The U. S. Constitution of 1789 and Natural Law: Concord or Conflict?

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Delivered to the Constitutional Thought and History Seminar
Pembroke College, Oxford University
February 26, 2015

Three Views of the Constitution's Moral Foundations

My topic for this afternoon is the relation of the United States Constitution of 1789 to classical natural law. This relation has long been the subject of considerable debate. The debate notwithstanding, the vast majority of contemporary scholars who write on the Constitution's moral foundation hold that the relation of the Constitution of 1789 to classical natural law is one of conflict rather than concord. I will call this account of the relation the *conflict thesis*. This afternoon I want to set my face against the prevailing winds and argue that the relation of the Constitution of 1789 to classical natural law is one of *concord rather than conflict*. I will call this the *concord thesis*.[1] We might distinguish two variants of the *concord thesis*. The *weak* version of the thesis holds only that there is no opposition between the Constitution and classical natural law (the *weak* variant is simply a denial of the *conflict thesis*). I want to argue something stronger (the *strong version* of the *concord* thesis): The Constitution of 1789—in particular, the institutional structure that it effectuates—presupposes classical natural law, OR, more aptly, the institutional structure put into effect by the Constitution of 1789 is intelligible *only given* classical natural law. Doubtless you now think that I, like King Lear, am running headlong into the wind, fist raised to Heaven, and shouting "Blow, wind, blow" or perhaps just tilting at windmills.

Before proceeding I had best say what I mean by "classical natural law." Natural law in the classical sense refers to an objective moral order that is discerned by reason and that binds all persons, at all times, and in all places. This moral order is not created by human will or convention but, rather, is normative for human willing and human action. Moreover, the moral order overarches ruled and ruler alike and is binding on both. When human rulers command that which is contrary to the moral order—if, for instance, they command something unjust—then those commands are not exercises of authority and those to whom they are directed are not obligated to obey. The prescriptions and prohibitions of this objective moral order are essentially connected to an objective or real goodness. In its most fundamental requirements the natural law commands or requires that which is simply, absolutely or intrinsically good and forbids that which is simply or intrinsically evil. As well, on classical natural law theory, law *per se* (and so any species of law) is directed toward the common good. Any putative human "law" that is contrary to the common good—by being for the advantage of some part of the community, for instance, rather than the good of the whole—isn't really a law at all. The Athenian stranger of Plato's last work, *The Laws*, calls laws that are not for the common good "bogus laws." He goes on to say that those who say such laws have a claim on our obedience are "wasting their breath." I should add that finite or human *good* on the classical understanding is teleological. The good of anything consists in performing its proper function with excellence. And the proper function for

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[1] I am not the only one to have argued for the *concord thesis*. A version of the thesis was advanced by Edward S. Corwin in his 1928 and 1929 *Harvard Law Review* articles, both entitled "The 'Higher Law' Background of American Constitutional Law," and by Morton White in *The Philosophy of the American Revolution* and *Philosophy, The Federalist, and the Constitution*. And there have been others. I believe that some earlier proponents of the *concord thesis* (and here Corwin and White are illustrative) held a flawed understanding of classical natural law. Moreover, as will become apparent, my way of arguing for the *concord thesis* is also different from the way others have argued for it.

human beings is living according to reason (insofar as the account of reason we have in view is a noninstrumental or substantive account).

Now you might wonder just how likely it is that the Constitution of 1789 reflects a commitment to the foregoing account of moral reality. After all, its framers described the political order they were constructing as a *novus ordo seclorum*—a new order for the ages. Taking this claim as their point of departure, a number of scholars have claimed that the Constitution of 1789 is the first distinctively *modern* Constitution. By this they mean that the Constitution of 1789 embodies the commitment of its architects to modern philosophy. The argument usually runs something like this: (1) The Constitution's meaning is determined by the framers intentions; (2) The framers subscribed to modern philosophy and intended their Constitution to reflect those commitments; therefore (3) The Constitution embodies the tenets of modern moral and political philosophy. And this commitment to modern philosophy entails the rejection of classical natural law. Thus, the modernist interpretation of the Constitution is an instance of the *conflict thesis*.

