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# The Political Animal and the Ethics of Constitutional Commitment

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## THE POLITICAL ANIMAL AND THE ETHICS OF CONSTITUTIONAL COMMITMENT

*Josh Chafetz\**

“Nothing appears more surprizing to those, who consider human affairs with a philosophical eye,” David Hume wrote in 1741, “than the easiness with which the many are governed by the few; and the implicit submission, with which men resign their own sentiments and passions to those of their rulers.”<sup>1</sup> Hume’s explanation, unsurprisingly,<sup>2</sup> is that “the governors have nothing to support them but opinion. . . . [A]nd this maxim extends to the most despotic and military governments, as well as to the most free and most popular.”<sup>3</sup> For Hume, opinion and opinion alone explains why a majority would submit to being ruled by anything other than the immediate fulfillment of its every desire.

It is no slight to the great Scot to note that we still share his puzzlement as to why we accept government structures even when we dislike the substantive outcomes they produce. Professor Daryl Levinson, in his fascinating new Article,<sup>4</sup> takes up a version of this quandary and advances the discussion impressively. In his formulation, the question is “why politically empowered majorities would choose to comply with legal limitations on what they can accomplish politically.”<sup>5</sup> Levinson notes that James Madison clearly believed that constitutional structure would prove more durable than constitutional rights and therefore

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\* Assistant Professor of Law, Cornell Law School. Thanks to Will Baude, Aziz Rana, Catherine Roach, Steve Sachs, and Justin Zarembky for helpful and thought-provoking comments on earlier drafts. Any remaining errors or infelicities are, of course, my own.

<sup>1</sup> DAVID HUME, *Of the First Principles of Government*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 32, 32 (Eugene F. Miller ed., Liberty Fund 1987) (1741).

<sup>2</sup> This explanation is unsurprising because of the role that habit and opinion famously play in Hume’s ethical and epistemological thought. See DAVID HUME, *A TREATISE OF HUMAN NATURE* 455–76 (P.H. Nidditch & L.A. Selby-Bigge eds., Oxford Univ. Press 2d ed. 1978) (1739–1740) (arguing that moral principles are discoverable, not from reason, but from sentiment); DAVID HUME, *An Enquiry Concerning Human Understanding*, in *ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS* 5, 43–45 (P.H. Nidditch & L.A. Selby-Bigge eds., Oxford Univ. Press 3d ed. 1975) (1748) (arguing that habits or customs of thought underlie all *a posteriori* knowledge); see also Leslie Green, *‘Because Everyone Thinks So’: Hume on Authority and Common Opinion* 1 (Univ. of Oxford Legal Research Paper Series, Paper No. 59/2010, 2010), available at <http://ssrn.com/abstract=1697992> (“Hume thinks that law is fundamentally a matter of social fact and that obedience to law is an artificial, because convention-dependent, virtue.”).

<sup>3</sup> HUME, *supra* note 1, at 32.

<sup>4</sup> Daryl Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 *HARV. L. REV.* 657 (2011).

<sup>5</sup> *Id.* at 659–60.

sought to enlist structure in the service of rights.<sup>6</sup> But why, Levinson perceptively asks, should we expect that structural constitutional rules will have any more bite than rights-protecting ones?<sup>7</sup> Why do powerful groups accept the rules of the game when, under those rules, they lose on an important issue?<sup>8</sup> To paraphrase Hume, Levinson wants to know why it is that we submit to our constitutionally prescribed governing structures when they produce substantive results at odds with our sentiments and passions.

Levinson's answer to this big question consists of a creative and compelling identification of various public choice mechanisms which bind political actors to the constitutional order, even when they dislike the immediate outcomes produced by that order. Creative and compelling — but not complete. As I shall argue in this Response, Levinson overlooks another set of mechanisms, ones which work not at the level of material interests but rather at the level of political morality. After briefly summarizing the mechanisms that Levinson does identify, this Response then turns to describing both the content and the historical pedigree of the ones he does not. It is important to emphasize from the outset, however, that I do not claim that ethical obligation is the sole or even dominant aspect of constitutional commitment. I come to supplement Levinson's argument, not to supplant it.

