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Constituting Democracy

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CONSTITUTING DEMOCRACY

by

DAVID GAUTHIER



The Lindley Lecture
The University of Kansas
1989

The E. H. Lindley Memorial Lectureship Fund was established in 1941 in memory of Ernest H. Lindley, Chancellor of the University of Kansas from 1920 to 1939. In February 1941 Mr. Roy Roberts, the chairman of the committee in charge, suggested in the *Graduate Magazine* that

the Chancellor should invite to the University for a lecture or a series of lectures, some outstanding national or world figure to speak on "Values of Living"—just as the late Chancellor proposed to do in his courses "The Human Situation" and "Plan for Living."

In the following June Mr. Roberts circulated a letter on behalf of the Committee, proposing in somewhat broader terms that

The income from this fund should be spent in a quest of social betterment by bringing to the University each year outstanding world leaders for a lecture or series of lectures, yet with a design so broad in its outline that in the years to come, if it is deemed wise, this living memorial could take some more desirable form.

The fund was allowed to accumulate until 1954, when Professor Richard McKeon lectured on "Human Rights and International Relations." The next lecture was given in 1959 by Professor Everett C. Hughes, and has been published by the University of Kansas School of Law as part of his book *Students' Culture and Perspectives: Lectures on Medical and General Education*. The selection of lecturers for the Lindley series has since been delegated to the Department of Philosophy.

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DAVID GAUTHIER
Distinguished Service Professor
of Philosophy
University of Pittsburgh

The Lindley Lecture, University of Kansas, April 7, 1989

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University of Kansas

Constituting Democracy*

David Gauthier

1. To the foreign student of political thought, the American intellectual landscape contains an unexpected feature—the Constitution. That the Constitution should be a fundamentally important element in political practice is unsurprising, even if, to the foreigner, the way in which the Constitution enters may at times seem strange. But that the Constitution should be fundamentally important in political thought is a quite different matter. Yet the foreigner may and should reflect that, to its founders, the United States is a nation founded in revolution, not only in the actual circumstances of its birth, but also, and more importantly, in the idea which informs it. That idea, expressed in the Declaration of Independence, is that “Governments ... [derive] their just Powers from the Consent of the Governed.” The Constitution not only affirms this idea in its opening words, but applies it in the institutions and rights it determines. The Constitution, then, is to be read, not merely as defining a particular political practice, but as defining a *form*—indeed, in its time, a *new* form—of political practice, in which the powers of government are legitimate because they are established through and limited by the consent of “We, the People.”

But how does the Constitution define a new form of political practice? Frank Michelman began a recent lecture with the claim, “In American constitutional argument the premise is standard, if often tacit, that all legitimate authority, hence all law, is ultimately traceable to a popular will.”¹ Towards the end of the lecture he said, “In the American constitutional understanding—to take up, now, where I began—the thought is inescapable that the Constitution’s authority, as judicially enforceable higher law, derives from its popular origin as “our” law.” (M.) Between those two statements lies at least part of the problem I want to address. How does the Constitution come to be, not merely the embodiment, but the *privileged* embodiment, of the popular will? How does it come to be binding *higher* law?

The Constitution stands in a dual relation to popular will. It is

*Earlier versions of this lecture have been presented as part of the John M. Olin program in normative political economy at Duke University, and to the Society for Ethical and Legal Philosophy. I am grateful for the discussion on those occasions. I also want to thank Christopher Morris for his comments on the initial version, and Jamie Titus for her advice throughout.

expressive of that will; only so does it have authority. But it is also constitutive of that will. The Constitution determines what shall and shall not be expressive of popular will. And so we find ourselves asking, not only why the Constitution should have *any* authority—why we should see it as embodying the popular will—but why it should have the higher authority of defining the popular will, or of being, as we might say, its constitutive expression. I want to approach this question in the light of a distinction Michelman makes in elucidating constitutional argument, between deliberative and strategic politics.

“*Deliberative* politics connotes a reasoned interchange among persons who recognize each other as equal in authority and entitlement to respect, jointly directed towards answering some questions of public ordering ... all remain open to the possibility of persuasion by others and ... a vote, if any vote is taken, represents a pooling of judgments. *Strategic* interaction ... appeals to one another’s several self-interests by conditional offers of cooperation and forbearance ... Strategic outcomes, whether formally embodied in votes or in contracts, or just informally carried out in social behaviors, represent not a judgment of reason but a vector-sum in a field of forces.” (M.) I have made one significant alteration in Michelman’s characterization of deliberative politics, in omitting reference to the constraints of “justice, right, and the common good” which he imposes on the reasoned interchange. Michelman’s characterization treats these as exogenous to a reasoned interchange; I shall claim rather that a concern with justice and the common good are ensured by the very idea of such an interchange, properly conceived.

Michelman argues that to treat the constitution as binding higher law requires that we consider constitutional law-making as deliberative, rather than strategic. “If the Constitution is just another strategic political power play, why would or should we feel in the least bound by its authority?” (M.) But if this points to an explanation of why we consider the Constitution binding, it does not yet suggest why we consider it binding *higher* law. And here, we must invoke the idea that ordinary law-making—let us say legislative politics—typically rests on a strategic power play. The Constitution affords the perspective of deliberation, of reasoned judgement about the public ordering, for evaluating the day-to-day decisions taken about particular aspects of that ordering. If we were confident that these day-to-day decisions were themselves deliberatively reached, we should have no need of *higher* law.

