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Legal Theory and the Rule of Law

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ABSTRACT:

In "Legal Theory and the Rule of Law" Noel Reynolds maintains that the rule of law can be understood as a set of conditions that rational actors would impose on any authority they would create to act in their stead in creating and administering legally binding rules. The authority and obligation associated with law derive from this fundamental convention, and the principles of the rule of law are the conditions of that agreement, which become thereby governing principles to which legislatures, judges, and enforcement agencies can be held in their official actions. These generally recognized standards are inherent in this conventionalist concept of law in the sense that natural lawyers have wanted, but they arise from a social fact, not a background moral or political theory, thus bridging the persistent chasm that divides positivist and natural law theorists.

KEY WORDS:

natural law, legal positivism, rule of law, conventionalism, coordination, obligation, agreement, unanimity

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When future Nobel Prize winner F. A. Hayek wandered out of economics into the fields of political and legal theory in the mid-1940s, he was widely ignored and not much appreciated.[1] Hayek was convinced that latent in the western traditions of law lay a doctrine of rule of law that he and others could wield as a powerful new weapon in their war against an expanding socialism in Europe and America. The first legal theorist to pick up on the idea was Harvard's professor of jurisprudence, Lon L. Fuller, who incorporated Hayek's principles of the rule of law into his 1963 Storrs lectures and labeled them the "inner morality

of law."[2] Over the next four decades, the rule of law gradually attracted increasing attention from positivist and natural law theorists alike, and most recently it has provided the subject for several significant publications each year. Perhaps because of the way Hayek used the concept, legal theorists were slow to agree that it should play a central or important role in legal theory. This, too, has changed as the rule of law has increasingly been recognized as a central and essential element of the idea of law itself. Where it was once thought to be a morally neutral element of that concept (Fuller and Oakeshott), it has more recently been saddled with explicit moral content (Finnis, Dworkin, and most recently Barnett and Allan).

As with most branches of philosophy, legal theory begins with the real world and the problems of understanding that arise as humans try to explain their experiences in that world. Law—like language, science, morals, and politics—has been a feature of human societies from ancient times to the present. Law seems like a rather simple feature of those earlier societies compared to the complex legal systems of our own day that can hardly be constrained within national boundaries. Legal theorists have yet to reach the levels of agreement that characterize these other fields of philosophical and scientific endeavor as to just what it is that requires explanation. With the revival of natural law thinking in the last half century, the concept of law seems at least as controversial today as it was half a century ago.

The principal source of continuing disagreement derives from the mid-century positivist insight that law and morals are separate things. On the one hand, the notion of legal obligation must be recognized and addressed by any successful explanation of the full range of legal phenomena. On the other hand, positivists saw no reason to explain that widespread form of obligation as being derived from moral truths that bind all human beings. Somehow, it was a feature of human interaction that could take different forms across time and space and was not tied to any particular moral theory. In fact, its very function appeared to be the facilitation of harmonious actions by people who might personally be guided by quite different moral theories—with no requirement that their moral differences be resolved as a pre-condition of such actions. And unlike moral truth, legal obligations can be changed by human actions of all kinds. They are social facts. Legal obligation did not seem to fit into standard moral theory.

In this essay I will recommend a conventionalist version of the positivist concept of law that recognizes the concept of rule of law as an important and integral feature of the idea of law itself. I will further explain how this approach

can give full recognition to both the factual and the normative character of law, but without invoking moral or political theories that would entail truth claims beyond those generated by human action. To this end, I will begin with an account of law, as we experience it in human societies—borrowing insights from both sociologists and economists.

Law is a human invention that is widespread, but not universal. It is always attached to a particular people, for whom it provides guidance in the daily pursuit of their interests. Legal jurisdictions may overlap, and humans make choices that bring them under different systems of law at different points in time. Theorists have generally come to accept Hayek's insight that law is strongest in societies where individuals are free to pursue their own life plans with minimal interference from the state, and that where the officers of the state have wider discretion to impose their own wills on the citizenry, without constraint of law, there is correspondingly less meaningful freedom for individuals. The claims of Hayek and Fuller—that a principal purpose of law is to provide standard and protected ways for people to pursue their own interests—are now widely accepted. As human societies grow in size and complexity, new forms of law are developed apace to accommodate those complexities.

