we might consider the impact of communication on the development of individual character.

The first component was suggested to me by Ronald Beiner's discussion of Aristotle's thesis that the virtues of the many can exceed those of the few through communicative deliberation. Aristotle says,

The principle that the multitude ought to be in power . . . seems to contain some truth. For the many, of whom each individual is not a

other activities, such as the management of business enterprises that may develop the political virtues, they may have been deprived of the opportunity fully to develop their characters and intellects. I certainly do not claim that all women or all people of color lack civic virtue; that is patently false. I do not claim that civic virtue is absent in all of the oppressed or everyone in poverty.

79. See R. Beiner, supra note 56, at 90.
good person, when they meet together may be better than the few
good, if regarded not individually but collectively, just as a feast to
which many contribute is better than a dinner provided out of a single
purse. For each individual among the many has a share of excellence
and practical wisdom, and when they meet together, just as they be-
come in a manner one person, who has many feet, and hands, and
sense, so too with regard to their character and thought.\textsuperscript{80}

This passage supports, though Aristotle is not explicit on this matter, an
account in which practical wisdom emerges through rhetorical ex-
change.\textsuperscript{81} This view of communicative virtue seems consistent with some
republican writing. For example, Cass Sunstein's work emphasizes the
role of communicative deliberation in republican theory.\textsuperscript{82} Thus, the first
component reconciles virtues and voices by denying that a conflict exists:
the practical wisdom of a polity in deliberation can exceed the practical
wisdom of the most virtuous individuals.

The second component—inculcating those qualities of individual
character that facilitate good communication—can be explored by briefly
considering the views of Amy Gutmann in her book \textit{Democratic Educa-
tion}.\textsuperscript{83} Suzanna Sherry has observed that the book could have been enti-
tled \textit{Republican Education} because the theme is "how to produce true
republican citizens—citizens who possess both the ability and the moti-
vation to participate in their deliberative political communities."\textsuperscript{84} Gut-
mann suggests that the abilities that facilitate participation in deliberative
politics can be fostered through public education: "Although inculcating
character and teaching moral reasoning by no means exhaust the pur-
poses of primary education in a democracy, together they constitute its
core political purpose: the development of 'deliberative' or what I shall
interchangeably call 'democratic' character."\textsuperscript{85} Gutmann suggests two
ways in which these virtues can be developed through education. The
first is direct: curriculum and teaching techniques can be structured with
a mind to developing what I have called the intellectual virtues necessary
to participation in deliberative politics. The second method is indirect.
Gutmann suggests that the adoption of democratic modes of governance
within schools is a means of "cultivating participatory virtues."\textsuperscript{86} Gut-

\begin{itemize}
  \item 80. \textsc{Aristotle, Politics, supra note 20, at 1281a40.} I have altered the translation to elimi-
nate a corruption in the text.
  \item 81. \textit{See R. Beiner, supra note 56, at 95-96.}
  \item 82. \textit{See Sunstein, Beyond the Republican Revival, supra note 8, at 1548-51.}
  \item 83. \textit{See A. Gutmann, Democratic Education (1987).} Gutmann's views echo those of the
    anti-federalists. \textit{See H. Storing, supra note 16, at 21} (noting that concern with civic education
    was implicit in anti-federalist opinion concerning the role of civic virtue in republican citizenship).
  \item 84. \textit{Sherry, Republican Citizenship in a Democratic Society, 66 Tex. L. Rev. 1229 (1988).}
  \item 85. \textit{A. Gutmann, supra note 83, at 51-52.}
  \item 86. \textit{Id. at 91.}
\end{itemize}
mamm's two methods for promoting civic virtue suggest that virtue and voice can be reconciled: through education we may be able to produce a citizenry in which all citizens more fully realize potential for civic virtue.

The third component—developing virtuous individuals through communication—is prompted by John Stuart Mill's defense of toleration based on its educative effect on human character. Mill's account suggests that freedom of communicative action—the institutionalization of the ideal speech situation in the public sphere—can itself contribute to the development of a virtuous citizenry. For example, if citizens take the obligation to vote seriously and educate themselves about the candidates or issues, the resulting educative process may develop the intellectual virtues. Of course, the educative value of participation would be greater if the extent of participation were enlarged. The ideal would be participation by the excluded in projects of self-government that would develop the full range of intellectual and moral virtues. The model of the town meeting—which involves a high level of citizen involvement—might be translated into neighborhood councils or advisory committees for government departments. In sum, the third component of the communicative virtue strategy implies that deliberative politics may transform the participants. Inclusion itself may be a method of promoting virtue in the excluded.