### I. LEVINSON'S MECHANISMS

Levinson identifies at least six public choice mechanisms as being responsible for constitutional commitment: coordination, reputation, repeat-play, reciprocity, asset-specific investment, and positive political feedback. By *coordination*, he means that, "in many contexts actors will be willing to sacrifice their first choices of outcomes or institutions in exchange for the benefits of avoiding conflict and agreeing on a common way forward."<sup>9</sup> Levinson suggests that the U.S. Constitution fulfills the coordination function well by being specific about "low-stakes issues, where agreement is more important to most political actors than achieving any particular outcome."<sup>10</sup> By *reputation*, *repeat-*

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<sup>6</sup> *Id.* at 662–63.

<sup>7</sup> *See id.* at 663.

<sup>8</sup> *See id.* at 705.

<sup>9</sup> *Id.* at 684.

<sup>10</sup> *Id.* at 709. A quibble: Levinson seems to think that, for example, issues of presidential succession are "low-stakes," a claim which allows him to maintain a tight fit between constitutional specificity and "low-stakes" controversies. This seems clearly backwards — the Constitution is specific about who succeeds the President precisely because, in the event of presidential death, incapacitation, or resignation, the stakes are so *high*. Cf. BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES (forthcoming Yale Univ. Press) (describing a series of situations — including some involving presidential suc-

*play*, and *reciprocity*, he means those mechanisms by which political actors, recognizing that they are playing an iterated game, will agree to abide by certain rules of the game when they are in power, understanding that other players will abide by those same rules when *they* are in power. “For example, Democrats in control of the national government may refrain from suppressing Republican political speech on the tacit understanding that Republicans will similarly respect free speech when they are in control . . .”<sup>11</sup> By *asset-specific investments*, Levinson means those investments that political actors make in order to enhance their efficacy in working within a given set of governing structures.<sup>12</sup> Once those investments are sunk costs, those actors then have an incentive to maintain the stability of the structures to which those investments apply. Whatever resources a political actor has invested in mastering the art of lobbying Congress will be for naught if Congress ceases to have any power; the actor thus has an incentive, independent of particular substantive outcomes, to support the institutional status quo. Finally, by *positive political feedback*, Levinson means that the substance of politics can be shaped by the institutions of politics “in ways that increase support for the institutions themselves.”<sup>13</sup> A simple example of constitutional provisions that produce positive political feedback are those (like our Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments) that expand the franchise. Enfranchised groups are unlikely to vote for their own disfranchisement or for officials who will disfranchise them.<sup>14</sup> The franchise expansion thus to some extent entrenches itself. Important to all of these mechanisms is the relatively high degree of *uncertainty* about the substantive outcomes that any given institutional arrangement will produce.<sup>15</sup> If certain groups know that they will never get the substantive policies that they want, then they have much less reason to care about coordination, reciprocity, or the loss of their asset-specific investments. But in a polyarchic political community, most groups know that they will win on some issues and lose on others — they just often will not know in advance which issues are which. Given this uncertainty, the mechanisms Levinson identifies serve to promote institutional stability.

The preceding paragraph is, of course, only the most superficial account of mechanisms that Levinson describes in great detail — and I

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cession — in which the Constitution is less specific than we might like, and describing potentially disastrous consequences).

<sup>11</sup> Levinson, *supra* note 4, at 711.

<sup>12</sup> *See id.* at 686.

<sup>13</sup> *Id.* at 687.

<sup>14</sup> *See id.* at 689.

<sup>15</sup> *See id.* at 694–95.

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urge the interested reader to give his full account significant attention. It is an explanatorily powerful account. Levinson has gone a long way toward helping us answer the question that Hume posed for us — that is, toward identifying the reasons that substantive losers respect the rules of the game under which they have lost.

## II. WHAT LEVINSON OVERLOOKS

### A. *Legitimacy*

But a closer look at Hume's own attempt to answer that question reveals an avenue that Levinson ignores. After telling us that only opinion can explain why we willingly submit to governing structures, Hume goes on to subdivide opinion into "opinion of interest" and "opinion of right."<sup>16</sup> Opinion of interest is "the sense of the general advantage which is reaped from government; together with the persuasion, that the particular government, which is established, is equally advantageous with any other that could easily be settled."<sup>17</sup> Levinson's mechanisms all fall within opinion of interest — that is, they all deal with political actors' expectations of the material benefits that will flow from existing governing structures. Opinion of right, on the other hand, is not contingent in this way — it is an opinion about governmental *legitimacy*, regardless of how that government distributes substantive goods.<sup>18</sup> Opinion of right, in other words, takes seriously how people justify their own practices and institutions and what forms of argument they use to explain their constitutional commitment. And it is these beliefs about governmental legitimacy that are absent from Levinson's account. That is to say, he does not address the question of

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<sup>16</sup> HUME, *supra* note 1, at 33.