2. My primary concern is to explore the deliberative/strategic distinction as a clue to understanding the role of a constitution in

political interaction. So let us ascend, or at least abstract, from actual to ideal political interaction. And let us begin by considering the presumption against the justificatory force of strategic interaction which underlies Michelman's defence of the constitution as higher law. I want to ask—why deliberative politics? Why not accept the fruits of strategic interaction—interaction in which each person advances his or her own interests? The paradigm of successful strategic interaction is, of course, the market. Each advances her own interests, and the result is mutually beneficial—no one could do better without someone else doing worse. The market shows us the workings of Adam Smith's Invisible Hand. But the harmony of the market is neither natural nor universal. A market-like structure emerges only in the absence of opportunities for force and fraud; it succeeds only in the absence of occasions for free-riding, for escaping or displacing costs. Force, fraud, and free-riding are the ills that blight the fruits of strategic interaction.

Politics may now appear as the remedy for those ills. We may appeal here to the view of James Buchanan, who distinguishes the *protective* state, which seeks to eliminate coercion and deception from the relations of human beings, from the *productive* state, which aims at the cooperative provision of those public goods that are inefficiently realized in market competition because of free-riding possibilities for evading or displacing costs.² One way of characterizing this view of the role of politics is to represent it as making possible market success (by eliminating force and fraud), and remedying market failure (by eliminating free-riding). But the reference to market success and market failure might misleadingly suggest the subordination of the political realm to the economic. I am not proposing that we think of persons as concerned exclusively or necessarily even primarily with what are normally considered economic goods, so that they would view politics simply as instrumental to their economic ends. The rationale of politics is to supplant or constrain strategic interaction, whenever, left to itself, it would result in an outcome that although individually stable would be mutually disadvantageous—stable, in that no person can benefit by unilaterally changing her behavior, but disadvantageous, in that all persons could benefit were each to change her behavior. This failure represents the fundamental structural problem in interaction. It can arise whenever different persons value outcomes differently—whenever our conceptions of the good may lead us to opposed evaluations of the possible outcomes of our interaction. We need not be economic men—or economic women—identifying our good with the size of our individual commodity-bundle,

to face the problems of strategic interaction, and to need the remedies of politics.

Consider, then, persons whose conceptions of the good lead them, in the absence of constraints, into mutually disadvantageous interaction. We need assume no deep hostility or conflict among these persons. To be sure, such conflict is possible—as between two persons, castaways on a very small and ill-favored island, each rightly viewing the presence of the other as a threat to his own survival. In these unfortunate circumstances, strategic interaction may result in a conflict assuredly fatal to one if not both of the persons; the logic is that of Hobbes's natural condition of humankind. Each may recognize this conflict to be disadvantageous, not only to himself but to his fellow, and yet peace may escape them. And the best they can even hope for is an uneasy truce. I mention this situation only to contrast it with the very different context that invites politics—the context of persons each of whom welcomes the presence of the others as potential participants in, to borrow Rawls's useful phrase, “a cooperative venture for mutual advantage,” (R. p. 4)³ but who recognizes also that individual differences in the evaluation of possible outcomes threaten to deprive each of the fruits of such a venture, and to do so despite each person's best efforts to advance her own interests. These persons seek, not only to avoid the costs of interference that even enemies might wish to avoid, but to gain the benefits that may be realized from the complementarity of resources and the division of labor. For such persons, and only for such persons, is there a *political good*.

I have contrasted two contexts of interaction; we should, however, consider the possibility of passage from one to the other. The interaction of those who would prefer not to interact, each of whom regards the presence of the others as a cost, may, in the most favorable circumstances, result in a *modus vivendi*. Now it may be that, having acquiesced in such a situation, the participants come over time to regard it differently, to realize that the others afford opportunities as well as imposing costs. The others are, if not yet welcome, nevertheless useful, their presence accepted and not merely and grudgingly tolerated. Persons who were once enemies, now find themselves allies. At first, their only bonds are those of convenience. And if opportunities for mutual benefit are seen to arise only in limited areas of life, and to be restricted to activities that are valued merely instrumentally, then the bonds between persons may remain ones of mere convenience. But as wider opportunities for mutual benefit come to be appreciated, so that each views her fellows as sharing in a way of life, then, provided that

each finds those fellows willing to ensure that her place in their activities is a fair and reasonable one, they come to be seen as public friends, their presence now welcomed rather than merely accepted. What were bonds of convenience become ties of mutual civic concern.

3. Public or civic friendship is a key idea in my discussion. It expresses a distinctive form of concern with other persons, which is neither instrumental nor affective, although it does not exclude either or both of these. Civic friends need feel no emotional attachment to the good of their partners, but they affirm each other's good in willingly making and honoring whatever commitments are needed to make their mutual activities successful from each partner's perspective. To be sure, a merely instrumental partnership already requires agreement to constrain or redirect the strategically rational actions of each partner towards their mutual benefit. Civic friendship does not supplant this need, but supplements it with the further demand that the agreement assure equal respect.⁴ Each of the partners retains her own conception of the good; their friendship requires, not that each submerge her identity and her aims in the common cause of a collective, but rather that each respect the identity and aims of her fellows, willingly according them equal place in their common affairs with her own. The more each feels secure in the place accorded by her fellows, the more each seeks to secure them in their places. To bring about this security, then, the partners face the task of designing institutions and practices that are the visible sign of their intention of friendship, so that by structuring their interaction in a way that manifests their mutual regard, they ensure that their friendship will endure. I shall, for convenience, speak of the design of appropriate institutions and practices as the formation of a constitution to regulate the interactions of persons regarded now as members of a society.

The constitution represents a shared good among the members of the society. This is to be understood in two related but distinct ways. First, in making possible cooperation and preventing unreasonable interference, it enables each better to realize his own good than would be possible in the "state of nature" characterized by universal strategic interaction. But second, and again in making possible cooperation and preventing interference, it enables each to express his friendship in performing actions that further the good of his fellows, and in refraining from other actions that would diminish their good. Thus persons are enabled to advance their own aims and interests in ways that exhibit respect for the aims and interests of each. I shall say that this constitutes

the political good. It is possible only for persons who view each other as welcome partners in cooperative interaction, and it is realized by creating the conditions under which they can translate that welcome into practice.

