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The Constitution and Public Virtue: Silence by Design

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Public virtue is lauded by a spectrum of eighteenth-century Americans as the foundation for self-government. In the eighteenth century, public virtue commonly denoted the willingness of individuals to sacrifice private interest for the common good or for the good of the community in the name of patriotism or out of love of country. While the best structural arrangements of republican government might temper the necessity for virtue, no government could afford to dispense with it altogether. The Founders further agreed that public virtue could not be considered apart from organized religion, eschewing the argument made famous by Bernard Mandeville that “private vices make public virtues.” For example, George Washington stated in his Presidential Farewell Address, “let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle. ’Tis substantially true, that virtue or morality is a necessary spring of popular government.”¹ Such an understanding of the intricate relations between self-government, public virtue, and organized religion was not

¹ George Washington, “Farewell Address,” *George Washington: A Collection*, ed. W. B. Allen (Indianapolis: Liberty Classics, 1988), 521-22; quoted in *Religion and the New Republic*, ed. James H. Hutson (Landam: Rowman & Littlefield, 2000), 176-77.

unique to Washington. John Adams remarked in 1798, “Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other kind.”² Furthermore, Adams had warned earlier in a letter to his cousin Zabdiel Adams that

*Statesmen my dear Sir, may plan and speculate for Liberty, but it is Religion and Morality alone, which can establish the Principles, upon which Freedom can securely stand. . . . The only foundation of a free Constitution is pure Virtue, and if this cannot be inspired into our People, in a greater Measure, than they have it now, They may change their Rulers, and the forms of Government, but they will not obtain a lasting Liberty—They will only exchange Tyrants and Tyrannies.*³

Richard Henry Lee wrote (in a letter to James Madison), “Refiners may weave as fine a web of reason as they please, but the experience of all times shews Religion to be the guardian of morals.”⁴ Following Washington, we can say that self-government presumes virtue, and virtue in turn presumes religion. The importance of religion for self-government would seemingly presume the interest of the state in promoting organized religion in some form or another. Yet, the apparent importance of religion brings to light a remarkable paradox: For all of the significance attached to virtue and to morality generally, the United States Constitution is itself silent on this very issue.

For many present-day Americans, this silence is not at all puzzling. Popular opinion holds that the Constitution prohibits official efforts aimed at virtue and morals *tout court*. Efforts by governmental agencies to praise virtue and condemn vice are prohibited by reason of the Establishment Clause of the First Amendment: “Congress shall make no law respecting an establishment of religion.” This amendment is commonly understood to erect a “wall of separation” between church and state.⁵

² *The Works of John Adams*, vol. XI (Boston, 1854), 229; quoted in Gertrude Himmelfarb, *One Nation, Two Cultures* (New York: Alfred A. Knopf, 1999), 86.

³ John Adams to Zabdiel Adams, 21 June 1776. *Our Sacred Honor*, ed. William J. Bennett (New York: Simon & Schuster, 1997), 412; quoted in *Religion and the New Republic*, op. cit., 177.

⁴ Richard Henry Lee to James Madison, 26 November 1784. *The Letters of Richard Henry Lee*, ed. James Curtis Ballagh (New York, 1911-14); quoted in Herbert J. Storing, *What the Anti-Federalists Were For* (Chicago: University of Chicago Press, 1981), 22.

⁵ The phrase “wall of separation” was used by Thomas Jefferson in a letter to the Danbury Baptist Association in 1802: “Believing with you that religion is a matter which lies solely between man and his God . . . that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people

Contemporary liberals typically assert that the Constitution prohibits any government promotion of virtue beyond what is required to coordinate the private pursuits of individuals. That is, the primary task of public authority is to coordinate desires and interests so that individuals can pursue them with as little interference as possible. Public virtue and the character of citizens are considered private affairs that are left solely to the discretion of individuals. Put differently, liberals consider it axiomatic that government should be neutral with respect to all comprehensive conceptions of the good, from which are derived systems of morals, values, and so forth.

