

CHAPTER THREE

Thoughts
on
Democracy

John Hospers

No feature of American life strikes a stranger so powerfully as the extraordinary indifference, partly cynicism and partly good nature, with which notorious frauds and notorious corruption in the sphere of politics are viewed by American public opinion. . . . (Yet) in hardly any other country does the best life and energy of the nation flow so habitually apart from politics. . . . It seems a strange paradox that a nation which stands in the very foremost rank in almost all the elements of a great industrial civilization, which teems with energy, intelligence and resource, and which exhibits in many most important fields a level of moral excellence that very few European countries have attained, should permit itself to be governed, and represented among the nations, in the manner I have described. How strange it is, as an Italian statesman once said, that a century which has produced the telegraph and the telephone, and has shown in ten thousand forms such amazing powers of adaptation and invention, should have discovered no more successful methods of governing mankind!

W. E. H. Lecky, *Democracy and Liberty* (1896)

I. CONDITIONS FOR DEMOCRACY

When a decision is mine alone to make, I deliberate, I decide, then I act in accordance with my decision. When others are

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involved, however, the situation is more complex. When there are two of us and the matter requires both our decisions, the outcome is either unanimous or a tie. When there are three or more of us, one method of achieving an outcome is for us all to vote on the matter. There are other ways of achieving an outcome, such as tossing a coin or one person exerting force on the others to prevent a vote from being taken. But if all the parties are acting voluntarily and whoever gets the most votes wins, the decision has been arrived at democratically.

1. *Consent*

“Democracy,” it is often said, “is government with the consent of the governed.” *All* the governed? Must consent be universal? As a rule, we didn’t agree on all the motions or on all the candidates; that’s why we accept majority rule and don’t insist on unanimity.

If twenty of us decide to form a club or fraternity, don’t we all first agree on (1) what sort of matters should be put to a vote, then (2) whoever gets the most voters wins? Then democracy is majority rule after democratic procedure has been consented to by all.

Still, few if any political democracies have been formed in that way. Not all Americans agreed to be governed in the way that they are presently governed. Even if 200 years ago a few of our forefathers signed on the dotted line, how does that fact commit us today? Can one person sign a contract on behalf of someone else, to which the second party did not consent or knew nothing about it because he was not yet born? If democracy is defined in terms of universal consent to democratic procedure, it is to be feared that we have then defined democracy out of existence.

“Didn’t we all agree just by living there?” Hardly. People

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living in dictatorships often desire to leave but are not permitted to do so. And there are many people who would like to leave but cannot do so for economic reasons. In both these cases, continued residence does not imply consent to the government under which you live.

2. *Voluntariness*

Doesn't the consent of the parties have to be voluntary? This question could involve considerable complexity; even legal experts are not agreed on what makes an action voluntary. If someone holds you up at gunpoint or threatens your life or welfare if you refuse, your resulting action can hardly be called voluntary: it is at least to some degree coerced—you might have voted differently but for the coercion exerted upon you.

But coercion is a far cry from influence. You can be influenced, heavily influenced, by what a parent or teacher has taught you and your resulting actions are still voluntary: nobody made you do them, you did them (as we say) of your own free will, with deliberation and weighing of evidence pro and con. It is still *your* decision, however much influenced by others. A voluntary act, wrote G. E. Moore in his *Ethics*, is one you could have avoided doing if you had decided just beforehand to do so.¹

What if you have been brainwashed? You acted as you chose, but your choices have been severely limited because the media (or your government) have not permitted you to “hear the other side.” As a result, you cannot make an informed decision. What if the newspapers and media are all on one side and you never had a chance to learn the true facts of the case? Perhaps you

1. G. E. Moore, “Free Will,” in *Ethics* (London: Oxford University Press, 1910).

could have formed a fair or impartial view if you had been permitted, but you weren't permitted. Or perhaps you would have formed one if you had gone to considerable trouble to go to the library, consult specialists, and so on, but you didn't have time or sufficient inclination to do all that. Is your vote then less than voluntary?

We do not have a "functioning democracy," say Benn and Peters,² if the channels of communication on which an impartial decision depends are closed to us. Is it then a democracy at all? In the Soviet Union, most people voted, but if they valued their lives, they would not vote against Stalin; and in most dictatorships, only persons friendly to the government are permitted to run for office at all—the choice is among candidates whom the ruling clique has already chosen. These are sometimes called people's democracies, but there is no reason to call them democracies at all. Still, there can be quite a bit of unfairness and prejudice in the media, and it is still called a democracy as long as most adult citizens can vote if they choose to. It is not clear at what point most persons would say, confronted by official pressure to vote a certain way, "This is it—now it is no longer a democracy."