<sup>17</sup> *Id.*

<sup>18</sup> Hume further subdivides opinion of right into "opinion of the right to power" and "opinion of the right to property." *Id.* By opinion of the right to property, he appears to mean the opinion that property holders have some greater claim to participation in governing structures. See James Moore, *Hume's Political Science and the Classical Republican Tradition*, 10 CAN. J. POL. SCI. 809, 816 (1977) ("Power follows property, Hume maintained, only if the owners of property believe that they have a right to share in the exercise of government, and property owners entertain such an opinion only if they have been accustomed to take part in the activities of government."). Opinion of the right to power, for Hume, is the belief that extant governments are legitimate precisely because they are, and have long been, extant. See Sheldon S. Wolin, *Hume and Conservatism*, 48 AM. POL. SCI. REV. 999, 1006 (1954) (describing the opinion of the right to power as "the prevalent disposition of men to believe that governments which have endured over a long period of time were legitimate governments").

This further subdivision of the category of "opinion of right" is not relevant to my discussion here, as I do not wish to claim that Hume is correct as to the *sources* of belief in governmental legitimacy. But, as I argue below, Hume *is* correct that a belief in governmental legitimacy (that is, opinion of right) is an essential component of the answer to the question that he and Levinson are asking.

what our opinions about governmental legitimacy have to say about the structure of constitutional commitment.

Levinson argues that, in focusing on public choice–type constraints, rather than opinions of legitimacy, he is simply adhering to and explicating Madisonian political science.<sup>19</sup> After all, did not Madison say that, “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary”?<sup>20</sup> Did he not write that, “Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob”?<sup>21</sup> Indeed he did — and no one could deny the central role of institutional design, taking into account the sorts of mechanisms Levinson identifies, in Madisonian thought. But these mechanisms emphatically do not cover the entirety of Madisonian political thought. After all, the same man also told his fellow Virginians that:

I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom [for public office]. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.<sup>22</sup>

Had every Athenian citizen been an Alcibiades,<sup>23</sup> no conceivable governing structure could have saved the Athenian polity.<sup>24</sup>

If some level of virtue is necessary for the perpetuation of constitutional government, then what is the nature of that virtue? And how does it answer the Madisonian/Levinsonian puzzle about why struc-

<sup>19</sup> See Levinson, *supra* note 4, at 663 (“This Article develops the Madisonian logic of constitutional commitment . . .”).

<sup>20</sup> THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961); see also Levinson, *supra* note 4, at 707 (quoting this passage).

<sup>21</sup> THE FEDERALIST NO. 55, *supra* note 20, at 342 (James Madison).

<sup>22</sup> 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 536–37 (Jonathan Elliot ed., 2d ed. 1836)

<sup>23</sup> On Alcibiades’s relentless self-interestedness and lack of moral or civic scruples, see generally 1 PLUTARCH, PLUTARCH’S LIVES 258–90, 322–25 (Arthur Hugh Clough ed., John Dryden trans., Modern Library 2001); THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 303–10, 322–26, 332, 340–43, 417–24, 438–40, 450 (W. Robert Connor ed., Richard Crawley trans., Everyman 1993). See also 1 PLUTARCH, *supra*, at 325 (calling Alcibiades “the least scrupulous and most entirely careless of human beings” in matters of “temperance, continence, and probity”).

