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# "Without Virtue There Can Be No Liberty"

Suzanna Sherry\*

As the first Earl R. Larson Professor of Civil Rights and Civil Liberties law, it is fitting that my inaugural lecture will focus on rights and liberties. Still, as Jeremiah Atwater, the first President of Middlebury College, said to the assembled Vermont legislature in 1801: "Liberty is a sound dear to us all: But what do we understand by it?"<sup>1</sup> Over the past two and a quarter centuries, Americans have understood rights and liberties in a variety of different ways. What I hope to do in this essay is to describe the two most prominent traditions of our heritage of liberty, and then to explore a way in which we might reconcile the conflicts between them and make both traditions useful in the service of liberty today.

We should begin with the beginning of American liberty, in 1776. The late eighteenth century was a time of great political and philosophical ferment, all over the Western world but especially in the new American states. Overthrowing a monarch was but the most extreme example of the antipatriarchal trend of the times. Longstanding hierarchical relationships—between parents and children, masters and servants, governors and governed—were being transformed. The bonds of birth and blood were dissolving, and with them went the security of carefully confined roles in which every player knew his part. The massive social transformation could be seen on every level, from family portraits in which fathers—who had always been portrayed standing above a seated family—were now shown on the same

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1. Jeremiah Atwater, A Sermon (Middlebury, Vermont, 1801), in 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, at 1170, 1172 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

plane as their wives and children,<sup>2</sup> to the widespread demand that merit and talent should replace birthright, illustrated by Thomas Paine's revolutionary claim that "[v]irtue is not hereditary."<sup>3</sup> The Declaration of Independence and the war that accompanied it not only severed American ties to England, but also served to crystallize and highlight the ongoing social revolution. There was no turning back.

Sudden freedom from the almost instinctive constraints that had governed society for centuries, however, left the fledgling United States in need of substitutes. Freedom too easily degenerated into what eighteenth century thinkers called license or licentiousness, which threatened the very existence of a nation. Atwater reminded the Vermont legislature that "[l]iberty, if considered as a blessing, must be taken in a qualified sense. The freedom which it implies must be a limited, not [an] absolute freedom . . . for the very idea of government always supposes some restraint."<sup>4</sup> John Locke, one of the inspirations for the American experiment with republican government, wrote that "[f]reedom . . . is not . . . [a] liberty for every one to do what he lists, [or] to live as he pleases."<sup>5</sup> Benjamin Rush, a noted Philadelphia doctor and educator, commented in 1787: "In our opposition to monarchy, we forgot that the temple of tyranny has two doors. We bolted one of them by proper restraints; but we left the other open, by neglecting to guard against the effects of our own ignorance and licentiousness."<sup>6</sup> Licentiousness sapped the economic and political strength of the nation, leaving

2. JAY FLIEGELMAN, *PRODIGALS AND PILGRIMS: THE AMERICAN REVOLUTION AGAINST PATRIARCHAL AUTHORITY, 1750-1800*, at 10 (1982).

3. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 181 (1992); see also *id.* at 176-180 (describing how wealth became insignificant as virtue prevailed among Revolutionaries). Algernon Sidney made the same point: "Virtues are not entail'd." Algernon Sidney, *Discourses*, III:26, at 373, quoted in ALAN C. HOUSTON, *ALGERNON SIDNEY AND THE REPUBLICAN HERITAGE IN ENGLAND AND AMERICA* 177 (1991). For similar descriptions of anti-elitist views, see Jack N. Rakove, "How Else Could It End?": Bernard Bailyn and the Problem of Authority in Early America, in *THE TRANSFORMATION OF EARLY AMERICAN HISTORY: SOCIETY, AUTHORITY, AND IDEOLOGY* 51, 61 (James Henretta, Michael Kammen, & Stanley Katz, eds., 1991) [hereinafter *TRANSFORMATION*]; Pauline Maier, *The Transforming Impact of Independence, Reaffirmed: 1776 and the Definition of American Social Structure*, in *TRANSFORMATION*, *supra* at 194, 194. On the collapse of coherent social theory, see Joyce Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 798, 802 (1992).

4. Atwater, *supra* note 1 at 1172.

5. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 301-02 (Peter Laslett ed., critical ed. 1960) (3d ed. 1698).

6. Benjamin Rush, *An Address* (1787), quoted in FORREST McDONALD,

its people too weak and dissolute to repel corruption from within or invaders from without. Early Americans discovered that too much liberty could be as dangerous as too little. Thus the great challenge of the age, one historian has written, "was to make authority and liberty compatible."<sup>7</sup>

Americans facing this challenge could draw on two distinct philosophical traditions: the doctrine of natural rights and the tenets of civic republicanism. The first doctrine focused on individual liberty and the second on community and responsibility. Both traditions were firmly entrenched in American consciousness by the late eighteenth century, and each had a substantial influence on the founding era. Nevertheless, there is significant conflict between these two strands of our heritage.

I would like to do three things in this essay. First, I will briefly describe each of the traditions. Then I will suggest that part of what is wrong in America today stems from the fact that we have all but lost the ideas of civic republicanism, leaving only a somewhat distorted heritage of rights. Because of this trend we are now facing some of the same threats to liberty the Founders feared. What can we do? What *should* we do? I will suggest that providing an education for republican citizenship offers a way both to revive the lost tradition and to reconcile the conflicting elements of the two traditions.

## I. NATURAL RIGHTS

When we think of rights today, especially when we mean rights that are enforceable by the judiciary, we limit ourselves to those rights granted by the Constitution or particular statutes. Even the most controversial Supreme Court decisions are ultimately tied to the Constitution, no matter how tendentious or attenuated the link. *Roe v. Wade*,<sup>8</sup> for example, was premised on the rather questionable notion that the Due Process Clause of the Fourteenth Amendment includes a right of reproductive freedom.<sup>9</sup> Both those opposing and those favoring the underlying right to reproductive freedom have attacked *Roe's* rationale from the moment it was written. Why, then, did the Court find it necessary to rely on such a vulnerable basis for its ruling?

To any modern observer even casually familiar with Ameri-

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NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 3 (1986).

7. FLIEGELMAN, *supra* note 2, at 14.

8. 410 U.S. 113 (1973).