"But democracy is *self-government*, and in a democracy we govern ourselves." However, who is the "we"? Aren't the residents of one nation always governed by others, those in the seat of political power? When Rhodesia was governed by the British, Rhodesians were still governed by others; and when the British left, they were as Zimbabweans, still governed by others, only this time these others were from within the country rather than from outside it. Defining democracy as self-government does not tell us which of these two the speaker has in mind.

2. S. I. Benn and Richard Peters, *Social Principles and the Democratic State* (London: Allen & Unwin, 1955), 342.

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3. Majority versus Plurality

If there are ten of us and the vote is 5 to 5, there is not a majority but a tie. We are then at a standoff unless we try voting again in the hope that the totals will change. If there are ten of us and the vote is 6 to 4, then of course there is a majority. If the vote is 4-3-3, the 4's have more votes than the others, but there is no majority because no one has more than half the votes. There is, then, a plurality but not a majority, and if democracy is defined in terms of majority vote, this is not (or not yet) a democracy.

In common usage of the word, however, democracy does not require that any person or group have a majority but only a plurality, and whoever gets the most votes wins. If a majority vote is required, there will have to be one or more runoff elections. In the United States, for example, there are no runoff elections for the presidency; some candidates win without having a majority of popular votes. In some elections, however, there are runoff elections until some candidate has a majority.

4. Frequency of Elections

In a democracy, there have to be elections. But how often? A nation in which elections were held only once every hundred years would not be called a democracy because the voters' preferences have not been consulted frequently enough. Indeed, some people's minds change almost every day.

Between every day and every century there is a wide gap. The United States has a presidential election every four years; in other nations, there is a new election whenever the parliament sustains a vote of no confidence, which may be five months or five years. There is no clear cutoff point: if thirty years passed

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with no elections, we would probably no longer say that the nation is still a democracy.

5. *Exclusions*

In every nation, some groups are excluded from voting. Non-citizens may not vote or, in the United States, persons under eighteen years of age. Until after World War I, no women could vote. As a rule, but not always, persons in prisons and mental institutions may not vote. In early America, the franchise was limited to owners of property because it was felt that they had more of a stake in their country. How many groups can be excluded while yet the nation remains a democracy? Again, there is no clear cutoff point—but a nation in which 95 percent of the citizens are not permitted to vote would hardly be called a democracy.

It has also been suggested that some votes should count more than others, though it is not always agreed which these should be. John Stuart Mill suggested that the votes of graduates of universities, who have superior knowledge, should count more than other voters; and the same for “employers of labour, foremen, labourers in the more skilled trades, bankers, merchants, and manufacturers.”³ Sometimes such plans have come to fruition: for example, an additional vote was given in Belgium to each married man and each widower of at least thirty-five years of age with families. In general, however, such schemes tend to be viewed as antidemocratic.

3. John Stuart Mill, *Representative Government* (1861; reprint, Everyman Library, London: J. M. Dent), 165–171.

*Thoughts on Democracy / 67*6. “*Indirect Democracy*”

In a New England town meeting, every citizen is entitled to vote directly for or against the measures being considered. In ancient Athenian democracy, every citizen—which did not include women and slaves—could vote directly for each measure. But in modern democracies, the sheer number of voters is so great that it is a practical impossibility for every citizen to vote on every measure. Most citizens lack the knowledge and the leisure to vote on the countless matters that may require attention. And so we have what is called an indirect democracy: you do not vote directly for the measure, but you vote for others (such as congressional representatives) who do, and if you disapprove of the way they vote, perhaps you can help to unseat them from office in the next election.

But Washington, D.C., is a long way from the hinterlands, and in most ages of the world’s history, no one could have imagined a democracy of such enormous size. It is difficult enough in a small democracy to get a majority to agree on anything. Any “participatory democracy” would seem to be a pipedream unless it was small enough to permit widespread participation. Today, however, “for all the talk about politics in Western democratic regimes, it is hard to find in all the daily activities of bureaucratic administration, judicial legislation, executive leadership, and paltry policy-making anything that resembles citizen engagement in the creation of civic communities and in the forging of public ends. Politics has become what politicians do; what citizens do (when they do anything) is to vote for politicians.”⁴

Sometimes neither Congress nor the state legislature, nor

4. Benjamin Barber, *Strong Democracy* (Berkeley: University of California Press, 1984), 147–148.

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even a city or township government, is up to handling all the details. How shall vast areas of government-owned lands be operated? Shall certain species of flora and fauna be preferred to others or eradicated entirely? Shall certain endangered species receive special protection? Shall wolves be reintroduced into the wilderness to cut down the elk population? Shall a dam be built at a certain place in the river (or elsewhere or not at all), and may a landowner be prevented from siphoning off most of the water from a river that flows through his property, thus preventing farmers downstream from using it? Shall certain areas be designated wetlands to encourage wild fowl to nest there and to prevent the spread of the desert? What measures shall be taken to prevent rivers from flooding? (Levees at one location may increase flooding at another.) Where shall certain roads be built, and along what routes? Must there be legislation to control the placement of every traffic light?

