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PLURALIST CONSTITUTIONALISM

By William A. Galston

I. Introduction

The purpose of this essay is to explore the ways in which a broadly pluralist outlook can help illuminate long-standing issues of constitutional theory and practice. I begin by adopting a common-sense understanding of pluralism as the diversity of observed practices within a general category—in this case, constitutions (Section II). In the light of this understanding, many assumptions that Americans and others often make about constitutional essentials turn out to be valid locally rather than generically. I turn then to pluralism in a more technical and philosophical sense—specifically, the account of value pluralism adumbrated by Isaiah Berlin and developed by his followers. After offering a rough and ready account of this version of pluralism (Section III), I bring it to bear on a range of constitutional issues (Section IV). In doing so, I distinguish between, on the one hand, areas of variation among constitutions and, on the other, some basic truths about political life that define core constitutional functions. I conclude (Section V) with some brief reflections on the normative thrust of pluralist constitutionalism—in particular, its presumption in favor of the maximum accommodation of individual and group differences consistent with the maintenance of constitutional unity and civic order.

II. Constitutional Diversity

It is easy for scholars working within particular national traditions to assume that the features of their own constitutions are definitive of constitutionalism as such. A brief glance across time and space suffices to dispel such parochial illusions.

While constitutions are usually written, they need not be; there is nothing paradoxical about tomes devoted to the British constitution.[1] Nor need they be democratic; as the late Carl Friedrich pointed out, autocracies and even dictatorships have managed to provide themselves with serviceable constitutions.[2] Similarly, constitutions need not be "liberal" in

[1] Larry Alexander, "Constitutions, Judicial Review, Moral Rights, and Democracy: Disentangling the Issues," in Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (New York: Cambridge University Press, 2008).

[2] Paul Sigmund, "Carl Friedrich's Contribution to the Theory of Constitutional-Comparative Government," in J. Roland Pennock and John W. Chapman, eds., *Constitutionalism* (New York: New York University Press, 1979), 38.

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the sense of protecting individual rights, immunizing a private sphere from public interference, or limiting the powers of government as a whole (as distinct from particular institutions within government). Nor, finally, need they rest on a foundation of popular sovereignty. For example, Article 1 of the Iranian constitution refers to the "sovereignty of truth and Qur'anic justice," while Article 2 cites "the One God . . . , His exclusive sovereignty and the right to legislate, [and] Divine revelation and its fundamental role in setting forth the laws."[3]

By contrast, there are some things that all constitutions must do, either explicitly or by implication. First, constitutions rest on, and often declare, a principle of authorizing legitimacy. When the preamble to the U.S. Constitution says, in part, that "We the People of the United States . . . do ordain and establish this Constitution for the United States of America," it does more than describe a collective action. It suggests that the people (and only the people) have the authority to perform such an act: the identical document, if imposed on the people without their consent, would lack legitimacy.

Second, constitutions establish governing institutions and set forth their respective responsibilities and powers. Put simply, constitutions constitute—create and define—a political community's governing powers. This apparently straightforward proposition conceals an ambiguity, however. Political scientist and comparative constitutionalist Stephen Holmes suggests that "Constitutions may be usefully compared to the rules of the game or even to the rules of grammar. While regulative rules (e.g., 'no smoking') govern preexistent activities, constitutive rules (e.g., 'bishops move diagonally') make a practice possible for the first time."[4] But whether we see a constitution as regulative or constitutive depends on how we understand the activity or practice that it governs or, alternatively, brings into being. It is reasonable to believe that while the rules of chess create the game of chess, they do not create the human capacity, or desire, for structured play.