This kind of thinking undermines the older assumption that law is a creation and instrument of governments and rulers. While that may be true of particular rules of law, the agreement of a people to bind themselves to the same legal system seems to be both logically and chronologically prior to the governments they create to service their systems of law. Politics itself turns out to be a product of that agreement. For where there is no law governing human interaction, there is only war. Politics arise when war is exchanged for law. In a regime of law, the people can seek, through political activity, the creation and implementation of particular rules of law that will protect or advance their individual interests and dreams.

The approach I will take in this essay will be to sketch an account of law as convention that will provide empirical grounding for the principles of the rule of law. Rather than argue philosophically for the particular concepts of this theory, I will argue for the preferability of this general theoretical approach over the alternatives in terms of its ability to account for the major elements of our experience of law in ways that correspond to our actual experience—and particularly for its superior account of the notion of rule of law.

I will start with a revised version of the simple notion, endorsed by positivists from Hobbes to Hart to Coleman, that law is grounded in a set of

conventions. The first of these conventions, on this revised account, is an agreement between all parties to yield their individual right to veto any rule that would impose obligations upon them—and to create by this agreement a common authority to promulgate and administer rules that all are obligated to obey and to enforce those rules as necessary. Every member of a legal system is presumed to have accepted this convention. The second convention, which is more like Hart's rule of recognition and which can be negotiated independently of the first—but not antecedently—is the form and process of government that will bear this authority. This one does not require unanimity about the specific outcome, but only acceptance of the process that produces it. It is the function of a constitution to spell out these institutional structures and their relationships. The basic logic of such a fundamental convention assumes that all parties find the creation of a common authority to be in their interest, and that the agreement has certain conditions attached to it which guarantee to the extent possible that the authority will not be turned against them inappropriately. It is these conditions which are embodied in the principles of rule of law as spelled out originally by Hayek and more fully below. It is by adherence to the rule of law that the citizens and their public officials preserve the original convention and the obligations to obey the law that flow from it.

The Problem

The difficulty of accounting for both the factual and normative aspects of law has long defined the central issue in legal theorizing. In the 1980s, writers from both sides of this dispute proposed that a mutually acceptable solution might lie in the characterization of law as a particular kind of convention which was both a social fact *and* a framework of reasons for action. The thesis at issue has been variously labeled the coordination thesis or the thesis that law is convention. The basic ideas are drawn from that branch of formal game theory which deals with coordination problems, those problems in which all parties stand to gain through collaboration. Certain social and linguistic theorists have seen in these non-zero-sum games a helpful explanation for the emergence of conventions or rules. Given that in this account such rules arise out of simple factual conditions, if it can also be shown that these rules provide reasons for action, we may in fact have a promising solution to the central quarrel of legal philosophy.

Early critics of the coordination thesis, as well as advocates, focused on coordination analysis as a means of justifying particular rules of law, rather than the fundamental convention that establishes a community of law. In my view, this was a serious mistake on both sides. Advocates were hard pressed to demonstrate

that every rule was a true coordination solution, and critics were handed too many easy targets. The coordination problem, as defined centuries ago by Thomas Hobbes, is the human condition in the state of nature without law. The coordination solution to that problem is the creation of an authority. The subsequent rules made by that authority may or may not meet the formal requirements of coordination problems and solutions. But that doesn't matter, as their justification need only derive from their origins in valid exercises of the authority. The right place to focus our interest in coordination theory as it might apply to legal theory is where the classical and contemporary theorists of political contract have focused. If a coordination thesis has a chance to bridge the gap between positivist and natural law theory, it will be by conceiving of the fundamental arrangement that constitutes the legal society as a convention arising out of a coordination problem. If Hart's rule of recognition can be seen as being derived from this convention, perhaps it can be shown also to have the kind of normative force that its critics have denied it.

