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REPUBLICAN CONSTITUTIONALISM¹

OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE. By Randy E. Barnett.² New York: HarperCollins Publishers. 2016. Pp. xiv + 283. \$26.99 (cloth).

*Lawrence B. Solum*³

INTRODUCTION: “REPUBLICANISM” IN CONSTITUTIONAL DISCOURSE

In *Our Republican Constitution*,⁴ Professor Randy Barnett articulates a vision of republican constitutionalism grounded on a conception of individual sovereignty; the central function of a republican constitution is the protection of the liberty of “We the People, each and every one.”⁵ Although the conception of individual sovereignty is a recent development in Barnett’s work, the theme of liberty runs throughout Barnett’s work over his whole career and is especially prominent in two prior books, *The Structure of Liberty*⁶ and *Restoring the Lost Constitution*.⁷

The key development in *Our Republican Constitution* is the articulation of two competing conceptions of American constitutionalism, a *republican* conception and a *democratic* conception.⁸ Although much of the book is historical and

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4. RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016).

5. The formulation, “We the People, each and everyone one,” appears throughout *Our Republican Constitution*. See, e.g., *id.* at 23, 65, 122.

6. RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY* (2d ed. 2014).

7. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2d ed. 2014).

8. *Id.* at 18. Barnett calls the two conceptions “visions.” *Id.* More precisely, we can say that the concept of constitutionalism is contested and that there are distinct conceptions of constitutionalism, two of which are the republican conception and the democratic conception identified by Barnett. On the concept-conception distinction, see W. B. Gallie, *Essentially Contested Concepts*, 56 *PROC. OF THE ARISTOTELIAN SOC.* 167

expository, the central aim of the book is to develop a narrative of republican constitutionalism for those Americans who are committed to limited federal power, a robust doctrine of separation of powers, and protection of the natural rights of citizens. This vision is contrasted to an opposing narrative of democratic constitutionalism that would attract those who are drawn to plenary and virtually unlimited national power, the administrative state, and a limited conception of judicially enforceable unenumerated rights. Barnett does not hide his cards: he is for republican constitutionalism and against its democratic rival.

This essay brings the ideas presented in *Our Republican Constitution* into juxtaposition with two other important ideas in the broad tradition of republican constitutional thought. The first of these ideas is *virtue* (or human excellence) in the classic or Aristotelian sense of that word. The second idea is *liberty* as that concept was understood in republican political thought. Once these two ideas are brought into conversation with the notion of individual sovereignty, we can begin to glimpse a revised vision of republican constitutionalism. Although this vision has much in common with that offered by Professor Barnett, there are differences as well.

The central aim of this essay is explication of a republican conception of constitutionalism that is related to but different from the version offered by Barnett. But at the very outset of that exploration, we encounter a problem. The word “republican” (either large or small case “R”) is ambiguous: it has more than one conventional semantic meaning.⁹ The ways in which “republican” is used in American constitutional discourse connect to the civic republican tradition in political thought¹⁰ and to the Republican Party.¹¹ The civic republican tradition itself has a long

(1956). It was later deployed by John Rawls. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

9. The *Oxford English Dictionary* definitions make it clear that the term “republican” and the root word “republic” have a wide variety of meanings. Republican, *OXFORD ENGLISH DICTIONARY* (3d ed. 2010).

10. For a discussion of the nature of “republicanism,” see Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 *HARV. L. REV.* 1695, 1699 (1989) (“So the question cries out: is the republicanism that is currently being ‘revived’ the republicanism famously studied by historians like Pocock and Gordon Wood, or is it some reformulated modern version?”).

11. See Jamal Greene et. al., *Profiling Originalism*, 111 *COLUM. L. REV.* 356, 360 (2011) (“Originalism is part of a bundle of ostensibly methodological commitments that

history, from Aristotle to classical Rome, renaissance Italy, and the Whig tradition in English politics.¹² And the use of the term “Republican” in connection with American party politics also has a long history, as the Republican Party itself has changed over time.

As used in academic constitutional scholarship, “republican” and its variations are theoretical terms, employed in the specialist discourses of constitutional theory, political science, history, and philosophy. It would be remarkable and unexpected if “republican” had a single meaning in all of these academic contexts; in part, the technical academic meanings refract the various meanings associated with the history of the term in the evolution of political thought and party politics. Given these complications, it is unlikely that contemporary theorists currently agree on a set of necessary and sufficient conditions for the application of the theoretical phrase “republican constitutional theory.” But in the absence of a clear concept, we risk talking past one another.

Our Republican Constitution articulates a vision of “republican” constitutionalism, but some critics have objected that Barnett’s use of the term “republican” differs from both the understanding of “republican” in the civic republican tradition as that tradition influenced the early American republic and “Republican” in the history of the Republican Party (or really “parties”¹³) in the United States.¹⁴ And some critics might even argue that Barnett does not understand “civic republicanism” as it existed in the Founding era or that he fails to grasp the constitutional stance of the contemporary and historical Republican Party. Of course, Barnett makes it clear that he is using the phrase “republican constitutionalism” in a stipulated sense (p. 27), so these criticisms are obviously incorrect if they are read literally. Barnett is aware that his usage of the word “republican” is different from other usages, and it seems highly likely that his critics know that he is not asserting that his vision

opinion leaders and the media associate with the Republican Party, and so it is hardly surprising that originalists seem to support conservative outcomes.”)

12. See, e.g., J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT* (1975).

13. See OXFORD ENGLISH DICTIONARY, *supra* note 9, for a general sense of the various political parties that have been called “Republican.”

14. See Sanford Levinson, *Randy Barnett’s Disdain for Democracy (and John Marshall)?*, 32 CONST. COMMENT. 113 (2016); see also Jack M. Balkin, *Which Republican Constitution?*, 32 CONST. COMMENT. 31 (2016).

of republican constitutionalism is identical to the “civic republicanism” of the Founding or the orthodox view of the Republican Party today or at any particular period in American history.

What is going on? Why does Barnett want to claim the word “republican” for his normative constitutional vision? And why would his critics want to deny him use of this term, insisting instead that he use other words, such as “liberal” or “libertarian”?¹⁵ Demanding clarity is a legitimate and important scholarly move, but there is no lack of clarity in Barnett’s deployment of the term “republican” as a label for his constitutional theory. Barnett and his critics could simply stipulate definitions and then move on, but they do not. Why not?

There is another way to conceptualize Barnett’s use of the term “republican” and his critics’ resistance to this move. In my view, Barnett and his critics are engaging in what philosophers of language call “metalinguistic negotiation”¹⁶—the process by which the meaning of words like “republican” and phrases like “republican constitutionalism” are contested (adversarially) or negotiated (cooperatively). I will use the phrase “metalinguistic contestation” to refer to the process of metalinguistic negotiation in its adversarial (as opposed to cooperative) form.

A central aim of Barnett’s *Our Republican Constitution* is to engage in metalinguistic contestation over the meaning of the phrase “republican constitution” by articulating a normative constitutional theory and showing the connections between that theory and various uses of the words “republican” and “republicanism” in both American history and contemporary constitutional politics. In other words, Barnett aims to infuse the phrase “republican constitution” with the normative content provided by his vision of constitutional theory. His effort at metalinguistic contestation is aimed at intellectuals and political

15. See Balkin, *supra* note 14, at 31 (arguing that Barnett’s view is “natural rights liberalism”); Levinson, *supra* note 14, at 114 (arguing that Barnett should have called his position “anti-democratic”); *id.* at 118 (suggesting that Barnett’s position should be called “liberal” or “libertarian”).