Beginning with persons, each with his or her own conception of the good, who recognize that these distinct conceptions of the good create the possibility that individual rational strategic behavior will be mutually costly, I have narrowed my focus to exclude those for whom the very presence of their fellows is itself a source of disadvantage. I have supposed that those who first see others as useful will, as they share a wider range of activities, come to see those others as companionable, and will seek ways to regulate their interaction to secure mutual benefit and express mutual respect. These ways are embodied in their constitution. Note that this constitution expresses no good of its own; there is, or at least need be, no communal good beyond what arises from the individual goods of the members of society.⁵ The idea is that the constitution should bring about those conditions that are optimally responsive to these individual goods, which are left quite open; each member of society is free to form and to carry out a life plan of her own. The only, but crucial, principled constraint imposed on each person's plan is that it be compatible with her receiving and being received by her fellows in welcome partnership.

4. I come now to the idea of deliberative politics. Let me quote again Michelman's characterization: "a reasoned interchange among persons who recognize each other as equal in authority and entitlement to respect, jointly directed towards answering some question of public ordering." (M.) The primary question of public ordering is to be answered by the constitution; what are the optimal conditions under which the members of a society may interact for their mutual advantage and to express their equal respect? How shall this question be answered? My concern here is, not to determine the answer, but to ascertain the method—the way in which one might arrive at an answer. And my suggestion is that we consider the primary question of public ordering as itself addressed to the public who stand to benefit from the ordering. The content of this question embraces *all* of the interactions of the members of society. But addressing this question to the public introduces a *particular interaction* taking as outcome a *public answer*. How shall this interaction be ordered? It might seem that we are faced with a circle—that we must know how social interaction may best be ordered so that we may best order the particular social interaction required to provide a

public answer to the question how social interaction may best be ordered. But, I suggest, this is not the case. The conditions for optimally ordering the particular interaction required to answer the question of optimal public ordering, may be made directly explicit by reflecting on the two standards that the ordering must satisfy—the standards of mutual advantage and equal respect.

We think then of a reasoned interchange. A deliberative politics is characterized procedurally. The appropriateness of the answers it yields to public questions is established, not by any appeal to assumed expertise, but by the assurance that the manner in which it is conducted is informed by the standards that the answer must satisfy. It begins from a question about the public ordering that all want answered, because the answer establishes standards or conditions of interaction from which all benefit, in relation to the benchmark set by individual strategic choice. It seeks an answer to which all can agree, since it is reached from a debate in which each is able, freely and fully, to offer his reasoned judgment under rules that treat no person as privileged and no answer as presumptively favoured. The pressure to reach agreement arises solely from its desirability, which is felt equally by the members of society, and not from any differences in capacity or temperament or position, which might bear differentially on the members, and so benefit some at the expense of others. Since each is able to present his reasoned judgment, each is able to ensure that the mutual advantage realized in the answer embraces his own good. Since no one is privileged, each is able to ensure this only by equally embracing the good of his fellows, and so demonstrating his equal respect for them and their endeavours. A reasoned interchange, in which all seek an answer to which all must agree, results in unanimity. The procedure of deliberative politics is thus informed by the standards that its outcome must satisfy. Through deliberative politics, therefore, we are able to provide the public answer demanded by the primary question of optimal public ordering.⁶

5. I mentioned previously that in characterizing a deliberative politics, I altered Michelman's account by omitting the requirement that the reasoned interchange give an answer compatible "with the dictates of justice, right, and the common good." (M.) It is now time to bring these elements in to my account. We give content to both justice and the common good by establishing a constitution through the procedures of deliberative politics. Considered as structuring interaction to promote, or to enable the promotion of, mutual advantage, the institutions established in the constitution embody the common good.

The recognized authority of these institutions is an important component of public capital. The value of this public capital is, of course, to be measured by its enhancement of the individual goods of the members. The attainment of supposed national objectives, not themselves found in the equal recognition of these individual goods, is no part of the common good as I am characterizing it.

Considered as structuring interaction to exhibit, or to ensure the exhibition of, full and equal respect for persons, the institutions established in the society embody justice. In requiring that agreement on these institutions be reached through a reasoned interchange, deliberative politics offers each person the opportunity to advance whatever proposal he pleases, but requires him to submit it to the critical consideration of his fellows, so that its adoption depends on his being able to give it a reasoned grounding that must either speak equally to the life-plans of all of the participants, or establish the parity of the proposal with similar and compatible proposals that, taken together, reflect equally their several life-plans. Thus no one, after giving his consent, has any basis for complaining that he was unable either to advance or to defend his concerns in ways available to any of his fellows. Now I take this to ensure the *ex ante* fairness of the institutions chosen. But the ideal of justice manifested in such a choice is essentially negative. It is, we might say, the justice of mutual convenience—of relationships among persons who, in Rawls's useful phrase, "are conceived as not taking an interest in one another's interests." (R. p. 13) This is essentially the weak conception of justice I develop in *Morals by Agreement* and elsewhere, representing "the virtue of the self-interested ... that curbs self-interest."⁷ But I said earlier that, beginning from relationships of convenience, if each of the participants can see her share of benefits to be a fair and reasonable one, then the others may come to be no longer merely accepted but instead regarded as friends, and so as persons in whom one takes an interest. If, as I am supposing, a constitution is an affirmation of civic friendship, and not a mere treaty or compact of alliance, then we may expect the ideal of justice it embodies to require, not merely equitable opportunities for individuals to advance their own life-plans, but a positive affirmation of those life-plans as equally and fully entitled to the support of society. Since civic friendship does not rest on or require personal affection, this conception of justice is compatible with a purely *personal* indifference among individuals, but it reflects and requires a positive *political* or *civic* concern of each for his fellows.