Those who advance the *modernist* interpretation of the Constitution (Frank Coleman, Walter Berns, Thomas Pangle, and Gary McDowell, among others) generally depict modern philosophy (especially moral and political philosophy) in Hobbesian terms. Like most distinctively modern philosophers, Thomas Hobbes affirmed a nominalist ontology—He rejected Aristotle and Scholastic ideas concerning forms and universals and maintained that only particulars exist. Together with his nominalist ontology, Hobbes affirmed the subjectivity of good and evil. *Good*, he said, refers to nothing other than objects of appetite or desire. *Evil* refers to nothing other than objects of hate or aversion: "For these words of good [and] evil . . . are ever used with relation to the person that useth them, *there being nothing simply and absolutely so, nor any common rule of good and evil to be taken from the nature of the objects themselves*." But if nothing is simply or absolutely good, then there is no greatest good that we ought to desire—whether or not we do desire it. And this implication entails the rejection of classical moral philosophy. Thus, Hobbes writes, "there is no such *Finis ultimus* (utmost aim) nor *Summum Bonum* (greatest good) as is spoken of in the books of the old moral philosophers. Nor can a man any more live, whose desires at an end, than he whose senses and imaginations are at a stand. Felicity is a continual progress of the desire, from one object to another, the attaining of the former being still but the way to the latter. The cause whereof is that the object of man's desire is not to enjoy once only, and for one instant of time, but to assure forever the way of his future desire." Since power is the means of attaining desired objects, Hobbes says human beings are moved by a restless desire for power after power that ceases only in death.

Human desire is in principle unlimited. But human beings inhabit a world of limited goods. Consequently, the goods of the world are scarce relative to human desire. The scarcity of goods means that often two or more individuals come to desire some good that they cannot both (or all) enjoy. When this happens Hobbes says the individuals in question become enemies. This enmity, together with human equality of ability and hope entails that the natural condition is a war of each against all in which each person lives in constant fear and danger of sudden and violent death. Sudden and violent death, however, is our greatest fear—that which we most want to avoid, that to which we are most averse. Any rational person will therefore want to leave or to avoid living in the state of nature. It is just here that Hobbes's introduces his laws of nature,

which counsel individuals to seek peace with others insofar as those others will seek peace with them. The laws of nature ultimately aim at self-preservation. But they do this by putting in place rules for establishing and maintaining peace among individuals who are by nature enemies. In order to seek peace, individuals must agree to lay down the right of nature—the right to everything and to do anything, even make use of another's body in order to survive.

In the state of nature individuals are unrestrained by moral law or the requirements of an objective justice in their relations to each other. Hobbes says neither just nor unjust have there [in the state of nature] any place. Instead, individuals in the state of nature possess an unrestricted license to everything that they judge necessary for or conducive to their own survival. But so long as individuals retain this right, then they remain in the state of nature. The state of nature can only be left when individuals lay down their right to all things. But an individual can only law down the right of nature by transferring it to another—to the sovereign—who then has it. In sum, Hobbesian natural law counsels seeking peace in order to secure one's own preservation. Seeking peace requires each person to lay down the right of nature. And the right of nature can only be effectively laid down by transferring it to a sovereign power. Hobbes says sovereign power is absolute, by which he means "indivisible" and "unlimited". And so Hobbesian natural law underwrites absolute or unlimited sovereign power. A popular sovereign of the Hobbesian sort would therefore be unlimited—it would have the power to do anything in order to secure the good of peace.

Now to call someone a "Hobbist" was a term of opprobrium or disapprobation among the founders and framers, who expressly rejected Hobbesian thought. But the political theorists who advance the modernist interpretation of the Constitution hold that the American founders and framers absorbed Hobbesian premises indirectly through works authored by Samuel von Pufendorf, Jean Jacques Burlamaqui, Emer De Vattel, and John Locke, among others. But I will set aside consideration of the soundness of the claim that these individuals served as conduits for the political philosophy of Hobbes. The argument about the Constitution's moral frame does not depend, one way or the other, on the implausibility (or plausibility) of this claim.

The modernist interpretation of the Constitution is not the only version of the *conflict thesis*. Legal scholars have long been enamored with the view of Supreme Court Justice Oliver Wendell Holmes. In a letter to his friend, the British political scientists Harold Laski, Holmes wrote: "As I always say . . . if my fellow citizens want to go to Hell I will help them. It's my job." This, as Michael Sandel notes in *Democracy's Discontent*, was a statement of his judicial philosophy—a philosophy that wedded judicial deference to popular majorities to an interpretation of the Constitution, "that says the Constitution does not embody any particular conception of the good." Sandel writes, Holmes's "point was *not only* that judges should refrain from imposing *their* morality on the Constitution, but also that *the Constitution itself refuses to endorse any particular morality*" (44-5). Thus, in his first opinion for the Court in *Otis v. Parker* in 1903, Holmes's wrote, "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this Court can know but imperfectly, if at all. *Otherwise, a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-*

speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus* [always, everywhere, and by all]" (emphasis added). On Holmes's view, then, a constitution (and so of course the Constitution of the United States) embodies rules of right that are only relatively fundamental—which is to say, not absolutely fundamental. In other words, Holmes rejected the very notion of a Constitution that presupposes or embodies rules are laws that are right for all men, at all times, and in all places. Holmes's view of a morally indifferent Constitution logically coheres with his relativism in matters moral and metaphysical. In his (in)famous *Harvard Law Review* article entitled "Natural Law," Holmes recalls that, as a young man, he used to say "truth was the majority vote of the nation that could lick all the others." His settled view as a justice of the Supreme Court was that the judgment of the younger Holmes was essentially correct. "The test of truth," he wrote, "is a reference to either a present or an imagined future majority in favor of our view." I should note that Holmes's putatively morally indifferent Constitution was not really morally indifferent at all. For the Constitution on Holmes's view embodies a commitment to the metaethical position of moral relativism (or to some sufficiently similar expressivist or orectic view as to present a distinction without difference).