9. *Id.* at 153-54.

can law, the answer is so obvious that asking the question appears disingenuous or worse. The Court based the right to reproductive freedom on the Constitutional text because the Court derives its only authority from the Constitution. The Court can enforce only those rights it finds in the Constitution; no other principle will suffice. As one scholar noted, commenting in fact on *Roe*, "[a] neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a Constitutional principle and the Court has no business imposing it."<sup>10</sup>

This positivist view—that the Court must base all of its decisions about rights on the Constitution—is, surprisingly, a relatively recent innovation. For roughly the first seventy-five years of this country's existence, lawyers and judges routinely relied on extra-constitutional sources of rights, claiming and enforcing the unwritten natural rights of mankind.<sup>11</sup>

The most famous assertion of natural rights, of course, came in 1776: Thomas Jefferson claimed for himself and his country the "unalienable rights" of "life, liberty, and the pursuit of happiness." Jefferson's eloquent prose merely echoed not only John Locke's work of a century earlier, but also the ideas of many Americans whose names and words we have since forgotten. In 1760, Joseph Fish preached an election sermon in Connecticut in which he argued that each individual has "a natural, unalienable right to think and see for himself."<sup>12</sup> Silas Downer dedicated a "tree of liberty" in 1768 by referring to natural rights as those which "no creature can *give*, or hath a right to take away."<sup>13</sup> Alexander Hamilton, whose name we have not forgotten, but with whom we usually do not associate grandiloquent claims of natural right, discouraged his fellow lawyers from relying solely on written constitutions. "The sacred rights of mankind," he wrote in 1775, "are not to be rummaged for, among old

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10. John Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 949 (1973).

11. For a more detailed discussion of the founding generation's view of natural rights, see Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171 (1992); Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001 (1989); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

12. Joseph Fish, Election Sermon (1760), quoted in STEVEN M. DWORETZ, *THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION* 177 (1990).

13. Silas Downer, A Discourse at the Dedication of the Tree of Liberty (1768), in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, *supra* note 1 at 97, 100.

parcements, or musty records. They are written, as with a sun beam, in the whole *volume* of human nature . . . and can never be erased or obscured by mortal power."<sup>14</sup> In state after state, draftsmen laboring over new state constitutions included language referring to "natural," "inherent," "essential," or "inalienable" rights, and to "the common rights of mankind."<sup>15</sup>

Eighteenth century Americans passionately believed that their most important liberties came not from written bills of rights but from unwritten natural law. Indeed, opponents of the federal bill of rights argued that listing rights in the federal constitution would be dangerous because it might be construed to *limit* pre-existing natural rights. James Iredell told the North Carolina ratifying convention:

[I]t would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation. . . . Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.<sup>16</sup>

James Madison in Virginia and James Wilson in Pennsylvania made identical arguments.<sup>17</sup> Madison eventually solved the problem by including the Ninth Amendment in the Bill of Rights.

Those readers who are frantically trying to recall what the Ninth Amendment says are not alone: the Supreme Court has never decided a case on the basis of the Ninth, no constitutional law casebook included any real discussion of it until early in 1993,<sup>18</sup> and it is most often lumped with the Second, Third, and Tenth as one of those amendments that doesn't mean anything today. Robert Bork called it an "inkblot," likening it to the drafters accidentally spilling ink on the text.<sup>19</sup> It states "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>20</sup>

14. Alexander Hamilton, *The Farmer Refuted &c*, in 1 THE PAPERS OF ALEXANDER HAMILTON 81, 122 (Harold C. Syrett ed., 1961).

15. Sherry, *The Founders' Unwritten Constitution*, *supra* note 11 at 1133.

16. JONATHAN ELLIOT, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 167 (2d ed. 1891).

17. 3 *id.* at 626-27; 2 *id.* at 436.

18. DANIEL A. FARBER, WILLIAM N. ESKRIDGE, & PHILIP P. FRICKEY, CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 499-503 (1993).

19. *The Bork Disinformers*, WALL ST. J., Oct. 5, 1987, at A22.

20. U.S. CONST. amend. IX.

That we so easily overlook this Amendment, with its obvious natural law heritage, is evidence of how far removed we are from the Framers' vision of natural rights.

Between the mid-1700s and the mid-1800s, American statesmen, politicians, clergy, and ordinary citizens could hardly utter the word rights without saying or meaning inalienable natural rights. This language was not mere rhetoric. Beginning in the 1780s, even before the advent of the federal constitution, state courts began *enforcing* unwritten natural rights. A New York court in 1784 agreed with Alexander Hamilton's argument that "statutes against law and reason are void."<sup>21</sup> The Court held that an American patriot could *not* sue the British citizen who occupied her home during the British occupation of New York City, despite a state trespass statute that purported to allow the suit, and despite the absence of any relevant provision in the written constitution.<sup>22</sup> In 1786 a Rhode Island court enforced a right to trial by jury, even though no such right was listed in the Rhode Island Constitution.<sup>23</sup> So it continued, in state after state, right through the first half of the nineteenth century.

Between 1780 and 1840, courts in every state repeatedly invalidated laws that violated no provision of the written constitution. Instead, state court judges relied on such extra-textual sources of law as "principles of natural justice,"<sup>24</sup> "natural right and justice,"<sup>25</sup> "*common right and common reason*,"<sup>26</sup> "fundamental principle[s] of civilized society,"<sup>27</sup> "the rights of the subject,"<sup>28</sup> and "the first principles of civil liberty and natu-

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21. *Rutgers v. Waddington* (N.Y. City Mayor's Ct. 1784), reprinted in JULIUS GOEBEL, *THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY* 393-419 (1964).

22. *Id.*

23. *Trevett v. Weeden* (Newport Sup. Ct. Judicature 1786), described in JAMES MITCHELL VARNUM, *THE CASE, TREVETT AGAINST WEEDEN: ON INFORMATION AND COMPLAINT, FOR REFUSING PAPER BILLS IN PAYMENT FOR BUTCHER'S MEAT, IN MARKET, AT PAR WITH SPECIE* (1787). For further discussion of the case, see Wayne D. Moore, *Written and Unwritten Constitutional Law in the Founding Period: The Early New Jersey Cases*, 7 CONST. COMMENTARY 341 (1990).