Recall Aristotle's famous thesis: "Man is by nature a political animal. . . . And yet the one who first constituted [a city] is responsible for the greatest of goods."[5] Like many other species, we might say today, humans are genetically configured to live in collectivities. But unlike all (or nearly all) other species, *how* we live together is not genetically or

[3] Constitution of Iran, available at http://www.iranonline.com/iran/iran-info/government/constitution.html. Article 1 does note, however, that the form of government of the Islamic Republic had been endorsed by 98.2 percent of eligible voters, suggesting that popular belief and endorsement has a role to play. But there is no suggestion that the truth of the Koran and the bindingness of sharia law rest on popular sentiment.

[4] Stephen Holmes, "Precommitment and the Paradox of Democracy," in Jon Elster and Rune Slagstad, eds., *Constitutionalism and Democracy* (New York: Cambridge University Press, 1988), 227.

[5] Aristotle, *Politics* 1251a3, 1251a30, trans. Carnes Lord (Chicago: The University of Chicago Press, 1984).

instinctually determined. Our sociality is unscripted. In one sense, then, constitutions are regulative: they shape but do not create human communities, the collective acts such communities perform, and the relations of dominance and subordination that make such acts possible. In another sense, however, constitutions are constitutive, because they create and give shape to legitimate authority as opposed to simple force. If X is to be a directive or "law" that requires rightful compliance, it must pass through institution Y in accordance with procedure Z. If it does not, it reflects only the will of the speaker, backed by whatever personal or collective power the speaker may command.

A third defining feature of constitutions is their orientation toward distinctive ensembles of public purposes. Consider again the preamble to the U.S. Constitution. Prior to ordaining and establishing national political institutions, it specifies, albeit in general terms, the ends that these institutions are designed to serve. They are created "in Order to" promote the goods of unity, justice, order, security, well-being, and liberty—*not* virtue or piety or perfection. (Other institutions may be thought responsible for cultivating the second list, or perhaps individuals are left alone to work out their own destiny.) Compare this again to the Iranian constitution. In Section 1, Article 3, we find an enumeration of sixteen purposes that the Islamic Republic of Iran is created to promote, the first of which is "the creation of a favorable environment for the growth of moral virtues based on faith and piety and the struggle against all forms of vice and corruption."

A key implication is that constitutional purposes help define each regime's distinctive orientation. No political community is, or can be, wholly neutral regarding all ends that individuals and associations may seek to pursue; each community encourages some while discouraging others (or prohibiting them outright). While some regimes are more capacious than others, none can accommodate on equal terms the full range of human possibilities. It is often said that to govern is to choose; so too is to create a government.

Fourth, constitutions are held to be "higher" than ordinary law. As the legal scholar Larry Alexander puts it, "constitutions are what validate ordinary law—the law produced by legislative and administrative bodies and by common-law courts."[6] We may trace this conception back to the Hebrew Bible, where each newly anointed king is commanded to write for himself a copy of "this law" (the Torah), to keep it with him at all times, and to read it "all the days of his life," so that he may act in accordance with "all the words of this law and these statutes" (Deuteronomy 17:18–19). This same passage suggests that only submission to higher law can check the natural tendency of the ruler toward arrogance, so that "his heart be not lifted above his brethren" (17:20).

[6] Alexander, "Constitutions, Judicial Review, Moral Rights, and Democracy," 119–20.

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The understanding of a constitution as higher law is at its least problematic when the constitution is regarded as the word of God, *nec plus ultra,* and it is nearly as unproblematic when the constitution is regarded as the expression of natural law or "right reason" refracted through human experience. Complications arise when the people are the ultimate sovereign, because it is not obvious how some of their acts can enjoy a higher status than others. One possibility is that unlike ordinary law, a constitution represents a conscious decision by the people acting in their collective capacity. In this vein, the American Declaration of Independence speaks of the right of the people "to institute new Government, laying its Foundations on such Principle, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness." A related possibility, captured in legal scholar Bruce Ackerman's "constitutional moments" thesis, is that the people are more thoroughly involved, and more likely to engage in meaningful deliberation, when they know they must decide questions that will reshape their community.[7] A third possibility, not exclusive of the others, is that constitutional decisions are both broader and deeper than others, requiring the people to act in accordance with their overall conceptions of human nature and human purposes.

