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ANNUAL SIR JOHN GRAHAM LECTURE 2012

Can the Ruler Truly Be a Servant?

The paradox of constitutional government

PROFESSOR ROBERT P. GEORGE

The Law Foundation NEW ZEALAND

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About the Sir John Graham Lecture:

The Sir John Graham Lecture was established in 2005 by Maxim Institute, to provide an opportunity for international experts to contribute to the policy debate in our country.

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Our mission is to foster ideas and leadership that enable freedom, justice and compassion to flourish in New Zealand.

As a think tank, Maxim Institute engages in the following core activities:

- Producing research and informed analysis of contemporary issues;
- Developing and promoting sound public policy;
- Communicating our research findings and policy initiatives to the decision-makers and leaders of today;
- Training and mentoring tomorrow's leaders for all areas of community, political and business life; and
- Equipping New Zealanders to become better informed and more effective agents of change in their community.

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The New Zealand Law Foundation is an independant trust established in 1982 and is registered as a charitable entity. The Foundation provides grants for legal research, public education on legal matters and legal training.

Sir John Graham

Sir John Graham is a New Zealand hero. He has spent his life training, inspiring and mentoring young New Zealanders in education and sport, having had a celebrated and distinguished career in both fields. He has been Headmaster of Auckland Grammar School, Chancellor of The University of Auckland, Captain of the All Blacks and President of the New Zealand Rugby Football Union.

John is a dedicated leader in our nation and his passion for New Zealand has endowed this country with a brilliant legacy. Appropriately, he was recognised for his services to education and the community, with a CBE in 1994, and was further honoured when he was knighted in the 2011 Queen's birthday honours list. John Graham's commitment to service and to this country has enriched all New Zealanders.

The Sir John Graham Lecture holds up John Graham's life as an example to tomorrow's leaders, encouraging them to serve our country well. It provides an opportunity to invite leading international experts to contribute to the policy debate in New Zealand. Public debate and discussion stimulate creative thinking and this event offers a forum for new ideas to be articulated, tested and refined.

The Sir John Graham Lecture 2012 was delivered on Wednesday, 8 August, at "The Wintergarden" in The Northern Club, Auckland.

Professor Robert P. George

Professor Robert P. George is McCormick Professor of Jurisprudence and Director of the James Madison Programme in American Ideals and Institutions at Princeton University. He has written many notable books and influential scholarly articles in moral and political philosophy, philosophy of law, constitutional theory and bioethics. A graduate of Swarthmore College and Harvard Law School, he holds a master's degree in theology from Harvard and a doctorate in philosophy of law from Oxford University, as well as honorary doctorates of law, letters, science, ethics, divinity, humane letters, civil law and juridicial science. He has been awarded the U.S. Presidential Citizens Medal, one of the highest honours that can be conferred by the United States on a civilian, and the Honorific Medal for the defence of Human Rights of the Republic of Poland.

He is currently serving as a member of the United States Commission on International Religious Freedom, having previously served on both the President's Council on Bioethics and the United States Commission on Civil Rights. He has also served on UNESCO's World Council on the Ethics of Scientific Knowledge and Technology (COMEST), and he is a member of the Council on Foreign Relations.

Sir John Graham Lecture
Auckland, 8 August 2012

– PROFESSOR ROBERT P. GEORGE –

Can the Ruler Truly Be a Servant: The paradox of constitutional government

Those of us who are citizens of liberal democratic regimes do not refer to those who govern as "rulers." It is our boast that we rule ourselves. And there is truth in this, inasmuch as we participate in choosing those who do rule. So we prefer to speak of them not as our rulers, but as servants—public servants, or at least as people being in "public service." Of course, these so-called servants are nothing remotely like the servants in *Downton Abbey* or *Upstairs Downstairs* or *The Duchess of Duke Street*. The extraordinary prestige and usually the trappings attaching to public office, in just about all times, and in just about all places, would by themselves be sufficient to distinguish, say, the Prime Minister of New Zealand or the President of the United States from Carson the Butler. But that prestige signals an underlying fact that discomfits our democratic and

egalitarian sensibilities, namely, the fact that even in liberal democratic regimes high public officials are rulers. They make rules, enforce them, and resolve disputes about their meaning and applicability. To a very large extent, at the end of the day, what they say goes.

Of course, our rulers rule, not by dint of sheer power, the way the mafia might do in a territory over which it happens to have gained control, but rather lawfully.[1] Constitutional rules specify public offices and settle procedures for filling them. Whether the constitution exists in the form of a specific document, such as the Constitution of the United States or the Constitution of the Commonwealth of Massachusetts or Virginia, or in some other form, as in the United Kingdom or here in New Zealand, it constitutes, in a sense, the set of rules governing the rulers—rules that both empower office-holders to make and execute decisions of various sorts and limit their powers. So, though they are rulers, they are not absolute rulers. Constitutional rules set the scope, and thus the limits, of their jurisdiction and authority. They are rulers who are subject to rules—rules they do not themselves make and cannot easily or purely on their own initiative revise or repeal. They rule in limited ways, and ordinarily for limited terms (which may or may not be indefinitely renewable at the pleasure of voters). They rule by virtue of democratic processes by which they came to hold office. They can be removed or significantly disempowered at the next election if the people are not happy with them. Still, they rule.

Now, my point is not to hoot at the idea of government, and those holding governmental offices and controlling the levers of governmental power, as "servants." On the contrary, I want, in the end, to defend the idea that rulers truly can be servants. I want to establish, however, that if these people we call public servants are, indeed, servants, they are servants in a special sense, a sense that is compatible with them at the same time being rulers. They are people who serve us by ruling. They serve us well by ruling well. If they rule badly, they serve us poorly—indeed, they disserve us.

There are, of course, lots of ways that rulers can disserve those whom they have a moral obligation to serve by ruling well. Most obviously, there is incompetence. Then, of course, there is corruption. And at the extreme, there is tyranny. So what does it mean for the ruler to truly be a servant? What does it mean for someone holding political office and exercising public power to rule well?