Congress, unable to control these countless details, creates a *regulatory agency*, which has powers to create certain rules, apply them to particular cases, and enforce them. These agencies possess enormous powers, including the power to regulate what you may do on your own land, and they constitute the *bureaucracy* that makes decisions on countless matters affecting the life of every citizen in the country.

What control do you and I have over this huge bureaucracy? Very little. We may vote to unseat the congressman of whose record we disapprove, but we have very little influence on the agency that he helped create. As a rule, the members of such agencies are appointed, not elected, and there may be nothing that your senator can do to change the rules of these agencies or their methods of operation. They are usually independent enough to be indifferent to criticism and letters of complaint; letters of protest have little effect on them because they realize that their tenure of office does not depend on you or even on

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thousands of other voters. They can afford to thumb their noses at all of us without losing their jobs. When we reach this level of indirectness, there is barely a sliver of democracy left standing, and often there is little difference between a bureaucracy in a so-called democracy and one in a totalitarian dictatorship.

The situation is not very different with the judiciary; a senator may vote for a certain candidate for the Supreme Court; but once he votes for him, neither you nor he has any control over what the candidate does once he is installed. After that, he need not take our views into consideration in making his decisions. In the case of the judiciary, however, this is “part of the plan”: it is an avowed purpose of the judiciary not to be swayed by the ups and downs of public opinion. Only at the level of the jury is a certain degree of popular opinion introduced, at least when “jury nullification” is permitted.

Still, for better or for worse, the judiciary is hardly a prime example of “democracy in action.” There are those who staunchly believe that members of both state and federal courts should be voted on in popular elections. In our own time, the Supreme Court decides whether abortion is murder, on the grounds of whether one is a human being from conception on or whether abortion represents a woman’s freedom of action over her own body. How nine people decide on this has large and fateful implications. Should the Supreme Court settle this, or state courts, or should the matter be left up to the individuals involved? On this point there is far from universal agreement.

2. DEMOCRATIC RULE

One problem that democracies face is that most people are not very careful or wise in their voting habits. The policies they vote for may not be the policies they would have voted for had they had more knowledge or been aware of the probable con-

sequences of their own actions. Here is an example repeatedly encountered in history: A majority of people, seeing that a minority is richer and better off than they are, exclaim “That’s unfair!” and vote to levy higher taxes on them, and if they do it one time, they are inclined to do it again: “Take it from them! They have more than they need anyway.” The rich, meanwhile, find it less worthwhile to go to the trouble of creating new industries and new jobs because the reward for their efforts is gradually diminished. Just then, however, the voters are becoming accustomed to receiving unearned income through the political process, and when they continue the process, they find that there is very little left for them to confiscate. They vote ever higher taxes to be imposed on the rich, and the rich respond by producing less and not hiring more workers. An intelligent minority of the citizenry anticipated what was coming but were shouted down by the short-sighted majority. As Alexander Tyler wrote in 1770 on the history of ancient Greece, “A democracy cannot exist as a permanent form of government. It can exist only until the voters discover that they can vote themselves largesse from the public treasury, with the result that a democracy always collapses over loose fiscal policy, always followed by dictatorship.” Plato fully shared this view, concluding that “democracy will elevate to power anyone who merely calls himself the people’s friend.”⁵

“The mental picture which enchains the enthusiasts for benevolent democratic government, wrote Sir Henry Maine in 1878,

is altogether false, and . . . if the mass of mankind were to make an attempt at redividing the common stock of good things, they would resemble, not a number of claimants insisting on the fair

5. Plato, *Republic*, trans. Francis M. Cornford (London: Oxford University Press, 1941), 283.

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division of a fund, but a mutinous crew, feasting on a ship's provisions, gorging themselves on the meat and intoxicating themselves with the liquors, but refusing to navigate the vessel to port. . . .

You have only to tempt a portion of the population into temporary idleness by promising them a share in a fictitious hoard lying (as Mill puts it) in an imaginary strong-box which is supposed to contain all human wealth. You have only to take the heart out of those who would willingly labor and save, by taxing them *ad misericordiam* for the most laudable philanthropic objects. For it makes not the smallest difference to the motives of the thrifty and industrious part of mankind whether their fiscal oppressor be an Eastern despot, or a feudal baron, or a democratic legislature, and whether they are taxed for the benefit of a Corporation called Society, or for the advantage of an individual styled King or Lord. . . .⁶

“Highly graduated taxation,” wrote Lecky in 1896,

realizes most completely the supreme danger of democracy, creating a state of things in which one class imposes on another burdens which it is not asked to share. The State is lured into vast schemes of extravagance, under the belief that the whole cost will be thrown upon others.

