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TWO UNDERSTANDINGS OF SUPREMACY: AN ESSAY

Vincent J. Samar*

I. INTRODUCTION

Does the supremacy provision of Article VI of the U.S. Constitution undermine the legal force of international law in the United States? Recently, there has been some debate on this issue arising out of the claim that if the U.S. Constitution is “the supreme law of the land,” and that only constitutional officers of the United States, in keeping with their responsibilities to uphold the Constitution, can decide what is international law for the U.S.¹ Such debates are not new to the history of the world. For much of world history, national rulers have claimed that their legal authority derives from some supreme source, be it: God,² tradition,³ or, in more recent democratic times of

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¹ Michael Paulsen has argued that “the Constitution is supreme over international law.” For Paulsen, international legal standards in conflict with the Constitution are unconstitutional. Michael S. Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1765 (2009). Paulsen is not alone. Ken Kersch has argued that use of foreign sources in constitutional interpretation, the so-called “new transnationalism,” is driven by an elite, politically-motivated worldwide trend toward judicial governance, which Kersch claims is antithetical to both democratic self-rule and the rule of law. See Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345, 346, 348-49 (2005). See also Symposium, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303 (2006).

² John M. Kang, *Appeal to Heaven: On Religious Origins of the Constitutional Right of Revolution*, 18 WM. & MARY BILL RTS. J. 281, 294 (2009).

³ See Victor E. Dike, *Traditional Rulers and Democracy*, NIGER DELTA CONGRESS, http://www.nigerdeltacongress.com/tarticles/traditional_rulers_and_democracy.htm; see also Timothy Case, *When Good Intentions Are Not Enough: Problem Solv-*

which the Constitution is a part, the people.⁴ These claims of legal authority are often set forth in sacred writings, historical records, or constitutional documents, like Article VI of the U.S. Constitution. However, once set down, these statements of supreme legal authority may sometimes result in disenfranchising other important legal sources outside the constitutionally authorized institutions. This is especially evident in the United States where recent international laws and decisions of international tribunals have come under attack because a treaty or customary international law was never formally made part of the supreme law of the land.⁵

In this essay, I will examine how two different understandings of the supremacy clause of the U.S. Constitution might impact the United States becoming part of a world government. My purpose in focusing on the possibility of the U.S. becoming part of a world government rather than whether specific international laws and decisions of international tribunals are constitutional is to provide a gauge to consider and evaluate these questions. *If the United States is not constitutionally barred from joining a world government, which would seem to be the greatest deviation from constitutional supremacy, then certainly matters of international law and the legal decisions of international tribunals, because they deviate far less from such authority, ought not to be trumped by constitutional supremacy provided they are otherwise legitimate, even if they were created outside the three constitutionally recognized branches of government.* A second purpose of this essay is to show that if the federal supremacy clause is interpreted according to my second thesis, the Constitution does not prevent the United States from becoming part of a world government, even absent a formal amendment permitting the affiliation. This is not to say if the U.S. were seriously to consider joining a world government, as it did join the UN Charter under its treaty power, that various constitutional provisions such as the treaty power might not prove useful in establishing the legitimacy of the affiliation, but that only a formal amend-

ing Courts and the Impending Crisis of Legitimacy, 57 SMU L. REV. 1459, 1490 (2004).

⁴ Walter F. Murphy, *Designing a Constitution: Of Architects and Builders*, 87 TEX. L. REV. 1303, 1313 (2009).

⁵ This is to some extent illustrated by the disagreement among the justices over the legitimacy of the recent Supreme Court decision in *Medellin v. Texas*, where the Supreme Court ruled that Texas courts are not bound by a decision of the ICJ because Congress did not intend that the treaty of compliance with ICJ judgments would be self-executing. 552 U.S. 491 (2008). The argument by Justice Breyer, joined by two other dissenters, focused on the language of the relevant treaties, including the Vienna Convention that should determine whether the ICJ's decision would bind U.S. courts. *Id.* at 538-67.

ment should not be necessary if the understanding afforded by Thesis Two were to gain widespread acceptance in the legal community.

My further purpose in this essay is to show that the history of the supremacy clause itself is more in line with the second proposed thesis, as it better encompasses what the founders intended. Section II states what these two understandings of supremacy are and how they might affect the United States in becoming part of a world government. Section III asks what theoretical underpinnings lay behind claims of legitimacy for any constitutional interpretation. Section IV looks at how the U.S. Constitution's supremacy clause from its inception came to dominate state constitutional supremacy clauses while at the same time being limited to respecting states' rights and the rights of persons. Section V shows that only the second of my two understandings of federal supremacy is capable of accounting for this American foundational experience. Section VI identifies background norms that must coexist with any application of the second understanding that might legitimize the United States becoming part of a world government. Finally, section VII identifies types of governments that would be unsuited to joining a world government either because their supreme law prohibits such an affiliation or would likely impose ideological barriers to the kind of cooperation necessary to make such a government effective. I conclude with a comment about a challenge likely to confront future generations of Americans, as use of international law becomes the increasingly preferred means for establishing world order.

II. TWO UNDERSTANDINGS OF SUPREMACY

Article VI; section two, of the U.S. Constitution states:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁶

The provision evokes a number of questions, including the one I want to focus on: In what sense does the Constitution claim to be supreme?

It is my contention that the provision was not written to make the federal government more efficient in a way the prior Congress under the Articles of Confederation could not be. Rather, the provision is there because the founders believed, as will be seen in the next section, that the source of the Constitution's authority over the various

⁶ U.S. CONST. art. VI, cl. 2.

state governments was the people of the respective states acting collectively to form “a more perfect union.” Consequently, when the Constitution speaks, it is in a sense the people speaking since there is no other way for the population to speak as a whole short of a constitutional amendment. Hence, what it says is what the people have decided upon, whether right or wrong, in their collective wisdom. I will address the issue of how changing public opinion over time might affect this understanding in a moment.

One view of this provision, which is strictly speaking not a normative view, but is perhaps the more common understanding of supremacy I shall call Thesis One. It states:

[The text declares] that the Constitution, all laws made in furtherance of the Constitution, and all treaties made under the authority of the United States are the “supreme law of the land” and enjoy legal superiority over any conflicting provision of a state constitution or law.⁷

This particular thesis captures the usual meaning of supremacy as “the quality or state of being supreme”⁸ and as “highest in rank or authority.”⁹ It is a *starburst* thesis in the sense that it goes out in all directions claiming authority unto itself. It is also the sense most often evoked in religious thought when statements of divine commands are thought to have been put down for all eternity in some sacred document(s). It is also the sense adopted by those who believe what the original founders thought ought to continue to endure as the basis for establishing national authority over the states.¹⁰ However, because the founders probably never envisioned world government, it is difficult to imagine today what view they would have had concerning the United States becoming part of a world government. Still, by a careful look at what the founders did evoke by creating the supremacy clause, it might be possible to glean an interpretation of their thinking that would allow, without constitutional amendment, the United States to join with other nations to form a world government.

Perhaps a better interpretation of Thesis One would be: “All else being equal, it is only the federal relationship that the Constitution establishes between the branches of government and with the states, that is supreme.” Here, the Constitution’s authority in its usual understanding remains, but only within a certain interpretative

⁷ BLACK’S LAW DICTIONARY (8th ed. 2004).

⁸ *Supremacy Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/supremacy>.

⁹ *Supreme Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/supreme>.

¹⁰ See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 44-47 (Princeton University Press 1997).

context that includes preserving existing governmental structures and subordinating the states to the authority the Constitution delegates to the federal government. The sense takes on a normative significance if it also implies what the Constitution says is right because it emerged as the best alternative to establishing a government based upon the thoughtful reflection and consent of the American people. However, this also means that what the Constitution says is not unconditionally correct. Even if one would not want to think the people could be wrong, it was certainly the case that the founders were operating under conditions of limited information. Consequently, if the supremacy clause is understood in this way, it may limit the possibility of the United States ever joining a world government absent a constitutional amendment, for surely such a joining would require a change in at least some of the powers assigned to the various branches of government or left open to the states.¹¹

¹¹ For example, the United Nations Charter (1945) provides: “All Members, shall settle their international disputes by peaceful means in such manner that international peace and security, and justice, are not endangered.” U.N. Charter art. 2, para. 3. Article 51 of the Charter states:

Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self defense shall be immediately reported to the Security Council and shall not in any way effect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. Charter art. 51.

Clearly, these provisions, while not directly undermining the U.S. Constitution, Article 1, Section 8.11’s grant of power to Congress “[t]o declare war;” surely these provisions constrain that power. They do so by way of treaty power granted to the United States under Article II, Section 2 and Article VI of the Constitution to become a signatory to the Charter. U.S. Const. Art. II, sec. 2; U.S. Const. art. IV. *Contra* Paulsen, *supra* note 1, at 1765, noting:

The constitutional supremacy thesis has an important corollary: as a matter of U.S. constitutional law, the constitutional power to interpret, apply, and enforce international law for the United States is not possessed by, is not dependent upon, and can never authoritatively be exercised by actors outside the constitutionally recognized Article I, Article II, and Article III branches of the U.S. government. The power to interpret and apply international law for the United States is a power vested in officers of the U.S. government, *not* in any foreign or international body.

Put in that way, one immediately notes three areas of possible concern on the Constitution's so-called "supreme" authority. First, what is the extent or range of matters that can be judged as federal matters? Second, who makes that decision as to what constitutes a federal matter: Is it the federal courts or can it be some outside authority? Must it always be the same? Third, what is significance of the phrase "all else being equal?" Taken with this understanding, Thesis One puts up too strong a barrier to the U.S. entering into a world government, at least not without major constitutional change. That is because supremacy, as understood under Thesis One, sweeps away all other values that not only might have encouraged this change, but might also be part of how the Constitution came to be adopted.

