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Author(s): James A. Grant

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Political representation and revolution: reconciling law, political will and constitutional reason

James A. Grant

At the heart of the idea of constitutionalism lies a paradox: on the one hand, the legitimacy of governmental power rests on the consent of individuals; on the other, such consent can only be expressed indirectly through already-established institutional forms. The political will, whether as a product of political representation, or as a rare moment of revolution, seems to be in a relationship of mutual antagonism with individual liberties. But if the moral reasoning underlying rights can only be the product of politics, then it is clear that politics must prevail over law and constitutional reason.

> *A spectre is haunting eastern Europe: the spectre of what in the West is called 'dissent'. This spectre has not appeared out of thin air. It is a natural and inevitable consequence of the present historical phase of the system it is haunting... The system has become so ossified politically that there is practically no way for such nonconformity to be implemented within its official structures.*[1]

The year 1989 – the bicentenary of both the French Revolution and the ratification of the U.S. Constitution – marked the decisive end of totalitarian regimes in eastern Europe. The collapse of the Soviet empire would soon follow. As far as communist rule was concerned, the owl of Minerva was beginning to spread its wings (to use, as we shall later see, a rather apposite

JAMES GRANT is a law student entering his final year at the University of Glasgow. His interests lie in legal and political theory, an area he hopes to study at postgraduate level.

[1] Václav Havel, "The Power of the Powerless", in *Open Letters: Selected Writings, 1965-1990*, ed. Václav Havel, 125-214 (New York: Vintage Books, 1992), 127.

cliché).[2] It is easy to forget – and sobering to remember – the magnitude of what happened that year. It was an example of that rare event: a 'constitutional moment'.[3] It was the result of the 'will of the people' breaking through and effecting change, even though it lacked the power to do so within the system. It was the culmination of incremental acts of 'dissent', when the people were finally able to express its constituent power and generate the dissolution of the constitutional order. It was, in a word, a revolution.

World-historical events like this may be exhilarating, but they are exceptional; the Berlin Wall is not stormed every day. One thing these moments demonstrate is that constituent power is real, and not merely a legitimising concept. In normal times, however, constituent power must find expression through representational form. This is not only for prudential reasons, but because constitutional forms enable the formation of political will and the management of political conflict.[4] That, of course, is not to say that law, political will and constitutional reason are reconcilable through some idea of mutual enablement. However, it does suggest that a conception of constitutionalism as a set of constraints on the democratic will is insufficient. But, ultimately, law and politics are only reconcilable if one is subordinated to the other. In this essay, I will argue that, taking a nuanced approach to political representation, the political must, and inevitably will, prevail over law and constitutional reason.

POLITICAL REPRESENTATION

Carl Schmitt claimed that constituent power should triumph over constituted power, democracy over constitutionalism, and politics over law. He did so out

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[2] Hegel, Georg Wilhelm Friedrichl, *Philosophy of Right*, trans. And ed. Thomas M. Knox. Oxford: Clarendon Press, 1942.

[3] See, e.g., Bruce Ackerman, *We the People: Foundations* (Cambridge, Massachusetts: Belknap Press, 1991).

[4] See Niccolò Machiavelli, *The Discourses*, trans. Leslie J. Walker, ed. Bernard Crick (Harmondsworth, Middlesex: Penguin, 1983), i:4.

of a belief that "the concrete existence of the politically unified people is prior to every norm".[5] Political will, in Schmitt's view, does not depend on political representation for its existence. Indeed, "the notion of representation contradicts the democratic principle of the identity of the people that is present to itself as a political unity".[6] Against this, Hans Kelsen, and Kant before him, argued that the will of the people has no unity until it is constituted in a legal order.[7] The Kelsen-Schmitt debate highlights the centrality of the idea of representation to the tension between law and political will. It is my submission that, contra Schmitt, one should accept and embrace political representation. However, pace Kelsen, constituent power nonetheless retains a crucial role in the constitution of the polity.