The overwhelming view of legal scholars who write on or teach the Constitution or Constitutional law is legal positivism, the self-referential incoherence of that view notwithstanding (see Chapter 5 of *Uncovering the Constitution's Moral Design* for a critique of H.L.A. Hart along these lines and see Robert C. Koons *Realism Regained* for a critique of Kelsen). When it comes to Constitutional moral foundations, legal positivists are one with Holmes (this is quite clear from what Hart maintained in reply to Lon Fuller). According to H. Jefferson Powell, for *positivists* "The Constitution's text is overwhelmingly concerned with process. Virtually all of the 1787 instrument deals with structuring the institutions of national government, all of which are majoritarian or subject to majoritarian control." On the Holmesian and positivist view, the Constitution concerns itself with how law is made and *not* with the content of the law or the ends that it aims to achieve. On this view the Constitution has no underlying moral commitments. It is morally indifferent. *Conflict not concord*.

Problems of Original Intent

Now I think that classical natural law constitutes the Constitution's normative ground. But how should we sort this matter out? The first move in my argument is to distinguish between the Constitution itself and the subjective intentions of its framers (and of its ratifiers). I think that original intentionalism—where the subjective intentions of the framers are taken to be determinative of the Constitution's meaning—is problematic for a number of reasons (see *Uncovering*, Chapter 1). I will focus on two objections that seem to me decisive. *First*, the framers of the Constitution themselves maintained that we should not recur to their subjective or personal intentions when trying to ascertain the Constitution's meaning. Thus, in a letter from 1821 to John Jackson, Madison wrote that we must distinguish between the Constitution's "true meaning" and "whatever might have been the opinions entertained in forming the Constitution." During the First Congress, he argued that "[W]hatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the Oracular guide in expounding the Constitution." Similarly, in the course of his debate with Jefferson over the Constitutionality of a national bank, Hamilton wrote, "[W]hatever may have

been the intentions of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual & established rules of construction. Nothing is more common than for laws to *express* and *effect*, more or less than was intended." In view of statements like these, anyone who faithfully follows the framers intentions, must reject reliance on those very intentions when it comes to ascertaining the Constitution's meaning, moral or otherwise. Original intentionalism, it turns out, is self-referentially incoherent. One might attempt to get around this difficulty by positing that the intention of the ratifiers—rather than the framers (who could be considered draftsmen rather than authors)—that determines what the Constitution means. But this revised position falls prey to my second objection to original intentionalism.

My *second* argument counts against any sort of (subjective) intentionalist account of Constitutional meaning—whether framers' intentions, ratifiers' intentions, or the intentions of political actors or citizens today. Subjective intentionalism in any form conflates the intentions individuals have (with respect to some thing or other) with that which the intentions are about. Any claim about the ontic status or meaning of *x* is one thing; any claim about the intentions of any person *p* concerning *x* another. So, on the one hand, we have the state of affairs in which *x* means *y* and the state of affairs in which *p* intends *x* to mean *y*. And these are not just the same state of affairs. It is entirely possible that *x* means *y* even though *p* (who invented or wrote *x*) intends *x* to mean *z*. Subjective intentionalism (whomever is doing the intending) fails to distinguish these states of affairs. Subjective intentionalism (whether advanced by McDowell or the living constitutionalists he opposes) is therefore premised on a modal conflation of the first order. It must therefore be rejected.

Consequently, if we want to know the Constitution's relation to classical natural law, we shall have to examine the thing itself. I am not suggesting we reject the framers or what they say. If they were wise and talented framers, then what they have to say about the Constitution should (to some significant degree) capture what it is. But it would be logically fallacious to equate the Constitution with what they say about it or with their intentions for it. From the foregoing this follows: Even if the framers absorbed the premises of Hobbes (directly or through Locke or Pufendorf or Rutherforth), it *does not follow that the Constitution is Hobbesian*. It's possible, as Orestes Brownson says, that the framers built the Constitution better than they knew. Compatible with the foregoing, I hold that where works such as *The Federalist* explicate the Constitutional structure, we should pay attention to what the framers say. But we should also observe Madison's caution to take arguments therein with a grain of salt. Works like *The Federalist* can help us ascertain the Constitution's purposes and meaning to the degree that such work captures the thing itself. I think the *Federalist* essays may be the best account of the institutional structure of the Constitution. But this should be a conclusion reached on reflection and not an *a priori* assumption predicated upon the conflation of *The Federalist* with the political order effected by the Constitution.