Thesis One suggests amending the Constitution to make this happen, if that is what the nation desires, but fails to appreciate that such changes don't always emerge in a finished form, and rather evolve over time as the public becomes more sensitive to what they are. Thesis One affords too broad a range of unrestricted authority to allow these conditions to manifest themselves in the law making process, except by way of amendment. At the point the country is ready to amend the Constitution, three-quarters of the states—as Article VII indicates—already agree with the change. Additionally, Thesis One fails to give due recognition to how the range of U.S. authority already may be limited by existing international norms that define its contents or determine the conditions under which it operates, and that these norms more than the supremacy claim actually determine the authority of the United States on international matters. Thesis One regarding supremacy not only fails by affording too much clearance of its path of operation, but also fails to afford adequate recognition to other norms that might limit its operation.¹²

¹² Problems relating important definitions to clearance are not new in science.

With the discovery during the latter half of the 20th century of more objects within the Solar System and large objects around other stars, disputes arose over what should constitute a planet. There was particular disagreement over whether an object should be considered a planet if it was part of a distinct population such as a belt, or if it was large enough to generate energy by the thermonuclear fusion of deuterium.

A growing number of astronomers argued for Pluto to be declassified as a planet, since many similar objects approaching its size had been found in the same region of the Solar System (the Kuiper belt) during the 1990s and early 2000s. Pluto was found to be just one small body in a population of thousands.

Some of them including Quaoar, Sedna, and Eris were heralded in the popular press as the tenth planet, failing however to receive widespread scientific recognition. The discovery of Eris,

Under the United States Constitution, the Supreme Court is the final arbiter of what the Constitution means.¹³ This means that the Court speaks as to the application and interpretation the Constitu-

an object 27 percent more massive than Pluto, brought things to a head.

Acknowledging the problem, the [International Astronomical Union] set about creating the definition of planet, and [eventually] produced one in August 2006. . . .

. . . .

. . . After much debate and one failed proposal, the assembly voted to pass a resolution that defined planets within the Solar System as:

A celestial body that is (a) in orbit around the Sun, (b) has sufficient mass for its self-gravity to overcome rigid body forces so that it assumes a hydrostatic equilibrium (nearly round) shape, and (c) has cleared the neighbourhood around its orbit. Under this definition, the Solar System is considered to have eight planets. Bodies which fulfill the first two conditions but not the third (such as Pluto, Makemake and Eris) are classified as dwarf planets, provided they are not also natural satellites of other planets.

Planet, WIKIPEDIA, <http://en.wikipedia.org/wiki/Planet> (last visited Sept. 27, 2010). "Having cleared the neighbourhood of its orbit" is a criterion for a celestial body to be considered a planet in the Solar System. This was one of the three criteria adopted by the International Astronomical Union (IAU) in its 2006 definition of planet." InternationalAstronomicalUnion.org, IAU 2006 General Assembly: Result of the IAU Resolution Vote, http://www.iau.org/public_press/news/detail/iau0603/ (last visited Sept. 17, 2010).

¹³ In *Marbury v. Madison*, the Court states:

It is emphatically the province and duty of the judicial department [the judicial branch] to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law [e.g., a statute or treaty] be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their

tion, not just about the Constitution.¹⁴ In this sense, the supremacy of the Constitution and its limitations are carried over to the supremacy of the Supreme Court. If the Court finds itself limited by what it understands, for example, a federal question to be—in light of the changing relationship that has become recognized between the federal government and the states—then the Court’s proclamations of what the Constitution says are themselves further evidence that Thesis One is too restrictive. For by saying what the Constitution requires, the Court is, in fact, saying what legally the Constitution means.¹⁵ The fact that the Court will engage a variety of interpretative methods to say what the Constitution means further suggests that claims of constitutional supremacy, at least in democratic societies like the United States, are not as totally encompassing as Thesis One would suggest.¹⁶ Perhaps a more circumscribed view for the sense of authority in Article VI operates to account for what Thesis One exaggerated. This new view, which I call Thesis Two, states:

All else being equal, the text establishes that the Constitution and the laws made in pursuance thereof, and all treaties made under the authority of the United States, are the highest form of law in the American legal system, mandating that state judges uphold them, when making determinations of federal law even if state constitutions or laws conflict.

In contrast with my earlier “starburst” thesis, the later thesis is more *directional*, focusing the authority of the federal government over the states.

eyes on the constitution, and see only the law [e.g., the statute or treaty].

This doctrine would subvert the very foundation of all written constitutions.

Marbury v. Madison, 5 U.S. 137, 177-78 (1803).

¹⁴ Supreme Court opinions become constitutional law, not just a way to understand the constitution.

¹⁵ Here I adopt a form of semantic interpretation that holds that the meaning of a legal provision is given by what the *words* used would have been intended to convey. See Ronald Dworkin, *Comment* in ANTONIN SCALIA, A MATTER OF INTERPRETATION 119-20 (Princeton University Press 1997).

¹⁶ See PHILIP BOBBIT, CONSTITUTIONAL INTERPRETATION 12-13 (Blackwell, 1991) in which he identifies six modalities of constitutional interpretation that the Supreme Court has at various times and in particular decisions relied upon: historical (looking to what the framers intended), textual (the meaning of the words), structural (inferences drawn from the structures of government set up), doctrinal (past case precedents), and ethical (moral commitments reflected in the Constitution).

Regarding the range of the federal government's authority under Thesis Two, it is helpful to note that Article VI uses the phrase "the supreme law of the land" suggesting that there may be a question as to (1) what constitutes a "law of the land" and also (2) who decides that question. Article VI further states, "the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."¹⁷ This provision suggests that federal court decisions concerning what constitutes a law of the land trump contrary decisions by state court judges. However, it does not suggest that decisions by federal court judges should necessarily trump decisions by judges of international courts, in particular, the International Court of Justice ("ICJ"). Perhaps, the views of ICJ judges on international law (including international human rights) should trump Supreme Court holdings. No doubt this would be a matter of what substantive issue was involved, whether the international aspect was deemed to be the determining factor, and who was making the decision. Still, when all else is *not* equal, when the focus is not comparing other national legal systems but on creating a world order, then the fact that the Constitution is the highest form of law in the American legal system seems to leave open the possibility of a global/international law trumping the Constitution. Here too, the factors aiding the determination may not be confined to national constitutional mandates, but very well might include attendance to the principles and institutions (to the extent these are inscribed in treaties or law) necessary to a smooth working system of global economics, protections for the environment, or human rights protections.

Under Thesis Two, federal law is supreme with the acknowledgement that several issues remain undetermined: (a) what is the law of the land and (b) who makes that determination when a question of international or global law is involved? Neither of these two questions can be answered by application of federal law alone without begging the question of how they might implicate international concerns. Additionally, there is the problem of legitimacy. What would the American legal establishment count as an acceptable answer to these questions? While this essay will not attempt to answer all these questions, it will suggest a method for how we might begin to think about them—a method that hopefully establishes legitimacy for decisions that might fall under a Thesis Two view of supremacy. Here, appeal to "partial" normative political theory is essential.

III. LEGITIMACY

My thesis here is primarily centered on legitimacy, not justification. "By legitimacy" I shall mean: "the political standard that laws

¹⁷ U.S. CONST. art. VI, §2.

and policies are required to pass in order to become formally recognized.”¹⁸ This contrasts with justification as “the epistemic standard on which a conclusion can be said to be adequately supported by a process of reasoning.”¹⁹ The distinction is important because I am not planning on setting forth specific reasons or more basic principles of political morality to establish a justification for why the Constitution should not prohibit the United States from joining with other nations to form a world government. Rather, I am hoping to show the range of political standards that Americans already accept for making major changes to their government structure, including constitutional changes, is not exhausted by having to pass a constitutional amendment.

Identifying which political standards might allow the United States to join a world government is not an easy process. History will attest that public reason, a process Americans have enjoyed, at least since the republic was founded, is what will identify those standards. The famous American historian Alexis de Tocqueville “noted in the early nineteenth century, while the ‘great democratic revolution’ occurring then in Europe and America was ‘a new thing’, it [participatory democracy] was also an expression of “the most continuous, ancient, and permanent tendency known to history.”²⁰ Certainly, it has been a constant challenge to authoritarianism. But what is democracy? History has shown—since many authoritarian nations like North Korea claim large electoral results—that it is not just a demand for public balloting, but what John Rawls has called “the exercise of public reason”.²¹

¹⁸ Brys Tanner, *Justification and Legitimacy: Two Concepts for Deliberative Democracy* (unpublished Ph.D. dissertation, University of Wollongong) (abstract available at <http://conferences.arts.usyd.edu.au/viewpaper.php?id=806&print=1&cf=16>).

¹⁹ *Id.*

²⁰ AMARTYA SEN, *THE IDEA OF JUSTICE* 323 (Harvard University Press 2009) (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 1, (George Lawrence trans., Encyclopedia Britannica, 1990).

²¹ SEN, *supra* note 20, at 324. Amartya Sen notes:

Balloting alone can be thoroughly inadequate on its own, as is abundantly illustrated by the astonishing electoral victories of ruling tyrannies in authoritarian regimes in the past as well as those in the present, for example in today’s North Korea. The difficulty lies not just in the political and punitive pressure that is brought to bear on voters in the balloting itself, but in the way expressions of public views are thwarted by censorship, informational exclusion and a climate of fear, along with the suppression of political opposition and the independence of the media, and the absence of basic civil rights and political liberties.

Id. at 327.

Rawls writes “[t]he idea of public reason specifies at the deepest level the basic moral and political values that are to determine a constitutional democratic government’s relation to its citizens and their relation to one another.”²² Here, constitutional democratic government might encompass a global world order, provided it was itself democratic. Rawls goes on to elucidate the structure of public reason:

It has five different aspects: (1) the fundamental political questions to which it applies; (2) the persons to whom it applies (government officials and candidates for public office); (3) its content as given by a family of reasonable political conceptions of justice; (4) the application of these concepts in discussions of coercive norms to be enacted in the form of legitimate law for a democratic people; and (5) citizens checking that the principles derived from their conceptions of justice satisfy the criterion of reciprocity.²³

Rawls’ idea of public reason seems particularly well suited to operate in pluralistic societies that are democratic, i.e., societies where people may have different philosophical or religious views of the world and different moral conceptions of the good.²⁴ Rawls himself notes:

[i]t is imperative to realize that the idea of public reason does not apply to all political discussions of fundamental principles, but only to discussions of those questions in what I refer to as the public political forum. This forum maybe divided into three parts: the discourse of judges in their decisions, and especially the judges of the supreme court; the discourse of government officials, especially chief executives and legislators; the discourse of candidates for public office and their campaign managers, especially in their public oratory, party platforms, and political statements.²⁵

The idea of using public reason as an explanation of democracy has also been advanced by Jürgen Habermas.²⁶ Habermas provides a more procedural exposition than Rawls, although Amartya Sen believes the differences may be deceptive.²⁷ Habermas, for example, disagrees with Rawls’s “priority of liberal rights [including liberty of belief and conscience, the protection of life, personal liberty, and prop-

²² JOHN RAWLS, COLLECTED PAPERS 574 (Samuel Freeman ed., 1999).