It means making and executing decisions for the sake of the common good. Such decisions will necessarily be compatible with the requirements of justice and at the same time embody justice. If we understand the concept of the common good properly—and I will say a word about that in a moment—then we will see that no decision that violates a requirement of justice is truly for the common good; and no decision that genuinely upholds and serves the common good will fail to advance the cause of justice.

It is also important to note that decisions can fail to serve the common good and can, indeed, damage the common good, even when they are not unjust. Even honorably motivated and well-intentioned people, including rulers, can make decisions that harm the common good because they are inexpedient, imprudent, or unwise. Holders of public office, like anyone else, can make poor, even disastrous, decisions even when acting on the purest and best of motives. Poor decisions by well-intentioned public officials can trigger or prolong a great depression; lead a nation into an unnecessary and even disastrous war, or prevent a nation from going to war to protect its people and their vital interests when it should have done; undermine or weaken the marriage culture and with it family life and everything in a society that depends on the health and vibrancy of marriage and the family.

It is worth adding here that reasonable people of goodwill can, and obviously do, disagree about what the common good requires and forbids, and what is, in truth, just and unjust.[2] Honorable people exercising public power can commit injustices—even grave injustices—while seeking, in good faith, to do justice, and believing in good faith that they are doing

it. So, just as not all violations of the common good are injustices, not all injustices are the result of malice, ill-will, or like vices. Still, all injustices, even if committed by officials who are sincerely trying to do the right thing, harm the common good. For justice is itself *a* common good and a central aspect of *the* common good of the political community. It is to the benefit of each and every citizen to live in a just social order; and harm to that order is therefore a loss for everyone, and not merely for the immediate and obvious victims of any particular injustice. Indeed, it is a loss even for the ostensible beneficiaries of injustices, and, indeed, even for their perpetrators—though, naturally, true evildoers don't see it that way. Corruption of character narrows their vision of the good, blinding them to the profound respects in which wrongdoing harms what is, in truth, *their* interest in living in a just society, as well as everyone else's.

The common good requires that there be rulers and that they actually rule. To grasp this is to begin to see the sense in which good rulers are also servants. As Gregoire Webber has observed, members of societies face a range—sometimes a vast range—of challenges and opportunities requiring both means-to-ends and persons-to-persons coordination, including, in the case of complex societies, coordination problems presented by the large number and the complexity of other coordination problems.[3] Since such problems cannot, as a practical matter, be addressed and resolved by unanimity, authority—political authority—is required.[4] Institutions will have to be created and maintained, and persons will need to be installed in the offices of these institutions, to make the choices and decisions that must be made, and to do the things that need to be done, for the sake of protecting public health, safety, and morals, upholding the rights and dignity of individuals, families, and non-governmental entities of various descriptions, and advancing the overall common good.

This would be true even in a society of perfect saints, where no one ever sought more than his fair share from the common stock, or violated the rights of others, or deliberately acted in any manner that was contrary to the common good. Even in such a society, effective coordination for the sake of common goals, and, thus, for the good of all, would be

required; and seeking unanimity, assuming a large and fairly complex society, would not be a practical option.[5] So, authority would be required, and that means persons exercising authority—rulers, ruling.

But the moral justification for the rulers' ruling is service to the good of all, the common good. And the common good is not an abstraction or platonic form hovering somewhere beyond the concrete well-being—the flourishing—of the flesh-and-blood persons constituting the community. It just *is* the well-being of those persons and of the families and other associations of persons—Burke's "little platoons" of civil society[6]—of which they are members. The right of legitimate rulers to rule is rooted in the duty of rulers to rule in the interest of all—in other words, the basis of the *right* to rule is the *duty* to serve. And the realities that constitute the content of service are the various elements of the common good. By doing what is for the common good, and by avoiding doing anything that harms the common good, rulers fulfill their obligations to the people over whom they exercise authority—thus, serving their interests, their welfare, their flourishing, in a word, *them*.

I don't know how to improve on the definition of the common good proposed by John Finnis in his magisterial book *Natural Law and Natural Rights* (which Oxford University has now put out in a 2nd edition and published alongside five volumes of his collected essays). The common good, Finnis says, is to be understood as:[7]

> a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s) for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community.

Now every community—from the basic community of a family, to a church or other community of religious faith, to a mutual aid society or other civic association, to a business firm—will have a common good. The common good of some communities is fundamentally an intrinsic good rather than an instrumental good. That is true, for example, of the

community of the family. Although families serve many valuable, and some indispensable, instrumental purposes, the point of the family is not exhausted by these purposes, nor do they define what the family is. The most fundamental point of being a member of the family is, simply, being a member of the family—enjoying the intrinsic benefit of being part of that distinctive network of mutual obligation, care, love, and support. The same is true, in Christian and Jewish thought at least, of the common good of the community of faith. Though communities of faith characteristically serve many valuable instrumental purposes, the most fundamental purpose of Israel or the Church is to be the people of God. Things are obviously different when it comes to, say, business firms. Although there are ordinarily many opportunities for principals and employees of companies to realise intrinsic or basic human goods (including goods that are fundamentally social, such as the good of friendship) in their collaborations in pursuit of the firms' objectives, those objectives are the ends to which the firm, and the cooperation of those working in and for it, are means.