At first glance, then, the silence of the Constitution regarding virtue is eminently reasonable and understandable. Morality, being fundamentally private, becomes oppressive when coerced by the power of the state. Furthermore, public morality becomes all the more oppressive in a society characterized by a plurality of different comprehensive conceptions of the good. Present-day American society provides an instructive example of such a pluralistic society. Liberals argue that tolerant, value-free neutrality is the only tenable position in a situation marked by a plurality of goods, and thus view the Establishment Clause as enshrining the principle of neutrality within the very framework of the Constitution itself.

However, as Bernard Williams has convincingly demonstrated, liberal neutrality is inherently incoherent: The very basis for so-called value-free neutrality is an appeal to a certain value, in this case individual autonomy, which itself is a good.⁶ That is, liberalism is neither value-free nor neutral, for it appeals to the substantial good of individual autonomy. Hence, arguments in favor of liberal neutrality collapse into non-neutral and often value-laden arguments that hold liberal goods, such as autonomy, to be preferable to other goods. One finds this position exemplified by Richard Rorty in *Achieving Our Country*.⁷ The separation of church and state, thus, functions to distinguish a secular liberal morality from all other systems

which declared that their legislature should ‘make no law respecting an establishment of religion or prohibiting the free exercise thereof’, thus building a wall of separation between church and state.” *Thomas Jefferson: Writings*, ed. Merrill D. Peterson (New York: The Library of American 1984), 510. For discussion of Jefferson’s letter to the Danbury Baptists as well as the later history of the “wall of separation” metaphor in American jurisprudence, see Daniel L. Dreisbach, “Thomas Jefferson, a Mammoth Cheese, and the ‘Wall of Separation Between Church and State’,” in *Religion and the New Republic*, op. cit., 65-114.

⁶ Bernard Williams, “Toleration: An Impossible Virtue?” in *Toleration: An Elusive Virtue*, ed. David Heyd (Princeton: Princeton University Press, 1996), 18-27.

⁷ John Rawls, to cite another example, has long been criticized for making arguments in favor of liberal goods under the guise of liberal neutrality.

of morals, especially those derived from traditional or transcendent sources of authority. In practice, contemporary liberalism is marked less by studied disinterest or neutrality toward comprehensive conceptions of the good than it is by highly moral arguments that seek to promote the virtues of autonomy and individual choice.

Therefore, many contemporary interpretations hold implicitly, if not explicitly, that the Constitution is not silent with regard to virtue, but rather speaks *sotto voce*. The paradox of virtue and the Constitution becomes less one of the Constitution's silence than of the rise and seeming establishment of a secular faith hostile not only to traditional religion but to America herself.⁸ Astonishingly, the Establishment Clause is appealed to as ground for this putative establishment. In this essay, I take issue with the prevailing liberal interpretation of the Establishment Clause. I argue that the Constitution is silent with regard to virtue because virtue—morality, religion, and so forth—originally was left to the discretion of the individual states. That is to say, while the federal government is prohibited from promoting or otherwise interfering in the inculcation of virtue, the various state governments enjoy much wider latitude. The silence of the Constitution regarding virtue becomes comprehensible only when placed in the context of American federalism. However, American federalism cannot be rightly understood apart from reference to the doctrine of states' rights, a misunderstood doctrine obscured by a confused interpretation of the "incorporation" of the first nine amendments by means of the Fourteenth Amendment. I argue that federalism understood in light of the doctrine of states' rights provides the key to understanding the means by which the Founders envisioned public virtue being fostered.