²³ *Id.* at 574-75.

²⁴ See JOHN RAWLS, POLITICAL LIBERALISM 213-14 (New York: Columbia University Press, 1993).

²⁵ RAWLS, *supra* note 22, at 575.

²⁶ See SEN, *supra* note 20, at 324.

²⁷ See *id.* at 325.

erty] which [Habermas believes] demotes the democratic process to an inferior position.”²⁸ However, Sen has noted that notwithstanding their differences in approach, to the extent both Rawls and Habermas have included a right to property, Rawls has never argued that the right to property is an entitlement; it is more an incentive toward enhancing “the deal the worst-off receive.”²⁹ Consequently, these two world-class philosophers might not be as far apart as at first might appear.³⁰

More problematic, according to Sen, is Rawls’s starting question: What constitutes perfectly just institutions as the point for all further comparisons?³¹ This is problematic because it attempts a deductive justification with which all may not agree. Sen prefers a different question as his point of departure: How can justice be advanced?³² The difference between the two positions recognizes that there may be no prior agreement, “even under strict conditions of impartiality and open-minded scrutiny (for example, as identified by Rawls in his ‘original position’) on the nature of the ‘just society.’”³³ Consequently, “actual choice demands a framework of comparison of justice for choosing among the feasible alternatives.”³⁴ In contrast with Rawls’s “transcendental institutionalism,” Sen prefers a “focus on actual realizations and accomplishments, rather than only on the establishment of what are identified as the right institutions and rules.”³⁵

My point in referencing this debate is not to take one side or the other on the ultimate question of justification. Rather, my goal is more tentative—to open the possibility for legitimation to arise by means other than a straight forward deduction from basic principles or already-established agreements without, at the same time, denying the possibility of someday finding a transcendental deduction. The hope, of course, is that a partial approach will not produce inconsistent results and that any well-established future theory of world government will likely benefit from how various partial approaches have helped us clarify along the way our most fundamental goals and aspirations, as well as what we believe ought to constrain our efforts to achieve them. That said: How might such a more partial approach function?

²⁸ *Id.* at 325.

²⁹ *Id.* at 325 & n.

³⁰ *Id.* at 9.

³¹ *Id.*

³² *Id.*

³³ *Id.*.

³⁴ *Id.*

³⁵ *Id.* at 10.

Here we might begin with how Sen sees freedom operating to further “a significant aspect of human life.” Sen has stated:

In noting the nature of human lives, we have reason to be interested not only in the various things we succeed in doing, but also in the freedoms we actually have to choose between different kinds of lives. The freedom to choose our lives can make a significant contribution to our well-being, but going beyond the perspective of well-being, the freedom itself may be seen as important. Being able to reason and choose is a significant aspect of human life. In fact, we are under no obligation to seek our own well-being, and it is for us to decide what we have good reason to pursue . . .³⁶

Sen’s point here is not the simple utilitarian position of maximizing pleasure or minimizing pain, but seeing social realizations “in context to the “capabilities people actually have.”³⁷ His social choice concern is with “measuring individual interests, values, or welfares as an aggregate towards collective decision.”³⁸ An example of such a collective decision is passing a set of laws under a constitution.³⁹ Freedom to choose gives the population the opportunity to decide what they should do, and with that opportunity comes the responsibility for what we do—to the extent that they are chosen actions.”⁴⁰ Here comparisons of different positions can be a very helpful tool. Freedom is not just some pre-political liberal value, but neither is it, as the civic republican might see it, the end of a process of democratic compromise. It must flow between both points of view, since the democratic process itself requires participation of free and equal citizens. Freedom emerges as a necessary element of the discourse that brings this process to life. It can help afford legitimacy to a choice, even though the choice is not fully theorized. For by a process of comparison, one is free to rank alternatives, even if not absolutely, to see which one might appear to be the better. And if one is at all empirical—by considering not only how different choices effect other peoples lives, but also ranking those choices to support well-being as well—the result will have positive normative significance. Obviously, there is no single formula

³⁶ *Id.* at 18.

³⁷ *Id.* at 19.

³⁸ *Id.*

³⁹ KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 106 (John Wiley & Sons, Inc. 1966). It should be noted that Social Choice Theory is not the same as Public Choice Theory. The later reflects a more utilitarian/preference approach to decision-making, while the former takes into account relevant norms and ways different decisions impact human life.

⁴⁰ See SEN, *supra* note 20, at 19.

for identifying a choice based on public reason. It manifests itself when enough people, after having deliberated, decide upon a position it would be futile for others to continue to dispute. As Sen is noted to have said: “it should not be difficult to say that Emperor Nero’s gain from burning Rome did not outweigh the loss of the rest of the Romans.”⁴¹

I want to suggest that especially at the political level such partial orderings, in the absence of a more fully theorized position, are not only not uncommon, but also often lead to wide-ranging acceptance for changes in the political order. Indeed, one of the most illustrative examples of this, that may also provide a precedent for the United States someday becoming part of a world government, is found in the debates leading to the adoption of the American constitution. As will be seen, not only did those debates underscore an external process that would lead to the federal Constitution becoming supreme over state supremacy clauses, but they also lead to limitations being placed on federal supremacy in service to various outside values necessary to obtain the support of the American people. None of this was derived by any transcendental deduction. All of it came from thinking through the failures in the Articles of Confederation, combined with background learning regarding politics and economics and how in both ancient and modern times various efforts had been made to construct working republics that could effectively provide for the common good.⁴²

IV. THE HISTORY OF U.S. CONSTITUTION’S SUPREMACY CLAUSE

What meaning did the founders assign to the supremacy clause? Of note is that the clause did not gain too much attention—no discussion or dissent—when it was first proposed on July 17, 1787 by Luther Martin, the delegate from Maryland to the Philadelphia Convention to replace the more controversial Madison/Pickney proposal that Congress “be empowered to veto state legislation.”⁴³ The original Martin language uses “supreme law of the several states” along with some other wording that was changed first by the Committee on Detail and later by the Committee on Style to the current wording “supreme

⁴¹ AMARTYA K. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* 99 (C.J. Bliss & M.D. Intriligator eds., Elsevier 1984)

⁴² *See generally* FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 56-142 (1985).

⁴³ *Id.* at 255 (citing *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 28-29 (Max Farrand ed., 1937)).

law of the land,” which was actually completed after the Convention had adopted the provision on August 23, 1787.⁴⁴

Initially, it appears that the founders expected the supremacy clause to apply only against the states. The historian Forrest McDonald notes that the original Madison/Pickney language afforded the Congress the power “to veto state legislation,”⁴⁵ thus making the Constitution dominant over the states.⁴⁶ Luther Martin’s new language substituted for this congressional veto that “the constitution, acts of Congress passed in pursuance of it, and treaties be ‘the supreme law of the respective States . . . & that the Judiciaries of the several state shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding.’”⁴⁷ According to McDonald, this change implied that judges “were to apply the test of constitutionality to *state* legislation.”⁴⁸ Subsequently, however, the language was further modified, “from ‘Judiciaries of the several States’ (which would include juries) to ‘the judges in the several States,’ which excluded juries but can be read as including national as well as state judges”⁴⁹

Madison seems to have preferred the original Madison/Pickney language that would have made the Constitution supreme over the states by allowing the Congress to review acts of state law to see if they conformed to the federal Constitution.⁵⁰ Apparently, he was less sure that the courts, rather than Congress, would be able to reign in the states, given their own state constitutional supremacy clauses that would now be under the authority of the federal government. In a letter to Jefferson, dated October 24, 1787, Madison “tacitly confirmed this interpretation . . . and repeated his belief that the [Martin] substitution would prove to be inadequate.”⁵¹ However, the history of judicial review has since shown the courts to be well adept to affirm, where constitutionally prescribed, the powers of the federal government over

⁴⁴ *Id.* (citing THE RECORDS OF THE FEDERAL CONVENTION OF 1787 389 (Max Farrand ed., 1937)).

⁴⁵ *Id.* at 255.

⁴⁶ *Id.*

⁴⁷ *Id.* (citing THE RECORDS OF THE FEDERAL CONVENTION OF 1787 28-29 (Max Farrand ed., 1937)).

⁴⁸ *Id.*

⁴⁹ *Id.* (citing THE RECORDS OF THE FEDERAL CONVENTION OF 1787 183 (Max Farrand ed., 1937)).

⁵⁰ *See id.* at 275-76.

⁵¹ *Id.* at 276 (citing Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 THE PAPERS OF JAMES MADISON, 1787-1788, at 205-20 (Robert A. Rutland ed., 1977)).

the states, and thus to affirm the supremacy of the federal Constitution.⁵²

Perhaps the best insight into what the founders originally intended by the provision is found in the *Federalist Papers*, a set of arguments by writers of the Constitution of 1787 urging ratification by the states.⁵³ In THE FEDERALIST No. 27, for example, Alexander Hamilton explains how the new Constitution would affect the sovereignty of the states:

It merits particular attention in this place, that the laws of the confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial in each state will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws.⁵⁴

The footnote following this quoted passage warrants particular attention because Hamilton says: “The sophistry which has been employed to show that this will tend to the destruction of the State governments will, in its proper place, be fully detected.”⁵⁵ Clearly, Hamilton envisioned that the creation of a national government would not destroy existing state governments, but would only curtail their individual sovereignty by creating a further set of duties for state officers, above and beyond their state responsibilities, necessary to comply with their new federal responsibilities. In situations where state and national positions would conflict, provided the Constitution had assigned power to the national government, state officers would be obliged to fulfill their federal responsibility over their state responsibility, because a federal constitutional responsibility would now be supreme over a state constitutional responsibility. Also, identifying situations where this deference would be needed would be the respon-

⁵² *E.g.*, *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803).