Now, what about the common good of the political community—the common good served by good rulers (and to which citizens also have responsibilities)? Is it fundamentally an intrinsic good or an instrumental good? There is, in what Sir Isaiah Berlin referred to as the central tradition of western thought about morality, including political morality, a powerful current of belief that the common good of political society is an intrinsic good.[8] This seems clearly to have been the view of Aristotle, and many self-identified Thomists are firmly convinced that it was the view of Aristotle's greatest interpreter and expositor, St. Thomas Aquinas. Finnis, however, argues that the common good of political society, though to quote Aristotle, "great and godlike" in its range and importance, is nevertheless fundamentally an instrumental, not an intrinsic, good.[9] And he further argues that the instrumental nature of the common good of political society entails limitations of the legitimate scope of governmental authority—limitations that, though not in every case easily articulable in

the language of rights, are requirements of justice. Although I have a difference, at the margins, with Professor Finnis, who (along with Joseph Raz) was my graduate supervisor in Oxford, on the question of just what the limits are (and, in particular, whether they exclude in principle moral paternalism), I agree that the common good of political society is fundamentally an instrumental good and that this entails moral limits on justified governmental power.[10]

The way we have come to think of these limits is in terms of what is usually called the doctrine of subsidiarity. This is a sound doctrine, though the label has now been appropriated by some people who, for whatever reason, want the use of the word without actually signing on to the doctrine. Without implying bad faith on anyone's part, this amounts to an abuse, and destabilises the word's meaning in a way that may eventually render it useless. Still, we have no better word or label at the moment, so let's just try to be clear in our minds about what the doctrine actually holds. Eighty years ago, Pope Pius XI, in the encyclical letter *Quadragesimo Anno* (1931), explained the basic idea:[11]

> Just as it is wrong to withdraw from the individual and commit to a group what private initiative and effort can accomplish, so too it is wrong . . . for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower associations. This is a fixed, unchanged, and most weighty principle of moral philosophy . . . . Of its very nature the true aim of all social activity should be to help members of a social body, and never to absorb or destroy them.

Now, this principle of justice and the common good reflects a particular understanding of the nature and content of human flourishing. Flourishing consists in *doing things*, not just in getting things, or having desirable or pleasant experiences, or having things done for you. The good, as Aristotle taught, consists in activity.[12] Human goods are realised by acting—one *participates* in them—thus enriching one's life and even ennobling oneself as one exercises and fulfills one's natural human capacities (for example,

one's capacities for friendship, knowledge, critical aesthetic appreciation).

And so, the common good, is, as Finnis remarked, best conceived as a *set of conditions*. But, we must ask, conditions for what? Well, let's recall Professor Finnis' definition: "conditions for enabling members of a community to attain *for themselves* reasonable objectives, or to realise reasonably *for themselves* the value(s) for the sake of which they have reason to collaborate with each other ... in a community." The common good is, in this sense, facilitative. Its elements are what enable people to do things, individually and in cooperation with others, the doing of which to a significant degree constitutes their all-round or integral flourishing. Under favouring conditions, people can more fully and more successfully carry out reasonable projects, pursue reasonable objectives, and, thus, participate in values—including some values that are inherently social in that they fulfill persons in respect of capacities for non-instrumental forms of interpersonal communion—that are indeed constitutive of their well-being and fulfillment.

Properly understood, then, the common good requires, as a matter of justice, limited government—government that respects the needs and rights of people to pursue objectives and realise goods *for themselves*. The fundamental role of legitimate government, and thus the responsibility of legitimate rulers—rulers who serve—is not to be doing things for people that they could do for themselves; it is, rather to be helping to establish and maintain conditions that favour people's doing things for themselves, and with and for each other. Governments should do things *for* people (as opposed to letting them do things *for themselves*), only where individuals and non-governmental institutions of civil society cannot do them, or cannot reasonably be expected to do them for themselves. Finnis used the word "enable," and it is the right word here: government's legitimate concern is with the establishment and maintenance of the *conditions* under which members of the community are *enabled* to pursue the projects and goals by and through which they participate in the goods constitutive of their flourishing.

Now, this facilitative conception of the common good does not require a doctrinaire libertarianism either in the domain of political economy or social morality; but it clearly excludes corporatist and socialist policies that, to recall those words from Pius XI, "withdraw from the individual and commit to the group what private initiative and effort can accomplish," or which remove from the family or religious or civic association and commit to government what can be accomplished by non-governmental collaborative effort. Surely a conception of the common good that is serious about the principle of subsidiarity will respect private property and take care to maintain a reasonably free system of economic exchange—that is to say, a market economy. "Social" (i.e. comprehensive or even widespread state) ownership of the means of production is plainly incompatible with subsidiarity's concerns and objectives, as is anything resembling a command economy. And this would be true even if the record of socialist states were benign when it came to respect for civil liberties and political freedom—which, on the whole, it certainly is not.

And it would be true even if, again contrary to the historical record, private property and the market system were not necessary as checks against the excessive concentration and abuse of power in the hands of public officials. But, as I've noted, the historical record demonstrates that private property and the market system, while not sufficient as guarantees against the concentration and abuse of political power, are for all intents and purposes necessary conditions for civil liberty and limited government. And there is a profound lesson in this for those of us who are interested in ensuring that rulers remain servants, ruling in the interest of citizens, and do not reduce citizens to a condition of dependency or servitude. For it is critical to the effective limitation of governmental power that there be substantial non-governmental centers of power in society. Private property and the market economy not only provide the conditions of social mobility, which is important to the common good in any modern or dynamic society, but also ensure that there are significant resources (and thus opportunities for people and the private associations

they form) that are not in the control of governmental officials or the apparatus of the state. This diffusion of power benefits society as a whole, and not only those who immediately benefit economically from the possession of property or the ability to profit in the market. And I am not simply here talking about general prosperity, though that is yet another benefit of private property and the market system. I am talking about the benefit to all—in terms of liberty, opportunity, and security—of the diffusion of power.

This goes well beyond economics. If we understand the common good, if we have a grasp of what constitutes or is conducive to the flourishing of human beings and what is not, we will recognise that limited government is also important because it permits the functioning and flourishing of non-governmental institutions of civil society—those little platoons again, families, churches, etc—that perform better than government could ever conceivably do the most essential health, education, and welfare functions and which play the primary role in transmitting to each new generation the virtues without which free societies cannot survive—basic honesty, integrity, self-restraint, concern for others and respect for their dignity and rights, civic mindedness, and the like.[13] These non-governmental authority structures represent another crucial way in which power is properly diffused and not concentrated in the hands of the state and its officials. They can play their role only when government is limited—for unlimited government always usurps their authority and destroys their autonomy, usually recruiting or commandeering them into being state functionary organs—and where they are playing their proper role they help to create conditions in which the ideal of limited government is much more likely to be realised and preserved, and its benefits enjoyed by the people.