Let us begin by examining the Establishment Clause of the First Amendment. While the Establishment Clause is popularly held to prohibit the establishment of a national church (and, by extension, to prohibit official expressions that could be construed as endorsing one faith over another), a careful reading brings out the neutrality of the language with respect to religious establishment itself. Congress shall make no law respecting the *establishment* of religion, nor can it interfere with or *disestablish* churches established by state governments. That is, while Congress is explicitly prohibited from interfering in religious affairs (with "interference" understood broadly as either promoting or discouraging religious activity), the intrinsic value of official efforts to promote religion is carefully passed over without com-

⁸ For particularly egregious examples of this in the field of history, see Ronald T. Takaki, *A Different Mirror: A History of Multicultural America* (New York: Little, Brown, and Co., 1994), and Howard Zinn, *A People's History of the United States: 1492-Present* (New York: Harper Perennial Library, 1995).

ment. The key issue here is not religion, but sovereignty: Congress is prohibited from interfering in affairs left to the discretion of the states, with religion in this case providing one notable example. If a particular state would establish a church, for instance, Congress is powerless under the Establishment Clause to prohibit it.⁹ The Establishment Clause, thus, erects a wall of separation between the *Federal* government and the churches, as well as between the *Federal* government and the various *state* governments. The force of the Establishment Clause is concerned less with the merits of promoting religion than with demarcating an area of concern for state government in which the Federal government is prohibited from interfering. Implicit here is the position that the inculcation of virtue or of character formation generally must be carried out in local communities, and so political responsibility for character formation must be left to local and state governments, rather than to the more distant Federal government.¹⁰

Under this reading, the Establishment Clause is less concerned with excluding religion from the public square than it is with providing further support to the doctrine of states' rights, perhaps the cornerstone of American federalism. Two principles underlay the doctrine of states' rights. The first holds that the powers held by the Federal government are explicitly enumerated and delegated by the states (which then retain all powers not enumerated and delegated, other than those reserved by the people).¹¹ The second, not unrelated to the first, holds that power should be retained on the lowest, most local level at which decisions can reasonably be made and carried out.¹² The doctrine of states' rights holds that power is held by

⁹ This example, of course, reflects the original, pre-Fourteenth Amendment understanding of the Establishment Clause.

¹⁰ Ground for this position was put well by Benjamin Constant: "Love of one's birthplace, especially today, is the only true patriotism. We can find the pleasures of social life everywhere; it is the habits and memories alone which cannot be recreated. Men must, therefore, be attached to those places which offer them memories and habits, and, in order to attain this aim, it is essential to grant them, in their homes, in their communes, as much political importance as possible without injuring the general good." See his *Principles of Politics Applicable to All Representative Governments*, in *Benjamin Constant: Political Writings*, ed. Biancamaria Fontana (Cambridge: Cambridge University Press, 1988), 254.

¹¹ This principle is explicitly expressed in the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

¹² This second principle resembles in many respects the Catholic principle of subsidiarity. However, there is one key difference: subsidiarity as it is understood in Catholic social teachings denotes the devolution of power along a hierarchy, with power (or, better understood, authority) originating at the top of the hierarchy. Samuel H. Beer argues that the principle of subsidiarity as developed by Aquinas amounted to "federalism from the top." See his *To Make*

the people as they are constituted in states; the states, representing its citizens, then delegate certain powers to the Federal government (these powers are enumerated in Art. 1, Sect. 8 of the Constitution).¹³ Political power is “delegated up,” as it were. One important consequence of the doctrine of states’ rights is that, in a federalist system of government, state governments (as opposed to individuals) are the beneficiaries of and right-holders under the Establishment Clause, just as they are the beneficiaries of and right-holders under the Tenth Amendment.¹⁴

It is important for the present argument to make clear the original intent of the Establishment Clause for, as we have noted above, one of the great ironies of American history is that the First Amendment and the Establishment Clause in particular have become the mechanism by which nearly all mention of traditional religion and morality has been driven out of public life. To understand how this turn of events came to be, we must examine the incorporation of the first nine amendments by the Fourteenth Amendment. The doctrine of incorporation holds that the Bill of Rights is binding on the states as well as the Federal government as a result of the passage of the Fourteenth Amendment. Sect. 1 of the Fourteenth Amendment reads, “No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” States were originally exempt from the Bill of Rights. This is plain when we examine Chief Justice John Marshall’s ruling in *Barron v. Baltimore* (1833): “Had Congress engaged in the extraordinary occupation of improving the Constitutions of the several states by affording the people additional protection for the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.” However, this is certainly not to suggest that the states were free to exercise unchecked power. Rather, the limits on state power were found in the state constitutions as well as in common law prac-

a Nation: The Rediscovery of American Federalism (Cambridge: Mass.: Harvard University Press, 1993), esp. 49.