The unanimist procedure of deliberative politics may remind us of Rawls's idea of choice in the original position. But for Rawls, unanimity

is reached through subordinating the differences among persons to the veil of ignorance, rather than by coordinating those differences in mutual agreement. And Rawls distinguishes the choice of the principles of justice from the choice of a constitution; he supposes that the latter proceeds "subject to the constraints of the principles of justice." (R. p. 196) He insists, "In framing a just constitution I assume that the two principles of justice already chosen define an independent standard of the desired outcome. If there is no such standard, the problem of constitutional design is not well posed." (R. p. 198) In subordinating the choice of a constitution to that of principles of justice, Rawls's account differs markedly from the one I have developed. As I have characterized deliberative politics, principles of justice are not the subject of a prior or independent choice, and constitutional choice is not subjected to any principled constraint established by prior choice. The exception that the constitution will promote mutual advantage and manifest equal respect is assured directly by the manner in which it is chosen.

My claim is that the outcome of deliberative politics is *constitutive* of justice among individuals. Concretely, a constitution may be said to constitute the political institutions of a society; abstractly, it may be said to constitute justice and, as we have seen, the common good. Rawls says, "Just as each person must decide by rational reflection what constitutes his good, ... so a group of persons must decide once and for all what is to count among them as just and unjust." (R. pp. 11-12) I shall comment on "once and for all" presently. Here my concern is with the *decision* on what is to count as justice. In identifying that decision with the choice of a constitution, I emphasize the idea that a constitution is legally foundational as the *privileged* act of popular will. Behind the popular will expressed in the constitution are only the particular and multifarious goods expressed in the life-plans of the individual members of society. Justice can not be found by mere reflection on them. But from our awareness of the costs of strategic interaction based on these life-plans, we face the question of an optimal public ordering; the answer is, in effect, the determination of what is to count as just and unjust.⁸ In giving this answer constitutional status, we represent it as a single, shared, public understanding.

6. I have developed the idea of deliberative politics as a constraint on strategic interaction. But as I recognized at the outset, within politics itself there is a strategic dimension, so that the day-to-day workings of the political system may be seen as exhibiting the very form of behavior

that, I have claimed, the deliberative politics of the constitution exists to control and redirect. And we may find this view of strategic politics expressed in American Constitutional thought, which, as Michelman notes, accepts “the doctrine that treats state-based power as more dangerous than market-based power,” and does this, he argues, because of “a vision of the public, political process of regulatory law-making as predominantly strategic rather than deliberative in character.” (M.) The Constitution⁹ addresses, from the deliberative standpoint, the politics of later society, and finds it wanting. Thus the Constitution strictly limits this politics.

To understand the relation between deliberative and strategic politics, I shall first focus again on the relation between the two modes of interaction. In strategic interaction, each person seeks directly to advance her own good. Agreements are made, and kept, to the extent to which they are perceived to be maximally beneficial from each agent’s perspective. Now one might think of deliberative interaction in the way in which Rawls describes R.B. Perry’s account: as maximally “promoting the ends reached by reflective agreement under circumstances making for impartiality and good will.” (R. p. 148) Agreement then is not limited to a coincidence of what is maximally beneficial from the differing perspectives of individuals. This may seem to correspond to the idea of “a reasoned interchange among persons who recognize each other as equal in authority and entitlement to respect.” Impartiality and good will are implicit in the idea, underlying my argument, of persons as “welcome partners in cooperation.”

Rawls’s criticism of Perry, insofar as it is relevant to our concerns, turns on identifying good will with “a benevolent concern for one another’s interests,” (R. p. 141) and supposing that this makes an account of agreement unmanageably complex. But whether or not this is a fair criticism of Perry, in relating good will to civic friendship I understand its role rather differently. I do not suppose that good will requires persons to be personally benevolent, or to take any interest, as *individuals*, in the interests of others, although of course it is compatible with and perhaps even conducive to taking such interest. Rather, I understand good will as involving openness and good faith—the willingness to acknowledge the nature and strength of one’s true concerns in the process of reaching agreement, and the subsequent willingness to adhere or keep to whatever is agreed. Within the framework of agreement, each must exhibit a positive concern for impartiality and mutuality.

In deliberative interaction persons may, and must be expected to,

seek to advance their own good. The reasoned interchange that it demands should be understood, not as opposed to the mode of strategic interaction, but rather, I suggest, as an idealized form of the "conditional offers of cooperation and forbearance" that Michelman considers strategic. Here I appeal to one of the main themes of *Morals by Agreement*. Under full information, the factors that lead ordinary bargaining to fall short of a reasoned interchange are absent. I say in my book, "In ordinary bargaining persons may conceal significant features of their circumstances, or the full range of their options, may misrepresent their preferences, or the strengths of their preferences. ... In ordinary bargaining persons may bluff, especially if they are also able to conceal or misrepresent factors, so that others have uncertain or mistaken expectations about what the bluffers are willing to do. ... In ordinary bargaining persons may make threats, but among fully rational persons threats are useless; no one will believe anyone who claims that he will act in a non-utility-maximizing way should others not comply with this threat, and to say that one will act in a utility-maximizing way is not to threaten. Our bargainers have no psychological strengths to exploit, or psychological weaknesses to be exploited. And we assume that ... no one need come to a decision without full consideration; bargaining is unpressured. Thus each bargainer can employ only his own rationality to appeal to the equal rationality of his fellows. In addition to rationality, there are only each person's preferences and possible actions to consider, and it is about these that everyone bargains."¹⁰ We regard each bargainer as serving as an ideal representative of the particular person he will be in the social world to be shaped by the constitution on which all agree.¹¹

Deliberative agreement may thus be treated as strategic bargaining under full information, in circumstances designed to remove the effects of all differential pressures and capacities on reaching agreement.¹² Michelman's claim that "strategic outcomes ... represent not a judgment of reason but a vector-sum in a field of forces" offers a false dichotomy; reason and force coexist in all human interaction. For force is the exercise of power, and without power, defined by Hobbes as an agent's "present means, to seek his future apparent good,"¹³ there would be no place for practical reason, for deliberation on using one's power to attain that good.