I will return to the role of these institutions of civil society towards the end of my remarks, but now let me shift the discussion to the question of constitutional structural constraints on the powers of government. Historically, political theorists have focused on the need for

such constraints as the most obvious and important way to ensure that governmental power remains limited and that rulers serve the people and do not become tyrants. And I myself think that constraints of this nature are important in this cause, though I will eventually get round to saying that they are likely to be effective only when they are a part of a larger picture in which they are supported by, and in turn support, other features of social life that help to keep government within its proper bounds, for the sake of the common good. So, as important as they are, I would warn against placing too great an emphasis on constitutional structural constraints. The danger there is ignoring the other essential features.

The Constitution of the United States is famous for its "Madisonian system" of structural constraints on powers of the central government. More than 200 years of experience with the system gives us a pretty good perspective on both its strengths and its limitations. The major structural constraints are: 1) the doctrine of the general government as a government of delegated and enumerated, and therefore limited, powers; 2) the dual sovereignty of the general government and the states—with the states functioning as governments of general jurisdiction exercising generalized police powers (a kind of plenary authority), limited under the national constitution only by specific prohibitions or by grants of power to the general government, in a federal union; 3) the separation of legislative, executive, and judicial powers within the national government, creating a so-called "system of checks and balances" that limits the power of any one branch and, it is hoped, improves the quality of government by making the legislative and policy-making processes more challenging, slower, and more deliberative; and 4) the practice (nowhere expressly authorised in the text of the Constitution, but lay that aside for now) of constitutional judicial review by the federal courts.

Now, I often ask my students at the beginning of my undergraduate course on civil liberties how the framers of the Constitution of the United States sought to preserve liberty and prevent tyranny. It is, alas, a testament to the poor quality of civic education in the United States that almost none of the students can answer the question correctly. Nor,

I suspect, could the editors of the *New York Times* or other opinion-shaping elites. The typical answer goes this way:

> Well, Professor, I can tell you how the framers of the Constitution sought to protect liberty and prevent tyranny. They attached to the Constitution a Bill of Rights to protect the individual and minorities against the tyranny of the majority; and they vested the power to enforce those rights in the hands of judges who serve for life, are not subject to election or recall, cannot be removed from office except on impeachment for serious misconduct, and are therefore able to protect people's rights without fear of political retaliation.

Now, this is about as wrong as you can get; but it is widely believed, and, as I say, not just by university students. None of the American founders, even among those who favored judicial review and regarded it as implicit in the Constitution, which not all did, believed that it was the central, or even a significant, constraint upon the power of the national government. Nor did they believe that the enforcement of Bill of Rights guarantees by courts would be an important way of protecting liberty. The Federalists—in the original sense of those who supported the proposed Constitution—generally opposed the addition of a Bill of Rights because they feared it would actually undermine what they regarded as the main structural constraints protecting freedom and preventing tyranny, namely, (1) the conception and public understanding of the general government, not as a government of general jurisdiction, but as a government of delegated and enumerated powers; and (2) the division of powers between the national government and the states in a system of dual sovereignty.[14] When political necessity forced the Federalists to yield to demands for a Bill of Rights (in the form of the first eight amendments to the Constitution), they took care to add two more amendments—the ninth and tenth[15]—designed to reinforce the delegated powers doctrine and the federalism principles that they feared would be obscured or weakened by the inclusion of a Bill of Rights.

As for the way judicial review has functioned as a structural constraint

in American history, suffice it to say that the practice has given my native-New Zealander friend Jeremy Waldron plenty of ammunition in making his case around the world against judicial review.[16] The federal courts, and the Supreme Court in particular, have had their glory moments, to be sure, such as in the racial de-segregation case of *Brown v. Board of Education* in the 1950s, but they have also handed down decision after decision—from *Dred Scott v. Sandford* in the 1850s, which facilitated the expansion of slavery, to *Roe v. Wade* in the 1970s, which legalised abortion throughout the United States—in which they have plainly overstepped the bounds of their own authority and without any warrant in the text, logic, structure, or original understanding of the Constitution imposed their personal moral and political opinions on the entire nation under the pretext of enforcing constitutional guarantees. These usurpations are, quite apart from whatever one's views happen to be on slavery and abortion, a stain on the courts and a disgrace to the constitutional system, bringing it into disrepute and undermining its basic democratic principles.

Moreover, since the 1930s, the courts have done very little indeed by way of exercising the power of judicial review to support the other constitutional structural constraints on the exercise of central governmental power. A very small number of isolated decisions have struck down this or that specific piece of federal legislation as exceeding the delegated powers of the national government or trenching upon the reserved powers of the states, but that is about it.[17] Most recently, and spectacularly, the Supreme Court found a way, by a bare majority, to uphold what seemed to me and many others an obvious case of constitutional overreaching by the national government—the imposition of an individual mandate requiring citizens to purchase health insurance coverage as part of President Obama's signature "Patient Protection and Affordable Care Act."[18] The government defended the mandate as a legitimate exercise of the expressly delegated power to regulate commerce among the several states. The trouble, of course, is that the mandate does not *regulate* commerce at all; it forces people into commerce—a particular

kind of commerce—on pain of a financial penalty. Now, the Court's four liberal justices were willing to stick to what has become longstanding tradition for those in their ideological camp, namely, counting anything the national government proposes to do as a legitimate exercise of the power to regulate interstate commerce if that's what the government says it is. The five more conservative justices were willing to face reality and say that whatever is going on with the imposition of a mandate to purchase health insurance, it is not regulating interstate commerce. One of the five, however, Chief Justice Roberts, decided to reinterpret the penalty as something that the Obama administration and its supporters in Congress had repeatedly and vociferously denied it was during the debate leading up to the passage of the "Patient Protection and Affordable Care Act," namely, a tax. He then joined the four liberals to uphold the mandate and the legislation as a whole as constitutionally permissible.

