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# Angels Do Not Govern: Constitutional Sovereignty as a Response to Humanity's Sinful Nature

William E. Thro

*“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. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”*

— James Madison<sup>1</sup>

Writing to the Romans, Paul stated an inherent truth about humanity — “all have sinned and fall short of the glory of God.”<sup>2</sup> As theologian R.C. Sproul explained,<sup>3</sup> “[w]e are not sinners because we sin; we sin because we are sinners. Since the fall, human nature has been corrupt. We are born with a sin nature. Our acts of sin flow out of this corrupted nature.”<sup>4</sup> As Chesterton observed, the sinful nature of humanity is “the only part of Christian theology which can really be proved.”<sup>5</sup> Because we are not angels, but sinners, government is necessary.

Yet, until our “eyes have seen the glory of the coming of the Lord,”<sup>6</sup> we will be governed not by angels but by sinners.<sup>7</sup> Our leaders are just as sinful as the citizens they lead.<sup>8</sup> As Samuel warned, human leaders will fight unjust wars, seize property, abuse individual rights, and apply confiscatory taxes in pursuit of their own glory.<sup>9</sup> Our Nation’s story illustrates the point.<sup>10</sup> The American republic was “conceived in liberty and dedicated to the proposition that all . . . are created equal,”<sup>11</sup> but our Constitution betrayed those principles by implicitly permitting slavery.<sup>12</sup> For a century after the “new birth of freedom,”<sup>13</sup> the “blessings of liberty”<sup>14</sup> remained an unredeemed “promissory note” for former slaves and their descendants.<sup>15</sup> While the last half century has seen much progress toward a “more perfect Union,”<sup>16</sup> our leaders, most of whom profess to be Christian, pursue unjust policies which have no basis in natural law or eternal law.<sup>17</sup> When our leaders deny these “self-evident truths,”<sup>18</sup> they deny the dignity<sup>19</sup> of those

who bear the image of God.<sup>20</sup> Because angels do not govern sinners, we must control those sinners who govern their fellow sinners.

The theological reality of humanity's sinful nature determines how to frame a constitution where sinners govern sinners. Such a constitution cannot adopt a Pelagian perspective,<sup>21</sup> which assumes humanity is inherently good and virtuous<sup>22</sup> and, thus, will defer to those in power.<sup>23</sup> Indeed, "the ostensible spiritual freedom of the Pelagian 'freedom of the will' that sets the ground for political despotism, because, if true, human coercion could then effect a real change in the soul."<sup>24</sup> Rather, a constitution for a polity where sinners govern sinners must adopt a Augustinian<sup>25</sup> or Calvinist perspective.<sup>26</sup> Like Calvin, it must assume "there is never a moment in human history when that which is human can be trusted blindly as a force for good."<sup>27</sup> The Augustinian or Calvinist distrust of "any entity exercising power"<sup>28</sup> "creates the conceptual ground for political freedom."<sup>29</sup> Recognizing humanity's sinful nature, power and responsibility must be not be in concentrated in any person or groups of persons.<sup>30</sup>

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coming of the Lord,” we will be governed not by angels but by sinners. Our leaders are just as sinful as the citizens they lead.

The United States Constitution reflects an Augustinian or Calvinist perspective<sup>31</sup> and embodies “obsessive distrust of government — *all* government — and [the] elevation of law into the ruling power of the state. Indeed, the idea of law itself as *sovereign* is the key.”<sup>32</sup> By making the law or, more precisely, the written Constitution, as sovereign, the American Republic is distinguished from those nations that make a human being (the monarch, religious leader, or dictator) or group of humans (the Parliament or the Party or the People themselves) as sovereign.<sup>33</sup>