¹³ In Federalist No. 39, Madison argues that while the Constitution is to be ratified by the people of America, “assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong.”

¹⁴ For this reason, Akhil Reed Amar has argued that the Fourteenth Amendment cannot incorporate the Establishment Clause. See his “Some Notes on the Establishment Clause,” *Roger Williams University Law Review* 2 (1996): 1-14.

tices. The limits delineated in the Constitution applied to the Federal government alone.

However, in *Gitlow v. New York* (1925) the Supreme Court recognized that the free speech and press guarantees of the First Amendment are “fundamental rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states.” That is, the rights of free speech and press guaranteed by the First Amendment are incorporated by means of the Due Process Clause of the Fourteenth Amendment and made to apply to the states. In other words, state governments as well as the Federal government are prohibited from abridging the rights of free speech and press. However, the Court did not provide any historical analysis of how the First and Fourteenth Amendments are related or why incorporation was applicable in this instance.

Justice Hugo Black provided the first detailed analysis of the history of the Fourteenth Amendment in his dissenting opinion in *Adamson v. California* (1947). Justice Black argued that one principal goal of the Fourteenth Amendment was to extend the protection guaranteed by the first eight amendments to persons threatened by state action. That is, while the Bill of Rights was originally envisioned as placing limits on the power of the Federal government with respect to both states and individuals, the incorporation of the first eight amendments by means of the Fourteenth Amendment placed limits on the actions states could take against its citizens as well. The force of Justice Black’s dissent in *Adamson v. California* was that the Fourteenth Amendment invalidated the precedent established in *Barron v. Baltimore*, opening the way for open-ended involvement by the Federal government in matters traditionally left to the prerogative of the states.

Again, we return to the issue of sovereignty. The Fourteenth Amendment’s incorporation of the first eight amendments would seemingly void the division of sovereignty characteristic of federalism—especially in light of the fact that incorporation expands the scope and power of the Federal government at the expense of state governments, virtually supplanting the doctrine of states’ rights. In practice, the doctrine of incorporation eclipsed rather than improved state constitutions. Incorporation vitiated the doctrine of states’ rights by effectively nationalizing state governments, turning state and local government into little more than units of provincial administration charged to carry out the policy and dictates of centralized power. The doctrine of Incorporation seemingly recasts federalism by centralizing power in the growing apparatus of the Federal government.

The dispute between incorporation and states’ rights becomes clearer when we realize the nub of the disagreement turns on two opposing views of sovereignty.

Donald W. Livingston describes the two positions as the nationalist and the compact theory, respectively, of sovereignty. The nationalist theory holds that the states were *never* sovereign. Abraham Lincoln was one of the most celebrated proponents of the nationalist persuasion. According to Lincoln in his First Inaugural Address, “[The Union] was formed in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. ... The Union is much older than the Constitution.”¹⁵ That is, the *Union* created the states; *not* the states the Union. In his 4 July 1861 Message to Congress, Lincoln argued that “the States have their *status* IN the Union, and they have no other *legal status*.”¹⁶ Lincoln here denies that the states enjoy the right of succession, which defenders of states’ rights had upheld as the cornerstone of state sovereignty. By denying the legality of succession, Lincoln denies as well the sovereignty of the states. In fact, he made this clear in an earlier statement, when he argued that the “sophism” of states’ rights “derives much—perhaps the whole—of its currency, from the assumption, that there is some omnipotent, and sacred supremacy, pertaining to a State—to each State of our Federal Union.”¹⁷ In other words, the sovereignty of the Union is indivisible. The states cannot possess sovereignty because they are merely derivative units of the original, indivisible sovereign Union.