Constitutions are almost always harder to change than ordinary laws. The amendment process set out in Article V of the U.S. Constitution is unusually rigorous, which may explain why the Constitution has been amended (officially) only seventeen times (roughly once every twelve years) since the Bill of Rights was ratified in 1791. The need for a framework of reliable expectations if citizens are to make long-term plans is often cited as the key argument in favor of constitutional stability. In fact, its justification goes deeper, as U.S. constitutional discussions illustrate.

Debate about the Constitution's engineered resistance to change broke out even before it was ratified. In *Federalist No. 49,* James Madison replied to Thomas Jefferson's view that it was wrong in principle to give the past a controlling interest in the present, and that, in practice, it should not be onerous to amend a constitution whenever the people so desired.[8] Madison's response merits extended quotation:

[7] Bruce A. Ackerman, *We the People, Volume 1: Foundations* (Cambridge, MA: Harvard University Press, 1991).

[8] Madison was explicitly replying to the argument Jefferson had made in a draft constitution appended to his *Notes on the State of Virginia.* He probably had in mind, as well, Jefferson's oft-repeated view that because human affairs were unpredictable and mutable, their institutional arrangements should be open to regular change. In a letter he wrote to Madison in 1789, for example, Jefferson declared: "I set out on this ground which I suppose to be self-evident: '*That the earth belongs in usufruct to the living;*' that the dead have neither powers nor rights over it. . . . We seem not to have perceived that by the law of nature, one generation is to another as one independent nation to another." Alpheus T. Mason, ed., *Free Government in the Making: Readings in American Political Thought* (New York: Oxford University Press, 1965), 374.

> [A]s every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability. If it be true that all government rests on opinion, it is no less true that the strength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he supposes to have entertained the same opinion. The reason of man, like man himself, is timid and cautious when left alone, and acquires firmness and confidence in proportion to the number with which it is associated. . . . In a nation of philosophers, this consideration ought to be disregarded. A reverence for the laws would be sufficiently inculcated by the voice of an enlightened reason. But a nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato. And in every other nation, the most rational government will not find it a superfluous advantage to have the prejudices of the community on its side.[9]

Reason may justify law, in short, but it does not suffice to secure its acceptance. Time, habit, and what Madison calls "prejudices" (community-based beliefs decoupled from background justification) are needed to close the gap.

This is not a new thought. In the *Politics,* Aristotle criticizes the analogy between progress in the arts and sciences and political progress: "Change in an art is not like change in law; for law has no strength with respect to obedience apart from habit, and this is not created except over a period of time. Hence the easy alteration of existing laws in favor of new and different ones weakens the power of law itself."[10]

As Aristotle stresses, this is not an argument in favor of stubborn conservatism. Circumstances change, and our understanding improves. He did not deny the possibility of what Alexander Hamilton asserts in *Federalist No. 9:* "The science of politics, . . . like most other sciences, has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients."[11] It is sometimes necessary and proper to alter laws, and even the arrangements of ruling institutions that the Greeks called "regimes." But as Aristotle and Madison both argue, the superior rationality of a proposed new law or constitution is not a dispositive argument in favor of adopting it: projected gains must be balanced against

[9] James Madison, *Federalist No. 49,* in *The Federalist Papers,* ed. Clinton Rossiter (New York: New American Library, 1961), 314–15.
[10] Aristotle, *Politics* 1269a20–24.
[11] Alexander Hamilton, *Federalist No. 9,* in Rossiter, ed., *The Federalist Papers,* 72.

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the disruption of habitual acceptance, the confusion of settled opinion, and the diminution of the veneration that rests, however unreasonably, on long-established custom.