A. Conventions and Certainty

Before exploring the particular implications of a conventionalist theory of law, it will help to review what sociological theorists from Parsons to Luhmann have learned about the ideas of convention and rule in the most general context of human action. Mutual adherence to conventional rules is the technique we use for reducing most of the uncertainty of our social world. By convention we stipulate sets of legitimate expectations that we each have of one another's conduct. This simplifies life greatly. When someone disappoints these expectations we can blame them without needing to revise our own cognitive models of the world. Equipped with such sets of conventional rules for conduct, we can interact meaningfully with others through language, markets, the law, family mores, morality, systems of religion, or games. Furthermore, such interactions do not necessarily presuppose any prior experience with or knowledge of the others with whom we are interacting. Eliminating most of the uncertainty in such relationships requires only that the parties accept the same conventions. By adopting stipulated rules of action as conventions, we cut short the infinite spiral of expectations that must be calculated for human interaction and thereby render human actions and expectations predictable. As certainty rises, so does the value of the individual freedom of society members to work toward an improvement of their lives or toward other goals important to them.

Just as our man-made theories of the natural world provide us with a structure of laws that can guide our interactions with nature, so also, man-made

conventions provide us with a structure of rules for guiding social interaction, or for coordinating our behavior with the legitimate expectations of others. This means that in our social lives we have two possibilities of reaction to disappointment. We can make cognitive adjustments, or we can hold firm in our structures, requiring the world to adjust to our (normative) expectations. This account of the distinction between cognitive and normative structures is offered by the sociologist Luhmann to clarify elementary law-making mechanisms. Normative expectations give us grounds for holding disappointments against actors. Thus "norms are *counterfactually stabilised behavioural expectations*."[3]

B. The Source of Legal Obligation

This counterfactual element of norms implies their unconditional validity and is the major source of the "ought" in the law. Legal obligation expresses this function of counterfactual validity. On this view, the "ought" of the law has little to do with either background moral or political theories or threats of enforcement. All it means is that each member of a legal community has a legitimate expectation that others act as they ought, i.e., in accordance with the conventional rules, just because they have agreed to the authority which has produced those rules and not because they reflect any ultimate moral truth or other reality. The same obligation obtains in instances where the rule is arbitrary from every moral perspective (e.g., driving on the right or on the left).

It is worth noting in passing that to attach the law to a theory of moral truth is to lose this advantage—for that would tie the "ought" of the law back to a cognitive uncertainty, i.e., the truth about morality. And to the extent that moral truth is thought to be objective and knowable, determining the "ought" of the law is transformed back into a cognitive problem with all the residual uncertainty and ground for controversy which that entails.

C. The Sociological Basis

The idea that human actions are best described with reference to such systems of reciprocal expectations is fundamental to the sociological theory of Talcott Parsons and other social interaction theorists. Parsons' central thesis was that

> . . . as soon as several actors who are each able to choose the meaning of their action subjectively want to act in relation to each other in a given situation, the mutual expectations of behavior must be integrated, and this could happen by aid of the stability of lasting, learnable and internalizable norms. Otherwise the 'double contingency' of the determination of meaning between two subjects could not be overcome, nor could the

'complementarity' of expectations be established. . . . [E]very lasting interaction presumes norms and without them a system could not exist."[4]

Conventions and Their Assumptions: Insights from Game Theory

It is helpful, in trying to grasp the huge magnitudes of the ignorance we overcome through the use of rules, to look at the rule-formation process in the microcosm of two-person relationships. Schelling's work in game theory provides some of the most helpful insights into the nature of conventions and the ubiquitous human activity of forming conventions. Schelling recognized that not all games are zero-sum and that there are games in which each player can win only if the other does as well. Schelling became interested in these games because of the coordination strategies they can produce. The success of players in such games depends on the degree to which they can accurately perceive what the other player expects them to do so that they can do it and achieve perfect coordination. The universal strategy of players in such games, regardless of the level of communication allowed between them, is to establish conventional understandings which have no intrinsic value, but which serve to signal intentions and expectations to each other. Even in games where no overt communication is allowed, players universally find ways of suggesting patterns of conduct or rules of behavior to one another which greatly improve their joint chances of winning the game.[5]

From this we learn that even the simplest exercises in two-person coordination require the establishment of at least implicit conventions or rules. A complex society is possible only because personal, face-to-face relationships are not required for establishing such rules for mutual interaction. Rather, the community provides the means for producing, publishing, perpetuating, and modifying the rules of language, markets, and the law. The rules which can protect us from risks of error are largely public goods equally available to all community members.