16. David Plunkett and Timothy Sundell, *Disagreement and the Semantics of Normative and Evaluative Terms*, 13 *PHILOSOPHERS’ IMPRINT* 23 (2013); David Plunkett and Timothy Sundell, *Dworkin’s Interpretivism and the Pragmatics of Legal Disputes*, 19 *LEGAL THEORY* 3 (2013); David Plunkett and Timothy Sundell, *Antipositivist Arguments from Legal Thought and Talk: The Metalinguistic Response* in *PRAGMATISM, LAW, AND LANGUAGE* 56–75. (G. Hubb and D. Lind eds. 2014).

leaders associated with the contemporary Republican Party—some of whom may be academics but most of whom are not. Barnett is articulating a vision for republican constitutionalism for Republicans and contrasting that to a vision of democratic constitutionalism associated with Democrats. He is entering into contemporary constitutional politics from a perspective rooted in constitutional theory and history, but he speaks to a contemporary audience from a contemporary perspective.

Barnett's metalinguistic strategy is narrative in form. He constructs a grand "republican narrative" (p. 250)—a story about American constitutional development that associates his normative theory of constitutionalism with the idea of a "republic" in the sense in which a republic is contrasted with "majoritarian democracy" (p. 58). Barnett's narrative aims to create an association between his metalinguistic proposal for the meaning of the phrase "republican constitution" and the political identity of readers who affiliate with the Republican Party or vote for Republican candidates. If Barnett's book succeeds, the political identity of being a "Republican" will come to be associated with endorsing the "republican constitution" and opposing the "democratic constitution."

One might be tempted to conflate Barnett's use of narrative in metalinguistic contestation with the kind of intellectual history that is associated with writings by professional historians about "civic republicanism,"¹⁷ but this would be a grave conceptual error. Barnett is not trying to unearth the historical meaning of the phrase "republican constitution" in the early republic or later—rather, his aim is to engage in metalinguistic contestation that creates new meaning for that phrase. Structurally, Barnett's move is similar to the attempt by progressive constitutional scholars to associate "civic republicanism" with a contemporary progressive constitutional theory.¹⁸

Thus, it should come as no surprise that Barnett did not use the phrase "Our Liberal Constitution" as the title for his book—despite the urging of critics that he do so.¹⁹ Given the

17. See POCOCK, *supra* note 12, and the discussion by Fallon, *supra* note 10, for references to the kind of historical writing to which the text accompanying this footnote refers.

18. See generally Fallon, *supra* note 10 (discussing relationship between republican revival and historical civic republicanism).

19. See Balkin, *supra* note 14, at 1; Levinson, *supra* note 14, at 2, 6.

contemporary political valence of the term “liberal,” that title would have been counterproductive, a laughable error of authorial judgment. Indeed, it seems unlikely that any members of the intended audience for the book would bother to read it, if it had that title, whereas a book entitled “Our Republican Constitution” might grab their attention. Members of the Republican Party will not endorse “Our Liberal Constitution”—because the contemporary meaning of the word “liberal” in political contexts is diametrically opposed to their political commitments.²⁰

My aim in this paper will not be to engage directly in metalinguistic contestation over the phrase “republican constitutionalism.” Instead, for the purposes of this paper, I will treat “republican constitutional theory” as a family resemblance concept.²¹ There is a variety of positions in constitutional theory that are called “republican.” Some of the positions that are called “republican” share common features with each other. There may be a series of overlaps, such that each member of the republican family of constitutional theories is a member of a conceptual network—having some features in common with adjacent positions. But it may well be the case that at the edges of the network, there are theories that are called “republican” but have very few common elements, perhaps none. I will articulate a version of republican constitutional theory, but I am not making an attempt to claim that the phrase “republican constitutionalism” should be exclusively associated with the theory I articulate as opposed to other versions of constitutional republicanism.

One strand of republican constitutional theory draws on what is called “civic republicanism.”²² The revival of civic republican ideas in constitutional theory coalesced in the 1980s—Frank

20. See *Liberal*, OXFORD ENGLISH DICTIONARY (3d ed. 2010) (defining liberal as “favouring social reform and a degree of state intervention in matters of economics and social justice; left-wing”).

21. For the idea of a family resemblance concept, see LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 67, at 32 (G.E.M. Anscombe trans., MacMillan Co. 1953); G.P. BAKER & P.M.S. HACKER, WITTGENSTEIN: UNDERSTANDING AND MEANING 320–43 (1980).

22. See generally Frank Lovett, *Republicanism*, Stanford Encyclopedia of Philosophy (2014), <http://plato.stanford.edu/entries/republicanism>; see also Philip Pettit, *Republicanism* (2003), <http://plato.stanford.edu/archives/spr2003/entries/republicanism> (prior version of Stanford Encyclopedia of Philosophy entry).

Michelman, Cass Sunstein, and Mark Tushnet are particularly associated with this moment in the development of constitutional thought.²³ Another set of republican ideas is strongly associated with Philip Pettit's work in political philosophy and in particular with his notion of republican freedom.²⁴ Both of these developments have been largely independent of what is sometimes called "virtue ethics"—which in one form is focused on the development of Aristotelian ideas about the role of virtue and character using the tools of contemporary moral philosophy.²⁵ The version of republican constitutionalism proffered in this essay brings these strands together, sketching a constitutional theory that emphasizes republican virtue and republican freedom as foundational concepts in *a* (but not *the*) republican constitutionalism.

The version of republican constitutionalism here is a sketch and not a fully developed theory. It is offered for the purpose of illuminating and questioning the ideas about republican constitutionalism developed by Randy Barnett in *Our Republican Constitution* and should not be understood as representing my own mature ideal constitutional theory. Although I do have a theory-in-progress that sets out an account of constitutional interpretation and construction in the context of the United States Constitution,²⁶ I have not developed an ideal normative theory of constitutionalism—although it would be fair to regard the remainder of this essay as a think piece that could serve as a preliminary step towards the development of such a theory. The ideas presented here are related to my prior work in virtue

23. See, e.g., MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 10 (1988); Frank I. Michelman, *Law's Republic*, 97 *YALE L.J.* 1493, 1495 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1576-89 (1988) (describing the impact of republicanism upon several modern public law controversies and suggesting that an understanding of republicanism requires a reformation of legal rules).

24. See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997).

25. Rosalind Hursthouse, *Virtue Ethics*, Stanford Encyclopedia of Philosophy (2012), <http://plato.stanford.edu/entries/ethics-virtue>.

26. See, e.g., Lawrence B. Solum, *The Fixation Thesis: The Original Meaning of the Constitutional Text*, 91 *NOTRE DAME L. REV.* 1 (2015); Lawrence B. Solum, *What Is Originalism?* in *THE CHALLENGE OF ORIGINALISM: ESSAYS ON CONSTITUTIONAL THEORY* (Grant Huscroft and Bradley W. Miller eds., Cambridge University Press, 2011); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 486-87 (2013).

jurisprudence²⁷ and aretaic constitutional theory,²⁸ but in my own view, my thoughts remain inchoate and underdeveloped.