This view – that constituent power vests in the people but must be exercised through political representation – can be seen in the work of Abbé Sieyès.[8] Writing during the French Revolution, a time when the idea of constituent power moved from theory into practice, Sieyès sought to draw a sharp distinction between constituent and constituted power. The constituent power of the people, or 'the nation', as Sieyès preferred, is not only "not subject to a constitution", he argued, "but it *cannot* and *must not* be".[9] However, while, in common with Schmitt, Sieyès believed "the nation is prior to everything",[10] he also recognised that the people could not govern without some form of constituted power. There is obviously a tension here. Sieyès resolved this tension through his analysis of political representation. As he saw it, political

[5] Carl Schmitt, *Verfassungslehre* (Berlin: Duncker & Humblot, 1993), 121.
[6] Ibid., 262.
[7] Hans Kelsen, *The Pure Theory of Law*, trans. Max Knight (Berkeley: University of California Press, 1970), 291.
[8] Emmanuel Joseph Sieyès, *What is the Third Estate?*, trans. M. Blondel (London: Pall Mall Press, 1963).
[9] Ibid., 126. Emphasis in original.
[10] Ibid., 124.

representation was "a permanent necessity in any large and populous country in which it was virtually impossible to unite the voice of the people directly".[11]

Although for Sieyès political representation is required for the expression of constituent power, this does not mean that, once constituted, the people are bound by the constitutional form. That would be to follow the approach of Thomas Hobbes. Starting from an idea of the state of nature as a war of every man against every man", Hobbes explained that, in the pursuit of peace and security, everyone would covenant to relinquish their natural rights and submit to a sovereign authority.[12] Like Sieyès, Hobbes believed that 'the people' only become united once represented by a sovereign authority.[13] However, whereas the Hobbesian Sovereign is the people's 'Representative unlimited',[14] "contrary to Hobbes... Sieyes argued that the people never leave the state of nature and thus retain the possibility of re-acquiring constituent power".[15] This demonstrates the ability of the constituted power to remain responsive to constituent power.[16]

So, although democracy is made possible by political representation, that constituted framework is provisional in nature, it is 'conditional rather than

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[11] Istvan Hont, "The Permanent Crisis of a Divided Mankind: 'Contemporary Crisis of the Nation State' in Historical Perspective", in *Contemporary Crisis of the Nation State?,* ed. John Dunn (Oxford: Blackwell, 1995), 198.

[12] Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), 88, 120-121.

[13] "Prior to the formation of a commonwealth a *People* does not exist, since it was not then a person but a crowd of individual persons." Thomas Hobbes, *On the Citizen*, trans. Richard Tuck and Michael Silverthorne. (Cambridge: Cambridge University Press, 1998), 95.

[14] Hobbes, *Leviathan*, 156.

[15] Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003), 63.

[16] For a discussion of Sieyès' arguments, see Lucien Jaume, "Constituent Power in France: The Revolution and its Consequences" in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2007), 68-71.

absolute', and must take account of political pressure from constituent power.[17] As Schmitt said, the norm ultimately rests on the exception.[18] Therefore, while it may appear at first glance that the political depends on the legal, we must never lose sight of the fact that the legal order is founded on the political, and the latter may alter the former. I will return to this, and the extent to which constitutional form 'contains' the political, after exploring the impact of this idea of political representation on the tension between law, political will and constitutional reason.

LAW, POLITICAL WILL AND CONSTITUTIONAL REASON

From the above, we can begin to understand that constitutionalism is not simply a set of constraints on political will. Rather, it is a means of organising and generating political will. Moreover, political representation is a "preferable form of government" because it allows for the management of conflict.[19] Crucial to Schmitt's understanding of 'the political' was a distinction between friend and enemy, which produced "the ever present possibility of conflict".[20] If we develop this further by drawing a distinction between 'the political' (the first order) and 'politics' (the second order), the latter can be understood as the practice of managing the conflicts of the former.[21] Following on from the previous section, we might say, tentatively, that 'the political' belongs to the realm of constituent power and 'politics' belongs to the realm of constituted

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[17] Loughlin, *Public Law*, 68.

[18] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge, Mass.: MIT Press, 1988), ch. 1.

[19] Bernard Manin, *The Principles of Representative Government* (Cambridge: Cambridge University Press, 1997), 41.

[20] Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 1996), 26-29.

