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# VIRTUE JURISPRUDENCE AND THE AMERICAN CONSTITUTION

*Timothy Cantu\**

## INTRODUCTION

For most of the current period of legal thought, legal realism or instrumentalism have been the strongest forces at work in the field.<sup>1</sup> This has coincided with the rise in popularity of the theories of deontology or consequentialism in the field of moral philosophy. However, since Elizabeth Anscombe's famous 1958 paper *Modern Moral Philosophy* was published,<sup>2</sup> the theory of virtue ethics<sup>3</sup> has captured a small but growing group of adherents. Moral philosophy, of course, is necessarily and intricately tied to legal theory, and because of this, a corresponding theory is slowly developing in legal academia. For example, Lawrence Solum has already written of the effect of virtue jurisprudence on some areas of the law,<sup>4</sup> and together with Colin Farrelly, has called for a return to the principles of virtue jurisprudence as the basis of law.<sup>5</sup> At best, this project is *in utero*.<sup>6</sup>

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1 VIRTUE JURISPRUDENCE 1 (Colin Farrelly & Lawrence B. Solum eds., 2008).

2 G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1 (1958).

3 I use this name, as Anscombe and those who came after her have, to mean a moral philosophy which promotes the inculcation of human virtue as its primary natural *telos*.

4 See, e.g., Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475 (2005) [hereinafter Solum, *The Aretaic Turn*] (arguing that the process by which we choose judges who will handle constitutional disputes ought to be focused on the character and virtue of the nominees, rather than political or public policy reasons); Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65 (2006) [hereinafter Solum, *Natural Justice*] (arguing that Justice is natural and good to humans and is therefore a natural part of virtue jurisprudence); Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003) [hereinafter Solum, *Virtue Jurisprudence*] (arguing that the best judges are not necessarily those who share our policy beliefs, but those who best possess the sets of virtues required of one who must judge).

5 VIRTUE JURISPRUDENCE, *supra* note 1, at 1.

Virtue ethics is not, of course, a new field. In one form, its roots in western thought can be traced as far as Plato;<sup>7</sup> however, the treatment given to it by his pupil Aristotle received more attention and is generally regarded as the true birth of the theory.<sup>8</sup> Most early Christians disregarded Aristotelian and other Greek philosophies as pagan, and therefore the theory of virtue and law proposed by Aristotle fell into disfavor among western cultures.<sup>9</sup> The next serious treatment of the theory was in the medieval period, when St. Thomas Aquinas revived peripatetic thought and gave his own detailed account of how exactly the flourishing of human virtue was the goal of government, as well as what a regime was and was not permitted to do in pursuit of this goal.<sup>10</sup>

This outline, while by no means exhaustive of the literature on the interaction of virtue and the law, provides a brief sketch of the primary influences on the field of virtue ethics from the pre-Enlightenment western canon. Until the recent treatment of the field, it had remained largely undeveloped from these roots. Recently, as noted above, some have attempted to build on this tradition and adapt our current legal system to virtue ethics, thereby creating a framework which most actively and effectively promotes the common good.<sup>11</sup> In many areas of the law, it remains to be seen or fully explored what sort

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6 See *id.* at 1–2 (“[W]e ought to say that the version of virtue jurisprudence offered in this brief introduction paper is hardly full blown.”).

7 See generally PLATO, *THE REPUBLIC* (R.E. Allen trans., Yale Univ. Press 2006) (c. 380 B.C.E.) (discussing Plato’s beliefs about the proper order of the good city, the good man, and the definition of justice).

8 See generally ARISTOTLE, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* 935 (Richard McKeon ed., W.D. Ross trans., Random House 1941) (c. 350 B.C.E.) [hereinafter ARISTOTLE, *Ethics*] (discussing the nature of virtue generally, as well as how virtue comes to be in humans); ARISTOTLE, *Politics*, in *THE BASIC WORKS OF ARISTOTLE* 1127, *supra* [hereinafter ARISTOTLE, *Politics*] (discussing the nature and order of the good city and in what each of its elements should consist).

9 See Ralph McInerny & John O’Callaghan, *Saint Thomas Aquinas*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2010), available at <http://plato.stanford.edu/archives/win2010/entries/aquinas> (“Thomas . . . countered both the Averroistic interpretations of Aristotle and the Franciscan tendency to reject Greek philosophy. The result was a new *modus vivendi* between faith and philosophy which survived until the rise of the new physics.”).

10 See ST. THOMAS AQUINAS, *Summa Theologica Part I–II*, in *2 BASIC WRITINGS OF ST. THOMAS AQUINAS* 742–805 (Anton C. Pegis ed., Random House 1945) (c. 1274) [hereinafter AQUINAS, *Summa*]; see also ST. THOMAS AQUINAS, *ON KINGSHIP TO THE KING OF CYPRUS* (I. Th. Eschmann ed., Gerald B. Phelan trans., Hyperion Press 1979) (c. 1267) [hereinafter AQUINAS, *ON KINGSHIP*].

11 See generally VIRTUE JURISPRUDENCE, *supra* note 1 (containing essays by numerous authors on how we ought to approach modern legal matters with an eye to the virtue jurisprudence tradition).

of effect virtue jurisprudence might have and what the broader implications will be.

One of these areas is constitutional interpretation. While the effect of virtue jurisprudence on constitutional adjudication has been explored,<sup>12</sup> the question of whether or not the Constitution may reasonably be interpreted as consistent with the ends of law according to virtue jurisprudence is valid and as yet little-discussed. If the Constitution is incompatible with virtue jurisprudence, then we must choose whether to have our cake or eat it. Such a discovery would not, of course, invalidate the theory of virtue jurisprudence; it would instead require us to conclude that the Constitution does not have a sturdy basis in a valid moral philosophy.<sup>13</sup> For many Americans, this choice between the Constitution and virtue ethics is easy: the Constitution functions neatly enough and is dear enough that it is the clear selection over what is, to most Americans, a nebulous and relatively unknown philosophical mindset.