Here is the road map. Part I explicates a theory of republican virtue that draws on Aristotle's theory of the human excellences as developed in contemporary virtue ethics, arguing that virtue is both a necessary means and the primary end of a republican constitution. Part II turns to the notion of republican liberty (or freedom)—again rooted in classical thought but developed in modern form by Philip Pettit: republican constitutions should aim to create, protect, and preserve republican liberty. Part III integrates these two ideas into a republican theory of constitutionalism and explains the ways in which republican virtue and republican liberty might provide a normatively attractive constitutional vision that supplements, extends, and enriches the vision offered in *Our Republican Constitution*.

I. REPUBLICAN VIRTUE

The connection between republican political theory and virtue has been widely discussed.²⁹ The version of republican constitutionalism on offer here connects with virtue or human excellence in two ways, as both *means* to and the *end* of a republican constitution. First, for a republican constitution to function well, officials (legislators, executives, and judges) must possess the virtues—especially the virtues of practical wisdom and justice—in sufficient numbers and to a sufficient degree. Second, a republican constitution aims to create human flourishing, and only virtuous citizens can flourish.

27. Lawrence B. Solum, *Virtue as the End of Law: An Aretaic Theory of Legislation*, JURISPRUDENCE (forthcoming 2016).

28. Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475 (2005).

29. See, e.g., PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY (stating that "if citizens are to keep the republic to its proper business, they had better have the collective and individual virtue to track and contest public policies and initiatives" is a "core idea" of "republican thought") (2012); John B. Mitchell, *My Father, John Locke, and Assisted Suicide: The Real Constitutional Right*, 3 IND. HEALTH L. REV. 43, 88 (2006) ("The philosophy of Civic Republicanism revolved around the notion of civic virtue."); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 623 (2001) ("While civic virtue was an essential element of classical republicanism, the new republican theorists barely mention virtue as an indispensable element of civic republicanism."); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985) (stating that the "animating principle" of the republican conception of politics was "civic virtue").

We will begin with a sketch of a relatively thick theory of the human excellences that draws on Aristotle and is closely related to contemporary virtue ethics.³⁰

A. THE MODEL THEORY OF THE VIRTUES

There are many theories of human excellence. Among the possible approaches are accounts of virtue drawn from Aristotle, the Stoics, Hume, and Confucius.³¹ On this occasion and in other work, I have adopted a theory of the virtues that draws on Neo-Aristotelian ideas, incorporating modified versions of Aristotle's account of flourishing and the virtues. This is a "model theory" or perhaps more realistically a "toy theory." The model theory is a simplified version of ideas from contemporary virtue ethics—and owes a great debt to work by Rosalind Hursthouse³² and Gavin Lawrence.³³ On this occasion, the theory is simply laid out; of course, a full version of the theory would need to defend Aristotle's account of the virtues against its rivals and demonstrate its consistency with contemporary cognitive science.

Before proceeding further, we should note that the theory of the virtues on offer here is not limited to "civic virtues"—virtues connected to participation in civic life.³⁴ As opposed to a thin theory of civic virtues, the account offered here is a thick theory of the human excellences. The so-called civic virtues are merely applications or instantiations of the dispositional qualities that are both preconditions for and constitutive of human flourishing.

The model theory of the virtues connects with the idea of *eudaimonia*—which can be translated as "happiness" or "flourishing." Individual humans flourish when they lead lives that focus on rational and social activities that express the human excellences. Thus, flourishing is a characteristic of whole lives and not of individual moments. Flourishing is a function of activity—and in particular the kinds of activity that express human nature as rational and social. This means that mental states, such as

30. See Solum, *supra* note 27. The account of republican virtue offered here draws heavily on prior work.

31. For exploration of a Confucian approach, see Lawrence Solum and Linghao Wang, *Confucian Virtue Jurisprudence* in *LAW, VIRTUE AND JUSTICE* (Amalia Amaya & Ho Hock Lai, eds., Oxford, Hart Publishing, 2012).

32. ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* (Oxford University Press 1999).

33. Gavin Lawrence, *Human Excellence in Character and Intellect* in *A COMPANION TO ARISTOTLE 419–70* (Georgios Anagnostopoulos ed.) (2013).

34. See *supra* text accompanying note 29 for discussion of "civic virtues."

pleasure or satisfaction, are not forms of flourishing—although flourishing may produce such positive mental states. Flourishing requires rational activity, because humans are creatures that reason and can act on the basis of reasons. Flourishing requires social activity, because humans are social creatures whose nature is to communicate and interact with one another. But not just any rational or social activity will do. Human flourishing involves activities that express the human excellences or virtues.

What are the human excellences? They are the dispositional qualities that are a constitutive part of human flourishing. Following Aristotle, the model theory identifies moral and intellectual virtues. Although Aristotle classified the virtue of justice as a moral virtue, the model theory will treat justice as a distinct category.

The moral virtues, including courage, good temper, and temperance, are dispositions with respect to morally neutral emotions, respectively fear, anger, and desire. Thus, a courageous human is disposed to feel the emotion of fear in a way that is proportionate to the threat or danger that elicits the fear and to respond to the emotion properly. The vice of cowardice characteristically involves the disposition to disproportionate or exaggerated fear. The vice of rashness characteristically involves a disposition to fear that does not adequately reflect the danger, and hence is associated with inappropriate risk-taking. A similar pattern exists with respect to the emotion of anger and the associated virtue of good temper, and the emotion of desire and the associated virtue of temperance. In each case, the virtue is a disposition to the mean with respect to a morally neutral emotion with associated vices of excess and deficiency.

The intellectual virtues are dispositional qualities of mind. Among the intellectual virtues are *sophia* or theoretical wisdom and *phronesis* or practical wisdom. Theoretical wisdom is roughly the ability to think well about complex and abstract matters. Thus theoretical wisdom facilitates the mastery of mathematics or complex legal doctrines. Practical wisdom can be understood in various ways, but the model theory adopts the perceptual account offered by Nancy Sherman.³⁵ Humans with *phronesis* are able to perceive the morally salient aspect of a choice situation and to identify workable responses. A *phronimos*, a human with the

35. NANCY SHERMAN, *THE FABRIC OF CHARACTER* (1989).

virtue of justice, possesses what we might call “moral vision”—a perceptual capacity that confers practical wisdom.

The virtue of justice is especially important for republican constitutionalism. Unpacking the virtue of justice is a large project,³⁶ but on this occasion, I will limit my discussion to a single core idea: justice is a disposition to internalize widely shared and deeply held social norms (or *nomoi*) that are consistent with human flourishing. We can call this conception of the virtue of justice, *Justice as Lawfulness*, where the term lawfulness is understood in a wide sense that includes social norms and positive enactments—to the extent that such enactments are recognized as authoritative by the relevant social norms. It is important to understand that on this account, the virtue of justice does not consist in disposition towards doing what is fair or morally best. Indeed, doing what you personally believe is morally best when that would be contrary to the *nomoi* is to act unjustly—given the account of justice assumed by the model theory.