24. *Elliot's Ex'r v. Lyell*, 7 Va. (3 Call.) 268, 284 (1802) (Lyons, J., concurring).

25. *Bradshaw v. Rodgers*, 20 Johns. 103, 106 (N.Y. Sup. Ct. 1822), *rev'd on other grounds*, 20 Johns. 735 (N.Y. 1823).

26. *Ham v. McClaws*, 1 S.C.L. (1 Bay.) 93, 96 (1789).

27. *Coates v. The Mayor*, 7 Cow. 585, 606 (N.Y. Sup. Ct. 1827).

28. *Foster v. Essex Bank*, 16 Mass. 244, 269 (1819).

ral justice.”<sup>29</sup> In 1809, Judge Spencer Roane of Virginia thundered at a lawyer who dared suggest that the Virginia Supreme Court had no constitutional authority “to declare a law void as being morally wrong”:

It was argued by a respectable member of the bar, that the legislature had a right to pass any law, however just, or unjust, reasonable, or unreasonable. This is a position which even the courtly Judge *Blackstone* was scarcely hardy enough to contend for, under the doctrine of the boasted *omnipotence* of parliament. What is this, but to lay prostrate, at the footstool of the legislature, all our rights of person and property, and abandon those great objects, for the protection of which, alone, all free governments have been instituted?<sup>30</sup>

Nor was the United States Supreme Court content to rely solely on the Constitution where individual rights were at stake. Chief Justice Marshall wrote that laws must be measured against “certain great principles of justice, whose authority is universally acknowledged,” and proceeded to invalidate a law that violated “general principles which are common to our free institutions.”<sup>31</sup> Justice Story invalidated a law because it violated, he said, “natural justice,” “the common sense of mankind,” and “the principles of civil right.”<sup>32</sup> Similarly, Justice Chase wrote that the legislature cannot “authorize *manifest injustice by positive law*,” whether or not the written Constitution prohibits the injustice.<sup>33</sup> Justice Paterson held the legislature accountable to “the principles of justice and policy,” “the dictates of the moral sense” and “right reason and natural equity.”<sup>34</sup> I have quoted all of this language to convey that the concept of judicially enforceable unwritten natural rights, which we today find so foreign, was taken for granted by Americans of the founding generation, especially those trained in the law.

The unwritten rights protected or claimed by the founding generation ranged from the majestic to the mundane, from the trivial to the terrible. Trial by jury, protection from *ex post facto* laws, and the right to compensation for the taking of property were all enforced even in the absence of written constitutional protections. One illustration of the breadth of natural rights comes from a speech in Congress during the drafting of the fed-

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29. *Holden v. James*, 11 Mass. 396, 405 (1814).

30. *Currie's Adm'rs v. Mutual Assurance Soc'y*, 14 Va. (4 Hen. & M.) 315, 341, 346-47 (1809).

31. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133, 139 (1810).

32. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 50-52 (1815).

33. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

34. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 255 (1796) (opinion of Paterson, J.).



eral bill of rights. Representative Sedgewick scorned the idea that a bill of rights could ever be a comprehensive listing of human rights: if that was what the drafters intended, he said, "they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper."<sup>35</sup> A Massachusetts miscreant claimed "a right to visit all the [w]hore-houses" in Boston.<sup>36</sup> In 1789, a South Carolina court enforced a right to bring slaves into the state despite a newly enacted statute prohibiting their importation.<sup>37</sup> Whether appalling or amusing, the list of potentially protected rights was not limited to those enumerated in the various state and federal constitutions.

## II. CIVIC VIRTUE

If the idea of natural rights makes us uncomfortable today, the other aspect of our heritage of liberty, civic virtue, is even harder for us to comprehend. Eighteenth century Americans believed that their experiment with liberty would stand or fall on the civic virtue of the citizenry. What did they mean by civic virtue? I will give a more expansive definition later, but for now let it evoke a general picture of citizens who are willing and able to participate in the public life of their community and their nation.

The quotation that forms my title today, "without virtue there can be no liberty," is from a 1786 speech by Benjamin Rush,<sup>38</sup> but it is just one formulation of an idea that was common to virtually every American in the founding era. Samuel Adams wrote that men "will be free no longer than while they remain virtuous."<sup>39</sup> His cousin and political opposite, John Adams, said that "public Virtue is the only Foundation of Republics."<sup>40</sup> An anonymous opponent of the Constitution wrote that a "free government, can only exist where the body of the people

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35. 1 ANNALS OF CONG. 759-60 (Gales & Seaton eds., 1834).

36. WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 89-90 (1975).

37. *Ham v. McClaws*, 1 S.C.L. (1 Bay.) 93 (1789).

38. Benjamin Rush, *Thoughts Upon The Mode of Education Proper in a Republic* (1786), in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* 9, 10 (Frederick Rudolph ed., 1965).

39. Letter from Samuel Adams to John Scollay (Dec. 30, 1780), in 4 *THE WRITINGS OF SAMUEL ADAMS* 236, 238 (Harry Alonzo Cushing ed., 1908).

40. Letter from John Adams to Mercy Warren (April 16, 1776), in 1 *THE FOUNDERS' CONSTITUTION* 670 (Philip Kurland & Ralph Lerner eds., 1987).

are virtuous.”<sup>41</sup> Another commented that “[a] virtuous people make just laws, and good laws tend to preserve unchanged a virtuous people.”<sup>42</sup> All these thinkers, and many others, rested their hopes for America largely on the character of its people: neither written constitutions nor unwritten rights, neither governments nor armies, could save a nation whose people would not save themselves.

In their reliance on virtue, the founding generation looked to a classical tradition that stretched back through seventeenth century English Whigs to Machiavelli and ultimately to Aristotle. According to this tradition, “man was by nature a political being, a citizen who achieved his greatest moral fulfillment by participating in a self-governing republic.”<sup>43</sup> Civic virtue was the highest reflection of humankind’s political or communitarian nature. To be unvirtuous was to fail to flourish, to be less than human.

Today, we can barely understand this concept of civic virtue. One of my colleagues snickered when he first heard the title of this speech; he assumed that “virtue” was used in its predominant modern sense of sexual chastity. In the eighteenth century, however, “virtue” meant something quite different.