Who Rules?: Constrained Popular Sovereignty

Turning to the Constitution itself, I submit that we should consider how the Constitution frames sovereign power. To ascertain just how the Constitution frames sovereignty, we need to answer to logically antecedent questions: (1) Who is sovereign for this regime (i.e., who

possesses final say when it comes to law)? and (2) What is the nature of the sovereignty they possess—constrained or unconstrained; limited or not? My answer to the first question is that the Constitution instantiates the final say of the people (i.e., it instantiates unmixed popular sovereignty). But before elaborating that answer any further, I want first to address the second question. My answer to the second question is this: Any putative sovereign for this constitutional order is limited or constrained. Put another way, there is no plausible candidate for a sovereign in the Hobbesian (or Holmesian) sense. To see why this is so, consider possible candidates for sovereign: The national government (or those who exercise the instruments of power), some department of the government (the legislative, executive, or judiciary), the states (given a provision of the Articles of Confederation and the doctrine of some—especially sessionists at the time of the civil war), the people (either nationally or as collected in states or as compound of both), and (per a suggestion by McDowell, I think) the Constitution itself. None of these exercises anything like unlimited or unconstrained final say.

Let's begin with the various departments of the national government. According to William Blackstone, legislative and sovereignty are convertible. According to Berns (or to Locke as rendered by Berns), the sovereign consists of all those who have a share in legislative power. On this way of thinking, the sovereign power for any given society is that power which makes the law. Suppose we take that power to be the legislature, Parliament in England and Congress in the United States. If the Congress is sovereign (that is, if Congress possesses final say as to law, etc.), then is Congress a Hobbesian sovereign? Is its power absolute or unconstrained (as Blackstone seemingly described the power of Parliament)? While I think it apparent that Congress possesses a kind of end-of-the-day, final say as to law *within the government* and, consequently, (at least arguably) the lion's share of power *within the government* (even if it doesn't always behave as if this is so), I cannot see how anyone can view the legislature as unconstrained. Elections mean that the people exercise a kind of end-of-the-day, final say with respect to the legislature. As well, the executive veto (though it can be overridden) and judicial review constitute real and non-trivial limitations on the exercise of legislative will. Moreover, as Madison suggests (and Hobbes would concur—though he would take this to count against the Constitution), bicameralism is a considerable constraint on legislative power. If legislative and sovereignty are convertible, then bicameralism is divided sovereignty with a vengeance. And divided sovereignty is inherently constraining. Finally, the Congress has only those powers delegated to it in Art. I, sec. 8 *and* Art. I, sec. 9 and the Bill of Rights expressly prohibit Congress from enacting certain sorts of laws. The only reasonable conclusion is that legislative power is considerably circumscribed.

So much for the legislature. What about the executive or the judiciary? One could conceive of a system in which there were various departments of the government and in which the executive was supreme with respect to the other departments (perhaps, for instance, the executive has an absolute veto over legislative decisions together with other extraordinary powers). Likewise, the Anti-Federalist Brutus took the Constitution proposed by the Convention of 1787 to entail judicial supremacy not only within the government but also within the political system as a whole—he took the judiciary to have final say as to what the Constitution means, final say about what the Constitution means to be final say as to what counts as law, and final say as to what counts as law to be sovereign power. But if the national legislature is circumscribed by Constitution, the judiciary and the executive are (at least arguably) more so. Judges and the

executive can be impeached and removed by the legislature. The executive's veto of legislative decisions can be overridden by the legislature and so is not final. Moreover, what the executive is empowered to do depends significantly upon what laws are passed. Without laws to enforce, the power of the executive is minimal indeed. Likewise, the reach of the Court's depends very much upon how Congress frames the jurisdiction of the lower courts and the appellate power of the Supreme Court. As well, Congress can except anything it wants (at any time it wants and for any reason it wants) from the appellate jurisdiction of the Court. Congress also controls the number of judges who sit on the bench—and can impact judicial decisions over time by raising or lowering that number (as Congress did during the Civil War and Reconstruction era). Moreover, as Hamilton notes, Court decisions only have effect to the degree that the executive is willing to enforce them. But Presidents have often refused to enforce decisions of the national judiciary and of the nation's high Court (the list includes such Presidents as Thomas Jefferson, Andrew Jackson, and Abraham Lincoln; FDR stood ready to defy the Supreme Court if they ruled taking the country off of the gold standard unconstitutional). Finally, decisions of the Court can be and have been overturned by Constitutional amendment (on 4 occasions). Clearly it would be a bridge (maybe several) too far to characterize either the Supreme Court or the President as sovereign in any sort of unconstrained or unlimited sense.