<sup>24</sup> It bears noting that Athenian power did not, in fact, survive the Peloponnesian War, in which Alcibiades’s machinations (on both sides) played a significant part. See sources cited *supra* note 23.

tural provisions are more enduring than the mere parchment barriers<sup>25</sup> of rights provisions? Here, I suggest, we turn to Aristotle.<sup>26</sup>

### B. Aristotelian Political Morality

When Aristotle wrote that “man is by nature a political animal,”<sup>27</sup> he had in mind a very particular conception of politics. To Aristotle, “he who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god: he is no part of a state.”<sup>28</sup> Beasts are unable to engage in collective life; gods have no use for it. Only humans stand at the intersection. Yet if we are naturally social, says Aristotle, then we must be naturally political, as well. The necessity of living together creates a necessity of ordering our communal life, of figuring out *how* we are to live together.<sup>29</sup> And although it is true that the maintenance of “mere life” requires *some* political structure,<sup>30</sup> a *good* state “exists for the sake of a good life, and not for the sake of life only.”<sup>31</sup> We pursue virtue — our unique excellence as humans — only when we move past behaving so as to fulfill our merely animal needs and wants and act in collective pursuit of the good life.<sup>32</sup>

The fact that we are naturally political suggests that our virtue as humans must be bound up with activity in the political arena. For Aristotle, it was the distinctive characteristic of a virtuous citizen “that he shares in the administration of justice, and in offices.”<sup>33</sup> This entails a willingness to rule and be ruled, in turn.<sup>34</sup> In Aristotle’s words, “the good citizen ought to be capable of both; he should know how to

<sup>25</sup> See THE FEDERALIST NO. 48, *supra* note 20, at 313 (James Madison); Levinson, *supra* note 4, at 662.

<sup>26</sup> This is not a project of which Hume would have approved. See Moore, *supra* note 18, at 810, 820 (noting that Hume’s political thought is largely a reaction against the classical republican tradition). But my aim here is to discuss the ethical component of constitutional commitment, not to provide an exegesis of Humean political thought.

<sup>27</sup> ARISTOTLE, *Politics*, in THE BASIC WORKS OF ARISTOTLE 1113, 1129 (Richard McKeon ed., Benjamin Jowett trans., Random House 1941).

<sup>28</sup> *Id.* at 1130.

<sup>29</sup> See HANNAH ARENDT, THE HUMAN CONDITION 26 (2d ed. 1998) (“To be political, to live in a *polis*, meant that everything was decided through words and persuasion, and not through force and violence.”).

<sup>30</sup> ARISTOTLE, *supra* note 27, at 1184.

<sup>31</sup> *Id.* at 1187.

<sup>32</sup> See ARENDT, *supra* note 29, at 36–37 (“The ‘good life,’ as Aristotle called the life of the citizen, therefore was not merely better, more carefree or nobler than ordinary life, but of an altogether different quality. It was ‘good’ to the extent that by having mastered the necessities of sheer life, by being freed from labor and work, and by overcoming the innate urge of all living creatures for their own survival, it was no longer bound to the biological life process.”).

<sup>33</sup> ARISTOTLE, *supra* note 27, at 1177.

<sup>34</sup> See *id.* at 1181 (“[M]en are praised for knowing both how to rule and how to obey, and he is said to be a citizen of approved virtue who is able to do both.”).

govern like a freeman, and how to obey like a freeman — these are the virtues of a citizen.”<sup>35</sup> Because we are always already politically enmeshed, the virtuous citizen cannot simply practice individual self-rule; he must practice collective self-rule. He must participate in communal governance, not to look out for his own narrow, animal interests, but rather to engage with his fellow citizens in their joint project of discovering and implementing the best rules to govern their communal life.<sup>36</sup> To withdraw from this project in the pursuit of pure self-interest is bestial; to withdraw from it in the pursuit of self-sufficient contemplation is divine. To engage in it is what alone marks him as human.

### C. Republican Virtue

This central Aristotelian idea — that we are always already politically situated and therefore that political participation, in the form of ruling and being ruled in turn, is the mark of a virtuous citizen — remained influential in the modern world. As J.G.A. Pocock famously demonstrated, Aristotelian ideas of political virtue were picked up first in Renaissance Florentine political theory,<sup>37</sup> then in seventeenth- and eighteenth-century English republican theory,<sup>38</sup> and finally in the Whiggism of the American revolutionary generation.<sup>39</sup> In describing the durability of this idea, Pocock writes — perhaps a bit hyperbolically — that “[t]he classical republicanism to which John Adams still adhered was basically a Renaissance rephrasing of the political science set forth in Aristotle’s *Politics*, and it possessed a high degree of capacity for dealing with the social phenomena of the seventeenth and eighteenth centuries.”<sup>40</sup> I do not want to over-claim here: the republican theory of the late-eighteenth century had been altered, complicated, reformed, and fractured in the two millennia since Aristotle.<sup>41</sup> And the

<sup>35</sup> *Id.* at 1182.