But what of federalism? Lincoln begins by reiterating the “inherent and fatal weakness” of republican government: “Must a government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?”¹⁸ Both Madison and Hamilton, for example, believed the greater danger to be a government too weak to maintain its own existence. In Federalist No. 45, Madison chided critics of the Constitution for dwelling upon a “secondary inquiry”

¹⁵ Abraham Lincoln, “First Inaugural Address,” in *The Portable Abraham Lincoln*, ed. Andrew Delbanco (New York: Penguin Books, 1992), 198.

¹⁶ “Message to Congress in Special Session,” *op. cit.*, 219. Emphasis in original.

¹⁷ *Ibid.*, 218. The rejection of states’ rights as mere sophistry was not unique to Lincoln. During the Revolution, the proposition that there could exist two sovereign powers within a single state was considered by some “that great political solecism imperium in imperio, a head within a head” See Response of the Worcester Committee of Correspondence to Pittsfield, 8 October 1778. *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780*, ed. Oscar and Mary Handlin (Cambridge, Mass.: Harvard University Press, 1966), 371; quoted in Gordon Wood, *The Creation of the American Republic* (Chapel Hill: University of North Carolina Press, 1969), 373.

¹⁸ *Ibid.*, 213. Emphasis in original.

regarding the possible effects of Federal power on that of the states. Hamilton, in Federalist No. 17, argued that the state governments enjoyed a decisive advantage vis-à-vis the Federal government: Owing to their proximity to the people, the state governments were accordingly much more influential and commanded the loyalties of the people in a way the Federal government simply could not.¹⁹ In addition, Hamilton counseled that the advantages enjoyed by state governments were such that only by means of “better administration” could the Federal government hope to have some claim on the loyalties of the people.²⁰ A composite government, partly national and partly federal, was the means by which the Founders proposed to address the fundamental weakness of republicanism.²¹ Lincoln, however, in his Message to Congress offers his own solution: “This relative matter of National power, and State rights, as a principle, is no other than the principle of *generality* and *locality*. Whatever concerns the whole, should be confided to the whole—to the general government; while, whatever concerns *only* the State, should be left exclusively, to the State.”²² Heretofore, the linchpin of American federalism had been the doctrine of states’ rights, the cornerstone of which had been the sovereignty of the states within the Union. The problem faced by Lincoln was that if he wanted to dispense with states’ rights but retain federalism, he would need to find a mechanism that would make intelligible the relations between the Federal government and the states. This he accomplished with his principle of generality and locality. Lincoln here asserts that sovereignty, being indivisible, is held by the Federal government that in turn delegates power to the states sufficient to address issues of local concern. Simply put, Lincoln puts forth a new federalism that dispenses altogether with the doctrine of states’ rights. The original balance between national and federal

¹⁹ Hamilton adds that the influence of state governments is not due merely to proximity per se, but to “the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large.” Hamilton’s remark echoes that of Constant’s (see note 11), as well as Burke’s famous declaration that “To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed toward a love to our country and to mankind” (*Reflections on the Revolution in France* [New York: Penguin Books, 1968], 135).

²⁰ Madison makes the same claim in Federalist No. 46: “If, therefore, as has been elsewhere remarked, the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome all their antecedent propensities.”

²¹ See in particular Federalist No. 39.

²² “Message to Congress in Special Session,” *The Portable Abraham Lincoln*, op. cit., 220. Emphasis in original.

government has been dismantled, with the national character of government much increased in predominance (and the federal character correspondingly diminished). The end result is a kind of nationalist federalism or, as Samuel Beer would have it, “federalism from the top.”²³ Lincolnian federalism, characterized fundamentally by the nationalist theory of sovereignty, thus prepares the ground for the doctrine of incorporation as it sanctions federal involvement in *any* activity that is claimed to be a national concern.²⁴