Though each part of the national government is limited in the exercise of its power, it does not follow (logically) that the national government as a whole is also limited (to say otherwise would be to commit the fallacy of composition). So is the national government as a whole an absolute or unconstrained Leviathan? I confess that I find the suggestion implausible. The very nature of a constitutional system such as the one ratified in 1789 implies that the federal government is subordinate to a Constitution ratified and amendable by the people. Moreover, it is not simply the jurisdiction of Congress that is limited by the Art. I, sec. 8 delegation of powers; nor is it legislative power alone that is restricted by provisions in the Bill of Rights or Art. I, sec. 9. The power of the national government as a whole is limited by those provisions. As well, the limited enumeration of powers implies that some powers have been reserved to the states (even if we might legitimately dispute the *extent* to which this is the case). The existence of other governments, with their own power and jurisdiction, must be considered a real limit upon national power. Further, those who occupy office or exercise governmental functions are removable from office—either because they must stand for reelection or because that branch closest to the people, the legislative branch, retains the power to remove appointed officials such as judges or executive officers appointed by the President (Art. II, sec. 4). Such constraints on national officials constrain the national government itself.

Consider also that the Constitution of 1789 separates the powers or functions of government into different departments. Moreover, the argument of *Federalist* nos. 47-51 concerns the best method for keeping the separation of functions in place. Over and against the separation of powers doctrine defended by Madison and instantiated in the Constitution, Hobbes holds that sovereignty is indivisible. The sovereign not only exercises the rights of sovereign power (which include making and enforcing laws as well as judging disputes under the law), but the rights of sovereign power must also be exercised by the same hands. It is in this context that Hobbes blames the English civil war upon the opinion that the rights or parts of sovereign power

were "divided between" King, Lords, and Commons.[2] As Hobbes sees it, sovereign power is destroyed when the rights or parts of sovereign power are placed in different hands (say, some prerogatives of sovereign power are placed with the King, other parts with Lords, still others with Commons)—divide and conquer, as it were. Hobbes goes too far here. He is right to hold that separating the rights of sovereign power (in his terminology) or the powers or functions of government (in Madisonian language) is inherently constraining. But Hobbes is wrong to think such limitation destroys sovereign power or to think that *limited sovereignty* (or limited authority) is an unintelligible notion (and Hobbes has no argument that is both valid and sound showing that it is). My point here, however, is simply that Hobbes would view the separation of powers as inherently limiting and so would view it as inconsistent with his doctrine that sovereign power is absolute. More to the point, if the national government is sovereign and if the powers of that government are separated into distinct branches, then the national government is a limited sovereign indeed.

So much for the national government. What about the states? At various points in American history, the states have been considered sovereign (by the Articles of Confederation or by secessionists at the time of the Civil War). Though I think there are obvious problems with the doctrine of state sovereignty (and that whether we take the states one by one or together—a distinction usually neglected by state sovereigntists), for the sake of argument let's suppose that the states are sovereign. If so, are they unlimited or unconstrained? This suggestion is implausible as well. Art. I, sec. 10 forbids states to pass *ex post facto* laws, bills of attainder, or any law impairing the obligation of contracts. States are also prohibited from coining money, granting titles of nobility, or entering into treaties, alliances, or leagues. Likewise, the states are constrained by the Civil War amendments to the Constitution. As well, the supremacy clause makes national law grounded in the Constitution a potential veto upon conflicting provisions in state laws and constitutions. Finally (and relatedly), federalism (and the tenth amendment) means some powers of government have *not* been reserved to the states. But if the states were unconstrained or absolute sovereigns, then they would exercise all the powers of government (either collectively or individually).

This leaves the people. Suppose the people are sovereign. Are they also an unconstrained sovereign? It's hard to see how. As Madison suggests in *Federalist* 51, the purpose of government (at least as envisioned by the Constitution) is to control both rulers and the ruled. In *Uncovering the Constitution's Moral Design* I noted that the Constitution enacts laws for individuals. And the national government enforces these by the imposition of severe sanctions for the violation of law. Surely a people so subjected to their government, if sovereign, can only reasonably be viewed as a very constrained sovereign. Indeed, isn't the mere existence of government constraining upon a people. I'm inclined to think so. But suppose an objector says my argument commits the fallacy of composition? Even if the government—through its ability to enact and enforce laws upon individuals—significantly constrains the will of each and every individual, it does *not* follow that the people as a whole are constrained (or that popular will is thereby constrained). Each citizen may be constrained or limited in their will, even when it comes to acting as a member of the body politic, and yet the people as a whole may (perhaps) be absolute or unconstrained. Thus, we are compelled to ask whether there is any further

[2] *Leviathan*, Part II, Chapter XVIII, 115-6. See also p. 118.

argument that the people (or society) is—*if sovereign*—in any sense constrained. Again, I answer in the affirmative.