B. TWO ROLES FOR VIRTUE: ENDS AND MEANS

What role should virtue play in a republican constitution? The thesis developed in the discussion that follows is that virtue can and should play two distinct roles—both as the *means* by which republican government can function well and as the *end* to which republican government should aspire. Each role is examined in turn.

1. Virtue as the Means for Republican Government

Both democratic constitutionalism and republican constitutionalism agree on a basic principle, which might be called the *Principle of Self-Government*. This principle is founded on the idea that citizens govern themselves through institutions established by the constitution (the fundamental institutions that establish the framework for legislation, execution, and adjudication). Democratic constitutionalism as Barnett understands it, emphasizes collective self-government; the fundamental institutions of self-government are majoritarian or super-majoritarian. Republican constitutionalism emphasizes government of the individual by the individual. For a republican

36. See Lawrence B. Solum, *Natural Justice: An Aretaic Account of the Virtue of Lawfulness* in *VIRTUE JURISPRUDENCE* (2007).

constitution on Barnett's account, the fundamental institutions of self-government are judicially-enforceable, liberty-protecting rights and institutional arrangements of executive and legislative power that aim to minimize rights violations and thereby preserve individual self-government. Within the American tradition of constitutionalism, we find both republican and democratic elements. Our constitutional tradition includes both the Ninth Amendment and *McCulloch v. Maryland*,³⁷ both the Privileges or Immunities Clause of the Fourteenth Amendment and the *Slaughter-house Cases*,³⁸ both *West Virginia State Board of Education v. Barnette*³⁹ and *Williamson v. Lee Optical of Oklahoma, Inc.*⁴⁰ Barnett's aim is to draw the republican strands together and articulate the republican conception of the *Principle of Self Government*—which we might call the *Republican Principle of Self Government*.

Well-functioning self-government, on either the republican or the democratic conception, involves the participation of both citizens and officials in the process of governance. Constitutions are not machines that would go of themselves (to borrow and adapt Michael Kammen's felicitous phrase⁴¹): self-government cannot survive, much less function well, if officials and citizens are corrupt. Even the most democratic constitution can self-destruct, transforming majoritarian democracy into authoritarian dictatorship—if the executive is a demagogue and the people are consumed by hatred and fear. Even the most perfect republican constitution will go off the tracks if the high courts are populated by ideologues or cowards—who sanction the destruction of liberty to assuage fear of foreign or domestic terrorists and sacrifice checks and balances and the separation of powers for the expediency of achieving the agenda of the ruling coalition.

A well functioning republican constitution requires virtuous citizens and virtuous officials. Although this thesis is advanced here as part of a sketch of a contemporary version of republican constitutionalism, it bears important affinities to ideas expressed at the founding of the American republic. But *please* remember,

37. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

38. *Slaughter-house Cases*, 83 U.S. 36 (1873).

39. *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624 (1943).

40. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955).

41. MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986).

these are only affinities, and the discussion that follows is not offered as intellectual history.

James Madison in the Virginia ratifying convention provided a formulation of this idea:

But I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea. If there be sufficient virtue and intelligence in the community, it will be exercised in the selection of these men; so that we do not depend on their virtue, or put confidence in our rulers, but in the people who are to choose them.⁴²

A similar idea was expressed by Madison in *The Federalist*:

As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.⁴³

To be clear, I do not claim that the account of republican constitutionalism developed here was present in the Founding era. In fact, I strongly doubt it could have been: the Framers surely had access to Aristotle's writings about ethics and politics and to the political history of the Roman Republic,⁴⁴ but they surely were not acquainted with the revival of virtue ethics that began in the 1950s—unless they possessed a time machine of which we are now unaware. The point of invoking the role of virtue in early American republican constitutional thought is to show that the

42. 3 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 536–37 (1827).

43. *THE FEDERALIST* No. 55 (James Madison) (J. Cooke ed., 1961).

44. See CARL J. RICHARD, *GREEKS & ROMANS BEARING GIFTS: HOW THE ANCIENTS INSPIRED THE FOUNDING FATHERS* (2009) (describing influence of Greek and Roman thought on the founders).

notion that virtue is a means to the effectiveness of republican constitutionalism is part of a family of republican theories that includes members from the Founding era.

Although founding era writings are replete with references to the idea that virtue is an essential precondition to the success of a republican constitution, this idea is sometimes submerged by an anachronistic reading of founding-era constitutional theory that more closely resembles contemporary public choice theory than it does the civic republican tradition.⁴⁵ It is true that *Federalist* 10 states, “Enlightened statesmen will not always be at the helm.”⁴⁶ But this does not entail the further conclusion that a republican constitution can function properly with a vicious citizenry and vicious officials. The Constitution of 1789 along with the articles of amendment that we now know as the Bill of Rights are, in my opinion, best understood as an attempt to make self-governance by virtuous citizens and officials resilient—able for some time to withstand a storm of vice or a drought of virtue. Republican self-government cannot long endure long-run global character change that produces a thoroughly corrupt citizenry and officialdom.

In a well-functioning republic, citizens need the moral and intellectual virtues—in sufficient numbers and to a sufficient degree. This means that most (or at least many) citizens must possess courage and good temper—the ability to put fear in its proper perspective and to withstand a demagogic politics of anger and hate.

45. John A. Ferejohn & Roderick M. Hills, Jr., *Publius’s Political Science* (February 1, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2712933. The following passage illustrates their interpretation of the political science of the *The Federalist*:

Publius’s lasting contribution, one that both Hamilton and Madison could embrace, was a vision of institutional design that was based on a realistic, if pessimistic, view of human nature—one that regarded a competent and well-structured government as a means to pursue genuinely common interests. From this viewpoint, it is a virtue of a set of institutions that they are stable or self-enforcing and, given his view of human nature, it seemed natural to seek to obtain this stability by enlisting man’s lower capacities – ambition, jealousy, inflated self-regard, self-dealing—to accomplish these necessary tasks. Institutions, so designed, seem well suited to work among individuals who must be taken largely as they are found. This vision of institutional design still inspires us as political scientists.

On this occasion, I cannot engage directly with Ferejohn and Hills’ reading of *The Federalist*—except to note the obvious point that their reading fails to explain the plain and obvious meaning of many passages—including the passage quoted above.

46. THE FEDERALIST No. 10, at 60. (James Madison) (J. Cooke ed., 1961).

In a well-functioning republic, most (or at least many) officials must be virtuous—again, in sufficient numbers and to a sufficient degree. The dangers of official corruption are so obvious that they hardly need to be cataloged. The world is filled with societies with sham constitutions⁴⁷—filled with checks and balances and high-minded declarations of rights, while in practice the form of government is authoritarian dictatorship or oligarchy, and liberty is scarce or nonexistent.

We can use judges to illustrate the idea that officials must be virtuous. Consider first the virtue of Justice as Lawfulness. A virtuous judge must be lawful—must respect and internalize the widely shared and deeply held social norms of the community and the positive laws that are recognized as authoritative by those norms. Put another way, a judge with the virtue of Justice as Lawfulness internalizes the *nomoi*: such a judge is a *nominos*. This means that virtuous judges do not view their role as promoting their own vision of the best society—their role is to serve the law and not the moral philosophy or political ideology to which they adhere.