Of course, it shouldn't have come to a decision by the courts at all. Congress itself, and the President, should have recognised and honored the fact that the Constitution does not empower the national government to impose a mandate on the people to purchase products, including health care coverage. One of the problems with judicial review in general is that its practice tends to encourage the belief among legislators (and, worse still, among citizens more broadly) that the constitutionality of proposed legislation is not the concern of the people's elected representatives; if a proposed piece of legislation is unconstitutional, they say, then it is up to the courts to strike it down. But this is a travesty. For structural constraints to accomplish what they are meant to accomplish, for them to constrain the power of government as they are meant to do, the question of the constitutionality of legislation in light of those constraints is *everybody's* business—judges exercising judicial review, yes, but also legislators, executives, and the people themselves.

The people of the United States, a large and consistent majority of whom tell pollsters they dislike the Affordable Care Act, desire its repeal, and regard its individual mandate as an unconstitutional trespass upon

their liberty, may yet act to dismantle it. Together with the general poor performance of the economy, the demand for repeal of the Act is a major issue in the presidential campaign and in contests for seats in the United States House of Representatives and Senate across the country. The Tea Party movement in the United States—much maligned by the elite print and broadcast media which now scarcely bothers to hide its biases in favor of larger government, socially liberal policies, President Obama, and the Democratic Party—has, to its credit, succeeded in getting people to think about the mandate not merely as a "policy issue" but as a constitutional question about the scope and limits of federal power. And so for the first time in my lifetime, the debate about the applicability of the doctrine of delegated and enumerated powers has spilled out of the courtrooms and into the streets, as it were. We are having a political debate about the meaning of a fundamental constitutional structural constraint—and thus a debate about limited government. I can't tell you how it will come out. (You can ask me again on the morning of November 7th.) But I'm glad we're having it. And if I tell you why in particular I'm glad we're having it, it will bring me in concluding my Sir John Graham Lecture to the profoundly important subject on which Professor Waldron concluded his excellent John Graham Lecture in 2008.

That subject is political culture. The Waldron lecture concerned the quality of parliamentary debate. The bulk of the lecture is devoted to a careful analysis and penetrating critique of a range of factors leading to the impoverishment of legislative deliberation in New Zealand warranting, in Professor Waldron's view, the stinging title he assigned to his lecture: "Parliamentary Recklessness." Its penultimate section is entitled "Parliamentary Debate" and offers a thoroughly gloomy appraisal. But instead of ending there, offering no grounds for hope, he concludes with a section entitled "The Quality of Public Debate," in which he points to the possibility that the deficiencies of parliamentary debate may be at least partially compensated for by a higher quality of public debate, and even hints that a higher quality of public debate could prompt the reforms

necessary to at least begin restoring the integrity of parliamentary debate. But he warns that things could also go the other way. The corruption of parliamentary debate could "infect the political culture at large," driving public debate down to the condition of parliamentary debate. A condition he chillingly described in the following terms:[19]

> Parliament becomes a place where the governing party thinks it has won a great victory when debate is closed down and measures are pushed through under urgency; and the social and political forum generally becomes a place where the greatest victory is drowning out your opponent with the noise that you can bring to bear. And then the premium is on name-calling, on who can bawl the loudest, who can most readily trivialise an opponent's position, who can succeed in embarrassing or shaming or if need be blackmailing into silence anyone who holds a different view.

So, in a sense, it is up to the people to decide whether they will rise above the corruption that has demeaned parliamentary politics or permit it to "infect the political culture at large." But "the people" are not some undifferentiated mass; they are *people*, you and me, individuals. Of course, considered as isolated actors there is not a lot that individuals can do to affect the political culture. But individuals can cooperate for greater effectiveness in prosecuting an agenda of conservation or reform, and they can create associations and institutions that are capable of making a difference. Anyone who knows Professor Waldron will understand that it was no mere politesse that caused him, in the concluding section of his lecture, to stress the importance of the Maxim Institute and foundations and organisations like it of varying ideological hues in the project of sustaining and enhancing the quality of political culture in his native land. He meant what he said about the "big contribution" that this Institute and others can make by "constructing debate in the society at large that at its best will put to shame the shabby and peremptory proceedings in Parliament."[20]

What Waldron was pointing to in the discussion of the quality of

democratic deliberation and decision-making was the essential role of non-governmental institutions—those little platoons, yet again—in sustaining a culture in which political institutions do what they are established to do, do it well, and don't do what they are not authorised to do. And he also rightly pointed to the danger that bad behavior on the part of political institutions—which means bad behavior on the part of the people who exercise power as holders of public offices—can corrupt or, at least, enervate the institutions of civil society, rendering them for all intents and purposes impotent to resist the bad behavior and useless to the cause of political reform.

My point, and this is why I promised to return at the end to the importance of institutions of civil society, is that this is true more generally, and it is certainly true with respect to the bad behavior of public officials who betray their obligations to serve by transgressing the bounds of their constitutional authority and the limits embodied in the doctrine of subsidiarity. Constitutional structural constraints are important, but they will be effective only where they are effectually supported by the political culture. The people need to understand them and value them—value them enough to resist usurpations by their rulers even when the unconstitutional big government programs offer immediate gratifications or the relief of urgent problems. This, in turn, requires certain virtues—strengths of character—among the people. But these virtues do not just fall down on people from the heavens. They have to be transmitted through the generations and nurtured by each generation. Madison said that "only a well-educated people can be permanently a free people."[21] And that is true. It points to the fact that even the best constitutional structures, even the strongest structural constraints on governmental power, aren't worth the paper they are printed on if people do not understand them, value them, and have the will to resist the blandishments of those offering something tempting in return for giving them up or letting violations of them occur without swift and certain political retaliation. But it is also true that virtue is needed, and that's not merely a matter of improving civics

teaching in homes and schools. The Constitution of the United States was famously defended by Madison in Federalist Paper Number 51 as "supplying, by opposite and rival interests, the defect of better motives." He made this point immediately after observing that the first task of government is to control the governed, and the second is to control itself. He allowed that "a dependence on the people is, no doubt the primary control on the government, but experience has taught mankind the necessity of auxiliary precautions"—hence, the constitutional structural constraints, among other things. But even in this formulation they do not stand alone; indeed, they are presented as secondary. What is also necessary, and, indeed, primary, is healthy and vibrant political culture—"a dependence on the people" to keep the rulers in line.