It is important to point out that the error we seek to avoid in social interactions is not so much the error of predicting wrongly what others will do but misjudging what they will expect us to expect them to do. Our own actions are based in expectations of expectations. Rules have their main benefit at the reflexive level of expectations of expectations, thus creating certainty of expectation from which follow the certainty of one's behaviour and the predictability of others' behaviour only secondarily. . . . [C]ertainty in the expectation of expectations, whether it be by aid of purely psychological strategies or by aid of social norms, constitutes the essential basis of all interaction and is

much more meaningful than the certainty of fulfilling expectations. (Luhmann 1985, 30) Rules are able to accomplish this in a complex society for several reasons. Rules anonymize and take the expectations into the realm of the impersonal. They are valid regardless of who expects or does not expect. Rules are temporally stable; they do not require renewed ascertainment. And rules are so abstract in their factuality that they regulate the expectations of expectations (Luhmann 1985, 30).

Conventional Rules Imply Mutual Advantage

Because the agreement implicit in conventions is present most visibly at the time a convention is born, an understanding of conventions for the purposes of legal theory can benefit from accounts of the process of convention formation. Again, Schelling is perhaps the most helpful on this score. It would seem intuitively correct to assume that agreements emerge in the coordination of action (from the point of view of the actors) when there are opportunities to benefit mutually from such coordination. Because the operation of rules tends to regularize behavior, rules most naturally enter our lives when there is advantage to be had from such regularization. Such areas of life include those where (a) conflict might be dangerous, (b) cooperation would be beneficial, (c) understanding is a condition for amelioration, or (d) one's behavior directly impinges upon the welfare of others.

When we speak of conventions as solutions to coordination problems we specifically think of the problem from the perspective of the various actors whose actions require coordination. In such problem situations there are two fundamental factors which prevail. First, the gains for each participant from coordinating action are usually so significant that there is incentive on both sides to find a solution. Second, because each actor is a separate individual, his or her specific interests may indicate a somewhat different solution than what will be most preferred by any other actor. Thus, any solution reached by agreement among the actors must be advantageous in some way to each one, but will not likely be maximally advantageous to any.

Levels of Convention

Given the complexity of modern societies, we could not speak of law as convention unless we had an extended concept of convention formation that preserved the notions of participation and agreement beyond the point where face-to-face negotiation is possible. The following sketch of a theory of levels of convention formation might help show how that is possible.

To this point I have only considered examples of simple conventions where

people could come together in arrangements which straightforwardly meet their various requirements on some specific issue. Nothing is required for such agreements beyond information, initiative, knowledge of self-interest, and some freedom of action.

The enormous improvements available through such primary level conventions soon attract our interest in extending this technique into situations which are more complex. Simple exchanges or arrangements are not feasible for all situations where there are mutual benefits to be had from agreements. Examples of such complicated situations, all of which are exemplified in some context by law, might include:

1. Conventions involving large numbers of participants where the time and effort required to include everyone in the negotiation are not easily justified by the gains to be had.
2. Conventions which benefit a community as a whole but do not benefit all participants equally.
3. Conventions which are neutral with respect to individual interests, and which could easily be different, but which are important to have, in whatever form (*e.g.*, traffic rules).
4. Conventions which produce or constitute public goods and thereby provide motivation for anonymous and unilateral cheating.

In a broad sense, all such complicated situations pose coordination problems in the game theory sense of the term, at least if it can be construed broadly. In these situations, all participants stand to gain from the establishment of mutual rules, but the means for negotiating such rules are costly or impossible to manage. For such situations, it does make sense, when the situations obtain for the same definable group of participants, to solve the coordination problem in Hobbesian fashion by creating an authority which can act not as a member of the community, but in the name of all community members, and can formulate rules to govern these situations. The fundamental and essential convention on which all the rest stands is the agreement to enter into a community of authoritative rules or law. Because of Hobbes's insight that "no man can be obligated except by an act of his own," this convention entails the daunting requirement that it be based on unanimous agreement.

The Unanimity Requirement

As daunting as the requirement of unanimity might first appear, it does have a solution—which in turn resolves the puzzle about rule of law. Unanimous agreement to the basic convention of a legal society presupposes some expected

benefits to all and avoidable injury to none. Many-party exchanges or agreements reached by unanimous consent retain the same unqualified voluntariness as a freely engaged two-party agreement.