When eighteenth century Americans spoke of virtue, they invoked several intertwined ideas, all of which stemmed from the classical tradition of political participation as the highest human good. Responsibility, independence and community spirit are some of the modern concepts that come closest to capturing the meaning of civic virtue. A virtuous citizen had an independent mind and a willingness to use it for the good of the community. Virtue meant taking responsibility for oneself and one’s community. Virtue also meant letting reason control passion, letting long-term community interests override selfish individual wants. Citizens in a virtuous republic deliberated rationally about what would best serve the interests of the community.

These appeals to reasoned argument and to individual responsibility make clear how liberty is at the mercy of virtue. Without reasoned argument, government can only rule through

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41. Letters of Centinel I. (Oct. 5, 1787), in 2 THE COMPLETE ANTI-FEDERALIST 130, 139 (Herbert J. Storing ed., 1981).

42. Letters from the Federal Farmer VII., in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 41, at 266.

43. Gordon S. Wood, *Classical Republicanism and the American Revolution*, 66 CHI.-KENT L. REV. 13, 23 (1990).

either raw power or deceptive rhetoric, what one scholar has called "strategic arguments designed to persuade by their emotional effect on the listener."<sup>44</sup> When coerced by force or manipulated by their emotions, a people are no longer free. Moreover, irresponsible citizens cannot participate effectively in a democratic republic. As one modern scholar has put it, "[t]hose who are free of responsibility for themselves cannot be free to make their own way in society."<sup>45</sup>

For the founding generation, one of the consequences of basing a republic on virtue was a kind of rough egalitarianism. A virtuous citizen worked hard, and a virtuous nation rewarded work, talent, and merit rather than accidents of birth. The historian Gordon Wood has described the new republic as adopting "achieved rather than ascribed standards of aristocracy."<sup>46</sup> Thus, John Smilie could say that "[a] virtuous man, be his situation what it may, is respectable."<sup>47</sup> Unlike the hierarchical social structure of England, in America even those in poverty could be respected and achieve full citizenship, if they were virtuous.

Although liberty as virtue could assist the cause of equality, liberty as natural rights could hinder that cause, as in the case I noted earlier about the natural right to import slaves. The tension between liberty and equality that still plagues us today thus has very deep roots. Where we struggle with the conflict between free speech and hate speech, the framers struggled with the conflict between the slaveowners' right to property and the slaves' right to liberty. I am not suggesting that the two are commensurate, or even that they should necessarily be resolved in the same way, only that both examples illustrate the same tension. Incidentally, today we usually take "civil rights" to mean equality, and "civil liberties" to mean liberty, so there is some irony (as well as great pride and pleasure) in holding a chair in *both* Civil Rights and Civil Liberties Law, because the two can be in such great tension.

Equality is just one example of the tension between the idea

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44. Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1846 (1988).

45. LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* 43 (1986).

46. WOOD, *supra* note 3, at 196.

47. Pauline Maier, *The Transforming Impact of Independence, Reaffirmed: 1776 and the Definition of American Social Structure*, in *THE TRANSFORMATION OF EARLY AMERICAN HISTORY: SOCIETY, AUTHORITY, AND IDEOLOGY* 194, 211 (James A. Henretta et al. eds., 1991) (quoting John Smilie).

of civic virtue and the idea of natural rights. When the good of the community comes into conflict with individual desire, so too do the two traditions. A republic founded on virtue seeks to cultivate and improve humanity, while a republic founded on rights seeks to gratify its citizens' desires. Anyone with children knows that the two goals are often mutually incompatible. But, as my mother-in-law reminds me, we are not good parents if we simply make our children happy without helping them become autonomous and independent, and so it is with a nation that gratifies desires with no regard for the character of its citizens.

The founding generation avoided the consequences of this conflict in several ways.<sup>48</sup> They generally failed to recognize the conflict, because they believed that only "idiots or self-murderers" would put their own selfish interests ahead of the interests of the community.<sup>49</sup> Moreover, many of their most cherished rights were viewed as collective rights, serving civic or communal purposes. Trial by jury, religious freedom and protection for robust and uninhibited debate on public matters all strengthened and encouraged a virtuous, responsible, and deliberative citizenry. Even the right to property, which we would consider a paradigmatic individual right against the community, was viewed differently by the founding generation. The ideal virtuous citizen was independent, responsible for himself and beholden to no one for his livelihood, and thus ought to own land. Land ownership both allowed citizens to cultivate virtue and independence, and tied them to their communities.

The fact that we, today, view property as a right against the state rather than as a way of cultivating virtue and community spirit begins to suggest just how far we have strayed from our dual heritage of rights and virtue. Other examples abound. One legal scholar—writing in a prestigious law review—recently attacked welfare reform that encourages family responsibility by giving incentives to parents to marry, to limit the number of children they have, to keep their children in school, to pay rent and to get available medical care for the children.<sup>50</sup> She says such reforms are nothing but foisting "majoritarian middle-class

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48. This paragraph synthesizes Suzanna Sherry, *The Intellectual Origins of the Constitution: A Lawyers' Guide to Contemporary Historical Scholarship*, 5 CONST. COMMENTARY 323 (1988).

49. Letter from John Sullivan to Meshech Weare (Dec. 11, 1775), in 4th Ser., IV., AMERICAN ARCHIVES 242 (Force ed., 1775), quoted in GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 56 (1969).

50. Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 720-21 (1992).

values" on welfare recipients.<sup>51</sup> A well-respected scholar has written an entire book expanding on the notion that equal citizenship means that "[e]ach individual is . . . entitled to be treated by . . . society as a . . . responsible . . . member," without a word about whether citizens ought to *behave* responsibly.<sup>52</sup> A woman who starved her 13-week-old baby to death by deliberately failing to feed him claimed that she should be absolved of any responsibility because she herself was a victim of abuse.<sup>53</sup> A brewery worker sought compensation from his employer for the alcoholism he allegedly incurred from drinking its free beer.<sup>54</sup> Some legal scholars argue that people and corporations are entitled to compensation when the state prohibits them from using their property in ways that damage the environment.<sup>55</sup> I could go on and on, but I think the point is clear: everyone claims rights, but no one accepts responsibility.