And virtuous judges must possess the other virtues as well. Lawfulness cannot be served by judges who are cowards, hateful, greedy, or indolent. Lawfulness needs the support of the intellectual virtues as well. Judges without theoretical wisdom will fail to understand the law. Judges without practical wisdom will not be able to apply the law correctly or to recognize those rare and exceptional circumstances where equity will correct the letter of the law to serve its spirit.

As it goes with judges, so it goes with other officials, from presidents to senators, from governors to county clerks, from cabinet members to administrative law judges. A corrupt officialdom can undermine the most republican of constitutions.

2. Virtue as the End of Republican Government

“Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept

47. See David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CAL. L. REV. 863, 865–66 (2013) (“Sometimes, constitutions lie. Anecdotal examples abound of ‘sham’ or ‘façade’ constitutions that fail to constrain or even describe the powers of the state.”).

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in force, and provision shall be made for their due execution.”

—Constitution of Pennsylvania (1776)⁴⁸

The model theory of human flourishing and the virtues has an obvious implication for the normative theory of legislation.⁴⁹ Legislation should aim at the promotion of human flourishing. Human flourishing requires peace and prosperity, so legislation should aim at the elimination of violence and poverty. Human flourishing requires lives of rational and social activity, so legislation should aim at creating vibrant communities with opportunities for meaningful work and play that engage our rational capacities. Human flourishing requires the virtues, so legislation should aim at creating the conditions for healthy emotional and intellectual development. Let us call this component of republican constitutionalism the *Aretaic Theory of Legislation*.

How can legislation promote flourishing and virtue? Begin by considering the role of law in providing the preconditions of flourishing, peace and prosperity.

a) *Promoting the preconditions of human flourishing*

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure *domestic Tranquility*, provide for the *common defence*, promote the *general Welfare*, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

—Constitution of the United States of America⁵⁰

Happiness or *eudaimonia* consists in “living well and doing well,” as Aristotle is sometimes translated.⁵¹ Peace and prosperity

48. *Constitution of Pennsylvania* § 45 (1776). Similar provisions are found in other early state constitutions.

49. As mentioned above, the account that follows draws heavily on prior work, especially Solum, *supra* note 27.

50. U.S. CONST. pmb. (emphasis added).

51. For the Greek, see ARISTOTLE, *NICOMACHEAN ETHICS* bk. I, ch. iv, 1095a15–20 (H. Rackham trans., Loeb Classical Library, Harvard University Press, rev. ed. 1934).

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are (usually and in some sense, almost always) preconditions for lives lived well. It seems uncontroversial that peace and prosperity are conducive to a flourishing life. Violence and poverty limit human possibilities in significant ways. Pervasive violence will result in significant pain and suffering, disabling injuries, and death. Severe poverty can result in malnutrition, starvation, and many other afflictions. Even if peace and prosperity were not preconditions for the development of the human excellences, legislation would still properly aim at the creation and maintenance of these conditions as constituent elements of flourishing human lives.

But peace and prosperity are also important because of the role they play in the development of human capacities. Emotional and intellectual growth is likely to be stunted under conditions of pervasive violence and poverty. Children who grow up in chaotic and violent conditions are likely to suffer from emotional problems that make the acquisition of courage, good temper, and temperance less likely. Disorder undermines the processes of intellectual growth that produce practical and theoretical wisdom. And it seems likely that poverty will have similar effects. Extreme deprivation during childhood and adolescence is not conducive to healthy emotional or intellectual development.

Finally, peace and prosperity create the conditions in which rational and social human activities are likely or possible. Of course, many different activities are rational or social, or both. The lives of a craftsperson, merchant, engineer, computer programmer, scholar, or public servant all can involve rational and social activities that express the human excellences. Both vocations and avocations can involve such activity: playing a musical instrument, painting, photography, sport, and perhaps even participation in a fantasy football league, as well as countless other activities outside of work, can form parts of flourishing human lives. Peace and prosperity facilitate these activities by creating opportunities for meaningful employment and by creating the time and resources that enable meaningful avocational pursuits.

Irwin as well as Broadie and Rowe use “living well and doing well.” See ARISTOTLE, *NICOMACHEAN ETHICS* 97 (Sarah Broadie & Christopher Rowe trans., Oxford University Press 2002); ARISTOTLE, *NICOMACHEAN ETHICS* 5 (Terence Irwin trans., Hackett 1985).

How can legislation promote peace and prosperity? For the most part, this important question is outside the scope of this essay. Some answers to this question are obvious. The criminal law should forbid and punish violence. The law of nations should forbid aggressive wars. Other answers are more controversial. What institutional arrangements are conducive to the kind of prosperity that enables flourishing? Some believe that the answer to this question involves a minimalist state that creates the conditions for laissez-faire markets and private ownership of the means of production and that maximizes free choice by consumers and workers. Others believe that market capitalism results in harsh conditions for workers and the promotion of mindless consumption that is inconsistent with capitalism. There are many other possibilities, but the choice between the feasible alternatives depends on the answers to complex empirical questions that are far outside the scope of this essay.

Nonetheless, the Aretaic Theory of Legislation can and should address questions about the kind of peace and prosperity that is conducive to human flourishing. It might be the case that stability could be maximized and violence minimized by an authoritarian social order that would undermine flourishing in other ways. Certainly, flourishing would be undermined by a police state that controls violence through fear and intimidation created by a system of secret police, informants, and mass surveillance. Likewise, the kind of prosperity that enables human flourishing might differ from simple maximization of gross domestic product. Meaningful work and a proper life-work balance might be more conducive to human flourishing than alternatives that aim only to maximize income measured in purely monetary terms. Legislation should aim at the right kind of peace and prosperity, and the kind that is right will support rational and social human activities that express the human excellences.

b) Facilitating the development and acquisition of the virtues

Legislation should facilitate the development and acquisition of the virtues. How can this be accomplished? Again, this is a complex empirical question. To give a fully adequate answer, we would need to understand the cognitive, social, and developmental psychology of the virtues. Given the current state of neuroscience, cognitive science, and the social sciences, it

seems likely that there is a good deal of uncertainty about the mechanisms by which the virtues are acquired.

Despite this uncertainty, we may be able to develop working hypotheses. It seems likely that nurturing family environments facilitate healthy emotional development by children. Therefore, legislation should aim at conditions in which children are attached to stable, loving family environments. Similarly, the law should aim to prevent domestic violence and child abuse. Moreover, nurturing families may be fostered by generous family leave policies and undermined by working conditions that do not permit parents (and other caretakers) to spend time with children.

The primary strategies for facilitating the development and acquisition of the virtues seem likely to be indirect. One can imagine a more direct approach. The law might command parents to engage in childrearing activities that will promote healthy intellectual and emotional development by children. Or the law could command that a certain number of hours per week be spent by parents in particular ways: two hours of reading stories, four hours of adult-child playtime, seven hours of family mealtime, and so forth. An army of social workers might employ electronic surveillance and instructional home visits to enforce these commands. But it seems unlikely that the direct approach would actually work. Common sense suggests that laws mandating specific parenting practices would likely do more harm than good.

c) Establishing the infrastructure for meaningful work and recreation

How can the law promote rational and social activities that express the human excellences? Again, the answer depends on complex empirical questions. The goal is to provide a social structure that supports meaningful work and play.