The concept of “Constitutional Sovereignty”<sup>34</sup> where a written constitution, rather than a monarch, is sovereign began in 1215 among “the reeds of Runnymede” with “the first attack on Right Divine.”<sup>35</sup> Magna Carta, forced on King John by a group of English Barons,<sup>36</sup> established explicit written limits on the King’s power *and* an explicit written enforcement mechanism for those limits:<sup>37</sup> twenty-five men<sup>38</sup> could declare the King in violation of Magna Carta and could make war against the King.<sup>39</sup> While the 1215 Magna Carta did “invent freedom” for the English-Speaking Peoples,<sup>40</sup> it did not permanently establish Constitutional Sovereignty.<sup>41</sup> Over the space of seventeen months from June 1215

to November 1216, the Pope annulled Magna Carta,<sup>42</sup> war broke out between King John and the Barons,<sup>43</sup> King John died,<sup>44</sup> and Sir William Marshal,<sup>45</sup> as regent for the nine year old Henry III, issued a new version of Magna Carta.<sup>46</sup> Marshall's 1216 version of Magna Carta, which lacks an enforcement mechanism,<sup>47</sup> "is centrist and is the painstaking work of the political process" and this version is "the foundation of English political history."<sup>48</sup> The barons lost; the 1216 Magna Carta was *not* Constitutional Sovereignty. The original Magna Carta's "chapter 61 — the *forma secures* — [was] a short term, misconceived expedient . . ."<sup>49</sup>

The British made a second effort at Constitutional Sovereignty. In 1628, with the Petition of Right,<sup>50</sup> Sir Edward Coke tried "to make Magna Carta fundamental law inviolable by either king or parliament. The attempt failed."<sup>51</sup> The following years "brought civil war, a king's execution, the Cromwellian regime, restoration, and a bloodless revolution."<sup>52</sup> Consequently, the "Crown in Parliament," not the monarch alone, became sovereign.<sup>53</sup> In the United Kingdom, the "Crown in Parliament" can "make or unmake any law whatsoever" and no court can "override or set aside" a parliamentary act.<sup>54</sup>

Yet, "[i]n America, the barons have won; chapter 61" is "a far-sighted anticipation of both the letter and the spirit of the" Constitution.<sup>55</sup> Sir Edward Coke "succeeded in America" because the Constitution is "untouchable, fundamental law, to be interpreted not by Congress, still less by the President, but by Justices of the Supreme Court."<sup>56</sup> Instead of a constitutional

design that “was largely a set of unwritten customs [like the United Kingdom, the American] founders deliberately rejected that model when they decided to adopt a written Constitution.”<sup>57</sup> That choice reflected the colonial experience with written limitations on government colonial<sup>58</sup> as well as the influence of Coke.<sup>59</sup> Indeed, the Mayflower Compact, although only a single paragraph, represents both government by consent and limitations on governmental power.<sup>60</sup>

As this account of British and American constitutional history demonstrates, Constitutional Sovereignty requires limiting the government by consent of the governed, empowering the judiciary to enforce those limits, and then limiting judges. Each of these three propositions merits greater discussion in the American context.

First, by the consent of “We the People,”<sup>61</sup> the Constitution “withdraws certain subjects from the vicissitudes of political controversy” and “places them beyond the reach of majorities and officials.”<sup>62</sup> Initially,