⁵³ The Articles of Confederation were thought to be too weak to meet the needs of the young nation because they provided for no executive and required unanimity of the states for any change. At the time the Convention first met in 1787, its charge was to propose amendments to the Articles that would strengthen the young nation’s ability to regulate relations among the states and foreign governments. It quickly became apparent that amendments would not work and a totally new organization of the nation was needed. *See* McDONALD, *supra* 42, at 213.

⁵⁴ THE FEDERALIST No. 27, at 146 (Alexander Hamilton) (J.R. Pole ed., 2005).

⁵⁵ *Id.* at 146 n. *.

sibility of the federal courts, as provided for under the new Constitution.⁵⁶ Thus, the Constitution reigns down the federal power over the states, but only to the extent that it has assigned certain powers to the national government.

In responding to both attacks against the “necessary and proper clause” as well as the “supremacy clause,” Hamilton, in *Federalist* 33, again considers what actual power these two clauses convey to the federal government. Here he states:

These two clauses have been the source of much virulent invective and petulant declamation against the proposed Constitution. They have been held up to the people in all the exaggerated colors of misrepresentation as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated; as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor sacred nor profane; and yet strange as it may appear, after all this clamor, to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same if these clauses were entirely obliterated as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government and vesting it with certain specified powers.⁵⁷

Here Hamilton makes explicit what is already implied by the creation of a national government with limited powers, namely, that when acting within the scope of those powers, the national government is supreme over state law. Also key is the fact that the national government has no broader power to act than what the Constitution has vested in it. Since it was never intended that the national government would replace the state governments, claims of state government obliteration are thus without justification.

What is justified, by ratification of the Constitution, is that powers previously assigned to the states, now are assigned to the federal government. But, Hamilton also wanted to make clear that law established by the people of the several states, was not a treaty among the several states, which declared that a national government with

⁵⁶ U.S. CONST. art. III.

⁵⁷ THE FEDERALIST No. 33, at 173 (Alexander Hamilton) (ABA ed., 2009).

certain designated powers would operate over the states. To make this explicit, he writes:

[I]t is said that the laws of the Union are to be the *supreme law* of the land. What inference can be drawn from this, or what would they amount to, if they were not to be supreme? It is evident they would amount to nothing. A LAW, by the very meaning of the term, includes supremacy. It is rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY.⁵⁸

The idea that constitutionally assigned powers to the national government must be supreme over state constitutional supremacy clauses is also supported by James Madison. In *Federalist 44*, Madison responded to the frequent attacks by Anti-federalists over the shifting of power from states to the federal government. Here he identifies three potential areas of national weakness if the constitutional assignment of powers to the national government were subject to state constitutional supremacy clauses:

In the first place, as these constitutions invest the State legislatures with absolute sovereignty in all cases not excepted by the existing Articles of Confederation, all the authorities contained in the proposed Constitution, so far as they exceed those enumerated in the Confederation, would have been annulled, and the new Congress would have been reduced to the same impotent condition with their predecessors.

In the next place, as the constitutions of some of the States do not even expressly and fully recognize the existing powers of the Confederacy, an express saving of the supremacy of the former would, in such States, have brought into question every power contained in the proposed Constitution.

⁵⁸ *Id.*

In the third place, as the constitutions of the States differ much from each other, it might happen that a treaty or national law of great and equal importance to the States would interfere with some and not with other constitutions, and would consequently be valid in some of the States at the same time it would have no effect in others.

In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members.⁵⁹

The aforementioned comments by Hamilton and Madison are worth noting because they directly engage a number of the themes of this essay. First is Hamilton's acknowledgement that in creating a hierarchy of political associations, the greater dominates the lesser. Second is Madison's suggestion that the greater association comes about not by its conformity to the constitutions of the lesser associations, as was true of the Congress under the Articles, but by the people of the several states. Otherwise, similarly to the Articles, the Constitution would have little power over the states, especially those whose constitutional supremacy clauses did not "fully recognize the existing powers of the Confederacy."⁶⁰ Third is Madison and Hamilton's mutual concern that the national government should arise through an arrangement that does not require the unanimous consent of all the states. This latter acknowledgement is particularly important as it suggests a limit to state constitutional supremacy clauses. No state, on its own, can trump the collective will of all or even most of the others. As Article VII provides, states that had not chosen to ratify the federal Constitution once the requisite number of nine had done so, would not be part of the new United States.⁶¹ In addition, they would not be entitled, as they were under the Articles, to prevent the other states from entering into the federal union.⁶² The arrow of determination is thus from the collection that makes up the larger association down to the members that make it up, and not the reverse.

⁵⁹ THE FEDERALIST No. 44, at 175 (James Madison) (ABA ed., 2009).

⁶⁰ *Id.*

⁶¹ U.S. CONST. art. VII.

⁶² *Id.* (stating that "The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same.").

To ensure that this would be the case, and to show that the people of the several states were the groundwork for the new Constitution, thereby providing it legitimacy, Madison, too, gives prominence to the oath requirement that state judges will be obligated to take:

The members of the federal government will have no agency in carrying the State constitutions into effect. The members and officers of the State governments, on the contrary, will have an essential agency in giving effect to the federal Constitution.⁶³

Here it is significant to note that the founders did not envision the Constitution to take its authority from already existing state constitutions, but from the people of the several states directly. This is made clear by the fact that Article VI does not require the states to rewrite their state constitutional supremacy clauses, but only requires that the judges in every state be bound by oath to the federal Constitution thereby suggesting that previously supreme state constitutions would now be subject to federal constraint.

As further support for the idea that the Constitution does not derive its authority from the states, Article VII declares that ratification by a convention in nine states “shall be sufficient for the Establishment of this Constitution between the states so ratifying the same.” Thus, even the authority to ratify the proposed Constitution itself, let alone its authority to operate once ratified, is deemed from the outset to derive not from any agreement among the states, as it does under the Articles, but from the people of the United States. It can thus be inferred that the founders foresaw the federal Constitution trumping state supremacy clauses by its very inception, beginning with the process of its own ratification. This suggests that the prior sovereignty of states was now constrained to matters not delegated by the Constitution to the national government. But, what is constraining the states to establish the Constitution after only nine states, as opposed to all thirteen, as required under the Articles, have ratified it? Apparently, the founders believed it was an inalienable right of the people of the several states to declare the form of government.

This social contract justification for the federal Constitution is made even more poignant when one considers the way the Constitution came into being. Initially, the delegates to the Philadelphia Convention of 1787 were authorized to propose amendments that might

⁶³ THE FEDERALIST No. 44, at 257 (James Madison) (ABA ed., 2009). It is interesting to note the historical development of the federal government in which a number of departments and agencies have moved toward creating their own enforcement apparatus and away from relying on state officers to carry out their will.

rectify deficiencies in the Articles of Confederation. Among the defects were no provision for repayment of debts to foreigners and to the nation's citizens contracted during the Revolutionary War; no provision for repossession of valuable territories and important posts held by foreign powers, which by expressed stipulation in the Treaty of Peace at Paris ought to have been surrendered to the new nation; no ability to repel an outside aggression against the union of states or assert a national right against Spain to navigate the Mississippi; and no capacity to regulate commerce among the several states, to coin money, or borrow on the credit of the United States.⁶⁴

However, as these matters were discussed, the framers soon realized that the problem was with the Articles themselves. In particular, not only did the Articles of Confederation not provide for an executive to carry out the law, but it required unanimity among the states for any amendments.⁶⁵ Only if all thirteen states agreed could the Articles be amended. Under the proposed Constitution, by contrast, not only would many of the aforementioned issues be attended to by specific stipulation, but also the Constitution itself would be established between the states that had ratified it, as soon as nine states had done so.⁶⁶ Additionally, the framers sought to avoid any subsequent criticism that adoption of the Constitution in this manner might lack the required unanimity of the states. McDonald describes the framers' anticipation of such a criticism and what had to be done to avoid it, as follows:

In a resolution appended to the Constitution and "laid before [the Confederation] Congress," the convention recommended that Congress forward the document to the states and that "it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification." Congress unanimously resolved to follow that recommendation, and the legislatures of all thirteen states voted to abide by it. In so doing, Congress and the legislatures approved Article VII of the Constitution and thereby constructively

⁶⁴ THE FEDERALIST No. 15, at 76-77 (Alexander Hamilton) (ABA ed., 2009).

⁶⁵ ARTICLES OF CONFEDERATION of 1781, art. XIII, para. 1 (stating "Every State shall abide by the determinations of the united States in congress assembled, on all questions by which this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a congress of the united States, and be afterwards confirmed by the legislatures of every State.").

⁶⁶ U.S. CONST. art. VII.

amended the Articles of Confederation in regard to the amendment process; and they did so in accordance with the stipulations in the Articles themselves.⁶⁷

Even if a unanimously adopted resolution of the Confederation Congress to which all thirteen states subsequently agreed would be sufficient to amend the Articles, the idea that a single resolution should open the door to the creation of a very different form of national government must give one pause. For the result hoped for by virtually all of the Federalists was not that the Articles of Confederation would be amended, for that would have kept the same form of government that they had found so unworkable. The Federalists sought a new republican form of federated government that had never been envisioned by the drafters of the Articles. McDonald's own description of the Resolution as a "constructive amendment" suggests that what the Resolution sought to do would never fully suffice to explain how so radical a departure from the government under the Articles could now be taking place.⁶⁸

In effect, the delegates to the Philadelphia Convention were recommending to the Congress and to the people of the United States a form of government never before undertaken. Just proposing to the whole people of the United States a Constitution with a strong, though limited, central government—which had not existed under the Articles—in itself was revolutionary. The proposed resolution that would ultimately be relied upon to amend the Articles emphasized just how much the new Constitution affronted the idea of unanimous agreement upon which the Articles were based. This document represents a social contract between the national government and the whole people, rather than between the national government and the thirteen sovereign states.⁶⁹ And the supreme authority of the Constitution is established not by words, but by the willingness of the people to accept a national authority to operate over the states.

