

## **A THIRD VIEW OF RIGHTS AND LAW:**

A critique of assumptions behind the Declaration and the Constitution

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### Introduction

Among the most famous lines ever penned are those of the American Declaration of Independence that affirm: "...all men are created equal and have been endowed by their Creator with unalienable rights... and that it is to secure these rights that governments are instituted among men." Clearly the delegates who signed that Declaration were assuming a version of what is called "natural law" theory, the theory that says there are rights (and/or laws) that are not invented by humans and cannot be done away by them. More importantly, it says that these natural rights or laws are the basis for the legal codes humans do create. For it is these unwritten natural rights and laws that are supposed to be the source of the obligation citizens have to obey the written law codes governments may make – provided, of course, that the written statutes reflect and protect those natural laws and rights.

It should come as no small surprise, then, to find that when a second group of delegates<sup>i</sup> convened to frame a Constitution for the new nation, they wrote one in which *there is not a single unalienable right.*<sup>ii</sup> Instead, every right mentioned in its famous Bill of Rights is an amendment that can be repealed. Thus the Constitution allows that freedom of religion, speech, and press, freedom from search and seizure, and all the other rights it specifies, can be repealed if the Congress or the states vote to do so. Rather than assuming the view that rights are natural,<sup>iii</sup> the Constitution assumes a positivist or pragmatist view of law in which statutes can be whatever "We the people" want them to be - including all specifications of rights. As a result the US legal system has no unalienable rights whatever since only the Constitution is law; the Declaration is merely a famous letter giving King George III the sack.

The two documents are, therefore, completely at odds over the nature of human rights and the basis for law making: according to the Declaration the authority for making statutes and the obligation to obey them stem from the existence of natural rights over which humans have no control. According to the Constitution, however, the authority for making laws is the will of the people and the obligation to obey them is that the majority will controls the government's power of coercion. Does it matter? Does assuming one view rather than the other make any important difference to how statutes are worded or interpreted? And if so, which view is correct?

In what follows I will argue that what we assume to be the source of authority for law-making does indeed matter to how laws are framed and interpreted. But rather than siding with either document on the nature of the ultimate authority for law, I will propose a third view. To be more specific: I will argue that each of those documents comes close

to an important truth, but then skews that truth. Moreover, each also omits or denies the element of truth approximated by the other. What I will seek to do, then, is to identify and clarify the truths each of them comes close to, and combine the two to form a distinctly different position, a view I'm calling "a third view of rights and law." But doing that will require more than simply extrapolating and conjoining the cleaned up version of what each got nearly correct. Along the way I will have to propose an additional principle needed to combine the two into a consistent, working whole.

## The Declaration

Let's start with the Declaration's version of natural law theory. The truth behind the words of that document may, I think, be summarized as the point that *all humans have a sense of justice*. Every people, tribe, tongue, civilization, and culture that has ever existed has, so far as we know, recognized that it is a norm for life that people should "give to all their due" and be treated likewise by others. So I think it's correct that humans are "endowed by their Creator" with an awareness of this norm, and that neither their awareness of it nor the norm itself are human inventions or anything they can make go away. Both seem instead to be "natural" and to generate obligations on people's thoughts and actions whether they wish it or not. That is the element of truth I think the Declaration came close to getting right.

But the Declaration doesn't quite put the point the way I just did. It doesn't say there is a *norm* for justice built into created reality, which all people have the ability to recognize. Nor does it identify that norm as the source of the obligation they feel to obey the statutes government enacts. Instead of appealing to a universal norm that obliges all humans simply because they're human, it skips the norm for justice and speaks only of rights. This is a serious omission because such rights as it envisions could only result from the norm of justice. So as I see it, the Declaration gets things backwards. It assumes that people have rights and that those rights are the basis for justice, when in fact unless people first recognized the norm of justice the whole notion of rights would make no sense. For a right can be nothing other than: *a benefit or immunity that cannot be denied someone without injustice*.