[21] "Politics, then, can be simply defined as the activity by which differing interests within a given unit of rule are *conciliated* by giving them a share in power." Emphasis added. See, e.g., Bernard Crick, *In Defence of Politics*, 5th edition (London: Continuum, 2005); See also Machiavelli, *Discourses,* n. 4, i:4.

power.[22] Without the practice of politics, the conflict of the political would be unmanageable. Therefore, and paradoxically, political representation can be said to be an important mechanism through which the people express their political will.

But this does not necessarily mean that constitutionalism enables democracy, that reason enables will, that law enables politics. For, ultimately, one side would have to give way to the other. Either constitutionalism must give way to democracy, reason to will, law to politics, or vice versa.[23] After all, once the expression of political will is enabled by political representation, the perennial question still remains: in a democracy, how are the rights of the citizen to be protected against the sovereign's will? If political will goes unconstrained, the sovereign authority could act to restrict individual liberties and the rights of minorities, in turn curtailing the exercise of constituent power. Before looking at the difficult question of the merits and demerits of both sides of the debate, we must turn our attention to those who deny the need to take sides at all.

1 MUTUAL ENABLEMENT

Those who argue that law and politics are mutually enabling usually do so out of a belief that they have an internal relationship.[24] Indeed, Jürgen Habermas, who has provided the most sophisticated attempt to reconcile law and politics, claims that rights and democracy are 'co-original'.[25] Arguing against liberals,[26]

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[22] For an analysis of the distinction between the different orders of the political, see Loughlin, *Public Law*, ch. 3.

[23] "What is clear is that normative theories of public law that promote one mode to the exclusion of the other will fail to address a central aspect of the situation and should be rejected"; ibid., 154.

[24] See Jürgen Habermas, "On the Internal Relation between the Rule of Law and Democracy" in *The Inclusion of the Other: Studies in Political Theory*, ed. Ciaran Cronin and Pablo De Grieff (Cambridge, Mass.: MIT Press, 1998), ch. 10.

[25] See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass.: MIT Press, 1996).

who seek to place rights above democracy, and (to a lesser extent) against republicans, who seek the subordination of rights to democracy, Habermas argues that a "discourse-theoretic understanding of the system of rights directs our attention to *both sides*".[27]

Here, Habermas uses two concepts to justify his position: firstly, the system of rights, which "gives *equal weight* to both the private and the public autonomy of the citizen".[28] This system consists of those basic rights that "citizens must confer on one another if they want to legitimately regulate their interactions and life contexts by means of positive law".[29] Secondly, he uses the discourse theory to confer democratic legitimacy on the general right to liberties. As Habermas puts it: "by means of this political autonomy, the private autonomy that was at first abstractly posited can retroactively assume an elaborated legal shape".[30] This is incredibly important to Habermas's theory of law. It explains how basic rights – which enable citizens to participate in the democratic process – and the democratic principle – which will *over time* develop and thus legitimize basic rights – are "*co-originally* constituted".[31] They are mutually enabling: without law, democracy can be circumvented, but without democracy, law loses its legitimacy.

On this understanding, Habermas's project in *Between Facts and Norms* can be seen as an attempt "to integrate what is most attractive about theories such as those of Rawls, Dworkin, and Michelman without falling prey to their

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[26] See, e.g., John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972); Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977).

[27] See, e.g., Frank Michelman, "Law's Republic", *Yale Law Journal*, Volume 97 (1998): 1493; Habermas, *Between Facts and Norms*, n. 25, 131. Emphasis added.

[28] Ibid., 118. Emphasis in original.

[29] Ibid., 122.

[30] Ibid., 121.

[31] Ibid., 121-122. Emphasis in original.

respective shortcomings".[32] By opting for a procedural conception of law, which is neither an appeal to higher moral standards nor merely the will of the democratic legislator, Habermas attempts to move away from the dichotomy of natural and positive law. Laws are legitimate if they are made in accordance with procedures under which everyone could participate on an equal basis, and if they meet with everyone's consent. This last part – *quod omnes tangit*, *omnibus tractari et approbari debet* – is particularly important for Habermas because he does not wish to subordinate law to morality.[33] Immanuel Kant, who took a similar view, argued that 'everyone's consent' does not mean everyone would agree if actually consulted, but that they would agree if they acted according to a higher moral norm.[34] Keen to depart from this moral aspect, Habermas specifically calls for the "agreement of all those possibly affected".[35] However, such universal agreement (especially of unborn generations) is impossible.[36]