This Note will argue, however, that the two are not only compatible but ideally paired. This is not to say that adopting virtue jurisprudence as the philosophical foundation of the Constitution would be without consequence. Rather, it will argue that the Constitution is compatible with virtue jurisprudence if the reader interprets it in a particular way which is consistent with the founders' general worldview and beliefs. This Note will not attempt to establish that virtue jurisprudence is a superior system to any other, nor that the constitutional interpretation it provides ought to be the preferred method. Instead it will give a theoretical framework by which we as a people might base our Constitution on virtue jurisprudence, if we desired to do so.

Part I of this Note provides definitions and explanations of the terms "virtue ethics" and "virtue jurisprudence." It examines the history of these theories as they have developed in western thought. Part II discusses how the Constitution can be grounded in the principles of virtue jurisprudence. It examines how the Constitution can be used to fulfill the goal of allowing its citizens to live excellent lives. First, it surveys the current constitutional jurisprudence and how in many cases it is counterproductive of the goal of producing virtuous citizens. Next, it discusses how, in early America, the people possessed certain traits of character which were highly desirable, conducive, and necessary to a free state. It uses these characteristics to understand

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12 See Solum, *The Aretaic Turn*, *supra* note 4.

13 This supposes, of course, that the truth of any one theory of moral philosophy is exclusive of others, a proposition which I do not defend here.

why the Constitution was written as it was, and why it would be in our best interests to ensure that these traits survive in America. Finally, it examines how the dual division of powers—federal against state and the three federal branches against each other—can functionally frustrate the development of vice in lawmakers in any branch at any level.

## I. FROM PLATO TO SOLUM: 2400 YEARS OF VIRTUE ETHICS AND JURISPRUDENCE

Virtue ethics is one of three current popular approaches to moral philosophy.<sup>14</sup> It emphasizes as the measure of actions whether those actions will produce excellent character, rather than judging actions by adherence to a set of rules (the deontological approach) or the consequences they produce (the utilitarian or consequentialist approach).<sup>15</sup> This brief description is the modern formulation of the theory, but it has remained substantively intact since it was first articulated.

In the earliest treatment of virtue and the state at length, Plato gave an account of the four cardinal virtues and how they come to be in both men and the state.<sup>16</sup> He named justice, fortitude, prudence, and temperance as cardinal virtues and further claims that the state must aim to foster each of these virtues in the respective class where it is necessary.<sup>17</sup> This is of limited use for the purposes of this Note because virtually no one, either in 1787 or today, thinks that American society has or should have designated strata which do not permit vertical movement from one to the other. The British aristocracy had been a partial cause of the American Revolution. It is, however, the first major treatment of the cultivation of virtue as the end of the state and served as a foundation for the firm establishment of the theory by Plato's pupil.

Aristotle remains one of the most well-known philosophers in human history and wrote extensively on the nature of virtue and virtuous activity. In the *Nichomachean Ethics*, he concluded that virtuous action was the greatest achievement man could reach and therefore

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14 Rosalind Hursthouse, *Virtue Ethics*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, *supra* note 9, available at <http://plato.stanford.edu/archives/win2010/entries/ethics-virtue>.

15 *Id.*

16 See PLATO, *supra* note 7, at 121–31, 141–47.

17 *Id.* Plato believed that there were or ought to be three main classes of man—producers, warriors, and rulers—and that each of these ought to be defined and in some way separated from the others. *Id.*

should also be his primary goal in life.<sup>18</sup> Building on this conclusion, he designated the inculcation of virtue in the populace as the primary goal of both the state and the household.<sup>19</sup> Later in the *Politics*, when studying the different types of political government, he referred to three distinct parts of government: the deliberative body, the magistracy, and the judicial body—a division which will sound familiar to any student of American political science.<sup>20</sup> This brief overview of Aristotle’s teachings on virtue describes its essential points as they will relate to the topic of this Note.

St. Thomas Aquinas, in his *Treatise on Law*, built upon Aristotle’s conclusions about the ends of government. First, regarding the nature of law itself, he determined that it is “an ordinance of reason for the common good, promulgated by him who has the care of the community . . . .”<sup>21</sup> Any such law, he further argues, will result in the creation of men who are good with respect to the ends of their particular government, for “the proper effect of law is to lead its subjects to their proper virtue . . . .”<sup>22</sup> In a well-ordered state, these laws result in the creation of citizens who are capable of and well-suited to attaining the common good—and this in turn will require that the citizens possess the cardinal virtues.<sup>23</sup>

St. Thomas’s conclusions about the purpose of law in this regard are not particularly different from those of Aristotle, though his arguments are often more concise and easy to follow. Both St. Thomas and Aristotle are of the opinion that legislators instill virtue—or vice,

18 ARISTOTLE, *Ethics*, *supra* note 8, at 944 (concluding that “[w]ith those who identify happiness with virtue . . . our account is in harmony; for to virtue belongs virtuous activity”).

19 ARISTOTLE, *Politics*, *supra* note 8, at 1129 (“[T]he state comes into existence . . . for the sake of a good life.”). The good life Aristotle speaks of (εὐδαιμονία, or *eudaimonia*) is the same as the happiness mentioned in the quote at *supra* note 18 as identifiable with virtuous activity. See also *id.* at 1189 (“Our conclusion . . . is that political society exists for the sake of noble actions, and not of mere companionship.”). It is important to note that in Aristotelian moral philosophy, an action is only virtuous with reference to the soul of the actor, accordingly as he does or does not have the habit of virtue. ARISTOTLE, *Ethics*, *supra* note 8, at 952.

20 See ARISTOTLE, *Politics*, *supra* note 8, at 1225. By his description, it is clear that the deliberative element corresponds to what we call the legislative and the magistracy corresponds to the executive. *Id.* at 1225–31.

21 AQUINAS, *Summa*, *supra* note 10, at 747.

22 *Id.* at 759.