By getting the relation between the norm and rights backwards, the Declaration bases the authority for human law-codes on *the subjective condition of individuals* rather than on a universal norm. It was this significant distortion that led to arguments over exactly who is and isn't born with rights. For example, in early US history it was actually debated whether women or Africans had rights. But such a debate would make no sense if rights were the result of a universal norm; in that case all people would have rights because the norm of justice holds for all people. But since the Declaration reversed this and tried to make the rights of individuals the basis for knowing what is just, then - sadly enough - it did make sense to argue over who was and was not born with those rights.

The individualism of the Declaration is also deficient in yet another way. By making rights the possessions only of individuals, it fails to see that social organizations have rights (and obligations) as well. It is not only individuals who have rights and

obligations vis a vis government, but so do marriages, families, churches, schools, businesses, and so on. For are not they, too, recipients of free speech and press? Are they not also to enjoy freedom from search and seizure? Should not each be guaranteed the freedom to conduct its own internal affairs rather than be dictated to by government? And do they not also have an obligation to obey the laws government enacts? By speaking only of individuals and government, the Declaration has bequeathed to America a habit of thinking in a truncated way that misses an important point, a point that also stems from the universality of the norm of justice, namely: justice requires that there be rights and obligations not just between individuals and government but between individuals, between individuals and all types of organizations, and among the various organizations as well.

One last point about the Declaration. Even if we attempt to temper its individualism with the stipulation that *all* humans have rights, what criteria can then be used to formulate them? How will we distinguish genuine rights from what are merely the desires and interests of individuals or groups? As vague as the norm of justice is<sup>iv</sup>, it affords far more guidance than any particular list of rights could do without being guided by that norm. Besides, as I shall shortly show, there's an additional principle that can be conjoined to the norm of justice to yield a more precise account of government's proper role relative to both individuals and other social organizations, and of those organizations to one another. And, by the way, this principle was already known to the English Puritans, and had formed the basis for their idea of limits to governmental authority and power – limits that were already widely accepted in the North American colonies prior to the Declaration. Nevertheless, despite an oblique reference to this Puritan idea<sup>v</sup>, Jefferson omitted it from the Declaration along with the universal norm of justice - just as he omitted the application of both of them to social organizations.

In sum, I find that the Declaration does indeed adumbrate an important truth, namely, that there is a natural, universal, norm of justice. But I also find that it distorts this truth by reversing the relation of that norm and the rights it gives rise to: we do not discover what is just by examining the rights we are born with, but discover what rights need to be protected by law by reflecting on what laws are required in order to have a just society. I also find the Declaration's view of rights to be too narrowly construed as they are supposed to be possessed only by individuals and only in relation to government. In short, the Declaration's view of rights and law is governed by its individualism.

## The Constitution

The Constitution, on the other hand, recognizes that there are no rights until and unless they are enacted into law or delineated by the judicial interpretation of law. Contrary to the natural law tradition, it does not envision people as possessing a complete set of identical rights in all times and places which are already legally valid and need only to be discovered in order to know which laws should be enacted.<sup>vi</sup> This is the important truth that it nearly gets right. The distortion of this point arises in that it is not conjoined with the Declaration's recognition that there is a standard for human law-making that is "natural" and beyond human control. It does, to be sure, assume that government has

limited legal competency and may not regulate the totality of life. This is reflected in the splendid opening words of the Bill of Rights: “Congress shall make no law respecting...” It does not, however, spell out any basis for that idea, nor does it so much as hint at any rule that could guide how we should formulate which specific limits are to be placed on government. By leaving those issues to be decided by Congress and the state legislatures without any guidelines, it thereby leaves us with the pragmatic or positivist view that rights are nothing more or less than whatever lawmakers decide they should be on grounds of practical need, and those needs are whatever the majority of lawmakers say they are.