It follows, in my view, that even conceptions of law based on a procedural paradigm are grounded in substantive values. As with the Rawlsian veil of ignorance, Habermas's system of rights presupposes rational agreement on pre-political moral standards, which (as we shall see) can only be understood as political.[37] Michel Rosenfeld argues that 'even Habermas's more nuanced and versatile proceduralism ultimately confronts the need to embrace contestable

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[32] Michel Rosenfeld and Andrew Arato, "Introduction", in *Habermas on Law and Democracy: Critical Exchanges*, ed. Michel Rosenfeld and Andrew Arato (Berkeley: University of California Press, 1998), 5.

[33] Translated as "all those affected should be heard and agree".

[34] Immanuel Kant, *Political Writings*, 2nd edition, Hans Reiss (Cambridge: Cambridge University Press, 1991), 78-80.

[35] Habermas, *Between Facts and Norms*, 104.

[36] See generally Niklas Luhmann, "*Quod Omnes Tangit*: Remarks on Jürgen Habermas's Legal Theory" in *Habermas on Law and Democracy: Critical Exchanges*, ed. Michel Rosenfeld and Andrew Arato (Berkeley: University of California Press), 157-172.

[37] Rawls, *Theory of Justice*, 136-142. Indeed, in his later work, Rawls accepted this as political: see John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

substantive normative assumptions'.[38] On the other hand (some would say, paradoxically), Habermas's system of rights seemingly leaves infinite room available for the democratic legislator to hollow out the basic rights through a "politically autonomous elaboration".[39] Unable to cloak basic rights with the force of law, Habermas comes down, in the last analysis, on the side of democracy. Hence, even the most sophisticated attempt to reconcile law and democracy, in the end, fails.[40]

2 LAW, POLITICS AND MORALITY

Let us return, then, to the question of whether law transcends politics, or whether politics must ultimately prevail over law. This debate is often characterised as one between liberals and republicans. However, these labels can often be unhelpful. For example, Ronald Dworkin, who most would see as a liberal, has been lumped in with republicans on account of his use of law "as a lever for politics".[41] Similarly, Frank Michelman and Cass Sunstein, two prominent republicans, saw republicanism as merely a variant of liberalism, and focussed more on the role of the courts than on the popular participation usually associated with republicanism.[42] Therefore, and for clarity and brevity, I will resist those labels, and will frame the debate as follows: on one side, there are those – such as Kant, Rawls and Dworkin – who conceptualize law as a form of moral reasoning, sheltered from the political. On the other side, there are

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[38] Michel Rosenfeld, "Can Rights, Democracy, and Justice be Reconciled through Discourse Theory? Reflections on Habermas's Proceduralist Paradigm of Law", in *Habermas on Law and Democracy: Critical Exchanges*, ed. Michel Rosenfeld and Andrew Arato (Berkeley: University of California Press), 82-112.

[39] Habermas, *Between Facts and Norms*, 122.

[40] For a defence of Habermas's position, see: Ingeborg Maus, "Individual Liberties and Popolar Sovereignty: On Jürgen Habermas's Reconstruction of the System of Rights", *Cardozo Law Review*, Vol. 17, Issue 4 (1996): 825.

[41] Emilios A. Christodoulidis, *Law and Reflexive Politics* (Dordrecht, Netherlands: Klewer, 1998), 52-60.

[42] See Adam Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005), 42-46; See Kathryn Abrams, "Law's Republicanism", *Yale Law Journal* , Vol. 97, No. 8 (1988): 1591.

those who locate morality firmly within the political domain, and therefore conceptualise law as the product of political will.