A subtle form of this abandonment of responsibility may underlie some of the current demand for "multiculturalism." The Canadian philosopher Charles Taylor has recently published a very persuasive essay suggesting that we ought to presume that any culture that has "animated whole societies over some considerable stretch of time [has] something important to say to all human beings."<sup>56</sup> Anything less, he notes, would take "supreme arrogance."<sup>57</sup> I agree that we should be open to, and willing to learn from, other cultures. I also agree, however, with Taylor's further insight: he recognizes that many proposals to create

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51. *Id.* One response to this is to ask by whose values *ought* we judge welfare recipients? "Certainly not those of a teenager who, by having a child out of wedlock—with no means to support it and largely unprepared to care for it—has already demonstrated that she does not make responsible decisions." Douglas Besharov, *The Moral Voice of Welfare Reform*, 3 *THE RESPONSIVE COMMUNITY: RIGHTS AND RESPONSIBILITIES* 13, 18 (1993).

52. KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 3 (1989). The book does talk about responsibility but only in the context of urging national responsibility to and for various "marginalized" groups, never in the context of those groups' own possible responsibility for their marginalized status. See, e.g., *id.* at 125, 148, 166-67.

53. See Jean Bethke Elshtain, *Battered Reason*, *THE NEW REPUBLIC*, Oct. 5, 1992, at 25, 28.

54. See CHARLES J. SYKES, *A NATION OF VICTIMS: THE DECAY OF THE AMERICAN CHARACTER* 126-27 (1992).

55. See, e.g., Richard Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 *STAN. L. REV.* 1369 (1993) (taking issue with holding that compensation under the Takings Clause due only if land use restriction deprives owner of "all economically beneficial uses" of property).

56. CHARLES TAYLOR, *MULTICULTURALISM AND "THE POLITICS OF RECOGNITION"* 66 (1992).

57. *Id.* at 73.

Afrocentric curricula or to purge the "canon" of Eurocentric influences are essentially demands for much more than this. They are essentially demands that we not only acknowledge "the equal value of all humans potentially" but also "the equal value of what they have made of this potential in fact."<sup>58</sup> In other words, some multiculturalists want us to value, not just tolerate or respect, but *value* each individual and every culture equally, regardless of the extent to which they have lived up to their potential or created anything worthwhile. The right to automatic recognition supplants the responsibility to develop our human potential or to be accountable for not doing so.

In letting rights overwhelm virtue we have done more harm than simply letting people get something for nothing. We also give them nothing and call it something. A poor and pregnant woman has a "right" to an abortion, but no resources with which to turn her life around whether or not she chooses to have the child.<sup>59</sup> School children have a "right" to an integrated education, but not to an adequate one. Working women have a "right" to a job, but no way to keep it if family obligations prevent them from imitating the workaholic tendencies of their free male colleagues.<sup>60</sup> We have the "right" to vote, but decreasing numbers feel any duty to do so at all, let alone in an informed manner.

We have, indubitably, lost our virtue. In our haste to protect rights, we have lost the language of individual responsibility. One modern scholar summarizes the situation by noting the proliferation of claims of right, to "trees, animals, smokers, non-smokers, consumers, and so on,"<sup>61</sup> and lamenting the fact that talk of rights is "the language of no compromise. . . . [t]he winner takes all and the loser has to get out of town."<sup>62</sup> Another writer cites the failure of welfare programs to reduce or eliminate poverty among the underclass as a consequence of remov-

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58. *Id.* at 42-43; see also *id.* at 64-68 (discussing multicultural curricula as a process of revising the images of dominated groups in society). Other scholars have noted another problem with modern multiculturalists in that they seem to deny the possibility of any shared culture: "contemporary multiculturalism is the same tribalism that divides Serbs from Croats or Bosnians, Armenians from Azeris, and Arabs from Kurds." Paul D. Carrington, *Diversity!* 4 UTAH L. REV. 1105, 1111 (1992).

59. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 65-6 (1991) (comparing the abortion policies of United States and West Germany).

60. See, e.g., Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 432 (1990); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1594-1608 (1991).

61. GLENDON, *supra* note 59, at xi.

62. *Id.* at 9.

ing from welfare policy any concept of individual responsibility.<sup>63</sup> He notes that because welfare payments are entitlements that have traditionally demanded nothing from recipients in return, "dependent groups are shielded from the pressures to function well that impinge on other Americans."<sup>64</sup>

We have elevated rights at the expense of both individual and community responsibility, and as the trend continues, it escalates. More and more absolute rights clash with one another. And if Benjamin Rush is right, having lost our virtue, we are now in danger of losing our liberty.

Why we have kept our rights but lost our virtue is not an easy question to answer, and I want to make only a tentative suggestion here. In the late nineteenth and early twentieth centuries, positivism invaded American law and jurisprudence. In its purest form, legal positivism defines law as only whatever is enacted by the relevant authority. Law is positively enacted legislation, written constitutions, and judicial decisions directly derivable from those sources. All other sources of law are irrelevant and illegitimate, including both natural rights and aspirations to human virtue. Others have thoroughly explored the causes of the rise of positivism, which may include the abolitionist movement and the Civil War, the rise of professionalism among lawyers, and the attraction of a scientific model of law.<sup>65</sup> Positivism is alluring, for, as Oliver Wendell Holmes has suggested, it gives us "the illusion of certainty which makes legal reasoning seem like mathematics."<sup>66</sup> For our purposes, however, it is enough to note that positivism did arise, and that it triumphed over older forms of legal reasoning.

When eighteenth century ideas of natural rights and civic virtue clashed with nineteenth century positivism, positivism won. It defeated the tradition of natural rights by stripping rights of their transcendent character: natural rights were transformed into constitutional rights and thus limited to what

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63. MEAD, *supra* note 45.

64. *Id.* at 2.

65. For one explanation, see ROBERT FERGUSON, *LAW & LETTERS IN AMERICAN CULTURE* 199-202 (1984).

66. Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 7 (1894). For more detail on Holmes and positivism, see Morton J. Horwitz, *The Place of Justice Holmes in American Legal Thought*, in *THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 31 (Robert W. Gordon ed., 1992); Eben Moglen, *The Transformation of Morton Horwitz*, 93 COLUM. L. REV. 1042, 1050-53 (1993) (reviewing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992)).

was written. As I suggested earlier, courts now enforce only those rights which they can find in the Constitution.