By limiting the powers of the national government, the Constitution limits what the people can do through their government. Limits as to what can be enacted into law by the government are therefore also limits upon what the popular sovereign can enact into law. But can't the popular sovereign simply remove these limits any time it wants by amending the Constitution? Here I think the answer is negative. First, the amendment process makes Constitutional amendment difficult thereby making the adoption of any given amendment unlikely. Surely the improbability of any given amendment succeeding serves as a kind of constraint on popular will. Second, the procedures for ratifying amendments requires a long-term, nationally distributed majority. To be sure, the requirements for amending the Constitution may impose purely procedural constraints upon the popular sovereign. But whether the constraints on popular sovereignty are substantive or purely procedural leaves my argument unaffected one way or the other. Purely procedural constraints are still constraints. Finally, popular sovereignty is not the sovereignty of an undifferentiated mass but rather of a complex (or compound) aggregate. The sovereignty of the people is a sovereignty of the people aggregated nationally *and* aggregated in states. And this division of political power into two distinct aggregations of the people can be nothing but constraining (much as bicameralism constrains the exercise of legislative power).

The foregoing entails that any putative sovereign under this Constitution is constrained or limited. By implication, no putative sovereign under this Constitution is unlimited or absolute. A possible objection emerges at this point. So far the argument is that no person or office under the Constitution constitutes an absolute or Hobbesian sovereign. But perhaps no person or office is sovereign under this Constitution. Perhaps the Constitution itself is sovereign. Now sovereignty, if it exists, seems like the sort of thing that can only be possessed and exercised by persons (perhaps on account of standing in some office). But let's grant the objector his initial point. If the Constitution is sovereign, can it be considered absolute or unlimited? I think the provisions for Constitutional amendment mean that it's quite obviously not an unlimited or unconstrained sovereign. The amendment process is best explained as an instantiation of the authority of the people over the Constitution they ordain. And this returns us to the implausibility of the claim that Constitution is sovereign. For how can that which is ordained be superior to that which ordains it? How can the instrument of the people be superior to those whose instrument it is?

So we return to the conclusion—no putative sovereign for this political order is rightly construed as absolute or unlimited sovereign. But we still need to know where the Constitution locates sovereign power (or, more aptly, political authority). Here I think there are two very general possibilities. Either the sovereign is wholly popular or it is not. If it is wholly popular then it is the people as a whole that exercises final say. If the sovereign is not wholly popular, then the sovereign is either not-at-all popular (as in the case of a monarchy) or it is a mix of popular and non-popular elements. The latter sort of sovereignty shows up in what we call a mixed regime. In a mixed regime the people as a whole share final say over what shall be law with some other person or group not subject to the people's control—perhaps a hereditary monarch or an aristocracy. Consequently, if the sovereign, in our Constitutional system, is not

wholly popular, then we should be able to point to something like a hereditary monarch or to some branch composed of and, if elected at all, then elected only by the those with landed property. As James Madison argues in *Federalist* 39, however, all governmental institutions trace back to the people as a whole. No one gets appointed to office by virtue of mere heredity. There are no property requirements for electing any branches of the government such that one must possess landed property in order to be elected and such that those who do the voting must also possess landed property. Even when we had property requirements for voting in State legislative elections, the amount of property one had to own was usually an exceedingly small amount and the requirement could usually be gotten around. Given this (per *modus tollens:* If A, then B; not B; therefore not A), I suggest that we have good reason to eliminate mixed sovereignty. Given the electoral features of the Constitution, I think we have reason to eliminate the notion that the sovereign is not-at-all popular as well. By implication, it follows that the sovereign is wholly popular. This finding comports with the assessments both of Patrick Henry, who very much opposed the Constitution, and of James Wilson who very much supported it. It also fits with Madison's description of the regime in *Federalist* 14 as being "unmixed."