Needless to say, the Anti-Federalists who opposed adoption of the Constitution viewed the supremacy clause with great suspicion.

⁶⁷ MCDONALD, *supra* note 42, at 279 (quoting Farrand, *Records*, 2:665). Thereafter, any further amendment to the new Constitution would have to be first proposed by either two-thirds of both houses of Congress or after two-thirds of the legislatures of the several states called forth a convention to propose amendments, and in either case the proposed amendment would need to be ratified by three-fourths of the several states to become part of the Constitution. *See also* U.S. CONST. art. V.

⁶⁸ The Articles, for example, did not envision a tripartite central government with its own executive and judicial authority.

⁶⁹ Exactly how strong the bond of union was would be tested seventy-five years later in a bloody civil war.

An efficient federal government need not, however, imply one so powerful as that proposed in the Constitution. The broad grants of power, taken together with the “supremacy” and “necessary and proper” clauses, amounted, the Anti-Federalists contended, to an unlimited grant of power to the general government to do whatever it might choose to do.⁷⁰

⁷⁰ HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS TO THE CONSTITUTION 28-29* (University of Chicago Press 1981).

Moreover, the Anti-Federalists insisted, in contradiction to their opponents, that the powers of the proposed government, not its organization, was the central question. All of the arguments of the Federalists that this new government was better constructed than the old one fell before the massive fact that the old government was weak and this one would be strong. “The Old Confederation is so defective in point of power,” William Grayson plaintively explained to the Virginia convention, “that no danger can result from creating offices under it; because those who hold them cannot be paid. . . . Why not make this system as secure as that, in this respect?” Not many Anti-Federalists were quite so transparent, but their opponents were quick to insist that Grayson’s position was precisely the ridiculous conclusion to which the Anti-Federalists argument led: without the power to do good, a government can do no harm. But a government must have the capacity to accomplish its ends, otherwise liberty itself is in danger: “there is no way more likely to lose ones liberty in the end than being too niggardly of it in the beginning. . . .” The means, the Federalists argued again and again, must be proportioned to the end, and the end in the case of the general government is not capable of being limited in advance. As bounds cannot be set to a nation’s wants, so bounds ought not to be set to its resources. “The contingencies of society are not reducible to calculations. They cannot be fixed, or bounded, even in imagination.”

The framers of constitutions must see that “no power should be wanting which the safety of the community requires.” Otherwise, when critical occasions arise, the country will suffer the alternative of usurpation or catastrophe. Of course, every power can be abused, and abuse must be guarded against; but “our risk of this evil [is] one of the conditions of the imperfect state of human nature, where there is no good without the mixture of some evil.” Publius [the name that the authors—Hamilton, Madison, and Jay—of the *Federalists Papers* were writing under, then] drove the point home:

For the absurdity must continually stare us in the face of confiding to a government the direction of the most essential national interests, without daring to trust it to the authorities

Their arguments sought to make the public question whether this new form of government really was wanted, implying that it would be the people that finally would be deciding the question. Here it is important to acknowledge that “public” meant free, property-owning white males. Still, these were the individuals who would create the new nation. Implicit in even the Anti-Federalist criticism was the acknowledgement that in the end it would be the people (so understood) who would decide the type of government to adopt.

Arguments of the Anti-Federalists that the new national government would undermine their liberties gave the public pause. Just six years before, the United States of America and the Kingdom of Great Britain signed the Treaty of Peace that ended the American Revolutionary War and granted sovereign independence to the new nation. Americans (though they seldom would describe themselves as such) held well in their memories the abuses that had occurred under British rule, and which led them to fight a war for independence from Great Britain. Many of these abuses—especially what were perceived as violations by the British Crown of their rights as Englishmen to liberty, property, and representation in Parliament—are set forth in the *Declaration of Independence*. Many Americans believed, at the time, these abuses warranted their final step toward separation. And so, when the Constitution was proposed to offset the endemic inabilities of the Confederation Congress to resolve problems faced by the country, the citizens of the young nation were concerned whether this proposed cure would prove more harmful than the disease.

Increasingly, however, the citizens were also becoming aware that the current situation under the Articles was not sustainable. And so, they adopted a compromise to insure the legitimacy of the new government and to offset fears of usurpation and tyranny given the centralization of power. Under the agreement, the first Congress meeting under the new Constitution would propose a Bill of Rights to the states for ratification as amendments to the Constitution, which became the first ten amendments to the new Constitution in 1791.⁷¹ Basically, the Bill of Rights would limit the power of the new national government in

which are indispensable to their power and efficient management. Let us not attempt to reconcile contradictions, but firmly embrace a rational alternative.

Id.

⁷¹ See generally RICHARD LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS*, (2006) (discussing Madison’s proposal of the Bill of Rights and the conflict regarding the protection of human liberties between the Federalists and Anti-Federalists, and the difficulty faced by the Philadelphia Convention to ratify the Constitution).

which it was hoped the public would find solace from the fear tyranny.⁷²

The agreement for a Bill of Rights added to the Constitution a set of limits to the power of the national government. Politically, it established the legitimacy of the new Constitution by limiting the new government to respect the basic freedoms of the public. Here it is important to see that the young Republic did not start out with the view that the Constitution would be first adopted, and then, if needed, a Bill of Rights would be added later. Rather, it started out with the understanding that a needed national government would be created, but that it would be limited almost from the outset by a Bill of Rights protecting individual liberties. It may not have been completely clear which rights would be included, although some involving basic liberties of the person, including rights to freedom of religion, speech, and freedom of the press, along with guarantees of property, and provision for states to retain some sovereign rights, were certainly to be included.⁷³ As a consequence, the public could view ratification of the Constitution as the outcome of a debate in which the free, property-owning white male citizens of the time could come to the view that

⁷² The amendments comprising the Bill of Rights that would limit any overreaching federal power are the following: The First Amendment bans state establishment of religion and acknowledges individual freedoms of speech, press, assembly, religious worship, and the right to peacefully petition the government for grievances. The Second Amendment establishes the right to keep and bear arms. The Third Amendment establishes protection against the forced quartering of soldiers in private homes during times of peace. The Fourth Amendment provides the right of the people to be secure in their person, papers, and effects. The Fifth Amendment requires due process of law before one can be denied life, liberty, or property for an offense; it also protects against double jeopardy and being forced to testify against oneself in a court of law. The Sixth Amendment provides for a speedy and public trial by an impartial jury, the right to cross-examine opposing witnesses, to have a lawyer and to be able to present friendly witnesses. The Seventh Amendment provides for trial by jury in civil suits. The Eighth Amendment provides against excessive bail or fines or imposition of cruel and unusual punishments. The Ninth Amendment acknowledges that the rights enumerated in the Constitution shall not be understood to limit other rights that may be held by the people. Finally, the Tenth and last Amendment to be adopted from the original Bill of Rights provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." See U.S. CONST. amends. I-X.

⁷³ "The proposed first Article, dealing with the number and apportionment of U.S. Representatives, never became part of the Constitution. The second Article, limiting the power of Congress to increase salaries of its members, was ratified two centuries later as the 27th Amendment." RevolutionaryWarandBeyond.com, History of the Bill of Rights, <http://www.revolutionary-war-and-beyond.com/history-bill-of-rights.html> (last visited Sept. 17, 2010).

their public reason to form a new nation would respect their basic rights.

The ratification process itself made clear that there would be conditions on the new Constitution that would constrain its supremacy by preventing the new government from having too much latitude to interpret what powers had been given to it. These conditions set boundaries on federal lawmaking that were intended to protect some states' rights and the rights of the people to liberty. But an interesting question arises of whether their existence does not also support my conclusion that by the end of the process of compromise and ratification, the view of federal supremacy held by the founders was that set out in my *directional* thesis establishing only some authority over the states, rather than my *starburst* thesis claiming authority writ large.⁷⁴ For the people were now deciding to adopt a federal Constitution whose authority was simultaneously acknowledged both to be supreme over the states, yet limited in its actions by the Bill of Rights.

V. FOUNDATIONS

This essay has operated on the assumption that the foundation of the American Constitution resides in a social compact with the American people. That view now needs to be made more precise to avoid a possible misleading implication. It is the case that the founders did adopt a social compact theory of government. But it was neither a pure contract with the American people nor a pure contract with the states. On the one hand, the founders recognized the individual sovereignties of the existing thirteen United States for the purpose of having ratification by state rather than a general vote of the American people. In this, they were affording deference to the current arrangement of the government under the Articles. On the other hand, they specified that each state was to choose delegates to a ratification convention for that state, which would then vote on whether to accept the Constitution.⁷⁵

⁷⁴ The difference between the two theses, is that the *directional* thesis expressly limits the Constitution's authority to the hierarchy established by *only* "the American legal system," "all else being equal."