Positivism, however, could not similarly transform the idea of virtue, because one cannot force a man to be virtuous by law or legislate a community into existence.<sup>67</sup> Virtue has to be desired and chosen or it becomes simply what one scholar has called "civic continence."<sup>68</sup> A community springs from the hearts of its members, not from the minds of its legislature. The positivist version of natural rights is constitutional rights, but there is no such thing as a positivist version of virtue. Moreover, it is difficult for positivism and theories of virtue to coexist because they are essentially alternative explanations for what makes a law right and good and just. So while the spread of positivism could leave something of our heritage of rights, it could only abandon the heritage of virtue.

### III. RIGHTS AND VIRTUE

If there is any question more difficult to answer than why we have sacrificed half our heritage of liberty, it is what we can do about it. Nevertheless, having offered such a pessimistic assessment of our current state, I would be acting irresponsibly if I failed to offer some solution.

Let me reiterate what we need: we need a way to reinvigorate virtue, and also to reconcile it with the idea of rights. One way to do this is to argue that we, as citizens, have a right to the maximum development of our virtues. As philosopher Martha Nussbaum has noted, "if you have a person on your hands who is a citizen with the basic capabilities to become virtuous, this exerts a claim on the lawgiver that those abilities should be developed."<sup>69</sup> The development of the capacity to be virtuous, however, is a daunting task in modern America. An apathetic and ill-prepared citizenry barely exercises its right to vote and devotes far more time to watching televised sports than to learning what the government is doing. Where do we start?

We are not the first to struggle with the dilemma of how to create a virtuous populace. The Founders knew that civic virtue

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67. For an illustration of this idea, see Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 MINN. L. REV. 933 (1991).

68. Lawrence B. Solum, *Virtues and Voices*, 66 CHI.-KENT L. REV. 111, 118 (1990).

69. Martha C. Nussbaum, *Comments*, 66 CHI.-KENT L. REV. 213, 233 (1990).



did not spring unbidden from the human heart, but needed careful nurturing. With some allowance for the changes of the last two centuries, my proposal is the same as theirs: education.<sup>70</sup>

In the eighteenth century, writer after writer—politicians, clergy, educators, and anyone else interested in the future of the nation—stressed the necessity of education to the maintenance of virtue and hence of liberty. Moses Mather declared in 1775 that “[t]he strength and spring of every free government is the virtue of the people; virtue grows on knowledge, and knowledge on education.”<sup>71</sup> The Massachusetts Constitution of 1780, one of many adopted by the various states between 1776 and 1787, noted that “[w]isdom and knowledge, as well as virtue . . . [are] necessary for the preservation of . . . rights and liberties.”<sup>72</sup> Zabdiel Adams preached in 1782 that “[a]n ignorant people will never long live under a free government. They will soon become slaves.”<sup>73</sup> An unknown Federalist said in 1787 that “[if] we would maintain our dear bought rights inviolate, let us diffuse the spirit of literature.”<sup>74</sup> Samuel Knox wrote in 1799 that “[i]gnorance . . . has ever been the parent and stupid nurse of civil slavery.”<sup>75</sup> Joel Barlow noted in 1801 that “[i]gnorance is everywhere . . . an infallible instrument of despotism.”<sup>76</sup> My title, that “without virtue there can be no liberty,” comes from a

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70. It seems especially appropriate for me to focus on education in my inaugural lecture as the Earl R. Larson Professor of Law. Just over 20 years ago, Judge Larson decided a case that changed the course of public education in Minneapolis. Acting with great courage, Judge Larson defied public opinion by permanently enjoining Minneapolis from discriminating on the basis of race or national origin and requiring Minneapolis to disestablish racially segregated schools. See *Booker v. Special Sch. Dist. No. 1*, 351 F. Supp. 799 (1972). He knew then what I am asserting here: liberty and education are inextricably linked.

71. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, *supra* note 49, at 120 (quoting Moses Mather).

72. MASS. CONST. of 1780, ch. V, § II, *reprinted in* 3 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* 1907 (Francis Thorpe ed., 1909).

73. Zabdiel Adams, *An Election Sermon* (1782), *in* 1 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA*, *supra* note 1, at 539, 555.

74. *The Worcester Speculator* No. VI (1787), *in* 1 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA*, *supra* note 1, at 699, 701.

75. Samuel Knox, *An Essay On the Best System of Liberal Education* (1799), *in* *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC*, *supra* note 38, at 271, 288.

76. Letter II from Joel Barlow [to] His Fellow Citizens of the United States: On Certain Political Measures Proposed to Their Consideration (1801), *in* 2 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA*, *supra* note 1, at 1099, 1121.

pamphlet itself called "Thoughts Upon the Mode of Education Proper in a Republic."<sup>77</sup>

Despite these and numerous other exhortations, education was an aspiration in 1800, and mostly limited to the privileged few. Although Noah Webster pointed out the irony of putting the vote into the hands of "every honest industrious man" while depriving some of the education necessary to exercise it,<sup>78</sup> little was done to extend educational opportunities to the masses.

In order to reinvigorate virtue, and to reconcile it with our notions of individual rights, we must establish a *right* to an education. If it seems ironic that I should first lament our modern preoccupation with rights and then urge establishment of yet another one, I want to remind the reader that my purpose is not simply to protect the individual holder of the right but also to create virtuous citizens. Remember also that our heritage of natural rights allows us to claim such a right regardless of the language of the Constitution. If the right requires a constitutional hook, the Ninth Amendment will oblige for the federal government and the Privileges and Immunities Clause of the Fourteenth Amendment suffices for the states.<sup>79</sup> Moreover, many state constitutions establish a state duty to provide public education.