The belief is, no doubt, very fallacious, but it is very natural, and it lends itself most easily to the claptrap of dishonest politicians. Such men will have no difficulty in drawing impressive contrasts between the luxury of the rich and the necessities of the poor, and in persuading ignorant men that there can be no harm in throwing great burdens of exceptional taxation on a few men, who will still remain immeasurably richer than themselves. Yet no truth of political economy is more certain than that a heavy taxation of capital, which starves industry and employment, will fall most severely on the poor. Graduated taxation, if it is excessive or frequently raised, is inevitably largely drawn

6. Sir Henry Maine, *Popular Government* (London: Longmans Green, 1878), 66–69.

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from capital. It discourages its accumulation. It produces an insecurity which is fatal to its stability, and it is certain to drive great masses of it to other lands.”

Today, however, “democracy has been crowned king. The voice of the multitudes is the ultimate court of appeal.”⁷

3. A REPUBLIC

What is needed, it is said, is not a democracy but a republic.

The word “republic” has no precise or unambiguous meaning. If a nation is a republic, it does not have a king or other monarch. It prescribes certain limits on what a majority may enact—the limits are not always the same. And there is usually a written constitution, to act as a guide, so that an observer may know what such a government is committed to. (It doesn’t always live up to the constitution, of course.) But this description is still extremely broad: there are many so-called republics in Central and South American countries, for example, which have been repeatedly overturned by revolutions and forcible takeovers.

Plato, in *The Republic*, presented a detailed plan of how a nation should be organized and governed. Every adult, male or female, was to be eligible for rulership; but the vast majority would be weeded out in a long and exacting period of training in various disciplines—mathematics, philosophy, statecraft, and military training; and the small group who survived this ordeal would be prepared at age fifty to be members of the Council of Rulers, holding that position for life. They would embody the highest wisdom in the society.⁸

7. W. E. H. Lecky, *Democracy and Freedom* (London: Longmans Green, 1896), 1:293.

8. Plato, *Republic*, bks. 7–10.

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It is doubtful, however, whether many persons today would be prepared to underwrite a system of government in which the citizens have no control as to who would govern them and there was no peaceful way to unseat them. Much closer to democracy, because it provides the opportunity for all qualified citizens to vote, is a constitutional republic, in which the constitution prescribes the rules of the nation's operation.

Whether or not a nation endures and prospers often depends to a considerable extent on what the constitution permits or prohibits and, of course, on whether the constitution is followed in practice. Lecky wrote in 1896:

It would perhaps be a paradox to say that the government of a country which is so great, so prosperous, and so pacific as the United States, has not been a success; but, on the whole, American democracy appears to me to carry with it at least as much of warning as of encouragement, especially when we remember the singularly favourable circumstances under which the experiment has been tried, and the impossibility of reproducing those conditions at home. There is one point, however, on which all the best observers in America, whether they admire or dislike democracy, seem agreed. It is, that it is absolutely essential to its safe working that there should be a written constitution, securing property and contract, placing serious obstacles in the way of organic changes, restricting the power of majorities, and preventing outbursts of mere temporary discontent and mere casual coalitions from overthrowing the main pillars of the State. In America, such safeguards are largely and skillfully provided, and it is to this fact that America mainly owes her stability.⁹

This stability would have been impossible in an unlimited democracy.

“No one imagines,” wrote Rose Wilder Lane,

9. Lecky, *Democracy and Freedom*, 116.

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that a majority of passengers should control a plane. No one assumes that by majority vote the patients, nurses, elevator boys and cooks and ambulance drivers and interns and telephone operators and students and scrubwomen in a hospital should control the hospital. Would you ever ride on a train if all the passengers stepped into booths and elected the train crews by majority vote as intelligently as you elect the men whose names appear in the lists before you in a voting booth? Then why is it taken for granted that every person is endowed on his 21st birthday with a God-given right and ability to elect the men who decide questions of political philosophy and international diplomacy? This fantastic belief is no part of the American Revolution. Thomas Paine, Madison, Monroe, Jefferson, Washington, Franklin did not entertain it for a moment. When this belief first affected American government, it broke John Quincy Adams' heart; to him it meant the end of freedom on earth.¹⁰