These reflections on the psychology of obedience are one thread in a larger tapestry. To a much greater extent than does ordinary legislation, constitution-making rests on broad assumptions about (inter alia) human nature, moral principles, and the way the world works. The Framers of the U.S. Constitution famously did not share the hopes of the French revolutionaries about creating a republic of virtue; the Framers' view was not that virtue in public life was impossible or even rare, but that we would be unwise to rely too heavily upon it.

Of the inferences Madison drew from his political psychology, the best known is his invocation of "auxiliary precautions"—institutional barriers against the weaknesses of human nature—in *Federalist No. 51.* But other inferences are equally noteworthy. Consider, for example, his declaration in *Federalist No. 47:* "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[12] Wise and virtuous philosopher-kings have an exemplary existence, but only in our imagination. In the real world, no one is wise and virtuous enough to be trusted with unchecked and unaccountable power.

Despite these cautionary notes, however, Madison warns against going to an extreme of pessimism about human nature that could undermine confidence in the possibility of republican government. He insists in *Federalist No. 55* that "[a]s there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form."[13] For better or worse, the American constitutional tradition is Janus-faced, resting on a delicate, easily disrupted balance between optimism and pessimism. Optimism expresses itself in periodic outbursts of utopian political expectations, the most recent of which occurred in the 1960s, while pessimism manifests itself in mistrustful efforts to abolish discretionary authority in favor of precise rules, such as those that have proliferated throughout the U.S. regulatory system in recent decades.

III. Pluralism as a Basis for Constitutionalism

The previous section emphasized the diversity and pluralism of constitutional traditions, with U.S. constitutionalism as one among many

[12] James Madison, *Federalist No. 47,* in ibid., 301.
[13] James Madison, *Federalist No. 55,* in ibid., 346.

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possibilities. In next two sections, I explore the constitutional relevance of pluralism understood more precisely and philosophically, taking as my point of departure the account of the moral world offered by Isaiah Berlin and known as value pluralism.[14] During the past decade, moral philosophers have clarified and debated many of the complex technical issues raised by value pluralism, as well as broader objections to the overall approach. For the purposes of this essay, a few basics will suffice.

1. Value pluralism is not relativism. To be a human being is to operate within a shared horizon of moral meaning and justification. In this respect, the distinction between good and bad, and between good and evil, is objective and rationally defensible. Pluralism enters at a different level—for example, the clash between pagan pride and Christian humility that we encounter as an aspect of a systematic difference between two enduring moral outlooks.

2. Objective goods cannot be fully rank-ordered. This means that there is no common measure for all goods, which are qualitatively heterogeneous. It means that there is no *summum bonum* that is the chief good for all individuals. It means that there are no comprehensive lexical orderings among types of goods. It also means that there is no "first virtue of social institutions,"[15] but rather a range of public goods and virtues whose relative importance will depend on circumstances.

3. Some goods are basic in the sense that they form part of any choiceworthy conception of a human life. Few would willingly place themselves in situations in which goods such as sustenance, civic order, and familial and social relations were insecure or absent. To be deprived of such goods is to be forced to endure the great evils of existence. All decent regimes endeavor to minimize the frequency and scope of such deprivations, which provide a ground of unity on which diverse individual and collective lives may be built.

4. Beyond a parsimonious list of basic goods, there is a wide range of legitimate diversity—diversity of individual conceptions of good lives, and also of public cultures and public purposes. This range of legitimate diversity defines the zone of individual liberty, and also of deliberation and democratic decision-making. Where necessity (natural or moral) ends, choice begins.

5. The denial of value pluralism is some form of what Berlin and others call "monism."[16] A theory of value is monistic if it either (a) reduces

[14] The *locus classicus* of this discussion is in the final section (entitled "The One and the Many") of Berlin's most famous essay, "Two Concepts of Liberty," in Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 167–72.

[15] John Rawls asserts that justice is the first virtue of social institutions in *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971). If Berlin is right, Rawls's claim is unsustainable as a general proposition, which does not mean that particular communities cannot choose to elevate justice to this position as a regulative principle of their own social life.

[16] See Berlin, "Two Concepts of Liberty," 170.