Human history suggests that some forms of economic organization are better than others in meeting this goal. Modern developed societies (e.g., France, Japan, and Norway) may have serious flaws, but they seem to do a better job at providing opportunities for rational and social activities that express the human excellences than did the feudal societies of Europe in the so-called Dark Ages or the Soviet Union under Stalin. But there is likely to be substantial debate about the comparative merits of Scandinavian-style social democracy versus the more market-oriented approach in the United States. From the perspective of

an aretaic theory of legislation, the question is, “What form of social organization best supports human flourishing?”

The Aretaic Theory of Legislation sets the goal—providing opportunities for rational and social activities that express the human excellences. Various configurations of employment law, labor law, property law, and so forth will do better or worse at meeting this goal. The question as to which configuration is best will depend on the answers to empirical questions that are outside the scope of a normative theory of legislation.

d) Legislation and the virtue of justice as lawfulness

The discussion of virtue as the end of law has not yet considered the virtue of justice. But if justice is a virtue, then it surely has implications for the ends of law. Recall that we are assuming a particular account of the virtue of justice, Justice as Lawfulness. The core idea is that justice is a disposition to be lawful, but in a special sense that departs from the idea that lawfulness reduces to a disposition to obey the positive law. This departure is illuminated by substituting a stipulated concept of a *nomos* for the notion of positive law. Let us use the term *nomoi* in this stipulated sense to refer to the deeply held and widely shared social norms of a community with human flourishing. The positive laws of a given community can play a role similar to the *nomoi* to the extent that they are promulgated by institutions or persons whose authority is recognized by the relevant social norms and so long as the content of the positive laws is consistent with substantive content of the system of *nomoi*. Many positive laws correspond directly to widely shared and deeply held social norms that clearly promote human flourishing: laws prohibiting murder and theft are like this. There are other laws and social norms where their relationship to human flourishing is contestable, but with respect to which, one cannot say that they are clearly contrary to human flourishing.

Other positive laws create new conventional rules that are consistent with the *nomoi*, but not required by them, for example, the traffic laws requiring that automobiles be driven on the left in the United Kingdom and on the right in most other nations. Once established as positive law by authority-recognizing *nomoi*, these rules may be internalized and become *nomoi* (widely shared and deeply held social norms).

Yet another possibility is that the positive law may directly conflict with the *nomoi*: in this case, there are further possibilities, corresponding to different ways in which the *nomoi* and the positive law can interact. The positive law may act as a technology of normative change—dislodging entrenched social norms through coercion, education, or some other mechanism. But another possibility is that the positive law may coexist with contrary social norms. Again, various consequences may follow. The positive law may simply fail to function to guide behavior: in the extreme case, even officials may subvert the positive law. Or the positive law may function imperfectly, with a subgroup of officials complying with (or even internalizing) the positive law while most members of the community resist, disobeying the law except in cases where the threat of punishment is sufficient to coerce compliance.

There is no guarantee that the social norms of a particular community at a particular time are consistent with human flourishing. From the perspective of virtue jurisprudence, we might say that these social norms are not true *nomoi*—they are social norms that undermine the function of law: the promotion of human flourishing. The problem of distinguishing true from false *nomoi* is a problem of knowledge and epistemic virtue. In some cases, even fully virtuous humans (the *phronomoi* who possess all the virtues including practical wisdom) may have mistaken empirical beliefs but lack knowledge of the facts that would correct their mistakes.

Republican constitutionalism requires that the law aim at the inculcation and preservation of the virtue of lawfulness and therefore that the laws should not undermine lawfulness. This means that lawmakers must take widely shared and deeply held social norms into account when they legislate. The decision to legislate in a way that is inconsistent with the widely shared and deeply held social norms of a community should not be taken lightly and should be limited to cases where it is clear that these norms substantially undermine human flourishing and hence are not true *nomoi*.

C. SUMMARIZING THE ROLE OF VIRTUE IN REPUBLICAN CONSTITUTIONALISM

At this point, a summary may be helpful. There are many possible republican constitutionalisms and each version might

have its own view of the role of virtue. The version that I have sketched here draws on the Neo-Aristotelian virtue ethics and deploys a theory of human excellence with three foundational ideas: (1) the moral virtues are dispositions connected to the human emotions with courage and good temper as examples; (2) the intellectual virtues are dispositions connected to human reason with theoretical and practical wisdom as examples; (3) the virtue of Justice as Lawfulness involves respect for and the internalization of the *nomoi*--the widely shared and deeply held social norms governing human interaction that are consistent with and a precondition of human flourishing.

A republican constitution views the virtues as means and ends. The virtues are the essential means to self-government; a well-functioning republican constitution requires that both citizens and officials possess the virtues to a sufficient degree. The virtues are the end of a republican constitution: the aim of legislation should be to promote human flourishing, and that requires the acquisition, maintenance, and exercise of the virtues.

Thus, the inculcation of virtue should be a central aim of a republican constitutional order. This goal might be explicitly stated, as in the 1776 Pennsylvania Constitution, quoted above. Or it might be implicit in the general commitment to the general welfare. Not every constitutional commitment need be stated in a preamble or operationalized through a clause. In our federal system, the promotion of healthy families and effective educational systems operates primarily at the state level—and hence it is in state constitutions and state legislation that we should expect to find evidence of the republican commitment to promotion of virtue as the fundamental end of law.

II. REPUBLICAN LIBERTY

What about liberty? Barnett's conception of republican constitutionalism puts liberty on center stage—as does the Preamble when it posited securing the “blessings of liberty” as one of the reasons for which “We the People” ordained and established the Constitution. On Barnett's understanding, a republican constitution is based on the idea of individual sovereignty—government for and by “We the People, each and every one.” Liberty is the guarantor and expression of individual sovereignty. But what is liberty? A familiar view emphasizes what are sometimes called “negative rights” or “noninterference

rights” — examples of such rights may include many of the liberties enumerated in the United States Constitution, including, for example, freedom of speech, the right to bear arms, and the right against unreasonable searches and seizures. The unenumerated right to privacy might be another example. But these are merely examples. There is a deep question lurking here: what is the fundamental nature of liberty—the deep structure and not the surface structure?

One answer to that question is found in republican political theory, which has a distinct and well developed conception of “republican freedom” or “republican liberty.” Here is how Pettit introduces and articulates the central idea:

Think of how you feel when your welfare depends on the decision of others and you have no comeback against that decision. You are in a position where you will sink or swim, depending on their say-so. And you have no physical or legal recourse, no recourse even in a network of mutual friends, against them. You are in their hands.

In any case of this kind you will be dominated by others, being in a position where those others have the power of interfering in your life in a certain way: and this, more or less arbitrarily; more or less at will and with impunity. If you do escape ill treatment, then, that will be by the grace or favour of the powerful, or by your own good fortune in being able to stay out of their way or keep them sweet. And even if you are lucky enough to escape such treatment, you will still live under the mastery of those others: they will occupy the position of a *dominus* -- the Latin word for master -- in your life.⁵²

Frank Lovett offers a more abstract version of this conception of liberty:

The republican conception of political liberty . . . defines freedom as a sort of structural independence—as the condition of not being subject to the arbitrary or uncontrolled power of a master. Pettit, who has done more than anyone else to develop this republican conception of freedom philosophically, puts it thus: a person or group enjoys freedom to the extent that no other person or group has “the capacity to interfere in their affairs on an arbitrary basis.”⁵³

52. See Pettit, *supra* note 22.

53. See Lovett, *supra* note 22 (quoting Pettit, *supra* note 24, at 165).

Let us use the phrase, the *Republican Conception of Liberty* to refer to this idea. At this point, I am sure that most readers have leapt ahead of my exposition and recognized the connection between the republican conception of liberty and the *Republican Principle of Self Government*. Self-government requires republican liberty. We cannot govern ourselves if we are mastered by others. And republican liberty requires self-government. We cannot be free from domination by others unless we are self governing.