23 See *id.* (“[I]f the intention of the lawgiver is fixed on . . . the common good . . . it follows that the effect of law is to make men good absolutely.”). The Latin phrase *boni simpliciter*, used here by St. Thomas, can be rendered more literally as “good in an unqualified sense.”

as the case may be—in their subjects by forming habits in them.<sup>24</sup> As a final note on this subject, it is important to note that while both of them thought that the habituation of citizens to virtue was the end of law, neither felt that it was the place of law to prohibit every vice,<sup>25</sup> nor to command every virtue.<sup>26</sup>

The preceding covers the most important arguments made in favor of virtue jurisprudence (though it was not yet termed as such) prior to the Enlightenment and American colonial period. Many of the American founders were well aware of this intellectual tradition and adopted it to some degree in their own philosophies on government.<sup>27</sup> While they did not uniformly identify “general virtue,” or even the same virtue if one was singled out, the men who played major roles in the drafting of the Constitution and Declaration of Independence subscribed to this theory in varying degrees. This is not especially surprising given the moral climate that they lived in; many of them would not have accepted that there is what Lincoln

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24 See ARISTOTLE, *Ethics*, *supra* note 8, at 952; see also AQUINAS, *Summa*, *supra* note 10, at 759.

25 See AQUINAS, *Summa*, *supra* note 10, at 792 (“[H]uman laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices . . . and chiefly those that are injurious to others . . .”).

26 See *id.* at 793–94 (“[H]uman law does not prescribe concerning all the acts of every virtue, but only in regard to those that are ordainable to the common good . . .”). Aristotle would agree with both of these propositions based on his belief that science of politics does not admit of perfect specificity, but rather requires prudence and experience in order to be learned well. See ARISTOTLE, *Ethics*, *supra* note 8, at 936–37.

27 See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . .”). I assume here, and I think it is at least arguable, that Jefferson (and the signers) felt that Happiness was a life in accordance with virtue, as that was a common sentiment at the time. See also John Adams, *Thoughts on Government: Applicable to the Present State of the American Colonies* (1775), in *THE REVOLUTIONARY WRITINGS OF JOHN ADAMS* 287–88 (C. Bradley Thompson ed., 2000) (“[A]ll speculative politicians will agree[ ] that the happiness of society is the end of government . . . . All sober inquirers after truth . . . have declared that the happiness of man, as well as his dignity, consists in virtue. . . . If there is a form of government, then, whose principle and foundation is virtue, will not every sober man acknowledge it better calculated to promote the general happiness than any other form?”); THE FEDERALIST No. 51, at 334 (James Madison) (Robert Scigliano ed., Random House 2000) (“Justice is the end of government. It is the end of civil society.”).

decried as the “right to do wrong.”<sup>28</sup> Even before Lincoln said this, the view that there was no such right was becoming less and less common, and it now seems to have virtually disappeared. It is common for a modern American to be offended by the notion that the government may interfere with his right to do what he wants—even if that action is widely recognized as a moral wrong. In this view, the only permissible government intervention on such basis is not on the grounds of the moral wrong done, but the fact that it interferes with someone else’s rights. This is a form of what is widely described as a libertarian political philosophy.

Virtue jurisprudence is not dead. It was what might have been termed “mostly dead” for a time in the earlier part of the twentieth century, but beginning with *Modern Moral Philosophy* in 1958, it has been undergoing the gradual process of revivification. Anscombe outlined the precise ways in which modern philosophy had departed from the Aristotelian moral tradition, such that the two were finally of little use to each other.<sup>29</sup> From this springboard, a number of modern philosophers and political scientists have arrived at the conclusion that the partial or total abandonment of post-Enlightenment philosophy and a return to the principles of Aristotelian moral philosophy is wise.<sup>30</sup> Their arguments differ only in some particulars from those outlined previously, and so for the purposes of this Note it will be reasonable to treat them as the same.

This Section has offered a rough overview of the history of virtue jurisprudence as it has developed from Plato to contemporary legal thought. The philosophy has undergone gradual modifications, but its central tenets have remained unchanged. These central tenets

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28 Abraham Lincoln, Speech at Quincy, Illinois (Oct. 13, 1858), in *THE LINCOLN–DOUGLAS DEBATES* 262 (Dover Publ’ns, Inc. 2004).

29 See generally Anscombe, *supra* note 2, at 1 (“[T]he concepts of obligation, and duty—moral obligation and moral duty, that is to say—and of what is morally right and wrong, and of the moral sense of ‘ought,’ ought to be jettisoned if this is psychologically possible; because they are survivals, or derivatives from survivals, from an earlier conception of ethics which no longer generally survives, and are only harmful without it.”).

30 See generally ROBERT P. GEORGE, *MAKING MEN MORAL* (1993) (arguing that those with good reasons to believe an action to be immoral may indeed work to legally prohibit that act, all for the sake of protecting the public morality, without violating the principles of justice); ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed., 1984) (arguing that the moral sciences have fallen into serious disrepair and are in need of rehabilitation); Colin Farrelly & Lawrence B. Solum, *An Introduction to Aretaic Theories of Law*, in *VIRTUE JURISPRUDENCE*, *supra* note 1, at 1 (arguing that the emphasis of jurisprudence should not be rights, ideology, or utility, but instead virtue, and containing articles by, among others, Heidi Li Feldman, Antony Duff, and Kyron Huigens).



include the notions that (1) it is the appropriate place of the state to make laws preventing immoral acts on the basis of their immorality; (2) the proper limits of the state in regulating morality lies not in the right to do wrong, but in the prudential judgment that laws enforcing morality would be counterproductive; and (3) humans can determine what is and is not moral with sufficient certainty to make laws about it. From here, this Note will examine the ways in which the Constitution is consistent with this philosophy of jurisprudence.