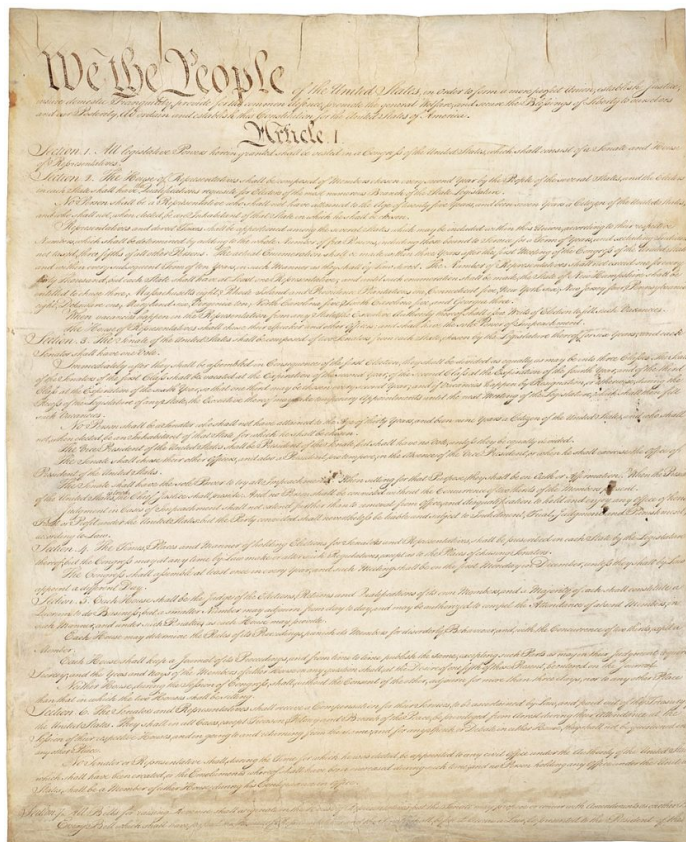
there are "certain specified exceptions to the legislative [and executive] authority" within the constitutional text.<sup>63</sup>

Those provisions impose both requirements and prohibitions. Additionally, there is the separation of powers.<sup>64</sup>

Rather than combining executive, legislative, and judicial power in a single person<sup>65</sup> or

even a parliament dominated by a political majority, the Constitution "protects us from our own best intentions" by preventing the concentration of "power in one location as an expedient solution to the crisis of the day."<sup>66</sup> Finally, instead of an all-powerful national government,<sup>67</sup> the Constitution "split the atom of sovereignty . . . establishing two orders of government [federal and state], each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."<sup>68</sup>

Second, since our constitutional actors are imperfect sinners, there



"The Preamble and 1st Article of the Constitution of the United States" / [Wikimedia CC0](#)

will be times, “where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution . . .”<sup>69</sup> “Whenever a particular statute [or executive action] contravenes the Constitution, it will be the duty of judicial tribunals to adhere” to the Constitution and declare the statutes and executive actions void.<sup>70</sup>

This power of judicial enforcement goes beyond simply declaring a constitutional actor in violation of the Constitution. In *Cooper v. Aaron*,<sup>71</sup> the Supreme Court of the United States established “Judicial Supremacy”<sup>72</sup> — its decisions interpreting the Constitution were the supreme law of the land even though the other branches or the states may interpret the Constitution differently.<sup>73</sup> In the same case, the Court established “Judicial Universality”<sup>74</sup> — all government officials in the other branches of government and all States are bound by the Supreme Court’s decisions in a particular case even though those officials were not a party to the decision.<sup>75</sup> After *Cooper*, constitutional actors must “follow the Court’s interpretations, not just in the particular case announcing those interpretations, but in similar cases as well.”<sup>76</sup> In America, “the government can and does lose in its own courts and then respect those judgments.”<sup>77</sup>

Third, since judges are not angels, but sinners, there must be meaningful limits on how the judiciary interprets the Constitution. Because of judicial supremacy and judicial universality, courts will be tempted to become “a bevy of Platonic Guardians,”<sup>78</sup> that “substitutes their predictive judgments for those of elected

legislatures and expert agencies.”<sup>79</sup> Conversely, judges may be tempted to ignore the Constitution and simply defer to the judgment of legislators,<sup>80</sup> bureaucrats,<sup>81</sup> or university administrators.<sup>82</sup> Sometimes our jurists give in to temptation. *Dred Scott v. Sandford*,<sup>83</sup> *Plessy v. Ferguson*,<sup>84</sup> *Buck v. Bell*,<sup>85</sup> *Koremastu v. United States*,<sup>86</sup> and *Roe v. Wade*,<sup>87</sup> are contrary to the original public meaning of the Constitution’s text. Individual jurists sometimes admit they have succumbed to temptation. Judge Calabresi believes judges should revise statutes that are “out of date, out of phase, or ill adapted to the legal topography,”<sup>88</sup> a view that “cannot be reconciled with fundamental tenets of the American form of representative democracy.”<sup>89</sup>