B. Virtues of the Excluded

The second strategy for reconciliation is to explore the virtues of the excluded. The core of this strategy is the possibility that Aristotle's postulated connection between social and economic status and the virtues might be turned on its head—that the differences in character between the oppressed and the powerful might include virtues among the former that are not present in the latter.

1. The Matsuda-Kennedy Debate

This second strategy is inspired by Randall Kennedy's discussion of


88. A word about terminology is appropriate. I use the terms “excluded” and “oppressed” to refer to groups like women, people of color, and gays and lesbians. These groups have been oppressed because they have been excluded. Of course, other groups may have been oppressed but not excluded or vice versa. In the text that follows, the terms “excluded” and “oppressed,” if used as nouns, should be taken as referring to groups of persons who have been oppressed by exclusion. I rely here on an intuitive notion of oppression, the full analysis of which is beyond the scope of this essay.
Mari Matsuda’s articulation and defense of the difference thesis: “Matsuda claims that the racial status of minority scholars uniquely deepens and sharpens their analysis of racism and their resolve to end it. She suggests, in other words, that victimization breeds certain intellectual and moral virtues.” Kennedy criticizes Matsuda for ignoring differences among people of color, and for failing to note the affinities between the positions articulated by legal scholars who are persons of color and white legal scholars. Moreover, he maintains, the Marxist notion that the oppressed will liberate themselves has not been confirmed by history.

Consider what Matsuda had to say about the matter: “Those who lack material wealth or political power still have access to thought and language, and their development of those tools will differ from that of the more privileged.” Thus, Matsuda’s initial move is to argue that the excluded do possess the intellectual virtues, but to observe that their development of these virtues may take a different form. She continues:

[T]hose on the bottom know how bad life is without the substantive and intangible goods the philosophers ponder. An expanded consciousness of the actual experience of racism is a method of theoretical inquiry available to CLS scholars in responding to the problem of normative priority. This method will generate new theories of justice provable in the only sense available; through intuition, guided by reason, tested against the lives of real people—a formula that is familiar to twentieth century philosophers.

At this point, I will leave the debate between Kennedy and Matsuda. The point, for now, is that their exchange raises the question whether the tension between the civic virtue thesis and the inclusion thesis may, in part, be alleviated by considering the virtues of the excluded.

2. Distinguishing Knowledge and Virtue

In order to continue the discussion of the question of distinctive virtues of the excluded, we need to make a distinction. There is a difference between the claim that the excluded have distinctive knowledge and the claim that the excluded have distinctive virtues. Part of the case for the inclusion of excluded voices can rest on the claim that excluded persons

90. See id. at 1780-85.
91. See id. at 1785-87.
92. See id. at 1780 & n.56.
93. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, supra note 61, at 335.
94. Id. at 359-60.
possess knowledge that should be considered in republican deliberation. The excluded, of course, have knowledge of their own preferences, their wishes, desires, hopes, and fears. Moreover, the excluded and oppressed are likely to have knowledge of the conditions of their oppression—information about the extent and causes of their deprivation. Thus, a case can be made, even on utilitarian grounds, for some form of inclusion of excluded voices in the process of political deliberation based solely on the distinctive knowledge of the excluded.

3. Some Doubts about Distinctive Virtue

The excluded can possess distinctive knowledge without possessing distinctive virtues. Is the possession of distinctive knowledge sufficient to sustain the inclusion thesis, even if the excluded lack distinctive virtues? There are some good reasons for resting the case for the inclusion thesis on distinctive knowledge and not on distinctive virtues. The notion that the excluded may possess distinctive virtues is a troubling one. One difficulty with this notion is that it is inconsistent with the basic Aristotelian idea that exclusion and oppression inhibit the development of the virtues. The notion that exclusion and oppression may actually foster virtue seems, at least on the surface, to be radically inconsistent with the Aristotelian picture of moral and intellectual development. Moreover, there is at least anecdotal evidence in support of the Aristotelian picture. We do know that at least some, probably very many, oppressed and excluded persons do not develop the virtues—that they lack the qualities of character and intellect that make for a flourishing life.