## II. THE CONSTITUTION, AMERICAN VIRTUE, AND VIRTUE JURISPRUDENCE

### A. *Made for a Moral and Religious People*

The Constitution, like every republican form of government, requires a certain set of virtues among its citizens in order to function effectively.<sup>31</sup> While the founders did not endorse the principle that a republican state could exert full control over the private lives of citizens, they certainly believed that the state could legislate morality in appropriate circumstances.<sup>32</sup> Instead, their concerns with the federal Constitution involved its scope of powers and removal from the vast majority of citizens; accordingly, their views on what appropriate measures were for state constitutions varied widely.<sup>33</sup>

It was noted both by those who drafted the Constitution and by later observers that one of the great difficulties in creating a federal government was that its citizens would have such widely varied inter-

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31 See JUDITH SHKLAR, *ORDINARY VICES* 4–5 (1984); ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 49–50 (1985); William A. Galston, *Liberal Virtues and the Formation of Civic Character*, in *SEEDBEDS OF VIRTUE* 37–39 (Mary Ann Glendon & David Blankenhorn eds., 1995); Harvey C. Mansfield Jr., *Constitutional Government: The Soul of Modern Democracy*, 86 *PUB. INT.* 53 (1987).

32 See, e.g., Adams, *supra* note 27, at 288 (“If there is a form of government, then, whose principle and foundation is virtue, will not every sober man acknowledge it better calculated to promote the general happiness than any other form?”). For evidence that this conclusion includes morals laws, see *id.* at 292, where Adams discusses the wisdom of laws for the liberal education of youth as well as “sumptuary” laws, or laws designed to promote frugality and prevent extravagance and luxury.

33 Compare MA. CONST. ch. VI art. XVIII (making provision for the funding of Massachusetts public schools, but not ratified until April 9, 1821) and *id.* (making no provision for the purchase of Native American lands), with N.C. CONST. of 1776, art. XLI (providing that the legislature “shall establish” schools for the instruction of youth, but not providing that such schools be free) and N.C. Const. of 1776, art. XLII (prohibiting the purchase of Native American lands except by the State Legislature). If one spent an afternoon examining pre-1800 American State Constitutions, myriad examples could be found; however, those cited *supra* serve as an example of the proposition that the several states needed diverse constitutions.

ests—in part thanks to the wide expanse of land covered by the United States.<sup>34</sup> While the needs and goals of citizens of Georgia and Massachusetts would be very similar at times, they would be quite different at other times. It was this rationale that led the Founders to leave the prohibition of all common law crimes to the states; it avoided the messiness of split law. It was not, of course, that they found murder, arson, rape, and the like to be acceptable; instead, they acknowledged the need for mechanisms other than a remote and distant federal government to handle these matters. John Adams expressed a view common among the founders when he wrote:

[W]e have no government, armed with power, capable of contending with human passions, unbridled by morality and religion.

Avarice, ambition, revenge and licentiousness would break the strongest cords of our Constitution, as a whale goes through a net. Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.<sup>35</sup>

Adams understood that somehow virtue would be formed in citizens, but that the federal government was wholly inadequate to accomplish that goal.

One of the unique principles of American society which Alexis de Tocqueville observed in his time—which he believed set it apart instantly from European nations—was the blending of what he called the “spirit of religion” and the “spirit of freedom.”<sup>36</sup> These two spirits, he believed, worked together to allow a greater society to emerge than if either spirit overpowered the other, as was typical in nearly every other historical example.<sup>37</sup> The balance of these spirits emerged most in the township, appearing to a lesser degree at each higher level (county, state, and federal), and in the mid-1800s most American political participation was in the township.<sup>38</sup> The federal government,

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34 THE FEDERALIST NO. 37, *supra* note 27, at 227–28 (James Madison); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 84 (Harvey C. Mansfield & Delba Winthrop trans. & eds., Random House 2000) (1840).

35 John Adams, Letter to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), in REVOLUTIONARY SERVICES AND CIVIL LIFE OF GENERAL WILLIAM HULL 265–66 (Maria Campbell & James Freeman Clarke eds., 1848).

36 See DE TOCQUEVILLE, *supra* note 34, at 43.

37 *Id.* at 43–44. In most historical societies, they tended to be dominated by either a religious authority or a secular authority. France is a perfect microcosm of this phenomenon, and de Tocqueville did not fail to note the contrast between the Americans and his own countrymen.

38 *Id.* at 59–65. de Tocqueville noted that the township and its freedom came from “the very dogma of the sovereignty of the people . . . . For all that relates to themselves alone, the townships have remained independent bodies.” *Id.* at 62.

though the Constitution substantially enlarged its powers when compared with the Articles of Confederation, did not have the constitutional tools to regulate or outlaw the institutions that developed these spirits on any sort of viewpoint basis. While the states in the early years of the Constitution did have broad power to regulate or prohibit such institutions, ease of passage between states ensured that citizens would generally find the states with the most accommodating laws for whatever their purposes might be.

Since de Tocqueville's time, however, judicial interpretation of the Constitution has changed to the point where it is not compatible with virtue ethics. In de Tocqueville's world, the common meaning of the Constitution, generally accepted as law, enabled the government to foster the development of societal institutions that created virtue, rather than ignoring or even dampening their existence. However, in the modern era, there are certain constitutional obstacles to either the federal or state governments promoting civic nonpolitical institutions. In order to found our government on virtue jurisprudence without abolishing the Constitution, it is necessary to modify or replace these doctrines.

The first of these is the doctrine of incorporation. It did not make its appearance until, at the very earliest, almost half a century after de Tocqueville's study of America.<sup>39</sup> Over time, the constitutionally guaranteed rights of freedom from establishment of religion,<sup>40</sup> free exercise of religion,<sup>41</sup> freedom of speech,<sup>42</sup> of the press,<sup>43</sup> to keep and bear arms,<sup>44</sup> against unreasonable search and seizure,<sup>45</sup> against warrantless searches,<sup>46</sup> to a speedy and public trial by an impartial jury,<sup>47</sup> to assistance of counsel,<sup>48</sup> and against cruel and unusual punishment,<sup>49</sup> have all been held, along with others, as applying equally against both the state and federal governments.

Of course, these rights are no longer the only ones guaranteed by the Court through the Constitution. In more recent times, the Court

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39 See *Gitlow v. New York*, 268 U.S. 652 (1925); *Chi., Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897).