If this new right is to serve the stated purpose of re-integrating the eighteenth century idea of virtue into our national consciousness, rather than simply adding another entitlement to the proliferating list, it must be carefully described. I am proposing education for citizenship, not just the education of citizens. It is not simply a right to education per se, or even a right to the same education for everyone, but a right to an education

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77. Rush, *supra* note 38 at 10. For other similar sentiments, see Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1208-10 (1991) (discussing the importance of education to Madison, Jefferson, and others); Robert H. Horwitz, *John Locke and the Preservation of Liberty: A Perennial Problem of Civic Education*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 136 (Robert H. Horwitz ed., 3d ed. 1986) (describing Locke's influence); CAROLINE ROBBINS, THE EIGHTEENTH CENTURY COMMONWEALTHMAN 14, 99-100 (1961) (describing similar Whig influence); Colleen A. Sheehan, *The Politics of Public Opinion: James Madison's "Notes on Government"*, 49 WM. & MARY Q. 609, 620-24 (1992) (attributing similar views to Madison); WOOD, *supra* note 48, at 120-21 (discussing the 1776 Revolutionary leaders' similar ideas).

78. Noah Webster, *On the Education of Youth in America* (1790), in ESSAYS ON EDUCATION IN THE EARLY REPUBLIC, *supra* note 38, at 41, 66.

79. See Susan Bitensky, *Theoretical Foundations for A Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 553 (1992).

that makes one capable of participating as a virtuous republican citizen.<sup>80</sup> It is therefore both more and less than what the courts have currently bestowed on us. So before agreeing too quickly with my proposal, the reader should understand what it means.

In this essay I will only sketch the outlines of an education for civic virtue, and how it might change the way we think about education. I will leave for a later article the details of how my proposal might affect existing education law: issues that range from funding options to the limits of free speech in school, from integration to religious freedom. Although the Supreme Court often mentions democratic citizenship as one goal of education,<sup>81</sup> there has been little or no systematic exploration of what an education for citizenship might look like. This essay is a preliminary sketch of just such an educational system.

First, you will be happy to know that I do not propose the education that Samuel Knox suggested for American youth in 1799, which included comprehensive knowledge of the following:

the English, French, Latin, and Greek languages, Greek and Roman antiquities, ancient and modern geography, universal grammar, *belles-lettres*, rhetoric, and composition, chronology and history, the principles of ethics, law, and government, the various branches of the mathematics and the sciences founded on them, astronomy, natural and experimental philosophy. . . . [and] the ornamental accomplishments [of] drawing, painting, fencing, and music.<sup>82</sup>

The course I propose might strike some as equally difficult, however, because it requires students or, in the case of younger students, their parents, to take some responsibility for their own education. The union of rights and virtue means that although it is the responsibility of the polity to provide the opportunity for an education for citizenship, it is the responsibility of the individual to take advantage of it. As modern Kantian philosopher Richard Eldridge noted, it is "a commandment of morality that we must develop our faculties rather than occupy ourselves with idle amusements."<sup>83</sup> Giving people responsibility is also a way

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80. For similar suggestions, see AMY GUTMANN, *DEMOCRATIC EDUCATION* 39 (1987); Horwitz, *supra* note 77, at 152 (noting Locke's radical ideas for educational reform); Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497 (1987) (discussing indoctrination common in our secondary schools and its failure to prepare students for citizenship).

81. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982).

82. Samuel Knox, *An Essay on the Best System of Liberal Education* (1799), in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC*, *supra* note 38, at 271, 315.

83. RICHARD ELDRIDGE, *ON MORAL PERSONHOOD: PHILOSOPHY, LITERATURE, CRITICISM, AND SELF-UNDERSTANDING* 44 (1989).

of educating them to virtue, for the exercise of choices helps develop the capacity to choose wisely.<sup>84</sup>

Again, I am only adapting to modern needs something Americans recognized when virtue and rights still coexisted. Joel Barlow wrote in 1792, "[b]y discovering to a man his rights, you impose upon him a new system of duties."<sup>85</sup> Samuel Harrison Smith, an eighteenth-century educator and publisher, noted "the obligation of everyone to enlarge the powers of his mind."<sup>86</sup>

The substance of my proposed education for citizenship might also be controversial. Education must ultimately produce adults who are both willing and able to deliberate rationally about the public good. It must therefore encourage both the capacity for independent thought and the inclination and courage to use education for the good of the community.<sup>87</sup> To achieve these goals, education must do two things: it must give children a sense of their own country's history and culture, and it must teach them to deliberate critically and rationally.<sup>88</sup> Only then can they function as citizens of their own particular democratic polity. Without the ability to think critically and rationally,

84. Responsibility may indeed be necessary to such development. See Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 300 (1988) ("Authentic responsibility can develop only where a person is free to act virtuously or not.").

85. Joel Barlow, *A Letter to the National Convention of France on the Defects in the Constitution of 1791* (1792), in 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, *supra* note 1, at 812, 834; see also Paul D. Carrington, *Meaning and Professionalism in American Law*, 10 CONST. COMMENTARY (forthcoming 1993) (ascribing similar view to prominent nineteenth century legal educator Francis Lieber).

86. Samuel H. Smith, *Remarks on Education: Illustrating the Close Connection Between Virtue and Wisdom* (1798), in ESSAYS ON EDUCATION IN THE EARLY REPUBLIC, *supra* note 38, at 167, 178; see also Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* 74 J. AM. HIST. 1013, 1019 (1987) ("One was obliged then to become an autonomous citizen, so that one could participate usefully in communities.").

87. This argument is not far from the Enlightenment vision that animated the founding generation. Immanuel Kant described "the motto of the [E]nlightenment" as "Have the courage to use your own understanding." FLIEGELMAN, *supra* note 2, at 3; see also Noah Webster, *On The Education of Youth in America*, in ESSAYS ON EDUCATION IN THE EARLY REPUBLIC, *supra* note 38, at 41, 45 ("Systems of education should be adopted . . . [to] implant in the minds of the American youth the principles of virtue and of liberty and inspire them with just and liberal ideas of government and with an inviolable attachment to their own country.").