7. Deliberative *politics*, however, demands a closer characterization in relation to strategic interaction. For we may say that in deliberative or constitutional politics, human beings seek, through an appropriately

conditioned strategic interaction, to direct and constrain their future interaction, which they anticipate to be largely strategic. They seek to remedy the failure of strategic interaction to yield outcomes affording fair mutual advantage. I want to distinguish and focus on two parts of this remedy. The first addresses the mode of decision. In pure strategic interaction, outcomes result from the independent decisions of individuals. There is no social decision determining a social outcome. Under some circumstances, of which the perfectly competitive market is our favored example, this decentralized mode of decision-making proves efficient, and leads to outcomes in which individual benefits are proportionate with individual costs. But where this natural harmony of interests is lacking, we may seek a centralized mode of decision-making that will bring about an artificial harmony. In a democratic society, the choice of this mode becomes itself the object of interaction among individuals. We seek then a decision-making institution, within which individuals may be expected to interact in strategically rational ways, but which structures their interaction so that its product—the social decision—yields a fair and optimal state of affairs. Such an institution may be envisaged as arising from unanimous agreement, since it is acceptable, and equally acceptable, to all. Each sees the opportunity for advancing her interests commensurately with those of her fellows in determining the decisions of society.

Typically, this institution—the primary institution of government itself—is largely majoritarian, as seems practically necessary if it is to combine efficacy with democracy. But any majoritarian decision procedure poses a constant danger to the unanimist foundations of the constitutional order. For if persons are bent on strategic behavior, then chance alone will almost surely give some opportunities for exploiting the procedure of majoritarian decision to gain benefits while displacing some costs, which of course entails that others pay costs without gaining compensating benefits. If we focus exclusively on the dangers of majoritarian decision, we may be led to impose severe constitutional restraints on its scope, and so on the scope of governmental authority. We shall leave large areas of society to the decentralized decision-making represented by free individual interaction. But to restrain government in these areas is in effect to unleash the market, and insofar as government serves as a remedy for the failure of the strategic interactions characteristic of the market, to restrain government is in effect to accept a greater measure of market failure without remedy. To be sure, we do not want the power of government to extend to interference with market *success*. We do not want to replace the strategic interaction of free

individuals, in those circumstances in which they are able to achieve optimal outcomes in which benefits are matched to costs, with the strategic interaction of an unrestricted majoritarian politics, which can by no means be expected to yield either optimal or fair outcomes. In effect then, we want to achieve a constitutional balance between two modes of strategic activity—market and government.

The second part of the political remedy concerns, not so much the mode of decision—individual or social, but the mode of reasoning. Here I may usefully quote Thomas Hobbes, while recognizing that he is not to be understood as a recruit to constitutionalism. In replying to Bishop Bramhall, Hobbes says, “because neither mine nor the Bishop’s reason is right reason fit to be a rule of our moral actions, we have therefore set up over ourselves a sovereign governor, and agreed that his laws shall be unto us, whatsoever they be, in the place of right reason, to dictate to us what is really good.”¹⁴ Law, for Hobbes, provides a *public reason*, authoritative over the private reason of each individual. Hobbes’s account of the need for public reason is a version, albeit an extreme version, of the general argument I have given in support of deliberative politics—unconstrained strategic interaction among individuals, in which each is guided by his own reason, leads to that most awful of strategic failures, the war of all against all. But we need accept neither his dismal vision, nor his insistence on a “sovereign governor,” to adapt Hobbes’s thought about law to my purpose.

Throughout my discussion, I have taken unconstrained and unstructured strategic interaction among persons as a base line. Now we may think of law as affecting that interaction in two very different ways. On the one hand, we may think of law as *structure*. This is how I have understood a constitution, as providing a framework for social decision in those areas in which, even if we assume that individuals interact strategically within the social framework, the outcome is likely to be mutually more advantageous than if matters are left to individual decision. But on the other hand, we may think of law as *constraint*. We may think of law as specifying a standard of *reasonable* conduct for each member of society, based on what those members would deliberatively acknowledge. Each then is expected to curb the pursuit of her own interests to conform to the requirements of law, and to do so because the law derives from a reasoned interchange to which she is party. It is in this sense that we may understand the law as a standard of *public* reason, overriding the exercise of private judgment and directing persons to their mutual advantage, and we may agree with Hobbes that “this *right reason*, which is the law, is no otherwise certainly right than by our

making it so by our approbation of it and voluntary subjection to it.”¹⁵ My claim, then, is that the law is entitled to serve this constraining role because its authority derives from the deliberative politics of constitution-making, which finds its expression in the idea of “We, the People.”

8. And in returning to the people I return from my abstract discussion of ideal politics. I must ask whether my argument has any application to the real political and legal realms. I face an obvious objection: does not my entire argument gain the appearance of relevance by deliberately confusing an ideally reasoned interchange with a particular set of political events? I have defended the claim that a constitution would be justifiably enforceable as higher law, were it the product of an exercise in deliberative politics—of a reasoned interchange among persons in circumstances sufficient to afford each the expectation of mutual advantage and equal respect. But can any actual constitution be represented as the product of reasoned interchange? Can any actual political or judicial decision be shown to be justifiably enforceable, by representing them as made in accordance with procedures that are the outcome of reasoned interchange?