After the Constitutional Convention of 1787, when Benjamin Franklin was asked what the convention had wrought, he responded, "A republic, madam, if you can keep it." It was not a democracy they had wrought but a nation "bound down by the chains of the Constitution." John Adams remained fearful that the new nation would degenerate into a democracy. "The people," he wrote, "are not the best keepers of the people's liberties or their own, if you give them all the powers, legislative, executive, and judicial. They would invade the liberties of the minority, sooner than any absolute monarch."¹¹ If the majority were to control the government, he wrote,

debts would be abolished first; taxes laid heavy on the rich, and not at all on the others, and at last a downright equal division of everything be demanded and voted. The idle, the vicious, the

10. Rose Wilder Lane, *The Discovery of Freedom* (New York: Arno Press, 1943), 202.

11. Charles Francis Adams, ed., *Works of John Adams*, vol. 6 (Boston: Little, Brown, 1856), 7, 9.

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intemperate, would rush into the utmost extravagance and debauchery, sell and spend all their share, and then demand a new division of those who purchased from them. The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.¹²

Jefferson may not always have been of the same mind on this issue. Having written the Declaration of Independence, he was in Paris at the time of the constitutional convention. When questioned about majority rule, he said, "Educate and inform the whole mass of the people. Enable them to see that it is their interest to preserve peace and order, and they will preserve them. And it requires no very high degree of education to convince them of this. They are the only sure reliance for the preservation of our liberty. After all, it is my principle that the will of the majority should prevail."¹³

Jefferson several times suggested that constitutions should be revised or replaced every generation or so, and others have suggested on his behalf that instead of meaning by "the majority" the majority of those who voted for the Constitution in 1787, he may have meant what is called a continuing majority, including the majority of each generation from that time forward. If that was indeed his meaning, it is questionable whether the inclusion of such an indefinitely large majority would have sufficed to sustain his view that the majority should always be trusted.

The Constitution is, in any case, a strongly antidemocratic document. It consisted not only of what the federal government should do but also of what it should not do. The federal government was not permitted to control the exercise of speech,

12. Ibid.

13. Thomas Jefferson, *The Writings of Thomas Jefferson*, vol. 6 (Washington, D.C.: Thomas Jefferson Memorial Association, 1907), 392.

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press, and religion (First Amendment); it could not withhold from citizens their means of self-defense (Second Amendment). It could not exact cruel and unusual punishment (such as torture); it could not sentence a defendant without trial by his peers (habeas corpus). It was not the powers of the government over the individual but the powers of the individual that could not be touched by the federal government.

The election of federal officeholders was also quite undemocratic—a fact that comes as a surprise to many of today’s students. According to the Constitution, citizens have direct voting power only over the membership of the House of Representatives, the branch of government responsible for the initiation of tax bills and whose members face reelection every two years. Senators were appointed by the state legislatures. Popular election of senators did not occur until the passage of the Seventeenth Amendment in 1913.

Nor was the president elected by popular vote but by a board of electors, the Electoral College. A portion of Article 2 of the Constitution says, “Each state shall appoint, in such manner as the legislatures thereof may direct, a number of electors, equal to the whole numbers of senators and representatives, to which the state may be entitled in the Congress. The Electors shall meet in their respective states, and vote by ballot for two persons. They shall make a list of all the persons voted for, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed.”

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“Neither the states nor the citizens elected the President,” wrote Lane.

His duty within the Republic was only to execute the laws made by Congress. But in world affairs he was the Republic’s substitute for a King. So that he might be completely free to do this, the President was not to be elected by (and therefore dependent upon) either citizens or the States. Temporary popular motions or changing public opinion were not to touch him. Local interests were not to be able to bring pressure on him. The President of the United States was to represent no group of Americans, no section of the Union; he represented The Republic. The President represented all Americans. No group had any claim on him.¹⁴

Today, however, thanks to two constitutional amendments, senators and presidents are elected directly by the voters.

And many a president in a time of crisis, since that freedom was taken away from his high office, must have silently cursed the Amendment that plunges him to the neck in a mob of short-sighted, clamoring men, clutching and pulling at him with a thousand hands. Today that Amendment does not let the captain of this ship of State make one clear decision unhampered by the ignorance and prejudices and fears of all the passengers on all the decks and all the men playing poker in the ship’s bar. An ocean liner could not be navigated for a day under such conditions.¹⁵

Under the Constitution, the federal government could not do anything that it was not specifically empowered to do in the Constitution. The founders were most concerned to protect individuals against the encroaching powers of the federal government, and they took great pains to ensure that there would be only a minimum of intervention by the federal government

14. Lane, *The Discovery of Freedom*, 203.

15. *Ibid.*, 207.

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in the lives of the people. The watchword of the federal government was “hands off.”