For Kantian moralists, the idea of constitutional reason is in essence a "fusion of constitutional law and moral theory".[43] Grounded in morality, so the argument goes, the common law "is sometimes superior to legislation as a means of resolving questions of justice, even when the latter is proceeded by wide consultation to ascertain public opinion".[44] Even when this moralist account of constitutional reason is recognised as "political not metaphysical", and "the expression of the people's constituent power", a special role is nevertheless afforded to the courts, which is "the exemplar of public reason".[45] According to this view, in Judith Shklar's words, "politics is regarded not only as something apart from law, but as inferior to law".[46] The appeal to a universal set of morals, safeguarded by the courts, therefore acts as a bulwark against politics, "the uncontrolled child of competing interests and ideologies".[47]

What most of these claims fail to acknowledge, and what Rawls pays lip service to, is that there will always be conflicting views of the good life – that is, morality is always, unavoidably political – and that this conflict can only be settled through politics, not some neutral law. These Kantian moralists "[equate] the moral point of view with that of impartiality", and fail to realise that it is precisely the opposite. By further equating moral reasoning with legal reasoning, we see the "politicization of law", the result of which is that 'judicial institutions have become arenas of political struggle".[48] One obvious danger in

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[43] Dworkin, *Taking Rights Seriously*, 149.

[44] Trevor R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001), 292.

[45] John Rawls, "Justice as Fairness: Political not Metaphysical", *Philosophy and Public Affairs*, Vol. 14 (1985): 223; Rawls, *Political Liberalism*, 231; ibid., 236.

[46] Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964), 111.

[47] Ibid., 111.

[48] John Gray, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age*, rev. ed. (London: Routledge, 2007), 6-7. It should be noted that not all liberals

this is that courts are not politically representative. In countering this criticism, Dworkin has argued for a distinction between questions of policy and matters of principle; only the latter may be decided by the courts.[49] But such an arbitrary distinction fails to take account of the fact that what is political is itself a political question. The decision to treat a question as a matter of principle, rather than policy, "is nothing more than mere political preference".[50]

Morality, then, does not operate, as it were, on a higher plane than the political. With that realisation, we must also acknowledge that "law is not and cannot be a substitute for politics".[51] Moreover, allowing "a supreme court to make certain kinds of political decision does not make those decisions any less political".[52] Does that mean that law and political will are irreconcilable? I do not think it does; instead, it merely means that politics should triumph over law. As we saw earlier, there will always be a role for law in the public realm of representative democracy – laws to ensure popular participation in free and fair elections, for example, or to police the process of representation.[53] That is not to say that law and politics are mutually enabling; the conception of law here is minimalistic, always malleable and subject to revision, a necessary by-product of political representation, but nevertheless external to politics. After all, in addition to law, other *political* practices – described by some as *droit politique* or *raison d'etat*, but, in Britain, more commonly referred to as 'constitutional conventions' – also make representative democracy possible.[54]

THE POWER OF THE POWERLESS

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equal moral reasoning with legal reasoning, see, e.g., see, e.g., Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999); Gray, *Enlightenment's Wake*, 115.

[49] See generally, Dworkin, *Taking Rights Seriously*, ch. 4.

[50] Tomkins, *Our Republican Constitution*, 24.

[51] John A. G. Griffith, "The Political Constitution", *Modern Law Review*, Vol. 42, No. 1(1979): 16.

[52] Ibid.

[53] See John Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

[54] See Loughlin, *Public Law*, especially ch. 8.

So far, I have tried to argue that constituent power requires constituted power, that political will (albeit to a limited extent) requires law, and that the tension between the two is resolved through the idea of political representation. It is important, however, to be clear about what I am not suggesting: I am not suggesting that constituent power can be reduced to constituted power; that the political can be reduced to politics. This is the error Emilios Christodoulidis makes in his "containment thesis".[55] He would argue that my argument represents the "false necessity" of the "assimilation of the political to the legal", and would argue instead for "an anarchy of political commitment", undistorted by any 'containment' within legal institutions, which would allow for "opposition to the democratic community".[56] Moreover, "the collapse of the moment of the 'constituent' into its institutional forms", Christodoulidis argues, inhibits "what could be *otherwise*, an event of rupture".[57] There is a difference, however, between saying, on the one hand, that constituent power is *represented* by constituted power and, on the other, saying that constituent power *is* constituted power.