40 See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

41 See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

42 See *Gitlow*, 268 U.S. 652.

43 See *Near v. Minnesota*, 283 U.S. 697 (1931).

44 See *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

45 See *Mapp v. Ohio*, 367 U.S. 643 (1961).

46 See *Aguilar v. Texas*, 378 U.S. 108 (1964); *Ker v. California*, 374 U.S. 23 (1963).

47 See *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *In re Oliver*, 333 U.S. 257 (1948).

48 See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

49 See *Robinson v. California*, 370 U.S. 660 (1962).

has read the Bill of Rights to contain a right to privacy which is never explicitly mentioned<sup>50</sup> yet has been broadly interpreted by successive iterations of the Court.<sup>51</sup> This right is part of the overall package of rights that has been selectively incorporated by the Court against the states. In practice, this has had the effect of substantially reducing the amount of latitude states have in crafting laws, particularly in the arena of what might be termed “morals legislation.”<sup>52</sup>

The Due Process Clause of the Fourteenth Amendment in its current form also stands against the idea that the states have stronger power than the federal government to regulate the rights listed above.<sup>53</sup> The wide range of legislation struck down under the guise of the Fourteenth Amendment encompasses at least some of the types of

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50 See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

51 See also *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down statutes in Texas and thirteen other states forbidding sodomy between consenting adults in private circumstances); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that state laws regulating abortion run afoul of the right to privacy as outlined in *Griswold*, subject to certain valid state interests and balancing tests); *Stanley v. Georgia*, 394 U.S. 557 (1969) (invalidating state laws prohibiting private possession of materials deemed obscene on the basis of the First and Fourteenth Amendments); *Griswold*, 381 U.S. 479 (holding that a Connecticut law prohibiting the use of contraceptives was in violation of the right to privacy found through the Court’s reading of the Ninth and Fourteenth Amendments); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (holding that an Oregon statute requiring all children between eight and sixteen to attend public school was in violation of the Fourteenth Amendment). See generally *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that a Nebraska law restricting foreign-language education was in violation of the Due Process Clause and that the liberty that clause protected extended to “enjoy[ing] those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men”). In *Olmstead v. United States*, a case not itself in favor of the right to privacy, an eloquent defense of the concept—and one of its most famous—was furnished by Justice Brandeis:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as the Government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized men.

*Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

52 For examples of this, see *supra* note 51, containing a wide variety of state statutes that were previously constitutional that are now prohibited by Supreme Court precedent. This list does not include decisions of lower courts that invalidate state laws on the basis of these or other privacy decisions of the Court.

53 U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

legislation which state legislatures might attempt to pass.<sup>54</sup> This idea of due process is also not the same as what some of the most influential architects and defenders of the Constitution thought of as “due process,”<sup>55</sup> and it also differs from the English common law meaning of the words.<sup>56</sup> Due process in the classical sense would encompass those decisions of courts and acts of legislatures which were duly passed or handed down and not in conflict with any provision of a superior law (in our case, the Constitution). It is easy to see how this conception of due process grants broad discretion to legislators to make laws, provided that they do not conflict with the Constitution. In this sense, the nature of due process is more suited to a view that the federal government is strictly limited to its enumerated powers, rather than a view that constitutional provisions may be read expansively to include various legislative goals which may or may not be within the fair textual meaning of the Constitution.

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54 The modern doctrine of due process finds its first notable roots, for better or for worse, in the infamous *Dred Scott* case, though it had been mentioned in a decision four years earlier in another Taney opinion. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857); *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 553 (1852). Chief Justice Taney used strikingly similar language in both opinions: that acts of the legislature in question could not possibly be regarded as due process of law. *Dred Scott*, 60 U.S. at 450; *Bloomer*, 55 U.S. at 553. At this point, of course, there is a long line of case law since the 1930s supporting this principle and further elaborating on it in various ways. See, e.g., *Near v. Minnesota*, 283 U.S. 697, 713–714, 718–720, 722 (1931) (holding that the Due Process Clause applies to other methods of disseminating information); *Stromberg v. California*, 283 U.S. 359, 369–370 (1931) (holding that the Due Process Clause of the Fourteenth Amendment encompasses the right of free speech); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding the same); *Pierce*, 268 U.S. 510 (holding that the Due Process Clause applies to direction of children’s education as well as operation of schools).

55 See, e.g., Alexander Hamilton, *New York Assembly. Remarks on an Act for Regulating Elections (Feb. 6, 1787)*, in 4 THE PAPERS OF ALEXANDER HAMILTON 35 (Harold C. Syrett et al. eds., 1979) (“[I]f there were any doubt upon the constitution, the bill of rights enacted in this very session removes it. It is there declared that, no man shall be disfranchised or deprived of any right, but by *due process of law*, or the judgment of his peers. The words ‘*due process*’ have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature.”).

56 See, e.g., EDWARD COKE, 2 INSTITUTES OF THE LAWS OF ENGLAND 45–46 (E. & R. Brooke, 1797) (“No man shall be disseised, that is, put out of seison, or dispossessed of his free-hold (that is) lands, or livelihood, or of his liberties, or free-customes, that is, of such franchises, and freedomes, and free-customes, as belong to him by his free birth right, unlesse it be by the lawfull judgment, that is, verdict of his equals (that is, of men of his own condition) or by the law of the land (that is, to speak it once for all) by the due course, and processe of law.”).

The more recent interpretation of due process and its related clauses lends itself to a more expansive reading. In this understanding, due process encompasses certain rights not written into the Constitution expressly, but which are conceived to be so “implicit in the concept of ordered liberty”<sup>57</sup> as to necessitate being given supremacy regardless of statutory schemes to the contrary at either the state or federal level. Naturally, this requires a different, nonoriginalist approach to the text, since it requires a reading between the lines on certain matters in order to afford the rights encompassed by due process the status of the highest law of the land.