⁷⁵ The Articles of Confederation (ratified 1781) had declared: "each state retains, its sovereignty, freedom, and independence." The treaty of peace (1783) that formally ended the Revolutionary War states in Article 1: "His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free sovereign and independent states." McDONALD, *supra* note 42, at 150. So, there was serious ground for the view, originally proposed by Delaware Delegate Dickenson for "a mixed [governmental] system, partly national, and partly federal. In which one branch of Congress would 'be drawn immediately

The choice to use the convention procedure grew out of a fear that a constitution ratified directly by the legislatures of the several states might be viewed as a treaty among the states—allowing all states to withdraw whenever any state breaches the agreement. Whereas, a Constitution drawn from a vote in convention, even if individual states had their legislature choose the delegates, would represent a compact with the American people, since the convention process would be outside the normal operations of state government. Indeed, Madison, in the first week of the Philadelphia convention, urged, “that the Constitution be submitted to ‘the supreme authority of the people themselves.’”⁷⁶ Consequently, Article VII provides: “The Ratifications of the Conventions of nine States, shall be sufficient for the establishment of this Constitution between the States so ratifying the same.”⁷⁷

The reason for not submitting the Constitution to the American people as a whole was to avoid possible criticism that the founders were effectively trying to favor states with larger populations and trying to force smaller states to abide by the decisions of the larger states. As further support that the founders were not attempting to side with larger states, after the Constitution would be ratified by nine states, it would go into effect *only* in those nine states;⁷⁸ the remaining states would remain independent sovereignties until they decided whether or not to ratify the Constitution. This also gives strength to the idea that a larger association (federal government) is not imposing its will on smaller already existing societies (states), as some have argued, but rather that each state has determined on its own in convention—though not by its own constitutional authority—whether to be part of the larger association.⁷⁹ This should, however, not be misread to sug-

from the people’ and the other would represent the states and be elected by state legislatures for long terms.” *Id.* at 215.

⁷⁶ *Id.* at 279-80 (citing Farrand, *Records*, June 5, 1:122-23).

⁷⁷ U.S. CONST. art. VII.

⁷⁸ Forrest McDonald is particularly concerned to make this point because adoption of the Constitution would amend “each of the state constitutions in a number of ways” and he did not think the framers intended to make it appear as if “the people in some states were altering the political societies and constitutions of other states.” McDONALD, *supra* note 42, at 280.

⁷⁹ McDonald cites Herbert Storing for the alternative, disagreeing where Storing “argues that the ratification procedure rested on the ‘assumption that the American states are several political wholes . . . but are, and always were from the moment of their separation from the King of England, parts of one whole.’” McDonald responds that notwithstanding the Preamble to the Constitution, which states “We the People of the United States . . . do ordain and establish this Constitution,” the fact that the Constitution had to “be submitted for ratification by each of the thirteen political societies, which is to say by the people of the several states

gest that it was the established constitutional governments of the individual states rather than the American people that gave rise to the national government coming into being. Herein lies an important difference in the way state sovereignty is treated under the Constitution versus the way it was treated under the Articles.

According to Article VII, ratification would be achieved by an affirmative vote by *convention* in nine states rather than in all thirteen existing state legislatures, as provided for under the Articles.⁸⁰ The Constitution, in effect, bypasses state constitutional procedures by appealing directly to the people of the various states to secure its ratification suggesting that *state sovereignty* was certainly not supreme in the way Thesis One might suggest.⁸¹ While it would be wrong to interpret this to mean that state legislatures would have no voice in the recommendation or selection of delegates or that now the people in each state would vote on ratification, it does signify that it is the people of the individual states, acting through the Constitution's mandated convention process, who are proffering the means for altering existing allegiances.⁸² In this, as Storing has noted, the Constitution's preamble—in saying “We the People”—is acknowledging a very different understanding of state sovereignty from that expressed under the Articles, which begins with a listing of all the states.⁸³

This difference in preamble language is not inconsequential. What it implies when connected to Article VII is an adjustment to the original Social Compact understanding of John Locke⁸⁴ that might have fitted the existing American arrangement between the Declaration of Independence in 1776 and the adoption of the Articles in

in their capacities as people of the several states,” “unmistakably implied that the source of sovereignty was the people of the states and that the residue of sovereignty that was committed neither to the national/federal nor to the state governments remained in them—an implication that was subsequently made explicit by the Tenth Amendment.” McDONALD, *supra* note 42, at 280 (citing HERBERT STORING, COMPLETE ANTI-FEDERALIST, 1:12-14, notes at 1:82 (University Press of Kansas 1985)).

⁸⁰ *Id.*

⁸¹ My point here is not to say each state had a constitutional procedure for ratifying a national constitution. Rather, the states spoke through the organs which the state constitutions assigned. Thus, by having the Convention assign via its adoption of Article VII a common convention procedure for ratification, the Convention was in effect bypassing traditional state constitutional authorities.

⁸² McDONALD, *supra* note 42, at 279-80.

⁸³ *Id.* at 280-81 (citing HERBERT STORING, COMPLETE ANTI-FEDERALIST, 1:12-14, notes at 1:82 (University Press of Kansas 1985)).

⁸⁴ Under the Lockean view, the social “compact was between the people on the one side, and the prince, sovereign, or rulers on the other.” McDONALD, *supra* note 42, at 280.

1781.⁸⁵ Locke's idea is pre-political, starting from a state of nature and developing from there a political society.⁸⁶ The founders' idea was that the *people of already existing societies* (states) could agree for their society to enter into a greater union or association, according to terms set from outside their society, provided those terms were sufficiently democratic to be acceptable to the people within those already existing societies. In one sense, state constitutional officers would be involved in the making of the decision to ratify the federal Constitution, even though their authority to do so was unlikely to be subscribed in any existing state constitutions.

The significance of this point is to undercut a potential objection to applying my Second Thesis to the United States becoming part of a world government, namely, that first this would require amending the federal Constitution. The state legislature selection of delegates to the ratifying convention was not likely to have been mentioned as a possible legislative power in any state constitution. As I have elsewhere suggested, affiliation to a world body might also be done by the treaty process.⁸⁷ This last point should not be underrated. What the analysis shows is that a national constitutional order can be side-stepped, but only provided that the people of that order view any alternative process as legitimate.⁸⁸ If the founders' design for the American states is any indication of what other democratic states might agree to (depending on their own individual histories and traditions), this process might be accomplished by means of a convention process in each nation-state in which the people of that nation, either directly or through specially assigned delegations, decide whether to become part of a greater global government. It also might be achieved

⁸⁵ The compact would now be viewed as "among existing societies [not even among the whole people as Storing suggested], which were themselves, according to the Lockean principle, indissoluble—a principle that is explicitly confirmed in the Constitution itself by the provision in article 4, section 3, which prevents the states from being divided without their consent, and is implicitly confirmed by article 5, which exempts equal suffrage by states in the Senate from the possibility of amendment." McDONALD, *supra* note 42, at 281.

⁸⁶ John Locke, *The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government* Nos. 95, 96, in *TWO TREATISES OF GOVERNMENT* 374-75 (Cambridge University Press 1960).

⁸⁷ See Vincent J. Samar, *The Treaty Power and the Supremacy Clause: Rethinking Reid v. Covert in a Global Context*, 36 OHIO N.U. L. REV 287 (2010).

⁸⁸ See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 41 (Harvard University Press, 1991). An interesting example of this is how the Franklin D. Roosevelt administration was able to bypass the constitutional amendment process through successive reelections and a public angry at suffering a depression to get the Supreme Court to accept creation of the regulatory/social welfare state where previously the libertarian freedom of contract model dominated.

by a series of different methods suited to the particular histories and traditions of the societies involved.

What Article VII has shown is the possibility of acting outside existing state constitutional procedures, which now might be extended to nation-states, so long as the process engenders the respect of the respective country. What cannot be eliminated from the equation is that the process be seen as legitimate. And that legitimacy must be understood dually: it must be manifested both in the larger group's recognition that what has emerged is a decision of the people of several independent political societies, and in the joining societies' acceptance of the process adopted, as a legitimate means for entering into such a contract. Madison's idea of submitting the question of ratification to the conventions of the several states, combined with effectuation upon the recognition of nine states without first altering the various state constitutions, provides support for a future similar procedure to be followed at the global level, but does not exhaust all the possibilities.⁸⁹

In the end, if such a world order is to come about it will have to be based on how associations come to be seen as legitimate by the public in the various countries uniting. This will come about when citizens in their respective societies come to see that many of the issues of environment, economy, terrorism, and so forth, are not all that different from the issues other societies confront, and begin to ask not just what would be the best system to have ideally, but what choices they might now make to not only advance the freedom and well-being of the people in their respective society, but together advance the freedom and well-being that might be possible for all the world's people. Notice I do not say what choices might *maximize* freedom and well-being for, at operational level of law, these general rights are the property of all human beings. Consequently, human rights constraints must accompany the more traditional cost/benefit/utility evaluation in making any such decision. Because the way these elements advance the decision may be only partly theorized, it may not be possible to fully predict in advance what result will be reached. But if public reason has occurred, it should be possible to establish that significant attention was paid to these various elements because their role in both the process and final outcome is evident.

⁸⁹ What differentiates this approach is that it does not try to derive its final determinations from a single political philosophy like the liberalism of John Locke that seems to have motivated the Antifederalists or the Civic Republicanism of the Federalists, but instead seeks to put the two in dialogue along lines not too far distant from Jürgen Habermas' "Discourse Approach". See Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles* 29 POL. THEORY 766-81 (2001).

VI. LIMITATIONS

The legitimacy of the American founding process presupposes that those who are choosing know roughly their own interests and are capable of entering into arrangements to protect those interests. It also presupposes that such choices do not necessarily end with just establishing the next level of government, but continue on into the future as society further expands its political relationships. In short, the people who would be voting on whether or not to accept any greater governmental arrangement would be viewed as autonomous individuals⁹⁰ capable of making their own decisions⁹¹ with knowledge of rele-

⁹⁰ Immanuel Kant notes:

As a rational being and thus as belonging to the intelligible world, man cannot think of the causality of his own will except under the idea of freedom, for independence from the determining causes of the world of sense (an independence which reason must always ascribe to itself) is freedom. The concept of autonomy is inseparably connected with the idea of freedom, and with the former there is inseparably bound the universal principle of morality. . . .

IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 71 (Lewis White Beck trans., Bobbs-Merrill 1959). Kant is referring to his categorical imperative, which in its second version—the one most relevant here—states: “Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.” *Id.* at 47. By an end, Kant means as the author of one’s own actions, as the source of one’s own purposes. This is made clear when earlier he says:

Now, I say, man and, in general, every rational being exists as an end in himself and not merely as a means to be arbitrarily used by this or that will. . . . All objects of inclination have only a conditional worth, for if the inclinations and needs founded on them did not exist, their objects would be without worth. . . . Beings whose existence does not depend on our will but on nature, if they are not rational beings, have only relative worth as means and are therefore called “things;” on the other hand, rational beings are designated “persons” because their nature indicates that they are ends in themselves, i.e., things which may not be used merely as means. Such a being is thus an object of respect and, so far, restricts all [arbitrary] choice.