Though my argument can rest here, the way in which the Constitution frames popular sovereignty also entails the rejection of Hobbes and Holmes in matters metaphysical and moral. To see why, we need to consider the way in which the Constitution constrains popular sovereignty. Our system is not designed to give the people whatever they want right when they want it. While framers like James Madison wanted popular rule and majoritarian government (as a careful reading of the *Federalist* or of his speeches at the Constitutional Convention reveals), Madison did not want rule by popular whim. Madison hoped for the rule of deliberative, reflective and just popular majorities. He and other framers believed that justice and the common good corresponded, generally speaking, to long-term and broad public opinion and not at all to immediate popular will.[3] So they created a system designed to achieve government by long-term popular will. In order to achieve this, he and the other framers placed multiple-veto points into the Constitution. And these veto points (places where a bill can fail to become a law) slow down the legislative process considerably. Thus, a bill must clear two houses of Congress and the President in order to become a law; sometimes a law must withstand judicial review to remain a law; and these are just the formal requirements. As Hamilton says, in the legislative process, "promptitude of decision is oftener an evil than a benefit" (*Federalist* no. 70).

The framers hoped bicameralism and the executive veto would promote multiple examinations from various perspectives of a proposed law from before the bill was adopted and went into effect (says Hamilton, "The oftener a measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation," *Federalist* no. 73). And in this particular, their intentions and the way the Constitution works go hand in hand. The Constitution actively favors long-term popular will over immediate popular will. The multiple veto points built into the legislative process mean that a proposed law is examined multiple times thereby

[3] The truth-value of my conclusion does not depend on Madison's hope for the Constitution—that it would promote the common good—being realized. Nor does it depend upon his assumption—that the common good and long-term popular will usually go together—being correct.

ensuring that the legislative process is time consuming. And if the legislative process is time consuming, then only long-term preferences can (all other things equal) find their way into law. The framers also put into effect a large rather than small republic. In a republic of this size, majority formation is difficult, but not impossible. A majority in a large republic is comprised of many more people than a majority in a small republic. Consequently, building majorities in an extended republic takes much longer than it does in a small republic. Once again, this time because of the extended sphere, only long-term preferences, *ceteris paribus*, will find their way into law. Consequently, the Constitution promotes rule by long-term popular will rather than by immediate popular will. That is, the Constitution distinguishes long-term popular will (or long-term preferences) from immediate popular will (or immediate preferences) by favoring the former over the latter.

My argument comes to this: the Constitution is a kind of preference sorting device. Developing this notion, *Federalist 10*, produces a rather powerful argument to the effect that the Constitution, by virtue of the extended sphere, favors non-factitious majorities over factitious ones—which is to say that it favors non-factitious majority will over factitious majority will. According to Madison, the larger the republic the more factions that are encompassed within its borders. The more factions there are, the less likely it is that any one faction is in the majority. And therefore the less likely it is that a group animated by a common, unjust motive exists. But even if such a group does exist in an extended republic, such a group will have a hard time discovering itself. And even if it does, it will have a hard time getting much done. After all people animated by injustice are naturally suspicious of others. They will suspect people even in there own group. The more people that are necessary for the group to form a majority, the more people there are of whom to be suspicious and, consequently, the less likely an unjust and selfish person is to cooperate with them. So a large republic lessens the danger of faction by making it unlikely that any faction is a majority and by making it difficult for a majority faction, if it exists, to carry out its schemes. The Constitution, by promoting popular will and establishing an extended republic aims to sort majorities in a manner that favors non-factitious majorities over factitious ones. That Publius seeks to prevent rule by factious majorities for the sake of rule by non-factious ones is evident from the conclusion of *Federalist* no. 51: "In the extended republic of the United States, and among the great variety of sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good" (see also the passage in *Federalist* 63, where Madison discusses the rightful rule of deliberate public opinion and his *National Gazette* essay on public opinion).

For all that, my argument here only requires that the Constitution distinguishes long-term from short term popular/majority will (or preference or opinion). Put another way, my argument will not rely on Madison's claim that long-term popular will or long-term, broadly distributed majorities are more likely to be just than short-term, narrow ones. Nor does my argument depend on the interesting correlative claim that in an extended republic majorities could seldom form save for on the principles of justice and the common good.

The Implication of Constrained Popular Sovereignty

Contra the unrestrained democratic majoritarianism of Oliver Wendell Holmes, the Constitution is not *simply* a device for translating majority will or the will of the people into law.

The Constitution does provide for the translation of majority or popular will into law. But it also distinguishes long term popular will (or long-lasting majorities) from immediate ones. And precisely this distinguishing entails that the Constitution cannot be Hobbesian or Holmesian in metaphysics or morals. For, as I've argued elsewhere, it is impossible intelligibly to distinguish between long-term popular will and immediate popular will on the basis of will alone. This is true just because it is impossible intelligibly to distinguish among exercises of will on the basis of will alone. This premise is eminently defensible.