Why is any of this relevant to virtue jurisprudence? Under the current jurisprudence of the Bill of Rights, states and municipalities are severely curtailed from making laws forbidding what they view as evils legitimately within the purview of the states to prohibit. In fact, it might even be said that we are at a point of moral libertarianism: actions may only be condemned if they infringe upon some right enjoyed by another. The clear upshot of this is that there are a multitude of possible laws, some historically utilized by various states, which are not permissible under the current constitutional regime, but would be considered by some states to be necessary or useful to creating virtue in the populace. As things stand, states’ hands are tied beyond using laws to try to create men who are at least publicly dutiful, if not virtuous. The private lives of men are unknown and untouched by state laws.

This regime of privacy and substantive due process is far from uncriticized. Justice White argued in multiple opinions that the Court has given itself too much power over the governance of the nation, and that the creation of new substantive due process rights should be, if anything, the exception rather than the rule.<sup>58</sup> On the current court, Justice Scalia, and possibly Justice Thomas, have opposed the doctrine of substantive due process in its current form,<sup>59</sup> despite its expansion due to the views of a majority of Justices on the subject during their terms on the Court.<sup>60</sup> Even at the beginning of the

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57 *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by* 395 U.S. 784 (1969).

58 *See Bowers v. Hardwick*, 478 U.S. 186, 192 (1986); *Moore v. East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting); *Roe v. Wade*, 93 S.Ct. 762, 763 (1973) (White, J., dissenting).

59 *See Hamdi v. Rumsfeld*, 542 U.S. 507, 589 (2004) (Thomas, J., dissenting) (quoting *In re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting)); *Chicago v. Morales*, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting); *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., joined by Thomas, J., concurring in judgment).

60 *See Lawrence v. Texas*, 539 U.S. 558 (2003).

major expansion of substantive due process, Oliver Wendell Holmes criticized the doctrine at the end of his time on the Court:

I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words "due process of law," if taken in their literal meaning, have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass.<sup>61</sup>

To take the advice of these Justices, constitutional doctrine relating to privacy either needs to be rewound to its pre-*Meyer* state, or revised in another direction that will allow states extra latitude. Originalism would most likely fit this requirement, but there may also be other models of interpretation that would allow it. What would be particularly relevant would be the approach of any given interpretation to the Tenth Amendment: would it side with the federal government, allowing significant power for the federal government to strike down "uncommonly silly law[s],"<sup>62</sup> or would the approach give the states the room which they need to function effectively as laboratories of experimentation? In fact, any constitutional model would depend heavily on how the reader construed the Constitution. An originalist or a textualist could fairly read the Tenth Amendment as allowing the states to do anything not specifically prohibited by the rest of the document. A proponent of the living Constitution could similarly construe the document to coincide with the aims and goals of virtue jurisprudence, allowing the states to enact morals legislation or even for the federal government to use powers such as the Tax and Spending Clause<sup>63</sup> or the Commerce Clause<sup>64</sup> to indirectly affect the morals of the people.

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61 *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).

62 *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

63 U.S. CONST. art I, § 8.

The current doctrine of substantive due process and privacy stands directly in the path of such changes, however. As long as any attempt by states to make these sorts of laws is counteracted by a federal enforcement of a state *laissez-faire* attitude towards morals legislation—specifically, while the federal judiciary uses incorporation to coerce the states into this attitude—our Constitution will not be compatible with the goal of making its citizens moral. A different and more federalism-oriented approach to the Bill of Rights would allow far more latitude on the part of states to create different schemes for establishing morality in the people.

### B. *Seedbeds of Virtue Bubbling Up From Below*

There is another aspect to the question of virtue and its designed source in the American republic, which requires an understanding of the sort of world in which the Founders lived and in which America was founded. This world was much the same as that examined by Alexis de Tocqueville a generation on from the Revolutionary War. Some of the essential features of that America which bear relevance to the development of virtue were thoroughly recounted in *Democracy in America*.

The unique patriotism of Americans which de Tocqueville observed and which he believed persisted because the people were “still simple in their mores and firm in their beliefs,” created an environment in which nearly every American was deeply invested in politics and the results of elections and laws.<sup>65</sup> It is this trait, this vested interest of every American in the success of a system into which they had poured their own labor, that resulted in a peculiar American character. This trait is generally regarded as persisting around the world even today, and it prompted de Tocqueville to comment: “[t]here is nothing more annoying in the habits of life than this irritable patriotism of the Americans. A foreigner would indeed consent to praise much in their country; but he would want to be permitted to blame something, and this he is absolutely refused.”<sup>66</sup>

Of equal importance to the fervor with which Americans attacked the political system was the religious attitude and culture, which informed their entire lives. de Tocqueville noted that while there were a wide variety of religions and sects in America that professed different theological beliefs, each and every one of them taught “the

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64 *Id.*

65 See DE TOCQUEVILLE, *supra* note 34, at 225–27.

66 *Id.* at 227.



same morality in the name of God.”<sup>67</sup> Indeed, as he observed on the matter,

If it serves man very much as an individual that his religion be true, this is not so for society. . . . [W]hat is most important to it is not so much that all citizens profess the true religion but that they profess a religion. . . . [A]ll the sects in the United States are within the great Christian unity, and the morality of Christianity is everywhere the same.<sup>68</sup>

Building on this fact, de Tocqueville later observed that “[r]eligion . . . should . . . be considered as the first of their political institutions . . . [because] it singularly facilitates their use of [freedom].”<sup>69</sup> The reason for this was directly the morality and virtues that American religion (and Christianity over the world) attempted to inculcate.<sup>70</sup> But was it the mere fact of religion, and more specifically Christianity, that caused the phenomenon he observed? Certainly, the near-total uniformity of religious culture in America at that time<sup>71</sup> (at least with regard to political religion, the topic at issue) assisted a great deal in the efforts of religious sects to ingrain certain traits in the young and old; but was this the only cause? No reasonable person would say that Christianity is the only religion capable of such formation, nor that it could only do it in a vacuum. In fact, there were numerous causes, some probably more important than Christianity. Among these was the education of early Americans—which was due in part to religious institutions.