<sup>36</sup> See J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 68 (2d ed. 2003) (“[The virtuous citizen] took part in the determination of the general good, enjoying in his own person the values made attainable by society while contributing by his political activity to the attainment of values by others. Since this activity was concerned with the universal good, it was itself a good of a higher order than the particular goods which the citizen as social animal might enjoy, and in enjoying his own citizenship — his contribution to the good of others, his relationship with others engaged in so contributing — he enjoyed a universal good and became a being in relation with the universal.” (footnotes and citations omitted)).

<sup>37</sup> See *id.* at 116 (noting the “profoundly Aristotelian” nature of political thought in late-fifteenth century Florence).

<sup>38</sup> See *id.* at 478–79.

<sup>39</sup> See *id.* at 521, 527.

<sup>40</sup> *Id.* at 317.

<sup>41</sup> Indeed, Pocock’s magisterial study is devoted to tracing precisely this process. See *id.* at vii–ix (describing the outline of the project).

relative status of republicanism generally, as against other systems of political thought, has fluctuated across time and place.<sup>42</sup>

Still, one hears more than the faintest echoes of Aristotle when Edmund Burke tells the voters of Bristol that their Member of Parliament owes them

[N]ot his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion. . . . Parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole — where not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member, indeed; but when you have chosen him, his is not a member of Bristol, but he is a member of *Parliament*.<sup>43</sup>

Burke's emphasis on the obligation of the politically active citizen to seek a unified "general good," rather than to pursue "local prejudices" is emblematic of the classical republican tradition. At almost the exact same time, across the Atlantic, Connecticut clergyman Moses Mather was insisting that the "strength and spring of every free government, is the virtue of the people."<sup>44</sup> Mather recommended the creation of a system of public schools to instruct children in "the principles of virtue and the rudiments of government" because "this is the only permanent foundation of a free government; this is laying the foundation in a constitution, not without or over, but within the subjects."<sup>45</sup> In a sermon to the Massachusetts legislature in 1778, Phillips Payson insisted that "[n]o model of government whatever can equal the importance of" public virtue.<sup>46</sup> And it is the same republican strain that came through when Madison insisted that good government depends on public virtue.<sup>47</sup> As historian Gordon Wood has summarized, eighteenth-century political theory prized republican government but rec-

<sup>42</sup> Cf. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1043 (1984) (exhorting us to remember that the Constitution was written in simultaneous thrall to "two, quite distinct, traditions" of political thought: classical republicanism and modern liberalism).

<sup>43</sup> EDMUND BURKE, SPEECH TO THE ELECTORS OF BRISTOL, ON HIS BEING DECLARED BY THE SHERIFFS DULY ELECTED ONE OF THE REPRESENTATIVES IN PARLIAMENT FOR THAT CITY (1774), reprinted in 2 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 89, 95–96 (Boston, Little, Brown, & Co., 3d ed. 1869).

<sup>44</sup> [MOSES MATHER], AMERICA'S APPEAL TO THE IMPARTIAL WORLD 67 (Hartford, Ebenezer Watson 1775).

<sup>45</sup> *Id.* at 68.

<sup>46</sup> PHILLIPS PAYSON, A SERMON PREACHED BEFORE THE HONORABLE COUNCIL, AND THE HONORABLE HOUSE OF REPRESENTATIVES, OF THE STATE OF MASSACHUSETTS-BAY, IN NEW-ENGLAND, AT BOSTON, MAY 27, 1778, reprinted in THE PULPIT OF THE AMERICAN REVOLUTION: OR, THE POLITICAL SERMONS OF THE PERIOD OF 1776, at 323, 337 (John Wingate Thornton ed., Boston, Gould & Lincoln 1860); see also *id.* ("Despotism and tyranny want nothing but wealth and force, but liberty and order are supported by knowledge and virtue.")