88. For similar suggestions see GUTMANN, *supra* note 80, at 38-39; WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 243 (1991) (stating civic education ought to produce "individuals who can effectively conduct their lives within, and support, their political community").

children cannot reach independent judgments, and without any attachment to their own community they have no reason to act in its behalf. As one education scholar has noted: "Society must indoctrinate children so they may be capable of autonomy. They must be socialized to the norms of society while remaining free to modify or even abandon those norms."<sup>89</sup> Again, this idea resonates with our particular heritage. One recent scholar has summarized the influences on early American education as suggesting that "[w]ithout rational education there is no independence of mind and thus eventually no liberty."<sup>90</sup>

I suspect that neither liberals nor conservatives will much like the implications of my proposal. For example, if young children have a right to an education for citizenship, and their parents some responsibility for providing it, that means that it is no longer acceptable to argue against school choice or voucher plans on the ground that some parents will not exercise the choice responsibly. Parents have an obligation to prepare their children for responsible citizenship in the same way that they have an obligation to feed them, and an utter failure to do so is plain and simple parental neglect.

Similarly, the theory of "educational equity"—recently propounded by some commentators and accepted by at least one state court<sup>91</sup>—pays insufficient attention to individual responsibility. That theory argues that school districts in a state must be funded, not just in equal amounts, but so as to ensure equal outputs. That is, the state should fund students in "disadvantaged" districts at a higher level than "advantaged" districts so that the students will achieve at the same level.<sup>92</sup> Unfortunately, this argument places the entire blame for underachievement and the entire burden for remedying it on the state, ignoring the fact that underachieving students sometimes choose to ignore or reject the same educational opportunities of

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89. Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 ILL. L. REV. 15, 19 (1987).

90. FLIEGELMAN, *supra* note 2, at 16.

91. See, e.g., *Abbott v. Burke*, 575 A.2d 359, 402-03 (N.J. 1990); Charles S. Benson, *Definitions of Equity in School Finance in Texas, New Jersey, and Kentucky*, 28 HARV. J. ON LEGIS. 401 (1991); James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislation Reform*, 76 VA. L. REV. 349 (1990). Ironically, studies suggest that "[t]here is no systematic relationship between school expenditures and student performance." Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 425 (1991) (emphasis omitted).

92. See generally Benson *supra* note 91; Liebman, *supra* note 91.

which their more successful counterparts have taken advantage. Attention to individual responsibility suggests that the society need only provide access to education: a failure to take advantage of it "does not generate any additional need claims that society is obliged to honor."<sup>93</sup> Samuel Adams may have been right when he declared that people who have lost their virtue "are not worth saving."<sup>94</sup>

My suggestion that education for citizenship requires teaching students to think critically and rationally is also likely to be unpopular in some circles. For example, fundamentalist parents in Tennessee unsuccessfully asked a court to excuse their elementary school children from required reading classes because they "did not want [their] children to make critical judgments and exercise choices in areas where the Bible provides the answer."<sup>95</sup> According to my theory, that desire, too, is a form of parental neglect. One scholar defends that parental neglect on the ground that "liberal freedom entails the right to live unexamined as well as examined lives."<sup>96</sup> Unfortunately, his definition of liberty is but another example of how we exalt rights at the expense of virtue. If we leave our own lives unexamined, we cannot presume to take part in the governance of others.

More broadly, an education in critical thought can put authority and tradition into question. Education for virtue is "not a mindless habituation, but consists of the critical scrutiny of beliefs and judgments."<sup>97</sup> In the 1960s, there was a slogan that was common on everything from backpacks to buttons: it said "Question authority." It used to drive many conservatives wild back then and I assume it still does, but it is a rough approximation of some of the implications of my theory of education for civic virtue. Preparing citizens to participate in their own country's politics requires instilling in them an attachment to their country, which in turn implies some respect for tradition, but

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93. GALSTON, *supra* note 88, at 185.

94. Letter from Samuel Adams to John Scollay, in 4 THE WRITINGS OF SAMUEL ADAMS, *supra* note 39, at 238.

95. *Mozert v. Hawkins*, 827 F.2d 1058, 1069 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

96. GALSTON, *supra* note 88, at 254. For alternative defenses of that neglect, suggesting that religious-based doctrines are a contestable epistemological choice that need not conform to reason to qualify as valid and sufficient education, see Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977 (1987); Nomi M. Stolzenberg, "He Drew A Circle That Shut Me Out": *Assimilation, Indoctrination, and the Paradox of A Liberal Education*, 106 HARV. L. REV. 581, 582-667 (1993).

97. Nussbaum, *supra* note 69, at 213, 224.

respect is not the same as blind obedience. Perhaps the slogan should be modified: "Question authority, but listen carefully to its answers." Still, those who want prayer and the pledge of allegiance back in the public schools and the flag protected from burning are unlikely to appreciate a theory of education that encourages students to think for themselves.

I do not mean to direct my remarks only to those who have an opportunity to set educational policy: legislators, judges, school board members, parents and teachers. I hope my message of individual responsibility as the only way to reclaim our republican heritage of liberty will also reach students themselves, especially law students, who as mature adults have both the opportunity and the obligation to participate in their own education. Law students are not passive receptacles into which we as teachers pour knowledge, but functioning citizens of the republic with an obligation to themselves and to everyone else to make the most of their educational opportunities.

Finally, I hope that I have followed in the footsteps of the earliest American law teachers, including George Wythe at William and Mary, David Howell at Brown, and Daniel Chipman at Middlebury.<sup>98</sup> Their mission, according to the foremost modern scholar of early American legal education, was "to transmit republican virtue to democratic leaders."<sup>99</sup> Because virtue requires education, I hope that these remarks make a contribution to the education of everyone who heard or reads them. Perhaps I have better defined rights and liberties: not just freedom to make choices, but the inclination to make wise choices.<sup>100</sup> Even if I have not persuaded you of the soundness of my theories, maybe I have increased your knowledge of American history. At the very least, I hope I have explained why I am so honored to be the first Earl R. Larson Professor of Civil Rights and Civil Liberties, and why I cannot imagine myself in any other profession.

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98. For documentation, see Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527 (1990).

99. Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in A Democracy*, 41 DUKE L.J. 741, 757 (1992).

100. See GUTMANN, *supra* note 80, at 33-41; see also Rogers M. Smith, *The "American Creed" and American Identity: The Limits of Liberal Citizenship in the United States*, 41 W. POL. Q. 225, 247 (1988) ("Freedom should not be understood to mean simply a lack of hindrance in doing what we will. It means valuing and exercising our capacities for reflective self-direction and choosing ways of life that preserve and enhance those capacities for all.").