But that brings us back to the role and importance of virtue. John Adams understood as well as anyone the general theory of the Constitution. He was the ablest scholar and political theorist of the founding generation. He certainly got the point about "supplying the defect of better motives," yet he also understood that the health of political culture was an indispensable element of the success of the constitutional enterprise—an enterprise of ensuring that the rulers stay within the bounds of their legitimate authority and indeed be servants of the common good, servants of the people they rule. He remarked that "our Constitution is made for a moral and religious people" and "is wholly inadequate to the government of any other."[22] Why? Because a people lacking in virtue could be counted on to trade liberty for protection, for financial or personal security, for comfort, for being looked after, for being taken care of, for having their problems solved quickly. And there will always be people occupying or standing for public office who will be happy to offer the deal—an expansion of their power in return for what they can offer by virtue of that expansion.

So the question, then, is how to form people fitted out with the virtues making them worthy of freedom and capable of preserving constitutionally limited government, even in the face of strong temptations, which

inevitably come, to compromise it away. Here we see the central political role and significance, I believe, of the most basic institutions of civil society—the family; the religious community; private organisations (such as the Boy Scouts) that are devoted to the inculcation of knowledge and virtue; private (often religiously based) educational institutions; and the like that are in the business of transmitting essential virtues. These are, indeed, as is often said, mediating institutions that provide a buffer between the individual and the power of the central state. It is ultimately the autonomy, integrity, and general flourishing of these institutions that will determine the fate of limited constitutional government. And this is not only because of their primary and indispensable role in transmitting virtues; it is also because their performance of health, education, and welfare functions is the only real alternative to the removal of these functions to "larger and higher associations," that is, to government. When government expands to play the primary role in performing these functions, the ideal of limited government is soon lost, no matter the formal structural constraints of the Constitution. And the corresponding weakening of the status and authority of these institutions damages their ability to perform all of their functions, including their moral and pedagogical ones. With that, they surely lose their capacity to influence for good the political culture which, at the end of the day, is the whole rugby match when it comes to whether the ruler can truly be a servant.

Questions and Answers

Professor, given the fact that your students—who are the elite students in the country—don't understand the constraints built into the constitution, and the fact that the structures of government were set up to be self-limiting, what is the likely future of the democratic process?

Well I think James Madison was right, in saying that "only a well-educated people can be permanently a free people." And then I think you have to add John Adams' point about the importance of the virtue in the people, no matter how well educated they are, if they are to preserve their freedom. The temptation is to accept quick and easy solutions to difficult problems—sacrificing freedom for the promise of security, prosperity, easy lives. People need virtue, as well as wisdom, to resist the temptation to let government keep expanding at the price of liberty and personal responsibility.

On the question of civic education, we need to do a much better job in our schools and universities. We also need the dedicated efforts of institutions such as the Maxim Institute. There is also the need for efforts in the home. Parents need to do their parts when it comes to teaching their children the fundaments of the constitutional order. In most cases, that means parents have to educate themselves first.

Of course, I'm not saying that parents need to turn their kids into constitutional scholars. I do think, however, that it is the citizen's obligation to understand the basic structures and the basic protections of the Constitution, and the basic obligations of citizenship, and to communicate an understanding of these matters to their children. You try to teach your kids all sorts of things beyond just reading, writing and arithmetic. When you say, "Don't hit your sister," you are trying to teach your kids a moral lesson about how to be a decent human being. There is an additional moral component that parents need to teach their children and it has to do with how to be a citizen.

Taking advantage of civic holidays for civic instruction in the home would be a very good thing.

My own growing up was in the shadow of the World War II generation. My father served in Normandy and Brittany and we did receive something more than just passionate patriotism in the celebration of holidays like Veterans Day and Memorial Day. We didn't get details about constitutional structural constraints—but we did get some sense about what the civic order was all about, and what it was that our fathers sought to protect. It was enough that you had a base on which to build. Getting back to something like that would be valuable. The antinomianism of the 1960s did a lot of harm I think, by—at a minimum—taking the wind out of the sails of those civic celebrations and tarnishing the concept of patriotism by associating it with a kind of chauvinism or excessive, unsavoury nationalism. To some extent we are beyond that, but there is still a lingering element that I think is an impediment to civic learning.

So we have work to do.

—That seems a very optimistic view against a background that looks more bleak.

My friends have threatened to inscribe my gravestone with the words, "we're going to turn this thing around."

I think the reality of institutes like Maxim is that they are meeting an important need. They are responding to a need that we perceive for a reform of civic education and a renewal of civic discourse. The first step is taking the measure of the problem, and so in recognising that something needs to be done, we are off to a start. As Professor Waldron says, the kind of work that the Maxim Institute is doing is foundational to any reform. I won't accept the claim that there is no hope. But if there is hope, it must begin with these institutions, these little platoons like the Maxim Institute, getting the ball rolling.

Thank you for an inspiring and challenging address. I was interested in your description of Obama-care as a mandate for people to participate compulsorily in commerce. I would have thought more Americans would be concerned about the compulsory participation in bail-outs of finance companies. This leads me to ask about your conception of public interest. Does your conception of public interest entail public welfare and, as a corollary of that, a duty on public officials to at the least seek to avoid deprivation and poverty? And secondly do you accept that private actors can engender poverty and deprivation? Let me give an example, in your own country, the Bell Telephone Company, which by the 1970s had become highly monopolistic. The federal government, its department of justice and the judiciary broke it up, which was seen as an act to promote public welfare and the public interest.

I think I may disappoint you by agreeing with both your points. My response is a "yes" although of course there is also a "but..."

I said in my lecture that my conception of the public interest does not entail a doctrinaire libertarianism, whether in political economy or in social morality. On the contrary, I agree with you that public authority should be concerned, and is rightly concerned, with public welfare and the fate of the least well-off. Now the question is, how best—consistent with integral human flourishing and the well-being of the people you are trying to serve—to deliver the kinds of social services, in a way that will enable people to help themselves.