It is troubling that the Constitution sees the Congress and the state legislatures as the unguided and ultimate sources of law, the obligation to obey the law, and any limits on their law-making. There is no reference whatever to justice as anything more than what is embodied in the written laws, so – once again - it acknowledges nothing about justice that is beyond human control. This is why I called its view of law pragmatist or positivist. That is the view which holds laws to be whatever we wish to make them, and insists that there are no guidelines for making them other than the judgment of lawmakers as to what will work best. On this theory, the very idea of rights is an invention of law-makers, a “useful fiction” that helps bring about the sort of legal order they judge to be best for a particular society at a particular time.

One of the failings of this view is that it leaves no room for appeal to a norm that can supply grounds for concluding that a law itself may be unjust. Put another way: too often in the US the only appeal for judging the rightness of a law is whether it is constitutional. But if that’s all there is, the question of whether the law is just has been omitted. This is a serious deficiency if for no other reason than that the relation of constitutionality to legality is not the same as the relation of justice to constitutionality. The Constitution itself must be held to a higher standard if it is to provide the legal framework for a just society, not just any society. Without that, its Bill of Rights would be nothing more than an arbitrary list of past and present preferences. In this connection I contend that the higher standard to which laws and rights must be held can be nothing other than the universal norm of justice. That is what must be brought to bear on the interpretations of the Constitution and on any future amendments to it.

To sum up, then: the Declaration recognizes that there is a standard for laws that is not itself human-made, but it makes that standard to be rights that ensue from applying the norm of justice to human life while ignoring the norm itself. It envisions every right humans should enjoy as already possessed by them, and the making of positive law as amounting to nothing more than figuring out how to protect those rights. So far as the Declaration states, that is the whole story. By contrast, the Constitution recognizes that there are no valid rights until they are embodied in black letter law or established by the judicial interpretation of law. But it also carries that insight too far by trying to make *it* the whole story. It recognizes no standard for justice beyond the judgment of law-makers about the pragmatic needs of society. It thus acknowledges no standard by which we could say that it would really be unjust to repeal the rights enumerated in its Bill of Rights.

But isn't all my talk of a universal norm of justice too vague to be of real help with the shortcomings of either document? How, for example, are we to apply the norm "give all people their due" so as to see how government should be limited? How can that norm show us even the *nature* of the limits to government's legal competency so that we can be guided in formulating specific limits on state power that can be enacted into law as rights? I think the answer to these questions is that the norm of justice cannot do these things all by itself. To yield such specific results, it needs to be taken in conjunction with another principle that is also universal and natural, a principle that was formulated by the man for whom this Lectureship was named. My reference here is to Abraham Kuyper, and to the social principle he called "Sphere Sovereignty".<sup>vii</sup>

### Sphere Sovereignty

Perhaps the best way to set the background for this principle is to contrast it to the two prevailing views of society that it opposes, namely, individualism and collectivism. Earlier I objected to the individualism in the Declaration without mentioning that the legal individualism it endorses is a reflection of a more general individualism, one that takes in all human society not only government. It is this wider, more encompassing theory that is usually distinguished by contrast to its rival, collectivism. The fundamental issue between them is over which is the source of the other: is it groups that produce individuals, or individuals that produce groups? Aristotle held the first view. He argued that "...the state is by nature clearly prior to the family and the individual, since the whole is of necessity prior to the part.... The proof... is that the individual, when isolated, is not self-sufficient."<sup>viii</sup> Or as he tersely summed the point elsewhere, "the solitary individual dies." The second view was held by thinkers such as Hobbes and Locke. It was Hobbes who famously described life in the state of nature as "*solitary*, poor, nasty, brutish, and short."<sup>ix</sup>

The debate between these two positions sounds a lot like the joke about which came first the chicken or the egg, and it might be just as funny were not such important consequences dependent on how it is answered. For there can be no doubt that throughout history governments that have taken a collectivist view have held justice to be whatever preserves the state,<sup>x</sup> while individualists have held that justice is accomplished when the state preserves the rights of individuals. In other words, the very idea of justice is itself skewed by whether one takes an individualist or collectivist view of society. For the collectivist, it is always more just to preserve the whole of which each individual is a dependent part than to risk the whole for the sake of any part. The individualist, on the other hand, sees every social organization as the freely contracted creation of independent individuals formed by them to further their interests. So which is right? Do independent individuals produce dependent groups or do independent groups produce dependent individuals?