Moreover, virtue is a requisite for republican liberty in two important ways. The first relationship is between the virtue of citizens and self-government. The second relationship is between the virtue of officials and the protection of republican liberty. Consider each of these two relationships.

First, negative legal rights against government and private actors (noninterference rights) are not a sufficient condition for republican liberty—although they may be a necessary condition. Human beings are resilient creatures. It is possible for some humans to remain self-governing under even the most repressive of political regimes. Even in a totalitarian state, courageous citizens maintain their integrity and organize to struggle against repression. But despite their resilience and capacity for resistance, human beings are vulnerable creatures—and this vulnerability can be exploited by a regime that systematically undermines the virtue of citizens by creating a culture of corruption, fear, and hatred. My reading of the lessons of human history (and especially the grand sweep of the twentieth century) is that human virtue can be successfully attacked: the character of the citizenry can be deliberately debased, resulting in a loss of the capacity for self-government. The virtue of citizens is a prerequisite for republican self-government; constitutional provisions that aim to protect the republican conception of liberty go hand in glove with virtue to protect the capacity of citizens to engage in meaningful self-government and hence to serve as individual sovereigns. We can summarize the way that virtue is required for republican liberty in the slogan: *republican liberty requires rights plus virtuous citizens and officials*.

Second, a constitutional scheme for the protection of rights (whether in the form of judicially enforceable individual rights or in the form of structural arrangements designed to minimize rights violations) does not provide a sufficient guarantee that

rights will not be violated. Even the best constitution can be subverted by corrupt officials. We have already noted the existence of sham constitutions.⁵⁴ In many cases, such constitutions may have been drafted as constitutional Potemkin villages—all flash, no cash. But this is not the only causal pathway to a sham constitution. A well-functioning republican constitution can be undermined by pervasive corruption of public officials. Perhaps the Weimer Republic,⁵⁵ which I believe functioned for a time to preserve a substantial degree of protection for republican liberty, is an example of republican constitutionalism degenerating into sham constitutionalism—with the ascent of a demagogue to national power and the systematic population of officialdom by individuals whose characters can only be described as vicious—in the Aristotelian sense of that word.

What are the implications of the *Republican Conception of Liberty* for republican constitutionalism? This is a large topic and a comprehensive account is far beyond the scope of a short essay. Nonetheless, a list of some implications can be offered. Consider the following ideas:

- Republican liberty requires that society be organized in such a way that individuals and their communities will flourish; hence, peace and prosperity are prerequisites for freedom.
- Republican liberty requires that society be organized in such a way that individuals develop the capacity for self-government; the formation of virtuous character should be a central aim of legislation, especially in the realm of the family and the educational system.
- Republican liberty requires the creation of conditions under which individuals can become economically self-reliant and independent of others, masters of their own lives and not depend on either government or a private entity to the degree that they become mastered by others.

Even this very sketchy list of republican ideas about liberty and the role of government should suffice to make it clear that republican liberty requires more than negative rights. Republican

54. See Law & Versteeg, *supra* note 47.

55. See generally JOHN HIDEN, *THE WEIMAR REPUBLIC* (2d. ed. 1996) (discussing the history of the Weimar Republic).

liberty depends on a sufficient degree of human flourishing and on virtuous citizens and officials.

But from the fact that republican liberty requires more than negative rights, it does not follow that any particular list of constitutional rights or particular doctrines about the arrangement of governmental institutions is required. Republican liberty might be consistent with judicially enforceable positive rights—such as the rights to education found in many state constitutions.⁵⁶ Likewise, it might be the case that republican liberty requires a strong national government with the power to overcome collective-action problems among the states in order to create the conditions for human flourishing. The word “might” in the prior two sentences reflects the fact that complex empirical and theoretical questions must be answered before we can reach conclusions about these topics. Some believe that the promotion of republican virtue and republican liberty is best realized under conditions that approximate the social arrangements in contemporary Scandinavian societies; others believe that the expanded role of government in these societies creates the risk of tyrannical government and undermines rather than enhances the capacities of individual citizens for self-government. The resolution of these questions requires a turn to social science and social theory. They cannot be answered by constitutional theory or political philosophy.

III. REPUBLICAN CONSTITUTIONALISM

What are the implications of republican liberty and republican virtue for republican constitutionalism in the here and now? How do these ideas intersect with the great constitutional questions of our day? We live in an era that is rife with constitutional controversy. Originalism and living constitutionalism contend for the title of best theory of constitutional interpretation and construction. Unenumerated rights are endlessly debated. The consensus favoring the New Deal constitutional settlement—with its associated ideas of plenary and virtually unlimited national power and the judicially created constitutional foundations for the administrative state—

56. For a discussion of positive state constitutional rights, see Lawrence Friedman, *Testing the Limits: Judicial Enforcement of Positive State Constitutional Rights*, 53 *DUQ. L. REV.* 437 (2015).

has begun to crack.⁵⁷ These big questions may be associated with the fundamental debate between republican constitutionalism and democratic constitutionalism. At a surface level, the democratic constitution seems consistent with living constitutionalism, a limited set of judicially enforceable rights, and the New Deal constitutional settlement.

What about republican constitutionalism? On this occasion, I will discuss only the question concerning the relationship between republicanism and debates about constitutional interpretation and construction. The form of republicanism developed in this essay is committed to the idea that citizens and officials (especially judges) should possess the virtue of Justice as Lawfulness—respect for the *nomoi* or widely shared and deeply held social norms that are consistent with and enable human flourishing. Does the virtue of lawfulness have implications for the great debate over originalism and living constitutionalism? Big question! In the paragraphs that follow, I will sketch an answer that draws on my work on originalist constitutionalist theory—particularly on an unpublished work-in-progress, *The Constraint Principle*.⁵⁸

Let us stipulate at the beginning that originalism is a family of constitutional theories that accept two ideas: (1) the Fixation Thesis (the communicative content of the constitutional text is fixed at the time each provision is framed and ratified), and (2) the Constraint Principle (constitutional practice ought to be consistent with the fixed communicative content). Let us further stipulate two ideas that not all originalists accept: (3) the Public Meaning Thesis (the original meaning of the constitutional text is its public meaning), and (4) the Interpretation-Construction Distinction (interpretation is the discovery of communicative content, while construction is the determination of legal effect including the legal content of constitutional doctrine and the decision of constitutional cases). Finally, let us further stipulate that (5) “living constitutionalism” is a family of theories organized around the idea that the legal content of constitutional doctrine should change in response to changing circumstances and values, and (6) any theory that denies either the Fixation Thesis or the Constraint Principle is a form of “nonoriginalism.”