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goods to a common measure or (b) creates a comprehensive hierarchy or ordering among goods.

One may well ask why value pluralism is to be preferred to the various forms of monism that thinkers have advanced since the beginning of philosophy as we know it. A few nontechnical remarks may be helpful.

To begin, monistic accounts of value lead to Procrustean distortions of moral argument. Utilitarians notoriously have a hard time defending some of the concrete consequences of their ruling principle; the standard example is that given certain plausible factual assumptions, slavery might turn out to be defensible on utilitarian grounds. But the difficulty is not confined to utilitarianism. Even Kant could not maintain the position that the good will is the only good with moral weight; hence his account of the "highest good," understood as a heterogeneous composite of inner worthiness and external good fortune.

Second, our moral experience suggests that the tension among broad structures or theories of value—consequentialism, deontology, and virtue theory; general and particular obligations; regard for others and justified self-regard—is rooted in a genuine heterogeneity of value. If so, no amount of philosophical argument or cultural progress can lead to the definitive victory of one account of value over the rest. Moral reflection is the effort to bring different dimensions of value to bear on specific occasions of judgment and to determine how they are best balanced or ordered, given the facts of the case.[17]

Many practitioners (and not a few philosophers) shy away from value pluralism out of fear that it leads to deliberative anarchy. Experience suggests that this is not necessarily so. There can be right answers, widely recognized as such, even in the absence of general rules for ordering or aggregating diverse goods.

It is true, as John Rawls pointed out more than thirty years ago, that pluralism on the level of values does not, in principle, rule out the existence of general rules for attaching weights to particular values or for establishing at least a partial ordering among them.[18] But in practice these rules prove vulnerable to counterexamples or extreme situations. As Brian Barry observes, Rawls's own effort to establish lexical priorities among heterogeneous goods does not succeed: "[S]uch a degree of simplicity is not to be obtained. We shall . . . have to accept the unavoidability of balancing, and we shall also have to accept a greater variety of principles than Rawls made room for."[19] But, to repeat, the moral particularism I am urging is compatible with the existence of right answers in specific cases;

[17] For a fuller exploration of objections to value pluralism, see William A. Galston, *The Practice of Liberal Pluralism* (New York: Cambridge University Press, 2004), chap. 2.

[18] Rawls, *A Theory of Justice,* 42.

[19] Brian Barry, *Political Argument: A Reissue with a New Introduction* (Berkeley: University of California Press, 1990), lxxi.

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there may be compelling reasons to conclude that certain trade-offs among competing goods are preferable to others.

IV. Pluralist Constitutionalism

Even though value pluralism is not relativism, pluralism certainly embodies what Thomas Nagel has called the fragmentation of value.[20] But political order cannot be maintained without some agreement. It is not unreasonable to fear that once value pluralism is publicly acknowledged as legitimate, it may unleash centrifugal forces that make a decently ordered public life impossible. Within the pluralist framework, how is the basis for a viable political community to be defined?

A. The minimum conditions of public order

While pluralists cannot regard social peace and stability as dominant goods in all circumstances, they recognize that these goods typically help create the framework within which the attainment of other goods becomes possible. They recognize, then, that anarchy is the enemy of pluralism and that political community is (within limits) its friend. Pluralists must therefore endorse what I shall call the minimum conditions of public order.

For modern societies, these conditions form a familiar list. Among them are clear and stable property relations, the rule of law, a public authority with the capacity to enforce the law, an economy that does not divide the population permanently between a thin stratum of the rich and the numerous poor, and a sense of membership in the political community strong enough (in most circumstances, at least) to override ethnic and religious differences.

It follows that pluralists are also committed to what may be called the conditions of the conditions—that is, those economic and social processes that experience suggests are needed (at least in modern and modernizing societies) to secure the minimum conditions of public order. Among these are a suitably regulated market economy, a basic level of social provision, and a system of education sufficient to promote not only economic competence but also law-abidingness and civic attachment.