As time went by, however, more and more laws were passed that violated both the letter and the spirit of the Constitution. The Constitution, for example, empowers the federal government to handle interstate commerce and to settle commercial disputes among the states. But the interstate commerce clause is used today to permit all manner of activities not envisaged by the founders—such as “taxing North Dakota farmers to build flood control dams on a dry creek rising in the mountains of Los Angeles County, and discharging into the Pacific Ocean in Los Angeles County.”¹⁶ It has been construed to enable Congress to regulate the wages of those who wash the windows of buildings in which any interstate commerce is conducted. It has been construed to permit endless regulations of agriculture, such as the amount and kind of crops that farmers may grow for their own use on their own land (*Wickard v. Filburn*, 317 U.S. 111 [1942]). It was construed to permit the federal government to set the price of natural gas at the wellhead (the Phillips Petroleum case of 1954), thus discouraging the search for new sources of natural gas and encouraging consumers to be wasteful because of the set price. And so on, for countless other judicial interpretations of the interstate commerce clause of the Constitution.

Another phrase in the Constitution that lent itself to extended interpretation was the “general welfare” clause. The intent of the founders was conveyed when a bill was introduced to pay a bounty to fishermen at Cape Cod and a subsidy to certain farmers. James Madison said, “If Congress can employ money indefinitely to the general welfare, they may take the care of

16. Newton Garber, *Of Men and Not of Law* (Greenwich, Conn.: Devin-Adair, 1962), 13.

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religion into their own hands; they may appoint teachers in every state, county, and parish, and pay them out of the public treasury; they may take into their own hands the education of children, establishing in like manner schools throughout the Union; they may seek the provision of the poor . . . which would subvert the very foundations, and transmute the very nature of the limited government established by the people of America.” When Congress rejected this bill, Jefferson wrote with relief, “This will settle forever the meaning of the phrase ‘general welfare,’ which, by a mere grammatical quibble, has countenanced the general government in a claim of universal power.” Nevertheless, it was far from settled: in today’s welfare state, the amount of transfer payments “to promote the general welfare” takes up about half of the federal budget, and the number of people receiving money from the federal government exceeds the number of people who labor to sustain it. Thus has the American nation, while still remaining a republic in its structure, become in large measure an unlimited democracy.

The individuals in any nation who create and sustain its economic well-being are a rather small minority—the creative entrepreneurs, people with new ideas and new inventions, and other people who can put those ideas to practical use by initiating new enterprises and hiring employees. They are the ones who create the jobs and keep the system afloat. But millions of Americans today condemn these individuals simply as “the rich,” as if their income had fallen like manna from heaven. They are envious of the success that some have had, and they aim to deprive them of it through legislative action, not realizing that the success of these comparative few has enabled them, the majority, to be gainfully employed and to sustain a standard of living that would be impossible without their achievements. During most of American history, these facts were widely recognized, even by employees who were far worse off economi-

cally than most employees are today. Today, however, with endless propaganda from the press and media and immigration from Third World countries where there is little appreciation of the free market, these facts have been largely lost sight of—hence the danger that the entrepreneurial class will be increasingly choked off by the demands of a discontented majority. Today one hesitates to entrust the fate of the economy to the whims of an easily swayed majority, especially when so many millions of citizens and noncitizens are dependent on these government handouts for their existence.

The America that de Tocqueville foresaw in the nineteenth century was

an immense and tutelary power, which takes upon itself alone to secure their gratification and to watch over their fate. . . . For their happiness such a government willingly labors, but it chooses to be the sole agent and the only arbiter of that happiness; it provides for their security, foresees and supplies their necessities, facilitates their pleasures, manages their principal concerns, directs their industry, regulates the descent of property, and subdivides their inheritances—what remains, but to spare them all the care of thinking and all the trouble of living? . . . The will of man is not shattered, but softened, bent, and guided; men are seldom forced by it to act, but they are constantly restrained from acting; such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd.¹⁷

17. Alexis de Tocqueville, *Democracy in America*, ed. H. S. Commager (New York: Oxford University Press, 1947), 580.

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4. DEMOCRACY AND “THE RIGHTS OF MAN”

If there is no check on majority rule, we have what is called unlimited democracy. Republics typically place a constitutional limit on the measures a majority may enact. But in what ways, and in what directions, should those powers be limited? One answer, which rose to great prominence in the eighteenth century, was “to protect human rights,” first stating clearly what these rights are, then enforcing them.