One of de Tocqueville’s most well-known and entertaining statements about American life was his moderately tongue-in-cheek observation that,

Whoever wants to judge what is the state of enlightenment among the Anglo-Americans, therefore, is exposed to seeing the same object under two different aspects. If he pays attention only to the learned, he will be astonished at their small number; and if he counts the ignorant, the American people will seem to him the most enlightened people on earth.<sup>72</sup>

This was an important aspect. The cause of this near-universal basic (and only basic) education was that the formal schooling of the

67 *Id.* at 278.

68 *Id.*

69 *Id.* at 280.

70 *Id.* (“[A]t the same time that the law permits the American people to do everything, religion prevents them from conceiving everything and forbids them to dare everything.”).

71 *Id.* at 278.

72 *Id.* at 289.

vast majority of Americans consisted in instruction in essential education only (reading, writing, arithmetic, and so on), and not in the sort of philosophical free flight that was characteristic of the great European universities of the time.<sup>73</sup> While that sort of education may be more conducive to the search for objective truth, what occurred in American schools—instruction in matters already largely assented to on the level of faith—was much more conducive to preparing students to live a life according to the moral code of the time: a life embodying the classical virtues.

This life of virtue was, in de Tocqueville's mind, one of the most important institutions to America's successful democratic state. He observed the difference in the lives of men and of the government between the eastern and western parts of America, and concluded that the much greater difficulty of life in the American west was due in large part to that society's lack of mores—mores that were present in abundance in eastern America at the time.<sup>74</sup> He noted that other observers had attributed too much of the success of the American republic to its circumstances and even to its laws, and too little to the character of the populace.<sup>75</sup>

Finally, and related to the mores of America, de Tocqueville observed the uniqueness of the American familial structure. He noted that the democratic and egalitarian character of society also infected the family, such that American families were less hierarchical and less formal in nature, as well as more closely bonded, than was traditionally observed in Europe and elsewhere.<sup>76</sup> de Tocqueville regarded the women of American society as well-prepared to judge the temptations of society and to share this wisdom with their families.<sup>77</sup>

All of these observations point to the same source, a source taken for granted by the political government of early America: the family.

73 See Hermann Röhrs, *The Classical Idea of the University*, in *TRADITION AND REFORM OF THE UNIVERSITY UNDER AN INTERNATIONAL PERSPECTIVE* 20 (Hermann Röhrs & Gerhard Hess eds., 1987) (observing that in the nineteenth century university goals evolved from teaching the “regurgitation of knowledge” to “encourag[ing] productive thinking”).

74 See DE TOCQUEVILLE, *supra* note 34, at 294–95.

75 *Id.* at 295. This topic—the necessity of mores to the American Republic—was of the highest importance to de Tocqueville. “If . . . I have not succeeded in making the reader feel the importance that I attribute to the practical experience of the Americans, to their habits, to their opinions—in a word, to their mores—in the maintenance of their laws, I have missed the principal goal that I proposed for myself in writing it.” *Id.*

76 *Id.* at 558–63.

77 *Id.* at 563.

It is the family, often referred to as the basis or unit of society,<sup>78</sup> from which all of these traits come. This is one major reason why the authors of the Constitution were able to create a document that took an extremely *laissez-faire* attitude, at least at the federal level, to governmental involvement in matters of morals. The Founders assumed, as was natural for the world in which they were living, that there would be strong families readily churning out moral citizens well-groomed for participation in public life. This attitude was hardly unique to America in 1787 or in the 1830s when de Tocqueville visited. Much major Enlightenment thought—though it attempted to divorce morality and faith from reason—never went so far as to presume that the irrational basis of morality and religion meant that these things were invalid.<sup>79</sup>

The family is far from the only factor that contributes to the fitness of a society to govern itself, but it is one of the most important. With parents traditionally being those who have the most time and influence over their children, there can be little question that they bear the brunt of the responsibility for the outcomes of the lives of the children they raise. The other important factor in the lives of children is community, which has influence on the children both directly and indirectly through the vehicle of the family.<sup>80</sup> As James Q. Wilson has noted, in the eighteenth century, American community life was able to support families without serious regard to the type of government in effect.<sup>81</sup>

Whereas early America had strong families and the communities to support them, it is an open question as to whether these exist in modern America in any substantive way. In fact, the easiest conclusion is that these social institutions are either on life support or already effectively extinguished. In 1960, nearly three-quarters of

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78 See ARISTOTLE, *Politics*, *supra* note 8, at 1130; Mary Ann Glendon, *Virtue, Families, and Citizenship*, in *THE MEANING OF FAMILY IN A FREE SOCIETY* (W. LAWSON TAITTE ed., 1991); Don S. Browning, *Altruism, Civic Virtue, and Religion*, in *SEEDBEDS OF VIRTUE*, *supra* note 31, at 105.

79 See, e.g., DAVID HUME, *A TREATISE OF HUMAN NATURE* 469 (L.A. Selby-Bigge & P.H. Nidditch eds., Oxford University Press 1978) (1740). While Hume argues that value statements should never make their way into philosophical endeavors, he also never argues that such statements do not have validity in other arenas. This is fairly typical of the philosophers of his time.

80 See David Popenoe, *The Roots of Declining Social Virtue*, in *SEEDBEDS OF VIRTUE*, *supra* note 31, at 81–82 (arguing that a characteristic of strong families is that they are surrounded by supportive communities, including friends, family, neighbors, and community organizations).