I do not mean to suggest that this public framework constitutes an ensemble of goods and values that always outweighs other goods and values. Under unusual circumstances, the moral costs of public life may become too high to be endured, and individuals may feel impelled toward conscientious objection or outright resistance. Nonetheless, pluralists will understand that in the vast majority of circumstances, reliable public

[20] Thomas Nagel, "The Fragmentation of Value," in Nagel, *Mortal Questions* (Cambridge: Cambridge University Press, 1979).

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order increases rather than undermines the ability of individuals to live in accordance with their own conceptions of what gives life meaning and value. This does not mean that each can live out his or her conception to the hilt. The ensemble of conditions of public order will typically require some modification of each individual's primary desires. In the absence of public order, however, the threat to those desires will almost always be much greater. It is rational and reasonable, therefore, for pluralists to incorporate a shared sense of the minimum conditions of public order into the ensemble of goods they value and pursue.

One of the strengths of the U.S. Constitution is that its preambular purposes closely track, and do not move much beyond, these conditions of public order. The Constitution mirrors, on the secular plane, a deservedly famous theological proposition, "In necessary things, unity; in uncertain things, liberty; in all things, charity,"[21] which might well serve as the motto of pluralist constitutionalism.

We may argue about what is necessary for purposes such as protecting liberty, order, or security, of course; all the more so when exigent circumstances reveal tensions among basic goods. Early in the Civil War, for example, President Lincoln was confronted with a clash between domestic tranquility and the rule of law. He famously responded by suspending the writ of habeas corpus, an act that the leading jurist of his day, Joseph Story, deemed to be under the authority of Congress only. Some months later, presenting a formal defense of his action to a special session of Congress, Lincoln asked (rhetorically), "[A]re all the laws, *but one,* to go unexecuted, and the government itself go to pieces, lest that one be violated?"[22] The crux of his argument was that in the specific circumstances in which he found himself, his duty to preserve public order overrode another basic public good with which order could not be reconciled: *Salus populi suprema lex.*[23]

One might argue, of course, that the requirements of public order sometimes depend on how leaders define the boundaries of the "people," a matter of controversy in Lincoln's day. "No Union with Slaveholders," preached William Lloyd Garrison five years before the Civil War; "Our first duty is to pronounce the American Union accursed of God—to arraign every man who supports it, and tell him, as Jesus told the rich young man in the Gospel, that whatever else he may have done, one thing he yet lacketh: *he must give up support of the Union.*"[24] In the two months of fragile peace after the

[21] Often attributed to St. Augustine, this maxim seems to have been used first in the seventeenth century by a German Lutheran theologian, Peter Meiderlin. It now serves as the motto of numerous religious denominations and associations. Pope John XXIII quoted it in his encyclical *Ad Petri Cathedram.*

[22] Quoted in Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991), 12 (emphasis in the original).

[23] That is: "The welfare of the people is the supreme law."

[24] William Lloyd Garrison, "Dissolution of the Union Essential to the Abolition of Slavery," September 28, 1855, in *American Datelines: Major News Stories from Colonial Times to the*

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secession of the southern states, prominent northerners counseled acquiescence. "If the cotton States shall decide that they can do better out of the Union than in it, we insist on letting them go in peace," said Horace Greeley, writing in the leading Republican newspaper, *The New York Tribune.* General Winfield Scott, the commander of the American Army, put it more pithily: "Wayward sisters, go in peace." (If Jefferson Davis, the president of the southern confederacy, had not chosen to fire on Fort Sumter, a decision fiercely opposed within his own Cabinet, a peaceful dissolution of the Union might well have taken place.)[25] Without Lincoln's stubborn, often lonely determination to preserve the Union at all costs—to defend the perimeter of "We the People" defined in 1787—the outcome we now regard as inevitable could have been very different. But the route to the *salus* of that people, so defined, ran through rivers of blood. In public matters, necessity and contingency are intertwined.