These were no mere “legal rights,” the rights that skilled lawyers say you have—for example, you may have a legal right to a “quickie divorce” in Nevada but not in Utah; to know what legal rights you have in the state or nation you live in, you can consult lawyers and law books. What the founders of America believed in, and what was the foundation stone of the republic they created, were moral rights—rights that all people possessed by their nature as human beings (hence “natural rights”), rights that the law ought to honor even if at a given time or place it does not. It is “the rights of man” that constitutes the principal limitation on governments, according to the founders; the foundation-stone of the new republic was the doctrine of individual rights, as set forth in the Bill of Rights, the first ten amendments to the American Constitution. The Bill of Rights provides a partial list of the rights of individuals that the new Constitution was to honor and enforce against those who would violate these rights, and the chief potential violator was the federal government; the new constitution was designed to “keep the federal government in its place” by announcing to the public what it could not do; and the only powers it was to have were those specifically listed in the new Constitution; anything that conflicted with the terms of the Constitution was to be rejected and, it was hoped, would be thrown out by the Supreme Court.

Rights are a nation's trump card in the attack on unlimited democracy.

But all this would have been impossible

if it were not that an admirable written Constitution, enforced by a powerful and vigilant Supreme Court, had restricted to small limits the possibilities of misgovernment. All the rights that men value the most are placed beyond the reach of a tyrannical majority. Congress is debarred by the Constitution from making any law prohibiting the free exercise of religion, or abridging the freedom of speech and of the press, or the right of assembly, or the right of petition. No person can be deprived of life, liberty, or property without due process of law. All the main articles of what British statesmen would regard as necessary liberties are guaranteed, and property is so fenced in by constitutional provisions that confiscatory legislation becomes almost impossible. No private property can be taken for public use without just compensation, and the Federal Constitution contains an invaluable provision forbidding any State to pass any law impairing the obligation of contracts. The danger of partial or highly graduated taxation voted by the many and falling on the few has been, in a great measure, guarded against by the clauses in the Constitution providing that representatives and direct taxes shall be apportioned among the States according to their population; that no capitation or other direct tax shall be laid unless in proportion to the census, and that all duties, imposes, and excises shall be uniform throughout the United States. The judgment of the Supreme Court condemning the income tax in 1894 brought into clear relief the full force and meaning of these provisions. Neither Congress nor the State legislatures can pass any Bill of attainder or any ex post facto law punishing acts which were not punishable when they were committed.¹⁸

In the Declaration of Independence, Jefferson spoke of “the right to life, liberty, and the pursuit of happiness.” These and

18. Lecky, *Democracy and Freedom*, 99–100.

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other formulations of “the rights of man” are extremely vague; it is often far from clear how they would apply in particular cases. Does the right to life apply to all persons under all conditions—should there, for example, be no capital punishment even for murder? Does the right to life apply to animals or only to human beings? May you not kill someone in retaliation for murdering your wife or children? Does the right to pursuit of happiness apply to all persons at all times, even to pursue one’s happiness with a life of crime?

Vaguest of all is the right to liberty: liberty to do what? Some would respond that liberty is to do anything besides initiate aggression (use force) against other individuals; but is colliding at high speed with another car part of your liberty even though others die in the accident? There are endless ramifications of all these, usually embodied in the law codes of the various states, specifying the range of punishment for each offense and describing in detail the distinctions among them, such as the differences between murder and manslaughter and the various distinctions within each: murder in the first degree, murder in the second degree, and so on. Actual laws are necessarily more detailed than the vague general principles that state the rights.

The right of freedom of speech and press was of particular importance to the founders, accustomed as they were to having their views censored by various European governments. Governments, they held, had no right to punish people for their views, however repulsive these views might be to those who heard them expressed. Could they express their views on someone else’s front yard or auditorium? No, not without permission of the owner: freedom of speech presupposes property rights—you can’t do whatever you please on property owned by others. “But doesn’t freedom of the press entitle you to place a free ad in someone else’s newspaper?” No, not without permission of

the owner of the paper; without that permission your claim would be not a right but robbery.

Many applications to particular cases are far from clear. Townspeople claim to have a right to be safe, the duty to provide the safety being the work of the police force. But what if that safety is bought at the price of violating the constitutionally guaranteed right of peaceable assembly? If you have a right to build a new house for yourself on new land, above someone else's house, do not others have a right to prevent you if it can be shown that your building there will cause mud slides on their property below? Apparently, each of these alleged rights will have to be stated in such a way that two people don't each end up having a right to the same thing (incompatibility of alleged rights). Laws requiring drivers' licenses and seatbelts and prohibiting the use of cell phones while driving are often demanded as "rights to be protected," but what if the protection is achieved at too great a cost, such as profiling speeders by race (even if it does make the roads somewhat safer by arresting more motorists who are guilty of speeding)? The neo-Nazis in Skokie, Illinois, claimed the right to hold a parade and demonstrations; but the residents of Skokie, who were mostly survivors of the Holocaust, claimed that the Nazis had no right even to defend their views in the public streets. (A possible alternative would be: permit the parade but double the police force.)