My argument for the proposition that it is impossible to distinguish some exercises of will from others on the basis of nothing but will proceeds as follows. It's possible to conceive of the set of every possible and actual exercise of will (whether voluntary, compelled, individual, corporate, minority, majority, of all, etc.). Abstractly such a set might be characterized as (W_1, W_2, W_3, . . . W_n). Now, it is impossible to distinguish some members of this set from others on the basis of will alone. That is, you cannot distinguish W_4 from W_5 or from any other member of the set or from the set as a whole on the basis of W_4 being an exercise of will. This follows from a truth about sets generally speaking. Take, for instance, the set of prime numbers beginning with 2 and running to infinity: (2, 3, 5, 7, 11, 13 . . .). It makes no sense to distinguish 7 from 3 and 13 on the basis of 7's primeness. Why not? Because it is logically impossible to distinguish some member(s) of a set from others on the basis of property (or properties) by which the set is defined (or, more aptly, on the basis of the predication of the property or properties defining the set). This constitutes my major premise (call it **(1)**). The minor premise (call it **(2)**) is that the set of all instances of will (possible or actual) comprises a set (or, at least, can be conceived as a set). But, in that case, **(3)** it is impossible to distinguish among exercises of will on the basis of will alone (this follows necessarily from my major and minor premises). From these premises and the conclusion (from **(1)-(3)**), it follows that **(4)** some exercise of will or other (whether of society or of the individual) cannot be taken as normative or obligatory for other exercises of will (such that other exercises of will must conform to it) on the basis of nothing but sheer will. Consequently, **(5)** if some exercise of will is normative or obligatory for others, then it will have to be on the basis of a real normative property such as goodness or rightness or obligatoriness that *transcends the set* of exercises of will and that is normative for human willing. That is, distinguishing some exercises of will from others requires positing a real standard of goodness or rightness, a real moral law. It is on the basis of this that I have elsewhere argued for the self-referential incoherency of ethical voluntarism (whether theistic or secular) and of conventionalism (and, consequently, conventional social contract theory).[4]

[4] The argument for the self-referential incoherency of conventionalism and voluntarism goes something like this: (1) conventionalism and voluntarism reject an grounds for normative or moral claims other than will (of God, of the community, of the individual, etc.), (2) Consequently, conventionalists and voluntarists make some instances of willing normative (or prescriptive) for other such instances on the basis of nothing but will (these theories, after all, are attempts to explain why we ought to do certain things and ought not do others), (3) It is impossible, logically, to distinguish among exercises of will on the basis of will alone, (4) To predicate that some instance or other of will is normative for others is to posit a ground transcendent of mere will, (5) Because conventionalism and voluntarism make some instances of will normative for others, they imply a standard for human willing transcendent of mere will, (6)

A consequence of the foregoing is that **(6)** it is impossible to distinguish among exercises of majority will on the basis of will alone. Therefore, **(7)** any distinguishing of exercises of majority will—say long-term majority will from immediate majority will—is intelligible only the assumption of a real, objective moral standard the ontological ground of which must be something other than sheer will. In the previous section we concluded, **(8)** the Constitution rather clearly distinguishes between long-term and immediate popular will (as determined by the majority) by virtue of the fact that it favors (through such mechanisms as multiple veto points) the former over the latter. Perforce, **(9)** the Constitution presupposes a standard of right willing that is not conventional or reducible will alone—even to the will of the community. **(10)** The Constitution therefore presupposes moral realism. But **(11)** moral realism belongs within the broader rubric of ontological realism. Thus, **(12)** if moral realism is true, then metaphysical nominalism (Hobbes) and metaphysical relativism (Holmes) are false. The Constitution presupposes moral realism (**(9)**). **(13)** It therefore presupposes ontological realism rather than metaphysical nominalism or metaphysical relativism.

I should like to go further to demonstrate how the metaphysical realism in question must be Aristotelian or Thomist rather than Kantian. But the constraints of time and space preclude an elaborate discussion on this point. I can, however, say something briefly. The impossibility of distinguishing intelligibly among exercises of will on the basis of will alone unravels any possibility of a purely deontological metaphysics of morals. Precisely because it is impossible to distinguish among exercises of will on the basis of will alone, it is impossible to distinguish a good will from a bad one on the basis of nothing but will. My argument above entails (necessarily) that one can only distinguish a good will from a bad one (or a right will from a wrong one) with reference to some good (or right) external to will as such. Correlatively, the will can only be judged good or bad, right or wrong insofar as it aims or fails to aim at an external good (or right). Thus, my argument entails not only the incoherence of conventionalism and voluntarism but of purely deontological realism as well. Traced all the way out, this leaves us with only (or so I believe) the non-consequentialist teleological realism of Aristotle and Aquinas. But that is as far as I can go for now.

In sum, the institutional arrangement effectuated by the Constitution is intelligible only given moral and ontological realism. And realism of the purely deontic variety will not do the trick.

But (5) entails the rejection of (1). Put another way, anyone who holds (5) has no warrant for holding (1).