Despite the widespread influence of these two theories, once again I want to propose that they are not the only possibilities. Like the dilemma of the natural rights view vs. the positivist/pragmatist view, the individualist/collectivist dilemma can also be

forked. For if we accept that neither individuals nor collectives preceded one another, if we accept that both were brought into existence simultaneously by the same Creator who endowed both with rights by subjecting them to the norm of justice, then we are not forced down either of the dead-end roads presented by that false dilemma. On this third view of society, individuals and groups are mutually co-dependent and equally important. Moreover, this view is supported by what we know about early humans. There never was a time when humans lived in complete isolation as Hobbes claimed, or without any ruling authority as Locke's contract theory supposes. So far as we know, people have always lived in families, tribes, clans, or villages and have always had some sort of recognized authority, rules, and traditions.

It is against this background that we must see Kuyper's principle of sphere sovereignty. For sphere sovereignty takes social organizations to be not only real but to be of importantly different types, and does so without in the least diminishing the rights individuals have relative to one another and to those organizations. In addition, it delineates rights social communities have with respect to one another, and so presents to us a fuller vision of human life than any of the prevailing false dilemmas can allow for.

Sphere sovereignty does this in a number of ways, but perhaps the easiest way to introduce them is with respect to two factors that it takes as natural in the sense that they are not human-made. The first is the multiplicity of facets to human life which, like the norm of justice, we do not invent and cannot make go away. It is the experience of these facets of life which lead people to form various communities in order to express themselves in each of them. For example, all people experience love and so form marriages and families, they experience the economic side of life and form business enterprises so as to earn a living, they experience the aesthetic facet of life and so embody its appreciation and practice in artistic organizations, they experience thinking in concepts and theories and so form schools, and they experience faith in something as divine and so form religious institutions.<sup>xi</sup> All these, and more, exist in addition to the side of life concerned with justice - the side that leads to the formation of the state. It is these aspects of nature and human nature which Kuyper called "spheres" of life.

The second natural factor is the authority that naturally arises in each sphere of life. For example, there is the authority of parents in a family, of owners in a business, of experts in a field of education, of clergy in a religious institution, and of rulers in the state. These, Kuyper pointed out, are very different *kinds* of authorities and no one of them is the source of the others. Instead, humans have been endowed with each sort of authority by their Creator, and thus each authority has the right to regulate life in its own sphere without interference from other authorities. (I use the word "right" in this context recalling that a right is a benefit *or immunity* that cannot be denied without injustice.) In this way, sphere sovereignty stands against every hierarchical view of society. That is, while there are hierarchies *within* social institutions, there is no hierarchy *between* them.<sup>xii</sup> In this way Kuyper offered a more complete formulation of this principle than Jefferson, who saw it only with respect to the relation of church and state and who exaggerated that relation as a "wall of separation" rather than as a recognition of distinct spheres of

authority. For although no two institutions of society can be walled off from one another, their spheres of authority surely can and should be distinguished.

At the same time that it accepts the naturalness of the various spheres of life, Kuyper's principle also acknowledges the human-made factor concerning them: it is humans who form the various social communities that correspond to each sphere. So while the marriage relationship is rooted in our sexual nature and is natural, the various forms marriages take are human artifacts. Similarly, there are varying forms of families, businesses, artistic and religious organizations, and states. But no matter which precise form these communities take, none of them may be regarded as the supreme authority for all the others. So on this principle, churches make rules about their requirements for membership, businesses decide what products or services to offer, teachers set the requirements for graduation and evaluate students' work, parents set children's bedtimes, and so on. And since the sphere of the state is that of public justice, it is government that makes and enforces the laws that comprise the public legal order.