Id. at 46.

⁹¹ Alan Gewirth has noted:

For human behaviors or movements to be actions in the strict sense and hence voluntary or free, certain causal conditions must be fulfilled. Negatively the behaviors must not occur from one or more of the following kinds of cause: (a) direct compulsion, physical or psychological, by someone or something external to the person; (b) causes internal to the person, such as reflexes, ignorance, or disease, that decisively contribute, in ways beyond his

vant circumstances.⁹² Furthermore, this autonomy condition would continue into the future, although it would now be partially constrained by the apparatus they had put into effect, as it was when the Constitution replaced the Articles of Confederation. But even if such autonomy can be presupposed to exist initially, how could such self-rule be guaranteed over time?

In the case of the adoption of the American Constitution, the background was a set of rights to liberty and property, and the right to vote (although not by all) that many regarded as rights of Englishmen.⁹³ Indeed, it was the deliberate denial of these rights by the English Crown prior to the Revolutionary war that was one of the motivating forces behind adoption of a Bill of Rights.⁹⁴ There was also a concern for maintaining a right of petition and of members of legislative assemblies to speak

control, to the occurrence of the behavior; (c) indirect compulsion whereby the person's choice to emit the behavior is forced by someone else's coercion.

ALAN GEWIRTH, *REASON AND MORALITY* 31 (University of Chicago Press 1978).

⁹² Gewirth further notes:

Positively, the person must control his behavior by his unforced and informed choice. This does not mean that whenever he chooses to do something, he does it, for he may be unable to do it. It means rather that when his behavior is voluntary or free, his unforced and informed choice is the necessary and sufficient condition of the behavior. For all behaviors that are the objects of moral and other precepts, it is assumed that the person addressed can control their behaviors in this way. When there is such control, the person chooses on the basis of informed reasons he has for acting as he does. Among other things, he knows what action he is performing, for what purpose, its proximate outcome, and his recipients. The self, person, or agent to whom the choices belong may be viewed as an organized system of dispositions in which such informed reasons are coherently interrelated with other desires and choices. Insofar as the person's behavior derives from this system, it is the person who controls his behavior by his unforced choice, so that it is voluntary.

Id.

⁹³ Unfortunately, the founders did not perceive the need to grant to vote to African slaves, women, or, in several states, to persons who did not own property.

⁹⁴ Before the Revolutionary War, there had been a series of complaints against the British Crown including total forfeiture of property for commission of a felony, especially since previous "articles against excessive fines" could be found "in Magna Carta, in the statute of 1 Westminster, c. 30, and in the 1689 English Bill of Rights." See McDONALD, *supra* note 42, at 21.

openly in those assemblies.⁹⁵ The “[r]evolutionary state constitutions, though genuflecting in the direction of separation of powers and bills of rights, in practice vested virtually unlimited powers in popularly elected legislatures.”⁹⁶ were anxious to check the excess of democracy in the state governments by strengthening the central authority, but only on condition that the strengthening be accompanied by attention to several basic principles. Among these were the complete separation of the three departments [legislative, executive, and judicial] of government, both in function and in personnel; either a plural executive or a single executive whose power was shared and checked by an executive council; a bicameral legislature, the two houses being chosen by some means that would ensure that they checked one another; explicit enumeration of the powers of each branch of government and a declaration that all other powers were reserved to the states; explicit separation of the ‘power of the purse’ from the ‘power of the sword,’ and explicit repudiation of standing armies, and an explicit denial of the power of the national government to charter corporations or to create monopolies; and a bill of rights.⁹⁷

Needless to say, a similar set of concerns would no doubt accompany establishment of a world order. And, similarly, the resolutions would need to be made an explicit part of the creation of such an order if the issues were to be addressed. The fact that constitutional democracies are well familiar with how to go about this process at the national level only gives credence that there would be much to draw upon at the global level for assistance. So, my point, at this more speculative early stage of thinking about world government, is more to point to what has already been done by many democratic nations and to suggest that these sources should provide a resource of information

⁹⁵ *Id.* at 39 (noting the English Bill of Rights had “confirmed free speech, frequent meetings of Parliament, and free elections.”). However, “neither Parliament nor the colonial assemblies extended the privilege to nonmembers: criticism of legislative bodies or of royal officials, along with dissenting religious opinions, was rigorously suppressed.” *Id.* at 46-47.

⁹⁶ McDonald notes this background to a remark Hamilton made that was published in 1774. “‘The only distinction between freedom and slavery,’ he wrote, ‘consists in this: In the former state, a man is governed by laws to which he has given his consent, either in person, or by his representative: In the latter, he is governed by the will of another.’” *Id.* at 160.

⁹⁷ *Id.* at 202-03. It is well to note that not all the suggested changes such as “reputation of standing armies” survived even to the end of the Convention, let alone over time.

for handling the myriad of procedural problems that would arise in connection with any world order proposal in an enlightened way.

Although the Bill of Rights would not for some time after its adoption be viewed to limit the power of the states, specific provisions like the Fifth Amendment provision against double jeopardy and the Seventh Amendment's proviso for juries in civil cases, subject to re-examination of decisions in accordance with principles of the common law, was a beginning at bringing down the worries to not reproduce the former excesses of the British Crown.⁹⁸ Elsewhere I have identified important similarities between the Bill of Rights and selected constitutional provisions—like the provision against *ex post facto* criminal laws—and various international human rights agreements already in existence, including those like the *Universal Declaration* that are more aspirational, as well as other documents like the “International Covenant on Civil and Political Rights” and the “International Covenant on Economic, Social, and Cultural Rights,” that define specific legal obligations of nations.⁹⁹

The importance of these similarities to the present work is that they provide a basis for guaranteeing—wherever they are enforced—that persons agreeing to become part of a greater global association have entered into the arrangement freely and openly, and that any future agreement will be similarly free and open. If, for example, freedom of speech, press, or the right to vote is denied, then there is little basis upon which to proclaim the greater association as a people's choice unless the people themselves had chosen to limit these rights.¹⁰⁰ But even then there would be a question of whether such a

⁹⁸ The U.S. Supreme Court didn't begin until the 1890s to interpret the Fourteenth Amendment, adopted in 1868, to incorporate several of the provisions of the Bill of Rights as enforceable against the states. *See, e.g., Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

⁹⁹ *See Samar, supra* note 87.

¹⁰⁰ For example, the “International Covenant on Civil and Political Rights,” 999 U.N.T.S. 171, 6 I.L.M. 368 (1967), provides:

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

....

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

....

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

....

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

....

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

....

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

....

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

....

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- a. To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

choice would only serve to support the existing status quo. Also, if certain basic rights to be free from arbitrary arrest or imprisonment are not observed, then basic autonomy is at risk. Along these same lines would include protection of families and right of free movement. Since social compacts rely on the voluntary choices of individuals operating freely and with knowledge of relevant circumstances, the presence of such protections is essential both substantively to protect the people's autonomy both now and in the future, and procedurally to insure that the terms of association are a product of fair and free deliberation. An important question, beyond the scope of this essay, is whether and on what basis certain rights would need protection especially against short-term majorities who seek to preserve a status quo.¹⁰¹

The substantive side guarantees that the choice is free and informed, and that basic rights are secured provided they not be too narrowly drawn. The procedural side guarantees equality and fair opportunity for debate. This doesn't mean that one is guaranteed perfect knowledge. It does mean that materially relevant information is not withheld from the deciders, and most probably that the deciders have had the opportunity to engage the issue and debate publicly the relevant choices prior to making their decision. While no doubt John Stuart Mill would support such a position from the standpoint of en-

....
Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

¹⁰¹ Interestingly, John Hart Ely, in his book, *Democracy and Distrust: A Theory of Judicial Review*, argues:

The Constitution has instead proceeded from the quite sensible assumption that an effective majority will not inordinately threaten its own rights, and has sought to assure that such a majority not systematically treat others less well than it treats itself—by structuring decision processes at all levels to try to ensure, first, that everyone's interests will be actually or virtually represented (usually both) at the point of substantive decision, and second, that the processes of individual application will not be manipulated so as to reintroduce in practice the sort of discrimination that is impermissible in theory.

JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 100-01 (Harvard University Press 1980)

suring that the choice that emerges should be accurate and true,¹⁰² my claim here is the more modest: that it should reflect what the choosers really want.

In this respect, the claim is sufficient if it provides real opportunity for self-rule. As John Locke writes:

Man being, as has been said, by nature all free, equal, and independent, no one can be put out of his estate and subject to the political power of another without his own *Consent*. The only way whereby any one devests himself of his Natural Liberty, and *puts on the bond of Civil Society* is by agreeing with other men, to joyn and unite into a community for their comfortable, safe, and peaceful living, one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it.¹⁰³

In this sense, mutually interested autonomous individuals, and not the imposition of some authority from on high, set civil society as the outcrop of a deliberative choice of free and equal citizens. Locke describes civil society as a body capable of movement depending where the greater force of public opinion carries it.¹⁰⁴

But, even with that qualification, one must be on guard against giving into simple passions, which at any time, may not reflect the best

¹⁰² “[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; prosperity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.” See JOHN STUART MILL, *On Liberty*, in *ESSENTIAL WORKS OF JOHN STUART MILL* 269 (Max Lerner ed., Bantam Books 1961).

¹⁰³ Locke, *supra* note 86, at 374.

¹⁰⁴ *Id.* Locke writes:

For when any number of Men have, by the consent of every individual, made a *Community*, they have thereto made that *Community* one Body, with a Power to Act as one Body, which is only by the will and determination of the *majority*. For that which acts any Community, being only the consent of the individuals of it, and it being necessary to that which is one body to move one way; it is necessary the Body should move that way whither the greater force carries it, which is the *consent of the majority*: or else it is impossible it should act or continue one Body, *one Community*, which the consent of every individual that united into it, agreed that it should; and so everyone is bound by that consent to be concluded by the *majority*.