Livingston calls the second theory of sovereignty the compact theory. This position, derived in part from works by Johannes Althusius and David Hume, holds that political association is indeed based on consent, but not the once-and-for-all consent characteristic of Enlightenment contract theorists (Rousseau being the example par excellence). Rather, consent is continuous and may be easily withdrawn. Althusius, for example, argues that political legitimation begins with the family rather than with “egoistically motivated individuals in an asocial state of nature” as did the Enlightenment thinkers (and in particular those thinkers closely identified with the French Enlightenment).²⁵ The ground for his assertion is one commonly made of contract theorists: namely, theories of social contract presume a socialized individual. That is, theories of social contract argue that men seek to form political association in order to protect their natural rights; critics respond that social contract theorists simply beg the question of socialized individuals. Whereas contract theorists argue that men move from the state of nature to political society centered around the state, Althusius argues that the family is the first political society—men are, after all, literally born into it. Furthermore, the family is political because it “contains the relations of authority and subordination.”²⁶

Althusius, of course, is not attempting to deny individualism or argue that men are not free to make contracts or form associations. Rather, he argues that while men indeed hold natural rights, these natural rights are wrongly understood if men

²³ For Beer’s articulation and defense of nationalist federalism, see his *To Make a Nation*, op. cit.

²⁴ Ironically, one argument employed by Lincoln in his first debate with Stephen Douglas was that the institution of slavery had become a matter of national concern because its defenders sought to secure the “*perpetuity and nationalization of slavery*” as opposed to merely defending the existence of slavery in their respective states. See “First Lincoln-Douglas Debate,” in *The Portable Abraham Lincoln*, op. cit., 118, emphasis in original. That is, Lincoln charges the defenders of states’ rights with violating in effect their own doctrine.

²⁵ Donald W. Livingston, “The Founding and the Enlightenment: Two Theories of Sovereignty,” in *Vital Remnants*, ed. Gary L. Greg II (Wilmington, Del.: ISI Books, 1999), 247.

²⁶ Ibid.

are viewed simply as an aggregate of over-socialized individuals. Men are parts of families as well as other independent social and political institutions.²⁷ These independent social authorities constrain and order men. Yet, these social authorities comprise a plurality; there is no single authority that commands or supersedes all of the others. Because Althusius recognizes the plurality of independent social authorities, he conceives sovereignty to be divisible: a symbiotic relation between a plurality of social authorities. This is directly contrary to the French Enlightenment thinkers who eliminated independent social authority in favor of a “doctrine of radical individualism and the concomitant doctrine that sovereignty is indivisible.”²⁸ Hume foresaw that a regime founded on the principles of radical individualism and indivisible sovereignty would inexorably lead to a new kind of tyranny.²⁹

According to the compact theory, the states were the primary sovereign units of the American republic.³⁰ States were not, however, solely or exclusively sovereign: Certain powers were delegated up, as it were, to the Federal government; other powers were retained by the people. But it is important to note that “the people” here are not the atomized individuals of contract theory, but rather are social bond individuals living in a society ordered by a plurality of social authorities. Social authority is neither singular nor totalistic. The plurality of social authorities makes possible space between various authorities, for there is no one social authority responsible for everything. Livingston observes that in the space opened up by the early medieval division of sovereignty between the church and the state, the Western idea of liberty first appeared. American federalism is characterized first and foremost by this idea of divisible sovereignty. The doctrine of states’ rights, in turn, was the institutional means par excellence for dividing sovereignty between the state and Federal level, delegating enough power for the Federal government to carry out

²⁷ This older, corporate understanding of individualism was described by such writers as M. E. Bradford and Richard Weaver as “social bond individualism.” For further discussion, see M. E. Bradford, “Is the American Experience Conservative?” in *The Reactionary Imperative: Essays Literary and Political* (La Salle, Ill.: Sherwood Sugden, 1990), and Richard Weaver, “Two Types of American Individualism,” in *The Southern Essays of Richard Weaver*, ed. George M. Curtis III and James J. Thompson, Jr. (Indianapolis: Liberty Press, 1987).

²⁸ *Ibid.*, 248-49.

²⁹ For this reason Lord Acton, in a letter to Robert E. Lee following the defeat of the Confederacy, wrote, “I saw in States’ Rights the only availing check upon the absolutism of the sovereign will ... Therefore I deemed that you were fighting the battles of our liberty, our progress, and our civilization.”