In addition, the notion that excluded or oppressed persons have distinctive virtues also poses a difficulty given Aristotle's theory of the relationship between the virtues. Aristotle posited the unity of the virtues, that is, he believed that in order for a person to possess one of the virtues, she must possess them all. But many of those who possess the special virtues of the excluded and oppressed may lack other virtues. Moreover, at least on Kennedy's interpretation of Matsuda, the virtues

95. I place the emphasis on virtue here to distinguish the difficulty for Aristotle of the notion that the oppressed and excluded possess any virtues at all.

96. I place the emphasis on distinctive here to highlight the difficulty for Aristotle of accepting any particular virtue that is not part of a unified package common to all virtuous persons.


98. For example, through oppression one might develop a strong sense of injustice and great compassion for those who suffer it. But despite the possession of these virtues (at least tentatively, call them that), it is possible and perhaps even likely that someone who has suffered great oppression might lack other virtues, perhaps good temper.
that the excluded and oppressed do possess are not shared by those who have not experienced oppression and exclusion. Thus, the idea of distinctive virtues of the oppressed seems to deny the unity of the virtues in two ways.

In sum, there are good reasons to doubt the viability of the thesis that the excluded possess distinctive virtues. Randall Kennedy's criticism of Matsuda was plausible.

4. Some Problems with Distinctive Knowledge

Despite these doubts about distinctive virtues of the oppressed, there are good reasons for looking beyond distinctive knowledge as the basis for giving the excluded an equal voice. Resting the case for inclusion on the distinctive cognitive knowledge of the excluded has its own set of problems. If the excluded possess knowledge but lack virtue, then arguments can be made on paternalistic and utilitarian grounds against full and equal participation. I am not endorsing the arguments for less than full participation which follow; rather, the point of this discussion is that such arguments are plausible if the case for participation rests only on the distinctive cognitive knowledge of the excluded.

First, the utilitarian case for inclusion based on distinctive knowledge requires only that the knowledge possessed by the excluded be included in the deliberative process; full participation by excluded persons themselves is not required. This abstract point can be made more concrete in the following way. If the only unique contribution of the excluded to political deliberation would be knowledge that can be expressed in propositional form, then that contribution could be realized by having expert social scientists gather the knowledge (perhaps by surveys and interviews) and present it to those who are qualified by their civic virtue for full participation in political discourse. As Scott Brewer put it, "Of course, for many substantive decisions, a substantive-decisionmaker will want to take testimony, as it were, from those who have"

99. This point needs to be qualified. It could be argued that actual participation of the excluded in political discourse is required in order for the knowledge of the excluded to be adequately considered. For example, it could be argued that the distinctive knowledge possessed by the excluded can be more accurately assessed and evaluated if the excluded themselves report their beliefs in political discourse. Or it might be contended that absent actual participation by the excluded, there might be a tendency to undervalue the information they provide. If the empirical premises of these points were established, they would make a case for attending to the voices of the excluded, but not, I think, for full and equal participation by the excluded in political deliberation. Full and equal participation in political deliberation entails not only an opportunity to speak and be heard, but also an opportunity to have a voice in the making of decisions, e.g., to vote, to be elected to office, or to serve as a judge. By itself, distinctive knowledge might justify freedom of speech for the excluded, but not equal citizenship.
had certain experiences of oppression."\(^{100}\)

The first point leads to the second. If the excluded possess knowledge but lack intellectual and moral virtue, there are paternalistic\(^{101}\) reasons to deny the excluded full participation. The excluded, it could be argued, may be irrational and hence incapable of acting on their distinctive knowledge in ways that serve their own interests. Initially, they may not draw accurate factual conclusions from their own knowledge because, for example, they may engage in wishful thinking—believing a proposition because they wish it were so. In addition, the wishes and desires of the excluded might be distorted by their exclusion or oppression. Those who have been deprived may be subject to the phenomenon of "sour grapes," or adaptive preferences—no longer even wanting what has been denied because of oppression. Arguments like these could be used as the basis for an argument that the excluded and oppressed should not be granted full and equal participation in political discourse, because limiting their participation is in their best interests. Like children, the excluded should only be allowed to engage in full participation after they have developed the moral and intellectual virtues. If we wish to reject this highly paternalistic conclusion, then we have reason to resist distinctive knowledge as the primary reason for including the excluded.