Id. at 375-76.

choice, even if it may appear to be the most desirable choice. What must govern on matters of great moment is a considered understanding of the views of others along with the evidence that supports each, while carefully restraining our own passions to judge too quickly and often unwisely. And we must take pains to insure balances between the competing positions, and to follow reason where possible, to insure not only one voice is heard or becomes too dominant, especially if basic human rights are in the balance. If we follow these elements of public reason, and are careful to implement them in our deliberations, then like with the founders' efforts to secure a national Constitution, the result should secure a global constitution capable of meeting changing world circumstances of which each nation can be proud.

VII. KINDS OF GOVERNMENTS THAT ARE NOT SUITED TO BECOME PART OF A WORLD ORDER

Our discussion of two understandings of supremacy has different implications for what types of states would be suited for inclusion in a world order. The implications follow not only from the two views of supremacy but also from how they might be implicated within a state's decision-making procedure. For instance, under Thesis One, or what I will now call the *exclusive* view, supremacy is manifested parochially. One form of this would be the requirement that any transfer of state responsibilities to an international or global body must be provided for under the existing national constitution including any amendments adopted for that purpose. Another form of restriction is where the officers of the state are tied to a particular set of moral or religious doctrines from which they cannot deviate. Both situations are problematic for an international order but for different reasons.

In the first situation, the global order emerges from the constitutional operations of the various nations making it up. This gives rise to the possibility that an action of the global body could be held unconstitutional by a national court if it were deemed to fall beyond the scope of powers assigned by the domestic constitution to that body. In other words, the global order would be hostage to individual state court constitutional interpretations, essentially marking the global order as a confederacy of independent sovereigns much the way the American states interrelated—or didn't—prior to the adoption of the Constitution.¹⁰⁵

¹⁰⁵ One interpretation of states' rights under the Constitution was that an agreement existed among the states and, as such, states could secede from the agreement. In *Texas v. White*, 74 U.S. 700 (1869), the United States Supreme Court ruled that while the union was "perpetual" and secession ordinances "absolutely null," membership in the union could be revoked "through revolution, or through consent of the States."

The second situation raises a different problem. While not necessarily interfering with the delegation of powers, it constrains how those powers might be exercised. For instance, if a state had a particularly conservative religious view of marriage and family life, it might refuse to follow any directive from an international tribunal affording global recognition to same-sex marriages. This contrasts with the first situation, where a state, even if it did not have so narrow a moral or religious dogma, might refuse to recognize an international tribunal's decision if there was a domestic prohibition against recognizing international obligations before they were formally adopted at the national level.

In either situation, then, the parochial effect of the local supremacy interpretation could substantially limit development of a global order in which persons would have certain rights regardless of where they lived or traveled. In effect, we see this problem manifested today with nations putting reservations into international agreements regarding what rights or interpretations of international law they will follow. For example, some Islamic states reserve from obligations under a treaty not to discriminate against women because it is part of their society's culture or religion to do so. Likewise, the United States reserves from abolishing the death penalty as a form of criminal punishment because its Constitution does not prohibit it, or is thought to prohibit assigning to outsiders how it will be interpreted even in regards to international law.¹⁰⁶

We also find the parochial effect of local supremacy clauses displayed in national court determinations like those of the U.S. Supreme Court, which hold that directives from international courts do not bind federal or state court decisions.¹⁰⁷ The broad effect of such a potential hodgepodge of limitations and constraints on the authority of the in-

¹⁰⁶ For example, the United States has reserved the right in signing the International Convention on Civil and Political Rights, "to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment . . ." 138 CONG. REC. S4781-01 (daily ed. April 3, 1992).

¹⁰⁷ In *Medellin v. Texas*, 552 U.S. 491 (2008), a Mexican national under death sentence for capital murder sought a writ of habeas corpus in federal court after a decision by the International Court of Justice (ICJ), in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I. C. J. 12 (Judgment of Mar. 31), held "that, based on violations of the Vienna Convention, fifty-one named Mexican nationals were entitled to review and reconsideration of their state-court convictions and sentences in the United States. The Texas Court of Criminal Appeals dismissed Medellin's application for failure to raise the Vienna claim in a timely manner and the case was appealed to the U.S. Supreme Court. Finding that the treaty in question was not intended by Congress to be self-executing, a five member majority of the Supreme Court upheld the Texas court's decision not to require

ternational order would be somewhat analogous to the difficulties the founders of the American Constitution encountered when they finally concluded that the Articles of Confederation could no longer be sustained.

Let us now consider how Thesis Two, which I call the *inclusive* view of supremacy, might alter this pattern. Under a strong interpretation of this view, a national constitution would not play the decisive role in determining whether an international action is legitimate or not, at least not once the country had become part of the greater world order. . A national constitution may provide a mechanism, such as treaty power for becoming part of a world government, but additional mechanisms may also be provided as set by the rules of the global body, notwithstanding that those rules may formally violate a national constitution supremacy clause, provided they can garner domestic legitimacy. Use of other mechanisms that might appeal more directly to the World's people would avoid nations from being justified in opting out of the government because another country had violated the terms of the treaty. If public reason is operating effectively, rules which violate human rights, such as those discussed in the prior section, should not be set up. This is analogous to the manner in which ratification of the U.S. Constitution was allowed to bypass state constitutional supremacy clauses, once it was agreed that a Bill of Rights which sets forth rights of both citizens and the states, would be introduced by the first Congress of the new United States. The founders proposed a procedure in Article VI of the soon-to-be-ratified U.S. Constitution that had been unanimously adopted by resolution of the Confederation Congress. This procedure proposed using conventions in each state to determine whether that state would ratify the Constitution, and to have the Constitution come into effect in the ratifying states after only nine had adopted it notwithstanding that the Articles of Confederation had endorsed unanimity. Once the new Constitution was adopted, it dominated what further authority remained with the states according to its own terms, except for what had been reserved in the Bill of Rights.

A more narrow interpretation of the Second Thesis would allow a national constitution to specify the condition for membership, provided that once membership was obtained, the nation could no longer opt-out without the agreement of the larger association. To do any less would constrain the authority of the greater association, in effect holding it hostage when considering any controversial action, by threat of national successions. In American history, this threat to federal au-

further review and reconsideration of Medellin's state court conviction notwithstanding the earlier ICJ decision.

thority did arise over the slavery issue and was ultimately resolved only by civil war.

An important further implication for the global community that arises from these considerations concerns the types of states that could be admitted as global members. Nations who profess an ideological view in a particular religious or moral dogma, except as it might contribute to social cooperation or protection of individual autonomy as a basic human right could not be admitted as full members. These nations could potentially play the role of an observer, the way the Vatican City state presently does in the United Nations. They have not been able to become full members of a world government because their laws may not allow the extension of global authority over matters they disagree with due to religious or cultural reasons.¹⁰⁸ And while a similar provision to the American first amendment protection of free exercise and non-establishment of religion should be recognized internationally as an obligation of world government, it is difficult to imagine states with strong religious traditions acceding to such an arrangement. Consequently, I find it inconceivable that states—which, for any of several reasons, follow my first view of supremacy—would be able to join a global world order.

CONCLUSION

In this essay, I have considered two different normative views of supremacy. Thesis One, presenting the more usual understanding, makes supremacy an all or nothing engagement. Under this view, parochialism reigns as the possibility of developing world government and international law wanes.¹⁰⁹ Regimes whose source of authority allow for no alteration can only limitedly become part of an international order, as they will by their own dogma always remain on the sidelines. Thesis Two, the other more directional understanding of supremacy, is the not-so-typical, but in another sense is more democratic because it treats supremacy as operating within a limited theater of judgments. Under this view, all judgments should not fall within the same theatre of operation, but only certain judgments. And it allows for the possibility that judgments formerly within one theater of national government may be moved to a different forum of world government upon incorporation into the greater association. In that sense, Thesis Two provides much greater latitude for the possible de-

¹⁰⁸ To borrow from a U.S. example, states which were concerned that they might be forced to recognize same-sex marriages made in sister states under the Constitution's requirement that each state give full faith and credit to the public acts of every other states, sought congressional support to limit the application of this provision, as allowed for under the Constitution.

¹⁰⁹ See, e.g., Paulsen, *supra* note 1.

velopment of a serious world order, to say nothing about international law. What the second view does not do is undermine the making of these judgments the way Thesis One might allow in support of a religious or moral dogma, or state-centered parochialism. It does recognize that final judgment of an issue must be left to general acceptance. While Thesis Two allows for wider scorings of persons, it is consistent with those basic human rights that promote and maintain free and open decision-making by autonomous individuals, even at the same time that it acknowledges the possibility of constraints from sources outside the existing governmental apparatus.

Where the world goes from here is an open question. Where the United States goes from here is equally open. While there are good reasons to believe that our own interests might be better secured by becoming part of a larger world order, it is by no means clear that this is what Americans want or will accept in the near future. What is hoped is that this essay should widen the range of discussion: That while much of the rest of the world is coming to recognize the legality of international law and the decisions of international tribunals as part of their own national law; the United States now needs to seriously consider just how far to join such an effort—the way the nations of Europe, for example, joined together to create the European Union and the European Court of Human Rights. But this will only be possible if Americans can first legitimate where international law and decisions of international tribunals interface with its current constitutional structure and traditions.

Most likely this would begin with the treaty process or possibly by some other acceptable method of affiliation. Still, whatever method is adopted Americans will need to come to terms with the fact that such an international tribunal may come to very different conclusions than even the Supreme Court of the United States. How Americans choose to meet this challenge may be just as important as the challenge they met two centuries ago.

If this venture into the meaning of supremacy in our Constitution has shown anything it is that laws from outside the constitutional structure that reference wider associations can be found to be legitimate, provided they arise by a procedure Americans can appreciate as democratic, support goals most Americans want, and do not violate those basic civil rights Americans have come to take for granted. However contentious the current debate concerning constitutional supremacy for the current generation of Americans may be, future generation will no doubt find themselves having to confront this issue in much broader relief. What we do today in providing them the tools to handle this problem will aide America in deciding whether to shed its parochialism to become part of a global world order.