But actual unanimity in a law community is impossible to ascertain. As a result, a substitute notion is needed. The common error of much democratic theory is to compromise for something like majority rule, which is an essential part of public decision making. But majority rule alone is inadequate for the creation of universal obligation to obey laws. The true analogue to unanimity is rule of law. The conditions of equality, generality, and prospectivity assumed in the rule of law can be construed to preserve the abstract conditions of unanimous agreement. It only makes sense that in voluntarily ceding their veto right over the process of making rules of law that would obligate them in the future, people would insist on certain conditions—that (1) no such laws could single out identifiable individuals for penalties or benefits, (2) all individuals would be treated equally under any laws or procedures, and (3) the rules could not be changed after the fact or in any other way that might hand discretionary or arbitrary power to those functionaries authorized to apply the penalties of law to specifiable individuals. On analysis, these and other similar conditions turn out to be equivalent to the long-recognized principles of the rule of law, and to include some others not previously recognized in this connection.

It is at this point in the analysis that the works of F. A. Hayek and Michael Oakeshott are so valuable in spelling out what such a form of association would be like in the abstract.[6] But the actual constitutional structure of such a community and the actual laws it would produce over time would be contingent on the experience, wisdom, interests, and political balance represented in the community. And they could be authoritative only on the basis of an understood, fundamental agreement to form and maintain a community of law, made in spite of the inevitable fact that there would be winners and losers on specific issues. The reasons for engaging in such a convention include not only the evils it can remove (Hobbes) but also the vastly augmented opportunities for human action that it creates (Hume). Nor is such a fundamental convention self-enforcing or maintaining, as the collapse of law under the Third Reich and countless other examples demonstrate.

Perhaps the most improbable claim of this theory is that a legal system can reasonably be characterized as resting on the actual agreement or consent of every member of the society that is obligated to obey the law. The defense of this assumption is only possible for those societies in which adults can choose to

leave—taking all their legally obtained assets—at any time. In such a society, all persons are deemed to consent to the authority of law, either because they chose to move into the geographical area served by that legal system, or because they were born there and never chose to leave for another situation they deemed preferable. This conclusion does not require that their choices include objectively optimal alternatives. We live in the real world, and our choices of regimes are limited to the ones that actually exist. When we choose one that actually affords us the protections of law, and we take advantage of that law to further our own interests by participating in the market and the legal society, we give the members of that society sufficient reasons to expect that we will obey the law and that we expect them to do the same.

The agreement of a community to a fundamental convention of this kind constitutes a special kind of community, which subsequently gains definition as it establishes a body of coincident rules that apply equally to each member of the community and a set of established procedures for maintaining the magistracy and revising the rules. Such communities are legal societies, bound by their mutual obligations to authoritative laws and a government.

Constructive Unanimity

The move from actual unanimity in social-decision making to the establishment of legal authority merely recognizes the practical impossibility of achieving complete agreement on a day-by-day basis, as well as the temptation to hold out for inordinate concessions that the requirement of unanimity creates for individuals. The conventionalist theory advanced here claims that it is rational, given the impossibility of achieving actual agreement on every rule that will necessarily affect all members of the society, to concede one's veto over such rules in exchange for institutions of authority on certain conditions that will govern the future exercise of that authority. The creation of legal authority is by definition unanimous as such authority only exists for those who agree to it and choose to take advantage of its existence in their lives. Scholars who have studied the process of social agreement have noted a number of general characteristics of such agreements. I have elsewhere shown how these empirically identified characteristics of actual agreements can be generalized as a set of abstract conditions of agreement.[7]

One of those conditions is that the authority be constrained by a standard of constructive unanimity, that is, that it be limited in its actions to creating and enforcing rules and procedures that all members of the society might reasonably have agreed to in advance. This is not a Rawlsian veil of ignorance. The

assumption has to be that people knowing their actual preferences, values, needs, and abilities could reasonably have agreed to let standards be laid down by public officials. This notion of constructive or ad hoc unanimity suggests the following as implicit limits on all legal authority:

1. Rules cannot violate the deeply held moral and religious beliefs of citizens. To the extent that these are matters many people hold to be more important than anything else, including life itself, it is not reasonable to expect them to put these at risk in agreements made with others to improve their situations in other respects. This may limit the range of moral and religious views that can share a single legal system. But note that it is a negative restraint only and does not require complete moral and religious agreement. It does require religious liberty.
2. Authoritative decisions cannot arbitrarily single out individuals or groups for particular penalties or benefits.
3. The public officials themselves, in their private roles as citizens and in their public roles as magistrates, are subject to all the rules they create.
4. There can only be one set of rules for everyone. There can be no special (privileged or repressed) categories of citizens.
5. Rules cannot be changed after the fact or made retroactive in their application without the actual consent of all concerned or compensation to those negatively affected.
6. All making and enforcement of rules must be knowable and observable by all citizens.
7. Every citizen must have reasonable access to the process by which the rules are formulated and administered.
8. Every citizen, when accused of rule violations, must have full opportunity to defend his or her case before disinterested judges .

Other conditions of such social conventions could be listed. This short list includes some of the most important *conditions of conventionality*. The claim is that any fundamental convention to be ruled by law implicitly holds these as limitations on the authorities it creates. These are not moral principles, but are factual conditions that protect constructive unanimity. Given the anticipated benefits, it is reasonable to give up one's veto to an authority that can be expected to act within these limitations.

The Principles of the Rule of Law.

The link between this kind of rational actor analysis and traditional natural-law and rule-of-law theories is that most of these conditions of conventionality can

be expressed in terms of the widely recognized principles of rule of law, particularly as these have been articulated by Hayek and Fuller. Elements 1 and 7 on this list have not been previously recognized in rule of law discussions. The others are directly translatable into recognized rule of law principles as follows:

2. The principle of generality--all rules must be general in scope.
3. The principle of generality--the rules must apply to everyone.
4. The principle of equality--there cannot be more than one class of legal persons.
5. The principle of prospectivity--new rules can only apply to the future.
6. The principle of publicity--no secret rules or prosecutions are allowed.
8. The principle of due process--all prosecutions must follow established rules which give defendants and plaintiffs full opportunity to defend their actions and their interests.

On this analysis, the conditions of conventionality or constructive unanimity are equivalent to the principles of the rule of law. Rule of law is revealed as an implicit norm or standard for legal communities that understand law as agreement or convention rather than coercion or habit. Rule of law just means constructive unanimity or conventionality. This includes, but goes far beyond the view that authority requires obedience to law. It also entails a broad set of implicit limits on all authority. Not just anything can be a law. There are implicit standards and limits in much the sense that natural lawyers have always wanted. But these standards are not derived from abstract moral or political principles. Rather, they are derived from social facts, from actual individual choices made for whatever reasons people (who may be presumed to act according to their own moral convictions and interests) may have as they pursue what they consider to be important in their lives. Thus the theory claims to transcend the recognized impasse in legal theory by basing law in social fact, while identifying broad standards inherent in law.

The Rule of Law

On the theory sketched in this paper, the principles of rule of law become tests of conventionality. They provide a legal system with non-conventional, necessary norms for regulating a system of conventions. They are the substitute for a theory of justice or rights or principles (Dworkinian). Yet they are not substantive.

The principles of rule of law in this context need not be suspected of being disguised guardians of Kantian autonomy. People do not have to be Kantians to prefer a society of conventions to a rule of tyrants, even if it turns out that in

principle Kantians would favor such an arrangement. So also might liberals of other stripes, including utilitarians.

The side benefits are enormous. The first of these is that by admitting the notion of convention, the logic of consensus infuses the system of law with a higher order of normativity—the principles of rule of law which become non-ethical and
non-natural law criteria for a principled criticism of law. And these meta-legal principles are sufficiently powerful that they cover most of the ground that the ethical theorists and natural lawyers want included in the critique of law. Furthermore, it makes the critique internal to the legal system, and available to judges. It is a means whereby such second order norms can be invoked without any presumption that a particular system of ethics may be correct or even preferable.

The weakness from the point of view of more extreme natural lawyers and political theorists will be that there is no absolute protection of rights. This is correct. The system cannot maintain itself against a determined, contrary consensus in the population. Rule of law is a spectacular, but fragile achievement in human societies. Its continuing existence and effectiveness will always depend on the understanding and commitment of citizens to preserve it in difficult times. Hence, the recurring recognition of political theorists—that free societies depend as much on public virtue for their success as they do on well designed constitutions—is well founded.

Endnotes

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