Here, then, is a fuller account of the basis for the freedoms and rights that we cherish. Government may "make no law respecting..." many things not because we the people say so, but because those things fall outside its proper authority. It may not require or forbid a particular religion, for example, because that concerns a different sphere of life from government's sphere of public justice.<sup>xiii</sup> This is the principle that can properly ground our right to be free to believe and worship (or not) as we please. Likewise, we have the right to be free to pursue whatever goals we may set for our lives without governmental interference – provided those goals do not transgress laws that safeguard public justice as well as the rights of other individuals and communities. And only this principle yields and supports the right of parents to have their children educated as they see fit.

Moreover, on this principle government has the duty to protect the integrity of all other institutions from interference by one another, as well as from itself. So if businesses engage in hiring practices that require children to accompany parents to their job and work with them seven days a week, it is the duty of government to enact child labor laws. The rationale for these laws is not to preserve a romantic notion of a carefree childhood, but to prevent the economic power of businesses from absorbing the familial, educational, and religious aspects of children's lives. This is also the proper rationale for anti-trust legislation in two respects. The first is that such legislation preserves people's freedom to enter into a certain sort of enterprise rather than being locked out of it by a monopoly. The second is that large monopolies can exercise inordinate influence over government or even attempt to control it (as actually happened in the US in the late 19<sup>th</sup> century).

It should be clear by now that the various spheres of life do not correspond to distinct groups of people. Sphere sovereignty is not a rule for how those who work in government should behave towards those who work in the church or in business, for example. Rather, it sees all people as involved in every sphere of life even if they are not equally involved. A person who works for the government may spend more time dealing

with its laws or services than someone who teaches first grade, but both are citizens and both have a share in educating youth. Likewise, a clergyman spends more time concerned with the gospel and the work of the church than does a businessman. But both are equally citizens, church members, parents, and wage earners. And it is sphere sovereignty alone that takes into account these distinct areas of life and so does not simply address the special interests of specific groups.

Thus it is the principle of sphere sovereignty that is presupposed by our idea of limited government whether it is consciously acknowledged or not. Earlier I referred to the tradition of English Puritanism that resisted the attempts of Charles I to become an absolute monarch, and to the way Jefferson watered down the biblical content of the Puritans' arguments. The advocates of that Puritan resistance – Richard Baxter, John Milton, John Owen and others – made clear that it was based on the scriptural teaching that God alone is the supreme authority for human life so that in this world there is no supreme authority. They drew the conclusion that any earthly authority claiming to be the source of all others was thereby usurping a status that belongs to God alone. And they equally rejected every claim that any one or two institutions were the conduits of God's authority. They saw that claim to be at odds with the biblical recognition of multiple authorities in life, each of which corresponds to a distinct facet of it. It was on that ground they demanded freedom of speech, freedom of press, and freedom of religion.

These writers were also advocates of expanding democracy, of course, and so they demanded the extension of the voting franchise to include all who paid taxes. But they were not deceived into thinking that democracy alone could establish or preserve the proper limits of government. They recognized that unless the various spheres of authority are distinguished, simply giving everyone a vote can result in a tyranny of the majority. In this I think they were right. In fact, I'll go further: would not freedoms and rights be better protected by a king who was guided by the idea of sphere sovereignty than an elected Parliament which acknowledged no limit to state power or had only a vague notion of it? Have not people voted for tyranny? Is not the tyranny of the majority the most vicious kind?