To sum up: (1) The debate between Kennedy and Matsuda raised the possibility that the inclusion thesis might be reconciled with the civic virtue thesis by identifying distinctive virtues of the oppressed and excluded. (2) There is a difference between the claim that the excluded have distinctive virtues and the claim that they have distinctive knowledge. (3) The thesis that the excluded have distinctive virtue poses problems for an Aristotelian virtue theory, because: (a) it seems inconsistent with the notion that the development of virtue is inhibited by oppression; and (b) it seems inconsistent with the unity of the virtues. (4) But attempting to argue for the inclusion thesis on the basis of distinctive knowledge alone is problematic because distinctive knowledge does not provide a sufficient reason for the excluded to participate fully and equally in political deliberations. Thus, we arrive at the central question: is there a plausible account or theory of virtue that makes room for distinctive virtues of the excluded and oppressed?


5. Distinctive Virtues of the Excluded

The case for distinctive virtues of the excluded might begin with a closer look at the idea that the excluded have distinctive knowledge. Thus far, I have treated distinctive knowledge as something which is purely cognitive, expressible in propositions that can be grasped by intellect alone. But this is an impoverished account of what we might call "ethical perception" or "moral vision." For Aristotle, practical reason requires the ability to discern the particulars of a moral situation. Legal philosophers may be most familiar with this aspect of Aristotle's thought in connection with his discussion of equity as an antidote to the generality of law.102

Practical judgment requires an ability to do what is right in the particular case, but this ability is not merely a matter of what we might call propositional knowledge. As Nancy Sherman puts it,

[O]n Aristotle's view, attending to the particulars is equally a matter of emotional awareness. Often we see not dispassionately, but because of and through the emotions. So, for example, a sense of indignation makes us sensitive to those who suffer unwarranted insult or injury, just as a sense of pity and compassion opens our eyes to the pains of sudden and cruel misfortune. We thus come to have relevant points of view for discrimination as a result of having certain emotional dispositions.103

The role of emotion in ethical perception suggests the following line of argument. The knowledge of the oppressed and excluded cannot simply be extracted and then considered by the virtuous in political deliberation. This moral knowledge results from beliefs that are constitutive of an emotional response and not from the propositional content of the beliefs alone.104 These moral emotions provide motivations that support moral action.105

This abstract point has a counterpart in our moral tradition and folk psychology. The idea that virtue is developed through suffering has strong roots in both the Old and New Testament. Consider also the commonplace that suffering is good for character. Of course, these bits of evidence do not establish my point. Rather, I invoke common sense and moral tradition to counter the preconception that the idea of distinc-

102. See ARISTOTLE, NICOMACHEAN ETHICS, supra note 25, at 1137b1.
103. N. SHERMAN, supra note 50, at 44-45.
104. Thus, the emotion of anger is constituted in part by the cognition that one has been slighted or injured. See id.
tive virtues of the oppressed is radically implausible.\(^{106}\)

In other words, the experience of oppression and exclusion may lead to the development of states of character that lead to moral action, to the right sort of choosing. Those who are privileged (the included and the nonoppressed) may not develop these virtues merely by being informed of the propositional content of the distinctive knowledge of the oppressed. Experience of oppression may not be necessary for the recognition of injustice, but it seems plausible that those who actually experience oppression will have ethical perceptions that are different from those who recognize injustice in other ways, e.g., through theoretical discourse about injustice.

6. The Role of Emancipatory Praxis in the Development of the Distinctive Virtues of the Excluded

At this point, I want to consider a final objection to my contention that the idea that the excluded and oppressed have distinctive virtues: many (perhaps only some, perhaps most, perhaps almost all) of the oppressed lack these virtues. How can my argument be squared with the existence of these counter examples? Consider two points.

First, I am not claiming that every excluded person will develop distinctive virtues. Notice that this qualification is not inconsistent with the Aristotelian framework that I have adopted. For example, there are many people within those groups who are not deprived, who grow up in an environment with all of the material and cultural supports for the development of the virtues, but who do not attain high levels of virtue. Why is that? Of course, there could be any number of explanations, ranging from the biological, e.g., mental illness caused by physical dysfunction, to the environmental, e.g., an unstable home life that did not provide an adequate moral education. Similarly, it may well be that only some of the oppressed and the excluded are able to develop distinctive virtues, given the conditions of their moral education.