All the rights claimed by the founders are rights of noninterference. Today they are referred to as *negative* rights because their possession by one person involves no positive action on the part of others but only the negative duty of noninterference with their exercise of their right. They are so called in contrast with what are currently called positive rights, which do demand positive action by others. If I have a right to part of your income, then you have a duty to turn it over to me, even against my will.

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The exercise of such a right might soon land you in bankruptcy if the amount I claimed as my right was large enough. The exercise of a positive right (“I have a right to your house,” “I have a right to an interest-free loan from you with no definite due date”) might end your career and would soon cease to motivate you to work for a living at all because your income would be in endless jeopardy.

The founders never thought of rights as including these alleged positive rights: rights had to do not with what you could get for others’ labor but with being protected against non-voluntary interference with your life. The founders’ principal target was not other individuals but government itself. The government could not deprive you of the means of defending yourself (Second Amendment). It could not condemn you to prison without a trial (habeas corpus). These various constitutional amendments were all designed to protect individuals against the superior power that governments might use against them.

If your country has been invaded or in some way victimized by the action of other national governments, you have the right to take up arms to repel the aggressors (right of self-defense). But is it permissible for your government to force you to join in this endeavor? By what right are you, an innocent party, being forced to enlist in a cause you may not approve of, perhaps lose your arms and legs, even your life, to shoot or bayonet others to death who have done you no wrong? “Either you believe,” wrote Ayn Rand in 1941,

that each individual man has value, dignity, and certain inalienable rights which cannot be sacrificed for any cause, for any purpose, for any collective, for any number of other men whatsoever . . . or else you believe that a number of men—it doesn’t matter what you call it: a collective, a class, a race, or a State—hold all rights, and any individual man can be sacrificed if some

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collective good—it doesn't matter what you call it: better distribution of wealth, racial purity, or the Millennium—demands it. . . . (And) if you are willing to believe that men should be deprived of all rights for a good cause—you are a Totalitarian. . . . Stalin and Hitler believe that their causes are good. Stalin thinks that he is helping the downtrodden, and Hitler thinks that he is serving his country as a patriot. They are good causes, both of them, aren't they? Then what creates the horrors of Russia and of Germany? What is destroying all civilization? Just this one idea—that to good cause everything can be sacrificed, that individual men have no rights which must be respected, that what one person believes to be good can be put over on the others by force. And if you—in the privacy of your own mind—believe so strongly in some particular good of yours that you would be willing to deprive men of all rights for the sake of this good, then you are as guilty of all the horrors of today as Hitler and Stalin.¹⁹

On this issue many persons today agree: murder is a violation of the victim's right to life. The fact that slavery was not prohibited in the Constitution was a compromise with the South, and a civil war was deemed necessary to correct that constitutional error. So much was anticipated by the founders themselves, who compromised their principles in order to form a federal government encompassing both North and South. There remain, however, some moral issues on which those sympathetic to Rand's position will nevertheless be torn. One of them is the problem of involuntary servitude in the armed forces (the draft). Many contend that it was imperative for the future of the world that the Nazi and Japanese dictatorships should be brought down and that this would have to involve military action on the part of (at least) the United States. The Axis powers almost won the war before the end of 1942. A

19. Ayn Rand, *The Journals of Ayn Rand* (New York: Dutton, 1997), 349–350.

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response to this double threat would require that a massive military force be ready at the earliest possible moment—five years later would be too late. And so, it was reasoned, a military draft would be needed in order to achieve victory in time to prevent the Axis from controlling most of the world. Thus the dilemma: if I am doing wrong in forcing you (or voting to make others force you) to suffer and die, perhaps to lie frozen in mud-soaked trenches, how am I justified in forcing you to do this even though such actions might be required in order to save the world from a Nazi take-over for the indefinite future? Here is a young man full of promise, with a great career ahead of him, and instead of allowing him to live to fulfill his plans, we order him to learn to fly and to bomb the enemy's cities from the air. "I hereby order you to kill people so that we can continue to live in comfort"—is this to be counted as a heroic battle cry? Have we the right to engage in such acts of coercion, even to realize a goal that would benefit, or even make possible, the continuation of civilized life on this planet?

If for lack of a drafted army our cause had been defeated and a regime of worldwide terror and death had resulted, would we not then regret our delicacy in "tolerating noncooperation" to achieve such a worthwhile end? Wouldn't the victory of the good have been worth achieving at the price of drafting a few thousand men?

But worth it to whom? Those who died before they had a chance to see their cause victorious? To those who enjoyed the fruits of victory while paying no price? Most people, it seems, camouflage the starkness of the choice with consoling euphemisms: achieving victory, serving one's country, seeing it through to the end—which blunt the sharp cutting edge of the issue, sheltering their minds from the real difficulties of the choice.