There is a further problem—the problem of binding posterity. Suppose that we could defend an actual constitution as the product of a real-world approximation to a reasoned interchange. We might then suppose that its provisions might justifiably be enforced over the parties to the agreement. But if, as with the American Constitution, the reasoned interchange took place two hundred years ago, then why may its provisions be justifiably enforced on Americans today? The preamble speaks of “our posterity,” but how is posterity brought within the Constitution’s scope? How can the Constitution be chosen “once and for all?”

These are familiar problems with attempts to offer a contractarian understanding of a political system. Such an understanding requires more than showing that actual political and judicial institutions and practices, or the particular decisions to which they give rise, are those that would follow, directly or indirectly, from a reasoned agreement or interchange among citizens. To be sure, such a demonstration serves a justificatory role.¹⁶ But it does not show that the institutions and practices take their *rationale* from the idea of a reasoned interchange. And this is essential to a full contractarian understanding. Recall that I began by referring to the importance, surprising to foreigners, of the American Constitution in political thought, and to the idea that it defines a new form of political practice, in which legitimacy derives from

the will of "We, the People." By interpreting the Constitution as the outcome of a reasoned interchange among Americans, we connect the *fact* of the Constitution to the way in which the invocation of popular will yields political legitimacy.

Such an interpretation requires both an actual and an ideal ground. The actual ground comprises the adoption, judicial interpretation, and amendment of the American Constitution. The ideal ground is a unanimous rational agreement on the fundamental terms of political association. We ask whether the former may be interpreted as a reasonable approximation to the latter, and so whether it may be taken as the constitutive expression of popular will.¹⁷ I can not, of course, carry out this enquiry here. I can only suggest the sort of argument that, if successful, would show why the American Constitution might be supposed to give legitimacy to the workings of the American political and legal systems, by expressing the rational will, not only of those who participated in its formation and adoption, but of their fellows and descendants.

9. Suppose then that we find an *actual* agreement, concluded in circumstances that, while no doubt falling far short of those that would permit a fully reasoned interchange on a fair basis among all the members of a society, may nevertheless be seen as intended to realize a practicable and reasonable approximation to such an interchange—or, perhaps more realistically, may be seen as making possible an interchange among a limited number of persons, the *outcome* of which might approximate to the outcome of a fair universal interchange. We think of the agreement as concluded by persons who take themselves to be representing, to the best of their ability, the members of their society, and to be seeking the terms that those members would find reasonable to accept. So that if the agreement begins "We, the People," we find the claim made in those words credible. And if the agreement continues by enumerating a set of objectives, the first being "to form a more perfect union," we may understand the agreement as speaking to the primary question of public ordering, so that it represents itself as the expression of the people's will about how their will shall be defined.

But these words may be expressions of pious sentiment—or even impious, uttered to mislead. They contain no guarantee that what follows them will express the people's will. Indeed, we may consider it unreasonable to suppose that any procedure of representation can guarantee an outcome approximating to that of a fair universal reasoned interchange. And we must expect any actual attempt at representation

to be limited by both the circumstances and the understandings of its time. The framers of the American Constitution deliberated from the fixed existence of the distinct states and their established forms of government; they accommodated the historical reality of black slavery, and even where slavery did not exist, they could not be said to have represented free blacks. Nor of course did they represent women. But, although we should be concerned with the circumstances that limit the scope of the deliberations through which a constitution is adopted, we may find that, over time, their biasing effect on a fair and free interchange is offset by the actual political and legal practices that stem from the adoption of a constitution. We should look at the political and judicial institutions and their decisions, and ask if, over time, they may be interpreted as the reasonable workings of a society aiming at mutual advantage and equal respect among its members. That is, we should ask if the political practice created by an actual constitution is best understood as an endeavor to satisfy the standard set by our ideal of a reasoned interchange. Insofar as the American Constitution may be so understood, we may suppose that if it bound those who concluded it as their actual agreement, it may have come to bind their contemporaries and posterity because they may see it as concluded on their behalf. They may treat the agreement of the Founders as if it were their own.

But if the Constitution is to be seen as the expression of posterity's will, then that will must be involved more directly than through interpretation of the agreement of the Founders. I noted earlier that Rawls speaks of a group of persons deciding "once and for all what is to count among them as just and unjust." But no human agreement can establish the conditions of mutual advantage and equal respect once and for all. The development of our moral, political, and economic understanding, and of our technological capacities to shape our environment, calls for continuing accommodation. Thus if the Constitution is to remain congruent with a reasoned interchange for posterity, posterity must be able to adapt it to their altered understandings and powers. An agreement, to be truly ongoing, must be amendable, and amendable by a procedure that endeavors, to the fullest extent possible, to yield an outcome that might approximate to that of a fair universal rational interchange. Thus the process of amendment, like the process of adoption, must aspire to the status of deliberative politics.