B. Constitutionalism

Constitutionalism offers a response to the challenge posed by the centrifugal tendencies of moral pluralism. Beyond the common foundation and requisites of public decency and order, every political community assumes a distinctive form and identity through its constitution. A constitution, we may say, represents an authoritative partial ordering of public values. It selects a subset of worthy values, brings them to the foreground, and subordinates others to them. These preferred values then become the benchmarks for assessing legislation, public policy, and even the condition of public culture.

Various aspects of this thesis require further elaboration.

Within the pluralist understanding, to begin, there is no single constitutional ordering that is rationally preferable to all others—certainly not across differences of space, time, and culture, and arguably not even within a given situation. Nonetheless, the worth of a constitution can be assessed along three dimensions: call them *realism, coherence,* and *congruence.* A constitution is realistic if the demands it places on citizens are not too heavy for them to bear. A constitution is coherent if the values it embodies and promotes are not too diverse to coexist within the same community. A constitution is congruent if its broad outlines correspond to the moral sentiments of the community and to the situation the community confronts.

For the pluralist, there is no single account of how a given constitution comes to be authoritative. One model is covenantal acceptance: the peo-

Present, ed. Ed Cray, Jonathan Kotler, and Miles Beller (Champaign: University of Illinois Press, 2003), 42.

[25] For all this and more, see the extraordinary article, "How the Great Struggle Began," *The New York Times,* April 4, 1915.

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ple of Israel at Sinai.[26] Another is public ratification of the work of a constitutional convention, as in the United States. A third is bargaining among representatives of large forces in a divided society—the process that led to the post-apartheid South African constitution, for example. A fourth flows from the ability of a great leader to express the spirit and needs of a people in a practicable manner—the Napoleonic Code, or the French Fifth Republic. It is even possible for a conqueror to establish an authoritative constitution for a conquered people, as the Allies did for Germany (and the United States for Japan) after World War II.

Authoritativeness, we may say, has two dimensions. No proposed constitution can become authoritative if it falls below the minimum requirements of realism, coherence, and congruence. Nor can it be authoritative if it fails to gain broad acceptance within the community—perhaps not immediately, but within a reasonable period of time. While the post–World War II German constitution met this condition, it seems clear in retrospect that the post–World War I Weimar Republic never did.

A constitution represents only a "partial ordering" of value in three senses. In the first place, there is no guarantee that a community's distinctive constitutional values will always be consistent with the minimum requirements of public order, or that in cases of conflict public order must yield to constitutional values. Second, it is not the case that constitutional values will always dominate an individual's ensemble of personal values. There are circumstances in which it is not unreasonable for individuals to place the values at the core of their identity above the requirements of citizenship.

Third, a constitution is only a partial ordering because the plurality of values that it establishes as preferred will unavoidably come into conflict with one another. Such conflicts are a familiar feature of U.S. constitutionalism. Public purposes understood in the consequentialist manner (e.g., "domestic tranquility") may clash with individual rights understood deontologically (e.g., a "fair trial"). And individual rights may themselves come into conflict; consider the tension between the right to a fair trial and freedom of the press.

From a pluralist standpoint, it is inevitable that many of these conflicts will have no single rationally compelling solution. Reasonable men and women may well disagree about the relative weight to be attached to competing values, and many will be able to make legitimate appeal to different features of the constitutional framework. There are no strict lexical orderings, even in theory, among basic values.

In *Federalist No. 51,* James Madison poses a famous rhetorical question: "[W]hat is government itself but the greatest of all reflections on human nature?" And he continues: "If men were angels, no government would

[26] The Talmudic rabbis debated, inconclusively, the extent to which the acceptance of the Torah could be understood as voluntary rather than coerced.

be necessary."[27] A philosophical pluralist must disagree. Even if every individual were, in Madison's sense, angelic—perfectly capable of subordinating ambition and self-interest to reason and public spirit—the incapacity of reason to resolve fully clashes among worthy values means that authoritative mechanisms for resolving disputes would remain indispensable.[28] The more reasonable individuals are, the more clearly they will understand the need for such mechanisms. And this is true even if there is broad public consensus on constitutional matters—that is, on the ensemble of values that are to be brought into the foreground.