There is certainly much to be gained from Christodoulidis' invigorating defence of the political. It is my argument that, even when represented (which it must be), constituent power remains always present, and always real, ready to break through in a moment of revolution and generate a change in the constituted order. There is certainly something 'exhilarating' about that possibility.[58] Where I disagree with Christodoulidis is in my belief that the political can bring about change even when given representational form. Indeed, the ability of the political, through 'dissent', to irritate the constituted power – and

[55] Christodoulidis, *Law and Reflexive Politics*, ch. 6.
[56] Ibid., 68; ibid., 65.
[57] See Emilios A. Christodoulidis, "Against Substitution: The Constitutional Thinking of Dissensus" in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press), 207; ibid., 194.
[58] Hannah Arendt, *On Revolution* (Harmondsworth: Penguin, 1977), 223.

therefore to break free from its containment – is true empirically, as well as in theory.

Take, just for an example, Václav Havel's essay, *The Power of the Powerless*,[59] in which he described the impossibility of 'resistance' and 'dissent' within the system of communist Eastern Europe.[60] He proposed living 'as if' he were in a free society. Havel's famous greengrocer – who displays a shop-window slogan proclaiming, 'Workers of the world, unite!', and does so, not out of support, but obedience – is capable, by ceasing to display the slogan, of triggering a revolt. The incremental effect of living 'as if' is what Havel meant by 'the power of the powerless', of 'living outside the lie'. Similarly, in the 1960s, Rosa Parks resolved to act 'as if' a black woman could sit on a bus in the Deep South. Aleksandr Solzhenitsyn wrote 'as if' a historian could publish his findings in Russia. These moments represent instances "when the crust cracks and the lava of life roles out".[61] They are, to all intents and purposes, moments of 'rupture', of acting on what could be otherwise, of constituent power.

In this way, constituent power, even when represented within a constitutional order, retains – as Locke put it – a residual right of rebellion.[62] It adds weight to Sieyès' claim that the multitude never leaves the state of nature. Indeed, even Kant, who argued that 'there is no right to sedition, much less a right to revolution', implicitly accepted the revolutionary capacity of constituent power when he acknowledged that, 'the lack of legitimacy with which [a revolution] began ... cannot release the subjects from the obligation to comply with the new order'.[63] But these moments are, as Schmitt would say, exceptional, and only go to reinforce the constituted order that normally represents the political.

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[59] Havel, *Power of the Powerless*, 125-214.

[60] Ibid.

[61] Václav Havel, "Dear Dr. Husak", in *Open Letters: Selected Writings, 1965-1990*, ed. Václav Havel (New York: Vintage Books, 1992), 79.

[62] John Locke, *Two Treatises on Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988).

[63] Immanuel Kant, *The Metaphysics of Morals*, trans. and ed. Mary Gregor (Cambridge, Cambridge University Press, 1996), 98.

CONCLUSION

To the question – How are rights to be safeguarded against the "excesses of democracy?" – we can answer that, to the extent that individuals have rights, they are the product of democracy.[64] As with the fall of religion as the moral source of rights, this answer can leave people feeling uneasy. But the 'tyranny of the majority' becomes less of a problem when we conceive of political representation as the mechanism through which the Hegelian dialectic can be achieved – that is, the mechanism for progress. Hegel argued that, through the process of conflict, systems of thought engage in a dialogue, after which the less self-contradictory side wins. In this way, generations can build on the achievements of previous ones, resulting in progress.[65] We may disagree about whether there is an endpoint to this process, but that is not what is important.[66] Progress is empirically true. What, if not progress, is the movement from feudal baronies to universal suffrage?

It is clear that this dialectical process belongs to the realm of politics, not some fixed, impartial law. And it is through political representation that the conflicts in the process can be adequately expressed and managed. True, in extreme situations, constituent power can, in a moment of revolution, exert change to the constitutional form. The people have a power – the power of the powerless – to rupture the system by demonstrating its self-contradictions. Representation and revolution are, in my view, both examples of the Hegelian dialectic. What we must ensure is that the progress enabled by political representation and

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[64] Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve, vol. 1 (New York: Vintage Books, 1990), 272.

[65] See Georg Wilhelm Friedrich Hegel, *The Philosophy of History*, trans. John Sibree. New York: Dover, 1956). See also Terry P. Pinkard, *Hegel's Dialectic: The Explanation of Possibility* (Philadelphia: Temple University Press, 1988).

[66] See Francis Fukuyama, *The End of History and the Last Man* (Harmondsworth, Middlesex: Penguin, 1992).

revolution is not inhibited by insulating contentious moral claims from political will through the mechanism of law and constitutional reason.

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