Second, recall that experience plays a role in the development of the

\(^{106}\) Consider in this regard, the following sensitive discussion of a similar issue by Susan Hurley:

Consider this claim: If the judge weren't a member of a group subject to discrimination, she wouldn't believe that affirmative action was right. It cuts both ways: whether a belief in affirmative action is true or not cannot depend on whether the believer is a member of such a group or not, and moreover being a member of such a group might make someone want to believe that affirmative action was right because it would be in her interests or those of her friends and family. On the other hand, we also can understand how being a member of such a group might give someone special insight about whether or not it is right.

virtues. One would expect that the distinctive virtues of the excluded would be most highly developed in those oppressed persons who engage in emancipatory praxis, that is, in those who develop the moral vision made possible by experiencing oppression and by engaging in action directed toward the righting of injustice.107

Indeed, we frequently hold up those who have struggled against oppression as models of virtue. Martin Luther King and Nelson Mandela exemplify the virtues of the oppressed. They possess an unique moral vision, an acute sensitivity for injustice, a righteous anger, and great rhetorical skill in communicating suffering, outrage, and hope. Our recognition of such figures reinforces my claim that the oppressed and excluded possess distinctive virtues in addition to distinctive knowledge. Martin Luther King isn't admired because he knew more about oppression than others. Martin Luther King is admired because of his character, because he possessed distinctive moral and intellectual virtues, virtues acquired through his experience of oppression and exclusion and his participation in emancipatory practice.

7. The Matsuda-Kennedy Debate Reconsidered

At this point, we can return to the debate between Kennedy and Matsuda. Matsuda need not claim that everything that the oppressed say will be different from the views articulated by the powerful. Nor does she need to claim that instillation of certain virtues by the experience of oppression is a sufficient condition for the liberation of the oppressed. Matsuda can recognize that there are differences in character among the oppressed, without recanting the thesis that the experience of oppression tends to affect character in systematic ways, just as Aristotle could maintain that a certain amount of wealth is conducive to, but not sufficient for, the development of a good character.

Furthermore, Matsuda's position is compatible with my contention that one of the ills of oppression and poverty is the effect it has on stifling the development of oppressed persons. Of course, this requires me to accept the thesis that the distinctive virtues of the oppressed and excluded are only virtues in a world of oppression and exclusion.108 But this possibility seems worth investigating. It seems plausible that oppressed persons in unjust societies must develop characteristics that would aid them in the fight against oppression, even though they would

107. See Matsuda, Pragmatism Modified and the False Consciousness Problem, supra note 61, at 1779-80.
fail to develop other virtues—characteristics that might allow them to flourish if they were among the powerful or if they lived in a just society.

Indeed, it is plausible that some of these virtues of the excluded might be connected to the conceptions of communicative rationality and communicative virtue already considered. The oppressed have a unique ability to communicate the experience of oppression. To put the point in Habermas's language, the oppressed have the ability to engage in expressive speech acts—disclosures of their subjective world that reveal to the public an experience to which they have privileged access.¹⁰⁹ Because the inclusion of these new voices might make a difference, we cannot rationally claim that conclusions we have reached in their absence are true or just.

VI. CONCLUSIONS

Let me return to my point of departure. The republican revival is offered as a tool for understanding the American constitutional order. In order to understand the republican notion of civic virtue, I have offered a classical account of civic virtue and a critical theory of communicative rationality. These ideas are not wholly foreign to our understanding of our constitutional order. The Framers of the Constitution and those who opposed the ratification of that document were well versed in the classics, and freedom of speech, at least as interpreted by the Supreme Court, may reflect an ideal of communicative rationality. But the notion of civic virtue that has been developed in this paper is not one that can simply be recovered intact, as it were, from some forgotten or neglected constitutional tradition. Whatever the value of the account that I have offered, it is not as a restatement of the intentions of the Framers or the antifederalists. Republicanism, despite its ancient historical roots, must stand or fall on its merits as a theory of what our constitutional order ought to be. The revivalists are quite right to make republicanism the best theory that it can be.

Moreover, close attention to the role of civic virtue suggests that traditional scholars of constitutional law do not have as their subject the whole of the American constitutional order. If we view our constitution as the set of fundamental practices (or the basic structure) that constitutes our social order and we believe that the character of citizens is part of what is constituted, then it seems clear that the constitutional order must include more than the United States Constitution. It must include

such fundamental practices as education and the structure of the family. The constitutional order must include the fundamental structure of the public sphere, the space in which deliberative democracy takes place, even though that sphere is outside the direct purview of state control. In other words, the republican revival suggests not just new approaches to familiar problems in constitutional law, but a new understanding of what it is that we are studying.