Some writers have suggested that sphere sovereignty isn't necessary because individualism alone is an adequate guard against state totalitarianism. We have already seen that according to this theory, social communities are the products of self-sufficient individuals who freely form contracts to create them. Thus the state is formed by a contract that restricts its power to the protection of the lives and property of those forming it. This view fails for several reasons, some of which have already been given. But in addition to those reasons, we should now also notice that on this view there is no safeguard against viewing any one institution as the supreme source of authority for all the others, and it especially does not adequately constrain the state. Recall, for example, that even Locke had to admit that once government is granted the power to enforce its laws, there is nothing to prevent it from encroaching on liberties in other spheres of life. Moreover, he even admitted that it was properly within his theory to allow state power to confiscate private property or ban church teachings if the state deemed it in its own interest to do so! The point is – once again – that without the idea of sphere sovereignty,



one community can be viewed as the supreme source of authority or as encompassing all the others. And when that happens, exemptions from its authority will be hard to find in theory and impossible to obtain in practice.<sup>xiv</sup>

Having made these points about what sphere sovereignty opposes, I must now add that it is not merely a negative principle. It does not aim only at restricting any one sort of authority or institution from claiming authority over the others. Rather, it is every bit as much aimed at allowing each sort of community the freedom to express, preserve, and develop the sphere of life it corresponds to and which accords with its own nature. So, for example, a school can aim at what its experts deem the best sort of education without having that dictated by the state or the church. Of course, a school may be *supported* by the state, a church, a labor union, or a business; but it may not be *run* by them. In this respect “state school” is as much a contradiction in terms as is “state church”, “state business”, or “state family.” At the same time, sphere sovereignty calls upon the state to truly be the state: to enact and enforce laws that form a just public legal order and not merely act as a broker for conflicting special interests.

Both the positive and negative sides of this principle are often undermined nowadays by attempts to replace belief in God with pragmatism. The idea is that government limits, rights, and laws can be equally well established on purely pragmatic grounds. So it is often claimed that the justification for having a limited government is that when that is put in practice business prospers, art flourishes, charities are more effective, churches, temples, and mosques have greater integrity, schools achieve distinction, and people are generally happier. That’s all true, of course, but it isn’t the justification of the practice. Those are some of the *consequences* of recognizing that human life has irreducible aspects and multiple authorities. But it is recognizing those aspects and authorities that is the ground of the principle leading to that practice, not its beneficial results. To see this point more clearly, consider what would happen if the idea of rights were placed on a purely pragmatic basis instead.

As I already pointed out, the pragmatic position on law and rights is that there really is no natural norm of justice and that natural rights are a fiction. All that really exists “naturally”, according to this theory, are people and their needs. Law makers are therefore to be guided by nothing other than their best judgments concerning those needs and the laws that will best meet them. We have already touched on one of the great failings of this view, namely, that it ignores what I called the norm of justice. For surely if there is a need that people not overpark during rush hour, then a law prescribing 10 tears in prison for over parking will effectively stop it. But it would also destroy both public confidence in the law-making body and public respect for the state. For since the law is clearly unjust, the state enacting it would be viewed as unjust. No doubt the pragmatist response would be that wise law makers would anticipate this public response and not pass such a law because of the practical consequence of doing so. But my main point still stands: what the pragmatist calls a “practical result” is in fact a result of the public’s recognition of a universal norm for justice, so that the result itself goes beyond being merely a practical matter. It founders on the norm of justice.

Another – inherent - failing of the pragmatic view is its own pragmatic effects. For if pragmatists were ever successful in convincing the public that their theory is true,<sup>xv</sup> it would immediately destroy the idea of rights and the public’s sense of obligation to obey laws. People would instantly grasp that rather than being the application of a universal norm that binds all alike, any proposed law or right is merely the preference of the group that enacted it. And that group would then be seen to be passing off its own desires as what is best for all. The pragmatic result of legal pragmatism, then, would be social and legal chaos.<sup>xvi</sup>