Can private enterprises do things that damage the public welfare by, among other things, harming the least well off? The answer to that is clearly yes. The government has a role here, to be sure, in preventing exploitation and abuse. You mention the bail-outs. We have the bail-outs because two presidents of the United States, from completely different parties and ideologies, believed, rightly or wrongly, that the large banks were too big to fail. Because the large banks anticipated that the

government would believe they were too big to fail, they did things that in a functioning market, they wouldn't have conceived of doing because the economic consequences would have been so potentially disastrous. I will up the ante: I don't see any reason not to break up the banks. If they're too big to fail, then we can't afford them. It's not because we want to ruin the market; rather, it's because we want a true market. If the government is going to come in and bail you out when you make bad economic choices, then we don't have a functioning market.

I want to restore the functioning of the market because I think the market when it is functioning properly is the greatest engine of social mobility ever created. Markets can lift people out of poverty. Both of my grandfathers were immigrant coal miners. When they arrived in the United States a little over 100 years ago, the McCormick Professor of Jurisprudence at Princeton was Woodrow Wilson. Today that chair is occupied by their grandson. That happened, not because of something remarkable about me. My story is remarkably like the story of millions of Americans. What's remarkable about my story, I suppose, is that it is unremarkable. And the market economy was critical in making that story possible.

Since the year 2000 we have been in a unique situation. Never before in my lifetime (or in the lifetimes of my parents and grandparents) have we had such a polarisation in our politics in the United States. There used to be a left and a right in the Republican Party and a left and a right in the Democratic Party. Now there's not. Now those on the left have moved entirely to the Democratic Party and those on the right have moved entirely to the Republican Party. But despite that, both George Bush and Al Gore agreed that the government-run welfare system, even as reformed under Bill Clinton in 1996, was not working and that private providers of social services to the needy were doing a much better job. So both parties campaigned on the proposal that came to be known as the "faith based initiative." That was a way of using government resources to enable the delivery of services not through government but through

churches and other private associations. It ended up getting derailed as a result of disputes over issues pertaining to anti-discrimination in hiring. But both parties agreed it was best to enlist the "little platoons" to do this work. If you look at the speeches of Bush and Gore, part of the incentive for the initiative for both candidates was that the private providers could make demands on the recipients of assistance, while government workers felt they could not make such demands. It was making a real difference in the success of the programmes.

Bush actually appointed a Democrat to run the programme—the distinguished public administration scholar John DiLulio of the University of Pennsylvania.

So the "but" is this. Yes, government has a role and responsibility, but it should be a subsidiary and facilitative role. Realistically I think there is going to have to be a safety net supplied by government for the most difficult cases—cases of people who cannot help themselves and for whom non-governmental assistance cannot efficiently or reliably be made available. But that is very different from an entire entitlement society and the maintenance of massive middle-class entitlement programmes that are government-run, and that end up folding because they go bankrupt.

I wonder if you could share with us your thoughts on the interpretation of Justice Roberts on the Obama-care case—why did he spin the way he did? What does that case now mean for any federal government that wants to push things on their citizenry? If they can make them buy insurance they can make them buy broccoli.

Obama has been quoted as complaining that the Constitution is one of restriction and it shouldn't be so. He wants to change it. If that is the case do you hold fears if he is re-elected?

The first question is the hardest. Why Justice Roberts did what he did is difficult to understand. This is probably the reason: There is a canon of

interpretation that is applied where judicial review is practised, which boils down to this—you should interpret a decision under review in a way most favourable to it surviving the scrutiny. So Roberts, as a good, faithful, workman-like lawyer, applies that canon and says, "Is there any conceivable way that I can interpret this provision that will enable me to uphold it?" After all, the default position is democracy, and judicial intervention should be an extraordinary thing and resorted to only where the judge cannot reasonably interpret the statute in a way that will enable it to survive. So he came up with the idea of the mandate as a tax. If it is a tax, it can be justified under the taxing power, and upheld as constitutionally legitimate. It gets upheld on that theory, but with him being the only member of the court holding that theory. Even President Obama and his supporters, during the legislative debates, had said as clearly and forcibly as they could that it's not a tax. They said it as loudly and defiantly as they possibly could! But by interpreting it as a tax, it survives judicial scrutiny; Justice Roberts figures he has done his duty.

I agree with the canon, but in applying the canon in a saving interpretation of a statute or provision, a judge may not legitimately change the statute and rewrite it. And the judge must take into account all the factors that are relevant. For example, in the U.S. constitution, a tax has to originate in the House of Representatives. This mandate and the penalty attached to failing to comply with it originated in the Senate, not the House. It can't be a tax without rewriting the history.

I think I see what Justice Roberts is trying to do. I like that he is trying to be deferential, but this looks to me like it goes too far. Now from the point of view of people who are critical of the legislation, there is one silver lining to this. If it's a tax and not a penalty, then it will not be subject, in the United States Senate, to a filibuster—which means it can be repealed with 50 votes plus the Vice-President's tie-breaking vote. If it were a penalty, which its supporters said it was all along, it could only be repealed by breaking the filibuster in the Senate, which requires the 60 votes. So Roberts' decision could make a huge difference, assuming

the election of Romney, as it will make it easier to overturn the statute legislatively.

There is also speculation about what may have motivated Justice Roberts. As far as I know, Roberts is a straight-shooter who calls it as he sees it. Those less inclined to take him at his word think he was intimidated by threats from the President and leaders of the House and Senate, that they would make the Supreme Court itself a political issue in the presidential election if the Court struck down the law. This would damage the status of the Supreme Court as a non-political body in the eyes of the American people. On this theory—Roberts is thinking as follows: "well, the Court is still recovering from the decision between Bush and Gore in 2000, and given that the court is just coming through that period of being roughed up, we shouldn't subject ourselves to more criticism by voting to strike down Obama-care."

In terms of the consequences of this decision—if you take precedent seriously—it is an invitation to the Congress and future presidents to go with certain proposals if they favour them for other reasons, that look like they cross the line as far as the delegated powers doctrine of the Constitution is concerned, by characterising whatever penalty is attached to acting or declining to act in a way consistent with the legislation, but defining it as a tax. So you get an expansion of the taxing power, even as you get a contraction of the commerce power, with the net result being that everything gets upheld, just as it was under the commerce power from 1937 to the mid-1990s.