³⁰ One still hears the language of the compact theory in American politics. In his First Inaugural Address, Ronald Reagan asserted that “the States created the central government, the central government did not create the States” (quoted in Livingston, *op. cit.*).

its assigned tasks while retaining sufficient power to limit encroachment by the Federal government on local customs and institutions—in short, on the freedom of individuals rightly understood.

We can now draw some tentative conclusions. We began the present inquiry by reflecting upon the seeming paradox of the Constitution's silence regarding virtue. We dismissed the popular liberal argument that the Constitution's silence simply indicates acknowledgement by the Founders that American government ought to be neutral with respect to all comprehensive conceptions of the good. We did so on two counts. First, the idea of liberal neutrality is philosophically incoherent; second, the language of the First Amendment's Establishment Clause does not prohibit official efforts to establish (or disestablish) religion *per se*. Rather, the Establishment Clause prohibits efforts by the Federal government to interfere in religious matters. The Establishment Clause is primarily an institutional means of limiting the encroachment of the Federal government on the prerogatives of the states. That is, the Establishment Clause is better understood in light of the doctrine of states' rights than as a means for eliminating traditional religion and morality from the public square altogether.

As noted, however, one of the great ironies of American history is that the First Amendment and in particular the Establishment Clause have become the means *par excellence* by which traditional religion and morality have been driven out of public life. This particular turn of events came about by means of the doctrine of Incorporation, whereby the Fourteenth Amendment consolidated the first eight amendments to the Constitution and applied them against the states with the same force and meaning as they had originally been applied against the Federal government. Incorporation can be understood as the recasting of federalism minus the doctrine of states' rights. To fully understand the ramifications of this, we examined two competing types of sovereignty: the nationalist and the compact theory, respectively. The nationalist theory holds that individuals are political insofar as men move from the state of nature to political society (with this move sanctioned by the social contract struck by these men among themselves) and that sovereignty is indivisible. Nationalist theorists play pleasing melodies such as "government of the people, by the people, and for the people," with the people always understood as an aggregate of egoistic individuals.³¹ Often in the name of justice or some other ab-

³¹ The perilousness of individuals in the face of state power was put well by Benjamin Constant: "The interests and memories which spring from local customs contain a germ of resistance which is so distasteful to authority that it hastens to uproot it. Authority finds private indi-

stract ideal, the central government renders impotent all other sources of social and political authority. The compact theory of sovereignty, in contrast, is characterized by social-bond individualism and divisible sovereignty. Both characteristics reflect the plurality of social authorities that allow for the possibility of ordered liberty.

American federalism is rightly understood by reference to the doctrine of states' rights and to the compact theory of sovereignty. The silence of the Constitution with regard to public virtue becomes clear, for we realize that the intent of the Founders was not to mute or prohibit official promotion of virtue or morality, but rather to limit the encroachment of centralized power on what Burke fondly called the "little platoon we belong to in society." The Founders, no less than Burke, recognized that the seedbeds of virtue were found in these little platoons. Accordingly, the state promotes public virtue best not by promulgating a favored system of morals but by strengthening and giving wide latitude to the little platoons. Religion is far too important to be left exclusively to government. In other words, the Constitution is silent with respect to virtue by design. This silence points to the provision that the Founders made for virtue—that government best fosters virtue less by its own efforts than by acknowledging the plurality of social authorities that order local communities. By dispensing with the doctrine of states' rights, Lincoln effectively voided the means by which the Founders envisioned public virtue being promoted among the people. This is not to say that American government has dispensed with virtue altogether. The past fifty years or so have constituted a long national experiment in which a single system of morals has been promoted unceasingly by the Federal government, with promotion abetted in no small part by the Constitutional developments described in this paper. If we have been successful in pointing to the unintended consequences of even the most well-intended actions, we will consider our efforts here worthwhile.

viduals easier game; its enormous weight can flatten them out effortlessly as if they were so much sand."