## Replies to Objections

I will close this section by replying to two objections to sphere sovereignty. The first is that it is a form of theocracy. This is wrong because the principle does not expect God himself to rule the state, nor does it expect law makers to run the state out of a holy scripture viewed as an encyclopedia on every subject. Belief in God is the ultimate justification for this principle, yes. But just as non-Theists may read the Declaration without feeling any political or legal pressure to be a Theist, so too may they read the principle of sphere sovereignty. They are free to accept it on any ground they wish, and to accept it to whatever extent they wish, *for that liberty is guaranteed them by the principle itself*. From its point of view, government is entrusted with establishing justice for all who are under its rule – which means justice for every individual and every organization. And to do that it must act as even-handedly as possible toward them all.

That brings me to the second objection. As I’ve just admitted, sphere sovereignty is a Christian-based idea. Its source is to be found in the attitudes and teachings of the New Testament, and its ultimate basis is belief in God. But it is not therefore part of a Christian agenda of forcing Christian views on non-Christians. Rather, its view of law and rights, government and justice, is that they should not be tilted in favor Christians - or any other particular group. In fact, since this principle is proposed as the chief way belief in God should impact government, it is thus an alternative to claiming that the US is a Christian nation and to the idea of trying to legislate Christian morality. In this connection, I see the agenda of the “Christian right” as a departure from the heritage of the Reformation represented by sphere sovereignty, as well as from the practices and ideas of the Founding Fathers. Such an agenda replaces “liberty and justice for all” with legislating the morality of the majority; as such it is an unchristian idea, and is opposed by sphere sovereignty.<sup>xvii</sup>

## The Norm of Justice Redux

I conclude, then, that the solution for my own admission that the norm of justice alone is too vague to be of practical value in the framing of laws and rights is to combine that norm with sphere sovereignty. It’s the principle of sphere sovereignty that gives the norm traction on the muddy, slippery road of everyday life.

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Prof Emeritus



<sup>i</sup> Only three of the 39 delegates who signed the Constitution had also signed the Declaration: Benjamin Franklin (PA), Robert Morris (PA), and John Rutledge (SC).

<sup>ii</sup> In fact, the rights specified in the Bill of Rights are not at all the natural rights referred to in the Declaration, but are only what Jefferson called “rights *against government*”. Rather than specifying rights as envisioned by the natural rights theory, the constitution is concerned only with safeguarding the belief in a limited state. See note *iii*.

<sup>iii</sup> The 9<sup>th</sup> Amendment does refer to “other rights retained by the people” in addition to those enumerated in the Bill of Rights. But this reference is to rights in the sense of restrictions on governmental power, rather than to a myriad of innate natural rights which government should enact into law. Natural rights theory has long been compatible with a totalitarian view of state power (Aristotle, e.g.), and the point of the amendments comprising the Bill is to elaborate the idea of a limited state rather than refer to additions to “life, liberty, and the pursuit of happiness.”

<sup>iv</sup> The norm “give every one his due” should however, be taken together with its auxiliaries of proportional and distributive justice. It thereby achieves more specificity, though it is still in need of even more.

<sup>v</sup> The Puritan idea of a limited state was based on biblical ideas whose proximate source in the political debates of the 17<sup>th</sup> & 18<sup>th</sup> centuries was the Reformation – the thought of Calvin in particular. In the first draft of the Declaration Jefferson made a slight nod in the direction of the Calvinist tradition when he wrote: “We hold these truths to be *sacred* and undeniable...” Franklin talked him into changing that to “self evident”.

<sup>vi</sup> There are two other important differences as well stemming from the rationalism of traditional natural law theory. One was the way it modeled the relation of value norms to value rules on the relation of mathematical and logical axioms to mathematical and logical rules by regarding the moral and legal rules as being as exceptionless as the norms. But this is not right. In the value aspects of life, the norms that play the role of axioms are exceptionless, but the rules we generate to help us conform to the norms are not. Every ethical or legal rule has exceptions. The other way was that it regarded both the norms and the rules as available to all people through the use of reason, which was viewed as autonomous and uniform for all. This is also false. Beliefs in these areas, as in all others, are inevitably skewed in favor of one’s divinity belief; there is no such thing as religiously neutral reason. See R. Clouser, *The Myth of Religious Neutrality* (Notre Dame: University of Notre Dame Press, 2005).