From a pluralist standpoint, individuals vested with the power to make authoritative decisions—whether judicial, legislative, or executive—must understand that many of the controversies they are called on to resolve represent the clash, not of good and bad, but rather of good and good. This means that these individuals must carry out their duties in a particular spirit: to the maximum extent feasible, their decisions should reflect what is valuable, not only to the winners, but also to the losers. Sometimes this will not be possible. But when not required by the logic of the matter to be resolved, winner-take-all decisions needlessly (and therefore wrongfully) diverge from the balance of underlying values at stake.

V. Conclusion

In the previous paragraph, I moved from a structural question—What must constitutions do?—to a normative question—What should they do? The reader may wonder whether I have offered adequate grounds for that transition. After all, I argued earlier that no constitutional ordering can be equally hospitable to all ways of life. Even when they do not explicitly prohibit choices, by placing a particular ensemble of values in the foreground, constitutions create social contexts that encourage some ways of life and discourage others.

This does not mean that all constitutions are created equal, however. Some are more restrictive, others less so. The pluralist approach implies a preference for capaciousness. To the greatest extent possible, constitutional orders should strive to accommodate the range of worthy ways of life—the ones that comport with the minimum conditions of public decency and order. This need not mean equal treatment, or even equal protection. It does mean that whenever the enforcement of public norms significantly interferes with individual or group practices that pluralists cannot deem unworthy, those in positions of authority within a constitutional order should look for ways of diminishing the human costs without eviscerating the norms.

[27] James Madison, *Federalist No. 51,* in Rossiter, ed., *The Federalist Papers,* 322.

[28] In the Talmud, angels are sometimes depicted as arguing, civilly, about important questions—much as the rabbis themselves did.

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Consider the much-discussed case of *Employment Division v. Smith* (1990),[29] where the issue was whether the free exercise clause of the First Amendment would permit the state of Oregon to ban the use of peyote, even for Native Americans who had long used it in their religious rituals, and to deny unemployment benefits to individuals who had been fired for such religiously inspired use. Writing for the majority, Justice Antonin Scalia argued that if a law is neutral on its face, is of general application, and is reasonably related to a legitimate state purpose, the mere fact that its enforcement selectively burdens certain individuals or groups (even in exercising their religion) is neither here nor there. Quite the reverse, he argued: Any society adopting a presumption in favor of accommodation would be "courting anarchy." The greater the diversity within the society, the greater the risk. So even fundamental interests of individuals must be subject to collective decisions. If that means that certain views, otherwise legitimate, are systematically repressed, so be it: "That unavoidable consequence of . . . government must be preferred to a system in which each conscience is a law unto itself."[30]

In my judgment, this approach combines the worst of Hobbes with the worst of Kant. It not only privileges authority over all other values but also assumes that asking "What if everyone did this?" is always the right test. Reasonable determinations based on the facts of particular cases need not (and should not) be transformed into universal decision-rules. There is no evidence that a more accommodating holding in *Smith* would have gutted Oregon's drug laws, any more than permitting certain draftees to be "conscientious objectors" undermined the military draft.

Whether in morals, legislation, or adjudication, pluralism points to a measure of particularism in all decision-making. Constitutional goods and principles create a framework within which decisions are made, and they often contain rules and presumptions that give some kinds of considerations more weight than others. Even so, there is no escaping the need for judgment that we cannot reduce to a collection of algorithms. For that reason, among others, constitutional contestation will never cease, no matter how firmly rooted and venerable a constitution may be.

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[29] *Employment Division v. Smith,* 110 S. Ct 1595 (1990).
[30] Id. at 1605.

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