<sup>47</sup> See *supra* p.5.

ognized its fragility.<sup>48</sup> “The [republican] state, like no other, rested on the consent of the governed freely given and not compelled.”<sup>49</sup> This necessitated that the republican citizen be willing “to sacrifice his private interests for the good of the community . . . [which] the eighteenth century termed ‘public virtue.’”<sup>50</sup>

It is important to note that this republican conception of virtue cashes out in procedural and structural terms. Precisely because the republican state rests on consent and participation, rather than force and fear, the virtuous republican citizen has a duty to obey — to rule and be ruled *in turn*. That is why republican public virtue emphasizes the setting aside of private interests. As a participant in collective self-government, the republican citizen has agreed in advance to work for the general good and to accept the communal determination of the public good. In Professor Aziz Rana’s words, for republican citizens, “participation in politics was both an education in virtue — through the Aristotelian experience of ruling and being ruled in turn — and the primary site for its display,”<sup>51</sup> by demonstrating that one can accept the public good over one’s own parochial interests. In short, this republican conception of politics, with its concomitant political morality, gives the citizen a compelling reason to accept the substantive results of the decisionmaking process of which she is a part.<sup>52</sup> It provides, that is, an *ethics of constitutional commitment*.

#### D. A Contemporary Example

Of course, that may be all well and good for the classical world and the eighteenth century — but is there any reason to think that republican theory has any significant motive force today? I think there is. Before getting to that question, however, I should pause to note that I am most certainly not asserting that republican virtue can fully account for our acceptance of constitutional structure. As I noted above, public choice mechanisms of the type identified by Levinson are explanatorily powerful and undoubtedly account for some — or even much — of our adherence to constitutional structure.<sup>53</sup> My claim is that a commitment to republican theory works alongside such mechanisms, not that it replaces them. But on a divisive substantive issue, a

<sup>48</sup> GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 65–66 (rev. ed. 1998).

<sup>49</sup> *Id.* at 66.

<sup>50</sup> *Id.* at 68.

<sup>51</sup> AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 122 (2010).

<sup>52</sup> *Cf.* Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 364 (2010) (“[R]epublican government must be *constitutional* government.”).

<sup>53</sup> *See* Part I, pp. 2–4.

relatively small number of people with independent republican commitments can make a significant difference.<sup>54</sup>

As for whether anyone today actually does hold the republican position, I think a recent example is illustrative. Consider President Obama's June 2010 dismissal of General Stanley McChrystal, his top commander in Afghanistan. A *Rolling Stone* profile quoted McChrystal and his top aides speaking derisively about civilian leadership.<sup>55</sup> In the days after these remarks became public, a number of conservatives, many of whom undoubtedly agreed with McChrystal's criticisms of administration policy, publicly called for the general to be fired. In a joint statement, Senators John McCain, Joe Lieberman, and Lindsey Graham referred to the comments as "inappropriate and inconsistent with the traditional relationship between Commander-in-Chief and the military."<sup>56</sup> Although they did not explicitly call for his firing, they made a point of noting that "[t]he decision concerning General McChrystal's future is a decision to be made by the president of the United States."<sup>57</sup> Bill Kristol took to the *Weekly Standard's* blog to suggest a replacement for McChrystal<sup>58</sup> — before McChrystal had been dismissed — and another post on the same blog was headlined, simply, "Why McChrystal Must Go."<sup>59</sup> And after the firing, *National Review* editorialized that "McChrystal embarrassed himself, offended his civi-

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<sup>54</sup> Suppose that republican political morality has motive force for a quarter of the population. Suppose, further, that this quarter of the population is distributed evenly across preferences for substantive outcomes so that, for any substantive issue, a quarter of the people in favor and a quarter opposed will have a commitment to republican political morality. Now, imagine that the constitutional process produces outcome *X*, which forty-five percent of the population supports and fifty-five percent opposes. This is a classic case of the situation with which Levinson is concerned — a "politically empowered majorit[y]" is being asked to "comply with legal limitations on what [it] can accomplish politically." Levinson, *supra* note 4, at 659–60. But note that since a quarter of the fifty-five percent in opposition has an independent ethical commitment to supporting the existing political structure, independent of substantive outcome, a solid majority (58.75%) would oppose an attack on the political structures for the purposes of undoing substantive decision *X*.

<sup>55</sup> See Michael Hastings, *The Runaway General*, ROLLING STONE, July 8–22, 2010, at 91, 92 ("Are you asking about Vice President Biden?" McChrystal says with a laugh. "Who's that?" "Biden?" suggests a top adviser. "Did you say: Bite Me?"); *id.* at 94 (quoting an aide referring to National Security Adviser Jim Jones as a "clown"); *id.* at 94–95 (quoting McChrystal and his aides as speaking dismissively about Richard Holbrooke, the administration's Special Envoy for Afghanistan and Pakistan).