<sup>vii</sup> See, inter alia, his Stone Lectures for 1898 given at Princeton and published under the title *Lectures on Calvinism* (Grand Rapids: Eerdmans, 1994), 78 ff; and Peter Heslam’s *Creating a Christian Worldview* (Grand Rapids: Eerdmans, 1998), chapter 6.

<sup>viii</sup> *Politics*, Bk 1, ch 2; Marx endorses Aristotle on this point in his “Economic and Philosophic Manuscripts of 1844”. See *The Marx-Engels Reader*, ed. R. Tucker (New York: W. W. Norton & Co., 1972), 78.

<sup>ix</sup> *Leviathan* (New York: Meridian, 1963), 143.

<sup>x</sup> Aristotle, *Politics*, 1283 b 40-43.

<sup>xi</sup> For a defense of the definition of a divinity belief as belief in something as unconditionally real, and for the reasons why some such belief cannot fail to be presupposed by any theory whatever, see *The Myth of Religious Neutrality*, Op. cit.

<sup>xii</sup> Thomist thinkers have often focused on the relations between levels of the hierarchy within an institution, and advocated the principle of subsidiarity which requires the activities of an institution to be carried out at the lowest possible level of its hierarchy. See, e.g., Yves Simon, *Philosophy of Democracy* (Chicago: University of Chicago Press, 1951, and *A General Theory of Authority* (Notre Dame: University of Notre Dame Press, 1962). This is a fine idea so far as it goes, but it cannot address the proper way organizations should relate to one another.

<sup>xiii</sup> The reason religious affiliation and practice was for so long made a matter of public law was because Aristotle had listed it among the unities necessary to maintain the state, and had defined justice as whatever preserves the state. It was on this ground that kings regarded the practice of a different religion or heresy within the same religion as treason. In addition to note viii, see also *Politics* 1322 b 19 ff.

<sup>xiv</sup> This is not to suggest that the implementation of sphere sovereignty would produce a utopia. Its effectiveness would still depend on the strength of public confidence in it, and its benefits could still be spoiled in particular instances by crime or unjust actions not yet made criminal by legislation.

<sup>xv</sup> There is also the more serious difficulty that according to pragmatism no belief is really true or false but simply works or doesn’t, where “works” means makes us happier than we’d otherwise be. I have critiqued the incoherencies of epistemological pragmatism in some detail in “A Critique of Historicism” (*Critica*, Vol. XXIX/no. 85/Abril 1997), reprinted in *Contemporary Reflections on the Philosophy of Herman Dooyeweerd*, ed. Strauss & Botting (Lewiston, NY: The Edwin Mellen Press, 2000).

<sup>xvi</sup> I have given a more detailed critique of the inherent failings of a pragmatist epistemology in “A Critique of Historicism”, *Critica*, vol. XXIX/ no. 85/ Abril, 1997. Reprinted in *Contemporary Reflections on the Philosophy of Herman Dooyeweerd*, Ed. Strauss & Botting (Lewiston: Edwin Mellen Press, 2000), 109 – 124.

<sup>xvii</sup> The idea that democracy means “the rule of the majority” (as Jefferson expressed it) should be terrifying to every Christian and to anyone else who cherishes civil liberties. Our form of democracy allows that the majority *elects those who rule*, not that the majority itself rules. This difference was deliberately made by the framers of the Constitution in hopes that those elected would be wiser than the general populace and, I would add, that they would have a clearer grasp of limits on

government - which means approximating the principle of sphere sovereignty whether elected lawmakers and judges are conscious of it or not.