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To preserve “the rule of law from the dictatorship of a shifting Supreme Court majority, . . . judicial opinions should be grounded in consistently applied principle” that respects Constitutional

Sovereignty.<sup>90</sup> As Frederick Douglass observed, if the Constitution is “interpreted, as it ought to be interpreted, the Constitution is a glorious liberty document.”<sup>91</sup> Respect for Constitutional Sovereignty requires rejecting “the conviction that the Constitution’s meaning *changes* over time and that *judges* should determine what changes should be made based on external policy considerations.”<sup>92</sup> This “Living Constitutionalism” approach requires judges to “exercise *Will* instead of *Judgment*” and the “substitution of their pleasure to that of” the People’s elected officials.<sup>93</sup> Rather, respect for Constitutional Sovereignty requires accepting “the Constitution’s meaning was fixed at its ratification [or the ratification of the amendment] and the judge’s job is to discern and apply that meaning to the people’s cases and controversies.”<sup>94</sup> Since all Constitutions were “written to be understood by the voters, its words and phrases were used in their normal and ordinary meaning as distinguished from technical meaning,”<sup>95</sup> the judiciary may embrace “an idiomatic meaning,” but it must reject “secret or technical meanings that would not have been known to ordinary citizens” at the time the Constitution was adopted.<sup>96</sup> Such an approach recognizes the words of the Constitution represent an overwhelming democratic consensus.<sup>97</sup>

Of course, two pillars of Constitutional Sovereignty — the idea of limiting governmental officials and judicial enforcement of those limits — are well established as American constitutional norms, the third pillar — meaningful limits on the judiciary — is not well established and somewhat controversial.<sup>98</sup> Sinners want the court to give them “justice,” not to follow the Constitution. Losers in the

political process want the Supreme Court to declare them winners. Yet, if the Constitution is to remain sovereign “to ourselves and our Posterity,”<sup>99</sup> the sinners on the Court must be limited just like the sinners in the legislature or the executive.<sup>100</sup>

Ultimately, “there is nothing new under the Sun.”<sup>101</sup> After the Fall,<sup>102</sup> human nature became sinful.<sup>103</sup> Angels do not govern sinners; sinners govern sinners. Until “Christ shall come with shout of acclamation,”<sup>104</sup> we cannot perfect humanity through the governmental means. At best, like the Constitution’s framers, we can hope “well-structured [governmental] systems” can “deter . . . the human impulse toward tyranny.”<sup>105</sup> If America’s sinners are to “confirm thy soul in self-control, thy liberty in law,”<sup>106</sup> then the Constitution — not the Congress or the President or Courts or the People — must be sovereign. ♦

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*Mr. Thro thanks Bryan Beaman, Steve Clifton, Cliff Iler, Shannan Stamper, Julie Thro, and Noah Thro for their helpful comments. He thanks Linda Speakman for her editorial assistance.*

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**William E. Thro**, M.A., J.D is General Counsel of the University of Kentucky, former Solicitor General of Virginia, and and recipient of Stetson University’s Kaplin Award for



Higher Education Law & Policy Scholarship and the Education Law Association's McGhehey Award for Education Law. Mr. Thro, who is a Fellow of the National Association of College & University Attorneys and a Distinguished Research Fellow of the National Education Finance Academy, writes in his personal capacity and not on behalf of the University of Kentucky. Although his wife is a retired Presbyterian pastor and former Moderator of a Presbytery, Mr. Thro is, at best, an "armchair theologian." Any heresies are his alone.

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### **Center for the Study of Law and Religion**

Gambrell Hall, Suite 310, 1301 Clifton Rd.

Emory University, Atlanta, GA, 30322

[canopyforum@emory.edu](mailto:canopyforum@emory.edu)

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