Regarding Obama and the future? The progressive movement is a long-standing movement, of which Woodrow Wilson, a Democrat, and Theodore Roosevelt, a Republican, were founders. Obama is an heir of this movement—he identifies himself that way. It has long been a complaint of progressives that our Constitution is an 18th century document that doesn't work very well for a 20th, now 21st century world. The way Wilson put it was that the Constitution is a Newtonian document trying to function in a Darwinian world. We need a Darwinian constitution, not a Newtonian

one, he argued. We need an evolutionary Constitution not a mechanical one. So, progressives tend to look favourably upon Parliamentary systems that exhibit what Waldron regarded as the vices of being able to push legislation through very quickly without the hurdles and bruises that you get along the way.

Now when the progressives tried to update the Constitution it didn't work. The idea of getting rid of that 18th century Constitution and replacing it with a new Constitution formally just didn't fly. Americans had learnt to revere their Constitution, so there was no sympathy for wholesale change. The progressives managed to get four amendments through, but there was no sentiment for a wholesale revision or a new constitutional convention or a movement to create a new parliamentary system. The four progressive amendments were: the direct election of senators; suffrage for women; a federal income tax; and the prohibition of alcohol, which later got revoked. That was all they could get, they couldn't get wholesale revision. So instead, the trend of progressive thought was to reinterpret the Constitution we have, in a way that downplays the structural constraints that get in the way of moving, getting stuff done, meeting the needs (or alleged needs) of a modern, industrial, now post-industrial socio-economic order. So it has really been by reinterpretation that the progressives have effected constitutional change; and that's what you see in the justices who now seem to act as though any claim made under the Commerce Clause gets validated. I can't think of any realistic piece of legislation that any of them would be likely to cast a negative vote on, if it were to be defended under the Commerce Clause. This was clear in the healthcare case, and it was clear in the dissenting opinions in the one or two cases from the 90s in which a majority was put together on the court to invalidate legislation.

So, the bottom line, I think, is that President Obama is not favourable (no progressive would be) to anything approaching a strict interpretation of the Madisonian system and its structural constraints. He and those in his camp think that the Constitution can be adapted to enable them to do

just about anything they like. They know that we're not going to have a constitutional convention to create a system where the executive can ram things through, so they do their best to interpret the Constitution we have in a way that is less constraining of executive and legislative action than undoubtedly the Framers themselves thought their handiwork would be.

ENDNOTES

1 I explore the meaning and moral significance of the Rule of Law in "Reason, Freedom, and the Rule of Law," *American Journal of Jurisprudence*, Vol. 46 (2001), 249-256.

2 I offer some thoughts on moral disagreement between reasonable people of goodwill in "Law, Democracy, and Moral Disagreement," *Harvard Law Review*, Vol. 110 (1997), 1388-1406.

3 G. Webber, "Authority and Obligation, Moral and Legal," (Symposium presentation, University of Auckland, Auckland, 9 August 2012).

4 On the rational (and moral) basis of political authority, see generally J. Finnis, *Natural Law and Natural Rights* 2nd edition (Oxford: Clarendon Press, 2011), ch. IX.

5 See J. Finnis, "Law as Co-ordination," *Ratio Juris*, Vol. 2 (1989), 97-104.

6 E. Burke, *Reflections on the Revolution in France* (London: Penguin, 2004), 135.

7 J. Finnis, Natural Law and Natural Rights (Oxford: Oxford University Press, 2011), 155.

8 I. Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (New York: Alfred A. Knopf, 1991), 208.

9 J. Finnis, "Is Natural Law Theory Compatible with Limited Government?" in Robert P. George (ed.), *Natural Law, Liberalism, and Morality* (Oxford: Clarendon Press, 1996), 1-26 (esp. at 5-9).

10 R.P. George, "The Concept of Public Morality," *American Journal of Jurisprudence*, Vol. 45 (2000), 17-31.

11 Pius XI, *Quadragesimo Anno*, Encyclical letter on the reconstruction of the social order, Vatican Website, May 15, 1931, http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html, sec. 79.

12 Patrick Suppes, commenting on Aristotle, explains that "flourishing or happiness is not a state of feeling but an activity." P. Suppes, "The aims of Education," in Alven Neiman (ed.), *The Philosophy of Education 1995* (Urbana, Illinois: Philosophy Education Society, 1996), 110-126. See also D.B. Rasmussen, "Human Flourishing and the Appeal to Human Nature," in E.F. Paul, F.T. Miller, and J. Paul, *Human Flourishing* (New York: Cambridge University Press, 1999), 1-43; and J. Finnis, *Fundamentals of Ethics* (Oxford: Oxford University Press, 1983), 38 ("Aristotle gives heavy emphasis to the fact that the life of *eudaimonia* is a lifetime of activity . . . .")

13 See P.L. Berger and R.J. Neuhaus, *To Empower People* (Washington, DC: American Enterprise Institute, 1977).

14 See Alexander Hamilton, *Federalist Papers*, Number 84.

[15] The ninth amendment states that the enumeration in the Constitution of certain rights is not to be construed as denying or disparaging others retained by the people, while the tenth amendment reserves to the states or to the people those powers not delegated to the federal government by the Constitution nor prohibited by it to the states.

[16] See, for example, J. Waldron, "The Core of the Case Against Judicial Review," *Yale Law Journal*, Vol. 115 (2006), 1345-1406.

[17] See, for example, *United States v. Lopez*, 514 U.S. 549 (1995).

[18] *National Federation of Independent Business v. Sebelius*, 567 U.S. (2012)

[19] J. Waldron, *Parliamentary Recklessness: Why We Need to Legislate More Carefully*, Maxim Institute's Annual John Graham Lecture, October 2008 (Auckland: Maxim Institute, 2008), 32.

[20] J. Waldron, *Parliamentary Recklessness*, 31.

[21] J. Madison, "Second Annual Message," December 5, 1810.

[22] J. Adams, *Message to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts* (1798).

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