The American Constitution was declared in effect on March 4, 1789. Speaking now from my foreign perspective, it seems to me that the best two hundredth birthday present that Americans could give their Constitution would be to devise a more determinate procedure for amend-

ment. Whatever the merits of the failed Equal Rights Amendment, the procedure for ratification, with states ratifying and then seeking to deratify, with Congress setting a five year period and then, when the amendment remained unratified, extending the period to ten years, is a failure from the standpoint of deliberative politics. Although the constitutional ideal must be unanimity—an agreement fair and beneficial to all, so acceptable by all—yet in the real world, a unanimist procedure invites a descent from the deliberative to the purely strategic, as each wields his individual veto. What must be sought, and what is in principle sought by the requirement of concurrent two-thirds majorities in Congress and ratification by three-fourths of the States, is consensus. What the amending procedure fails adequately to recognize, as the attempted ratification of the Equal Rights Amendment showed so clearly, is that consensus requires simultaneity—that Congress and the State should, in one period of time, accept the amendment. Even five years is here too long. The Equal Rights Amendment did not secure that consensus; had it been adopted by a controverted procedure that avoided true consensus, much harm would have been done to the constitutional ideal.

10. But the failed Equal Rights Amendment may itself be situated as part of an historical development of constitutional understanding that lends itself to a contractarian account. The more substantive amendments to the Constitution—the Bill of Rights, the Reconstruction Amendments, the amendments relating to suffrage—together with the more significant interpretative activity of the Supreme Court, may be seen as responses to recognized lacunae in the constitutional text, as judged in the light of evolved understandings and developed powers, and from the perspective of mutual advantage and equal respect. The failed Equal Rights Amendment was itself such a response, but one that ran aground on the apparently unresolved task of finding a judicial language that affirms sexual equality as it affirms racial equality, without presuming that legal acceptance or rejection of sexual categories must correspond to that of racial categories. Put very bluntly, there is yet no consensus on how to define the terms of civic friendship between men and women.

On a contractarian interpretation, the Constitution sets Americans an ongoing task. The canonical status claimed for its text requires that it be both expressive and constitutive of popular will. But insofar as popular will could be fully embodied only in the outcome of a fair reasoned interchange among all the members of the polity, a permanent

tension exists between the actual text and the ideal text that would be such an outcome, could it be realized. To the extent that the historical process of interpreting and amending the Constitution is responsive to this tension, the fallible text is shown to be perfectible, and so to constitute, in the second-best circumstances of real politics, the standard of legitimate authority. But the responsiveness of the historical process is a matter of actual respondings by political actors. The canon is never closed; the legitimacy of the Constitution is always subject to the legitimating activity of relating it to the ideal standard of a deliberative politics.

And so I return to Michelman's starting point: "In American constitutional argument the premise is standard, if often tacit, that all legitimate authority, hence all law, is ultimately traceable to a popular will." (M.) How shall we understand that will? My answer has been that we shall understand it as an agreement among the people, to overcome the failure endemic in human interaction, even when that interaction satisfies the standard of strategic rationality. We see the end for restructuring that interaction—to form, then, "a more perfect Union." That restructuring, I have argued, requires the establishment of justice. And we may take the other objectives in the Preamble to the American Constitution as abstract specifications of the main forms of public good—domestic tranquility, common defence, general welfare—concluding with "the blessings of liberty" to be secured to the citizens and their posterity. In this latter phrase, we may find the idea of a community in which each freely pursues her own good in a manner compatible with being welcome as a participant in the Union that the constitution establishes.

11. My conclusion is that, strange as it may initially seem to the foreigner, Americans are right to think that their Constitution defines a new form of political practice. For it is the first, and I believe arguably the most successful document to be plausibly represented as an expression of popular will determining what shall and shall not be expressive of that will. More than any other constitution, it has come to be accepted as the public expression of mutual agreement on the just powers of government. To be sure, we may expect to find, in any democratic polity, some recognition that the powers of government are legitimate because they are established and limited by "We, the People." The political practice codified in the Constitution has become the democratic norm, implicit in societies that lack the constitutional tradition that would make it explicit. And since the Constitution is the

pioneering attempt to define that practice, we might find, in some democratic polities, laws and institutions that fit better as possible outcomes of a fair universal rational interchange than those of America. But such comparative questions are not my concern. For political thought, understanding the American Constitution, asking for the rationale of its text, reveals what we mean by constituting democracy.

NOTES

1. Frank Michelman, "Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation," typescript; quoted by permission of the author. Further quotations from this lecture are identified by (M.).

2. See James M. Buchanan, *The Limits of Liberty* (Chicago: The University of Chicago Press, 1975), pp. 68-70. However, Buchanan's distinction between constitutional and postconstitutional contract is not part of the present argument.

3. References prefixed by R. are to John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).

4. Why is civic friendship needed in political society? Jules Coleman has suggested in conversation that if my argument in *Morals by Agreement* (Oxford: Clarendon Press, 1986) is sound, then a merely instrumental partnership should provide a sufficient base for the constraints needed to redirect individual actions to mutual benefit. (See especially chs. V-VII.) But without civic friendship, and the equal respect it engenders, some persons will almost certainly find themselves relatively disadvantaged by actual social arrangements, which they can not be expected to accept willingly, so that the society will tend to be both coercive and unstable. Coleman rightly questions both the basis of and the role for civic friendship in a rational contractarian theory; neither of these matters can be adequately treated in the confines of this lecture.

5. Thus political institutions, like the market, require no agreement on ends. However, political institutions do constrain each person in the pursuit of her ends, whereas the market does not. Thus the stable operation of the market does not require any analogue to civic friendship.