57. See Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1 (2013) (arguing that *NFIB* may alter the constitutional gestalt).

58. Manuscript on file with the author.

For the purpose of this discussion, I will set aside a group of compatibilist theories that accept fixation and constraint but accept a large role for reliance by judges on their own beliefs about political morality in what I have called “construction zones”—areas in which the original meaning of the constitutional text is underdeterminate because of vagueness, open texture, or irreducible ambiguity: Jack Balkin’s *Living Originalism* may be an example.⁵⁹ Instead, we will focus on theories of nonoriginalist forms of living constitutionalism, which reject the Constraint Principle. Such theories posit a Supreme Court with the power to adopt amending constructions—that is, doctrines of constitutional law that are inconsistent with the text and hence that amount to constitutional amendments in substance but not in form.

Republican constitutionalism better coheres with originalism than it does with nonoriginalist living constitutionalism. Two of the arguments that will be presented in *The Constraint Principle* illustrate the connections between republican virtue and republican liberty with the normative claim that officials (including Justices of the Supreme Court) should consider themselves bound by the original meaning of the constitutional text. These arguments are sketchy and underdeveloped, but on this occasion they are offered only as illustrations of the way in which republican virtue and republican liberty connect republican constitutional theory to originalism.

First, consider republican virtue and in particular the virtue of Justice as Lawfulness. By way of example, we can focus on the Justices of the Supreme Court. Virtuous Justices will possess all of the moral and intellectual virtues. They will be courageous and good tempered. They will be both theoretically and practically wise. And they will possess the virtue of Justice as Lawfulness—the disposition to respect and internalize the *nomoi*, the widely shared and deeply held social norms of Americans, including the authority-recognizing norms. Let us make an assumption that I believe is quite reasonable, but which could be contested.⁶⁰ The

59. JACK BALKIN, *LIVING ORIGINALISM* (2011).

60. An argument could be made that the relevant *nomos* is that the Supreme Court of the United States is the ultimate authority in our constitutional system. If this were correct, then common-law constitutionalism and not originalism would be supported by the virtue of justice as fairness. The case for the position presented in text and against common-law constitutionalism involves a variety of complex issues. For an investigation that does not employ the republican and virtue-theoretic framework deployed in this essay, see William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

assumption is that there is a *nomos* (a widely shared and deeply held social norm) that recognizes the authority of the United States Constitution (the document that is under glass in the National Archives plus the amendments) as the supreme law of the land. Justices with the virtue of Justice as Lawfulness will internalize and respect this *nomos* and hence will accept that they are bound by the original meaning of the constitutional text. Many forms of nonoriginalist living constitutionalism seem to clearly reject the binding authority of the United States Constitution, and in particular, the view that Supreme Court Justices should directly resort to their own view of political morality is inconsistent with the virtue of Justice as Lawfulness. The view that Justices of the Supreme Court are unconstrained by the constitutional text is a form of lawlessness—no Justice with the virtue of lawfulness could hold such a view.

Second, consider republican liberty and originalism. Nonoriginalist living constitutionalism ultimately makes the scope of our freedom depend on the decisions of the Supreme Court. Because of the nature of the Supreme Court as an institution, the Court imposes its views about the scope of our freedom on a case-by-case basis, deciding individual controversies and not formally amending the Constitution itself. By itself, that would not necessarily entail that the Court is not bound by the rule of law—because the Court could be bound by precedent. But of course, the Court does not consider itself bound by its own prior decisions; it retains the power to overrule its prior decisions, although it may consider the existence of precedent as one of many factors that it takes into account when rendering constitutional judgments. Bound by neither text nor precedent, the Supreme Court rules by decree—with the power to change the structure of government and the shape (or even the existence) of our freedoms whenever it chooses to do so. In other words, a nonoriginalist living constitutionalist Supreme Court is our *master*. Of course, our master may be kind. The Court may decide to conditionally grant us certain liberties. It may give us freedom of contract in one decision, and take it away in another. It may give women the right to choose whether to carry their pregnancies to term but then functionally nullify that right in a case decided the very next term—especially if the composition of the Court has changed. Today, it may provide a right to same-sex marriage, but tomorrow, who knows? It will depend on who is appointed to the

Court. Republican liberty is not consistent with a committee of nine unelected masters. Aristotle used the word tyranny for rule by decree. A Supreme Court that is not bound by the Constitution is a tyrant in the Aristotelian sense of that word.⁶¹

CONCLUSION: DEMOCRATIC CONSTITUTIONALISM RECONSIDERED

Let me conclude by offering some thoughts about democratic constitutionalism. The purest version of democratic constitutionalism in the history of American constitutional thought might be restated as “unconstrained Thayerianism”⁶² — the view that the Supreme Court should defer to Congress and that Congress should only be constrained by the requirement that it rule by legislation (laws of general applicability). Representation-reinforcement Thayerianism modifies this theory by giving courts a role in the enforcement of rules that protect democratic processes and protect discreet and insular minorities who are excluded from the democratic process. What should democratic constitutionalism think about liberty and virtue?

Democratic constitutionalists might embrace the view that liberty and virtue are ultimately subject to democratic will formation in a very strong sense. If a democratic majority endorses a right, then that should be judicially enforced, but if the majority opposes freedom of contract or freedom of speech, then so be it. If a democratic majority favors human flourishing, then the law should promote it, but if a majority rejects the inculcation of virtue as the end of legislation, their will should prevail. But this very strong attachment to majoritarian procedures as the ultimate end of constitutionalism may well be rejected by many proponents of a democratic constitution. Joshua Cohen explored many of the reasons for rejecting a proceduralist conception of democracy in his essay, *Pluralism and Proceduralism*.⁶³ Democratic constitutionalists who embrace representation-reinforcement rights may also embrace rights to democratic equality (including substantive rights to privacy and positive

61. For a discussion of Aristotle’s idea of tyranny as rule by decree, see RICHARD KRAUT, *ARISTOTLE* 105–06 (2002).

62. The label “unrestrained Thayerianism” is inspired by JAMES B. THAYER, *THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW* (Boston, Little Brown & Co. 1893).

63. Joshua Cohen, *Pluralism and Proceduralism*, 69 *CHI.-KENT L. REV.* 590 (1994).

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rights to educational and economic opportunities) on the ground that these rights are preconditions to equal participation in the democratic process. But notice that if they go down this road, their version of democratic constitutionalism is likely to begin to resemble republican constitutionalism—at least at the level of abstract theory. It seems unlikely that democratic constitutionalism can do without democratic virtue—even if the theory of virtue that they endorse is thinner than the robust republican version developed in this essay.

Moreover, democratic constitutionalists cannot help but be aware of the great danger associated with majoritarianism—the possibility that a majoritarian constitution can enable authoritarian politics. Some might think that this risk is vanishingly small under contemporary political circumstances, but anyone who follows contemporary politics as of the writing of this essay must be aware of this possibility. The dangers of authoritarianism highlight the core moral intuitions behind the republican conception of liberty. Fear and anger may lead some to sound a trumpet for a strong leader, but a republican constitutional regime that builds a reservoir of virtue among citizens and officials has the capacity to resist that siren song. This aspect of republican constitutionalism can be expressed as a simple and ancient proposition: *virtue is required for liberty*.