<sup>56</sup> Quoted in Roxana Tiron, *McChrystal Faces Ax*, THE HILL, June 23, 2010, at 1.

<sup>57</sup> *Id.*

<sup>58</sup> William Kristol, *Why Not Petraeus-Crocker in Afghanistan?*, WKLY. STANDARD BLOG (June 22, 2010, 1:01 PM), <http://www.weeklystandard.com/blogs/why-not-petraeus-crocker-afghanistan>.

<sup>59</sup> Stephen F. Hayes, *Why McChrystal Must Go*, WKLY. STANDARD BLOG (June 23, 2010, 9:50 AM), <http://www.weeklystandard.com/blogs/why-mcchrystal-must-go>.

lian superiors and colleagues, and overstepped his bounds as a servant of the U.S. government. Obama was justified in firing him . . . .”<sup>60</sup>

One could, perhaps, see this in terms of repeat-play and reciprocity:<sup>61</sup> conservatives support the Democratic civilian leadership against the military as part of an implicit bargain that liberals will support the Republican civilian leadership against the military, if it ever comes to that. But this would not be a good bargain for conservatives, at least in the foreseeable future, as the military — and especially the officer corps — identifies (and has long identified) as significantly more conservative than liberal and significantly more Republican than Democrat.<sup>62</sup> And the conservative commentators and politicians quoted above are presumably aware of this fact. Instead, I suggest that we take these commentators at their word and read them as, in fact, holding to an ethical sense of the role of the military in our polity. McChrystal violated the applicable ethical norms by showing and tolerating disdain for the civilians who are his constitutional superiors, and, as a result, even conservative commentators argued, he deserved to be fired. And this is despite the fact that those commentators both care deeply about military policy in Afghanistan and (most likely) share McChrystal’s disdain for those civilians currently conducting that policy. That is to say, these commentators subordinated their substantive policy preferences to their desire to preserve the proper functioning of the political structures. And the best explanation for their having done so, I suggest, is that they subscribe to a republican ethics of constitutional commitment.

### III. CONCLUSION

In short, the motive force of ethical reasoning must be part of the discussion about the bases of constitutional commitment.<sup>63</sup> Republican political morality was an important element of the Madisonian political science that Levinson aims to explicate, and to ignore it is to give a misleading impression of what Madison and much of the Founding generation took to be the relationship between ethics and politics. Perhaps more importantly, to ignore it is to ignore — and thereby to denigrate — the possibility of a political life that is grounded, at least in some part, in virtue, in concern for the common good over individual material interests, and in a common project of collective

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<sup>60</sup> Editorial, *Afghanistan: A Test of Resolve*, NAT’L REV., July 19, 2010, at 15.

<sup>61</sup> See *supra* p.3.

<sup>62</sup> See generally JASON K. DEMPSEY, OUR ARMY: SOLDIERS, POLITICS, AND AMERICAN CIVIL-MILITARY RELATIONS 70–126 (2010) (describing political ideology and partisan affiliation in the military).

<sup>63</sup> *Contra* Levinson, *supra* note 4, at 707 (doubting “whether moral obligation alone could be a sufficient explanation of real-world constitutional compliance”).

self-government.<sup>64</sup> Levinson suggests that such considerations “lie[] beyond the current reach of the social sciences, and certainly beyond the ambition of this Article.”<sup>65</sup> But they were not beyond the reach of Aristotelian, Burkean, or Madisonian political science — and even today, there are those in the social sciences who engage with such questions.<sup>66</sup> And rightly so, as we cannot hope fully to understand our collective political life without them.

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<sup>64</sup> For discussions of the importance of the political ethics of collective self-rule in contemporary contexts, see Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1150–55 (2009); Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 DUKE L.J. 177, 182–83, 224–36 (2008); Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self Government*, 100 HARV. L. REV. 4, 17–73 (1986); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 574–79 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1547–64, 1576–89 (1988).

<sup>65</sup> Levinson, *supra* note 4, at 691.

<sup>66</sup> See generally MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1998) (advocating a return to civil republican model of liberty as collective self-government).