6. We may clarify this analysis by reminding ourselves of the distinction among perfect, imperfect, and pure procedures. (See R. pp. 85-6) Think of a procedure as employed to reach an outcome satisfying a certain standard. If the procedure ensures that the standard is satisfied, and the standard is specifiable independently of the procedure, then the procedure is perfect. If the procedure ensures that the standard is satisfied but the standard is not specifiable independently of the procedure, then the procedure is pure. If the procedure does not ensure that the standard is satisfied, so that the standard must be specifiable independently, then the procedure is imperfect. How are we to classify the procedure of deliberative politics, as determining outcomes that satisfy the standards of mutual advantage and equal respect? It may seem to be clearly imperfect. Even if agreement is reached in a manner informed by the demands of mutual advantage and equal respect, there would seem to be no guarantee that the institutions agreed to will in fact make possible optimal cooperation under conditions requiring each to demonstrate respect for his fellows. But we should, I think, introduce here the distinction between expectation and outcome. The institutions selected by the procedures of deliberative politics may in fact fail. But they must be expected to succeed, and expected because, and solely because, of the manner in which they are chosen. There is no criterion for *expected* advantage, or for *expected* equal respect, independent of the agreement of persons under the conditions of deliberative politics. In this respect, I suggest, deliberative politics is comparable to other procedures for decision and choice. It should then be classified as *ex ante* pure, and *ex post* imperfect.

7. The quote is from my paper "Three Against Justice: The Foole, the Sensible Knave, and the Lydian Shepherd," in *Midwest Studies in Philosophy* VII (1982), p. 11. For the account of justice in *Morals by Agreement*, see especially ch. V.

8. A second contrast with Rawls's thought arises from my treatment of deliberative politics as determining what is to count as just and unjust. In recent writings, such as "Justice as Fairness: Political not Metaphysical" (*Philosophy and Public Affairs* 14, 1985, pp. 223-251) and "The Idea of an Overlapping Consensus" (*Oxford Journal of Legal Studies* 7, 1987, pp. 1-25), Rawls develops an account of justice not, as in *A Theory of Justice*, as a part of rational choice contractarianism, but rather as "a regulative political conception ... that can articulate and order in a principled way the political ideals and values of a democratic regime" and "such that there is some hope of its gaining the support of ... a consensus in which it is affirmed by the opposing religious, philosophical and moral doctrines likely to thrive" in the society. ("The Idea ...," p. 1) This conception, of "'justice as fairness' ... can be seen as starting with the fundamental intuitive idea of political society as a fair system of social cooperation between citizens regarded as free and equal persons." (*Ibid.*, p. 7) I want rather to appeal beyond any *presupposed* moral ideas, whether of fairness or of freedom and equality, to the underlying rationale for political society captured by Rawls himself in the phrase, quoted above, "a cooperative venture for mutual advantage," where 'advantage' is understood in terms of the individual goods of the members of society. Such a venture, I have argued, invites civic friendship, which introduces (rather than presupposes) the moral idea of equal respect. Then, as I have argued, mutual advantage and equal respect provide the standards for determining an optimal public ordering, and so what is to count as just and unjust.

9. I employ the capitalized form here to indicate that it is now the American Constitution to which I refer, and not the abstract constitution that for some time I have been discussing.

10. *Morals by Agreement*, pp. 155-6.

11. The idea of bargainers as ideal representatives is found in my paper "Justice as Social Choice," in D. Copp and D. Zimmerman (eds.), *Morality, Reason and Truth: New Essays in the Foundations of Ethics* (Totowa, N.J.: Rowman & Allanheld, 1984); see pp. 257-8.

12. Additionally, bargaining must proceed from an appropriate base point if it is to be considered deliberative. In *Morals by Agreement* I introduce a modified Lockean proviso to ensure that the base point does not incorporate force, fraud, or free-riding. (See especially pp. 201-5) Here, however, the concern to manifest civic friendship through the expression of equal respect is intended to safeguard against these ills. The question, pressed on me especially by Bruce Ackerman, is whether this concern may not also rule out inequalities in the base point that would be permitted by the proviso. I think not. Mutual advantage and equal respect do not require that the parties begin from an equality of condition. But the issue is too large to pretend to settle here.

13. Thomas Hobbes, *Leviathan* (London: 1651), ch. 10.

14. *The English Works of Thomas Hobbes*, ed. Sir William Molesworth (London: 1839-1845), vol. V, p. 194.

15. *Ibid.*, p. 193.

16. Some thinkers have claimed that hypothetical agreements lack justificatory significance. See for example Ronald Dworkin, "Justice and Rights," in *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), pp. 150-2. That you would have agreed yesterday to sell me the painting on your wall for \$100 does not entitle me to give you \$100 today and make off with it, now that you have learned that it is not the cheap 19th century copy you took it to be, but actually from the workshop of Tintoretto. But contractarian justification in politics relates to a context in which actual universal agreement is not possible. We recognize the need for political and legal order—the need to ensure mutual benefit in our interactions. Since this is a shared need, it should be possible for rational persons to come to agreement on a political and legal order, despite initial

disagreement about which order. But if persons can not come to such agreement *in medias res*, they nevertheless need to have political and legal institutions and practices in place. Therefore, that they would rationally have agreed to certain institutions and practices, in circumstances that would have given everyone an equal opportunity to advance her concerns and an equal requirement to accommodate the concerns of others, may be part of the best justification available for the political and legal order that they constitute.

17. Thus my account here treats a constitution, and the question of its justification, very differently than does Rawls's. For Rawls, "a just constitution is one that rational delegates ... would adopt for their society." (R. pp. 200-201) The adoption is hypothetical. My account of the adoption of a constitution, although presenting the procedure of adoption abstractly, does not treat it as merely hypothetical. The constitutional fact plays a key role in the argument. Of course, it would be absurd to suppose that such a fact is *necessary* for democratic legitimacy. In a fuller treatment than is possible there, it would be important to consider how one would account for political legitimacy in democratic polities that lack a constitutional fact. Here an appeal to the "constitution ... that rational delegates ... would adopt for their society" might be expected to be essential to legitimating authority. But there would be nothing approximating to the constitutive expression of popular will. It would seem that in the absence of a constitutional fact, a contractarian justification of political authority would fall short of a full contractarian understanding of political institutions and practices.

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