81 See James Q. Wilson, *Liberalism, Modernism, and the Good Life*, in *SEEDBEDS OF VIRTUE*, *supra* note 31, at 19–20.

American households were family households. That three-quarters declined over the next forty years until, at the turn of the millennium, the number had reached just over half (53%).<sup>82</sup> Childless families rose to 31% of all households, and of those households with children, 27% were headed by a single parent.<sup>83</sup> As the proportion of single parent households increased, the number of extramarital births experienced an even more disproportionate increase. From 1950 to 2000 the percentage of births outside of marriage jumped over 800%, as it went from only 4% of all American births to over 33% at the turn of the new millennium; this percentage continues to rise.<sup>84</sup> Corresponding to this decline in traditional families, and of similar importance, are the changes in social institutions and community life, specifically those changes that affect the upbringing and socialization of children.<sup>85</sup> Social institutions, or those institutions which foster in-person social intercourse, have seen their participation steadily decline since 1950.<sup>86</sup>

These statistics paint a bleak picture of American family and community life, and therefore also of the possibility of our children obtaining the positive social skills and virtuous behavior which are the end of virtue ethics. It is undoubtedly true that these changes have corresponded nearly perfectly with the chronology of the changes in law and Supreme Court precedent discussed above. However, it would be far too simplistic to attribute the declines to these changes alone. American society is far too complicated and subject to far too many causes to make such a confident connection. However, a more restricted federal government which gives greater latitude to state governments to make and enforce laws as they feel their particular circumstances would require, would give effective tools to the states to promote the inculcation of virtue through the traditional power of the family and its related societal and communal institutions.

What de Tocqueville observed as enabling the success of American society was then, and still is, a cause of a successful republic, but

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82 HERBERT S. KLEIN, *A POPULATION HISTORY OF THE UNITED STATES* 210 (2004).

83 *Id.* at 210–11.

84 *Id.* at 213.

85 See Steven Mintz, *The Family as Educator: Historical Trends in Socialization and the Transmission of Content Within the Home*, in *EDUCATION AND THE AMERICAN FAMILY* 110 (William J. Weston ed. 1989) (arguing that the ways in which children socialize had undergone more radical change post-1960 than at any time in the previous hundred and fifty years).

86 See generally ROBERT D. PUTNAM, *BOWLING ALONE* (2000) (arguing that there has been a decline in social institutions and social capital, as well as in-person social intercourse, since the midpoint of the 20th century).

any republic may choose to create laws, which serve to create, facilitate, or quash love of country, universal education, religious belief, and strong families. All these things, so noted and admired by de Tocqueville, were present virtually everywhere in American society both in his time and when the Constitution was framed. Hardly anyone would argue that what is now left of these things resembles what it did in de Tocqueville's time. Restoring these traits and the institutions that can create them will require governments that lend a sympathetic hand to such endeavors, rather than neutrality or discouragement.

*C. Man is Not Governed by Angels: The Structural Government  
and the Virtue of Lawmakers*

One of the most well-known aspects—as well as one of the most-revered—of the Constitution is the doctrine of separation of powers. As James Madison wrote, “the accumulation of all powers, legislative, executive, or judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>87</sup> Tyranny of those in power over the populace was certainly a major reason for this doctrine. However, there is another purpose for which the separation of powers doctrine may be used.

James Madison famously wrote in the *Federalist Papers* that “[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”<sup>88</sup> The behavior of lawmakers is eternally a problem for any government, and the Founders were certainly aware of the difficulty.<sup>89</sup> An obvious effect of the separation of powers is just what Madison noted: by counterbalancing interest with interest, internal

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87 THE FEDERALIST NO. 47, *supra* note 27, at 307–08. Of course, Madison and the other Founders were hardly supporting an original doctrine in their idea of separation of powers; it was held by Enlightenment political scientists to be one of the most important elements of preserving freedom for the people. See, e.g., CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS 155–56 (Anne M. Cohler, Basia C. Miller & Harold S. Stone trans. & eds., Cambridge University Press 2006) (1748).

88 THE FEDERALIST NO. 51, *supra* note 27, at 331.

89 See, e.g., Adams, *supra* note 35, and accompanying text. This quote, it seems, can be applied to this topic in two ways. The first, which is used *supra*, is that the people who lived under the Constitution must be moral in order for it to function effectively. However, the other applies to those given power to carry out the government: as Madison put it, where better motives are lacking or defective, then they may be supplied by creating “opposite and rival interests.” THE FEDERALIST NO. 51, *supra* note 27, at 332 (James Madison).

controls on government were created that should keep each branch of the government at bay. But was this a means of keeping base and vicious men from tyrannizing each other? In light of the state of American society at the time and the type of men who lived there, it hardly seems that this was the case. Rather, in light of the type of culture in America, as well as Adams's aforementioned assessment of the Constitution's need for a religious people,<sup>90</sup> it seems more likely that even otherwise good men were not to be trusted with the power to rule over others, and therefore the "helping hand" of the separation of powers was necessary.

This may seem like an ambitious re-imagination of the doctrine of separation of powers. However, regardless of the beliefs of those in the past, this doctrine can be understood as a means of maintaining lawmakers in virtue as well as preventing them from succumbing to vice. In fact, it makes more sense understood in this way, rather than as a means only of preventing base and impetuous legislators, judges, or executives from trampling over the rights of the public by setting them against each other. If such men are conniving enough, they will easily find means of circumventing such restraints and safeguards—the easiest way of doing this would be to simply conspire with other governmental departments (or under the U.S. Constitution, for the federal and state governments to conspire) to ignore constitutional restraints and protections. It is hardly the case that even virtuous lawmakers will not be subject to the same temptations and passions, since no one is perfect. Rather, by placing lawmakers into situations where they have clear and visible barriers—even if the barriers are in some sense only intellectual—to violating the rights of others, we give them the tools they need to effectively legislate as virtuous men.

#### CONCLUSION

The philosophical foundation of the Constitution has been discussed and debated for most of American history. Beyond certain ideas that formed the foundation of the document—for example, rights—the Constitution has been interpreted as consistent with any number of different theories of government and societal goals. In this respect, a project to reinterpret and re-found the Constitution on the philosophy of virtue jurisprudence would not be a new endeavor. However, it would be a marked departure from the modern trend towards deontology and utilitarianism; if it could be successfully

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90 See *supra* note 35 and accompanying text.

implemented, it might indeed have many positive effects on American society—especially in the arena of families and small communities.

These benefits would be in addition to the benefits the government would obtain from virtue ethics. A free society, which operates under a free government, requires citizens who will make good choices about their own government. If it is indeed possible for government to foster virtue in the citizens, it will thereby be ensuring its own effective functioning for so long as citizens maintain their virtue.