The American University Journal of International Law and Policy

Conference on Constitutional Federalism: The United States Experience — Implications for South African Reform, held at The American University in June 1992, sponsored by The Eleanor Roosevelt Institute for Justice and Peace

Volume 8, Numbers 2 & 3, Winter/Spring 1992/1993

ON THE FIRST PRINCIPLES OF CONSTITUTIONALISM: LIBERTY, THEN DEMOCRACY

Roger Pilon*

In response to Morton Halperin's discussion of political and civil rights,[1] I want to take exception not to the specific points Mr. Halperin has made, with which I am in substantial agreement, but to the approach he has taken to his subject and, as a result, to the emphasis that follows. More broadly, however, I want to take exception to the approach this entire symposium takes to the larger, profoundly important subject it treats, constitutionalism. In the course of doing so, I will argue that if our South African friends wish to draw upon the American experience in their efforts to bring about constitutional reform, they would be better advised to look not to what we do today but to what we did when we first embarked on our experiment in ordered liberty more than 200 years ago. More precisely, I contend that America's Founders got it right when they began, in the natural rights tradition, with libertarian substance, then moved to democratic process.

This symposium, reflecting nothing so much as the approach to government that came from our Progressive Era, has it exactly wrong when it begins with democratic process, for that approach yields neither legitimacy nor, quite often, liberty; and it encourages us to look for public solutions to what are in fact private problems. If justice is our ultimate concern, in short, we need to focus first on the substance of justice—liberty—and only then on the means for securing liberty, but one of which is democracy.

On Doing Things Backwards

Mr. Halperin has distilled for us what he takes to be "the core or the essence of political and civil rights as they exist in the United States," to help in drawing implications for South African reform. Toward that

---

* Senior Fellow and Director, Center for Constitutional Studies, Cato Institute.

1. *See* Morton Halperin, *Limited Constitutional Democracy: Lessons from the American Experience*, 8 AM. U.J. INT'L L. & POL'Y 523 (1993).

end he distinguishes and discusses "four essential elements" of a "limited constitutional democracy": free elections; legitimacy of political opposition; limits on arbitrary arrest, detention, and punishment; and protection for minority rights—the last of which he admits raises perplexing problems. And he points finally, by way of institutional safeguard, to the importance of an independent judiciary and independent private "watchdog" organizations if the system is to survive.

On the Need to Justify

Those are indeed core elements of limited constitutional democracy, as a look around the world makes clear. In his discussion, however, Mr. Halperin has simply assumed their legitimacy, which leads one to ask why we should believe those elements, or that system, are themselves justified. Indeed, in many parts of the world, including South Africa, there are people and parties who take strong exception to one or more of those elements and to the system of limited constitutional democracy itself. Perhaps Mr. Halperin thinks that system and those elements need no justification. At the least, he has given us no ground on which to answer critics of the system he sets forth.

On the other hand, many would point out that Mr. Halperin has touched upon only a very limited portion of our political and civil rights. In particular, the whole domain of economic activity—where most people spend most of their lives—is all but ignored in Mr. Halperin's discussion. To be sure, his discussion of minority rights broaches the issue of private activity when it speaks of religious and educational freedom. But it goes no farther, suggesting that his "civil rights" may not include those economic liberties—private property and freedom of contract, in particular—that many expect to find as civil rights in a limited constitutional democracy.

Lest these misgivings be thought unwarranted—for they stem from Mr. Halperin's emphases and omissions, not from his commissions—we need only turn to the next section of this symposium to find Professor Herman Schwartz discussing "social and economic rights" (which stand, presumably, in a category apart from "political and civil rights"),[2] that whole body of 20th century "entitlements" that inhere in man not "by nature" but by government direction. If there are rights to housing, health care, jobs—indeed, to "periodic holidays with pay," as Article 24

2. *See* Herman Schwartz, *Economic and Social Rights*, 8 AM. U.J. INT'L LAW & POL'Y 551 (1993).

of the United Nations Universal Declaration of Human Rights tells us—then those "rights" entail not simply that others leave us alone, as do traditional natural rights, but that they affirmatively provide us with the goods and services that are the content of such rights.[3] And that means that government must coerce the provision of those things from individuals or organizations that may be otherwise unwilling to provide them voluntarily. At a minimum, that means taxes and regulation. At a maximum, it means total socialization. But in either case, it means affirmative regimentation and, to the degree of that regimentation, the diminution of the right to plan and live one's own life that is thought by many to be the very mark of a free society—which I gather is another way Mr. Halperin might describe a limited constitutional democracy.

In the division of labor they have been assigned, then, Mr. Halperin and Professor Schwartz are carrying forth a bifurcated rights program that finds its intellectual roots in America in the Progressive Era, in England in offshoots of Karl Marx, and in Europe in certain elements of the French Revolution as well as later German schools of "good government." Call it the mixed economy, call it social democracy, call it by the various names that have attached to its various strains, it is a vision of political arrangements that distinguishes the political from the economic in ways that the classical liberal theorists, who gave us the theory of rights in the first place, would have found uncomfortable and, indeed, unjustifiable.

Which brings me to my larger concern. The divide that Mr. Halperin and Professor Schwartz are working, each in his own way, and the larger division in this symposium between, first, what the symposium organizers have called "instruments of governance" (federalism, the separation of powers) and, second, what might be called the "substance of governance" (these rights issues), invite us to indulge the following, altogether modern, scenario. In democratic politics, which is the only kind of politics the 20th century will entertain, we begin by coming together in some original position to constitute ourselves, whereupon we create institutions of government, the principal of which, the legislature, declares the law, including the substantive law of rights. We declare thus a will-based body of positive law: the law is what the sovereign—the people, through their representatives—says it is. At the same time, we sense, uneasily, that not any exercise of democratic will will do; there are certain rights, that is, that seem more "central" to the

---

3. *See* Maurice Cranston, *Human Rights, Real and Supposed*, *in* POLITICAL THEORY AND THE RIGHTS OF MAN 43-53 (D.D. Raphael ed., 1967).

enterprise than others—the right to participate in the process or vote, for example, or the right to bodily integrity, or perhaps rights pertaining to certain "basic" needs, like intellectual liberty, or food and shelter. We are not quite sure why these reservations arise, although we make certain representations about "social values" or "consensus" or the like. In any event, in all of this it is process first, substance second—much as in this symposium. Indeed, substance flows from process, we are told, deriving whatever legitimacy it may have from that process—the democratic process itself being in some sense inherently legitimate.

By implication, this is the approach of both Mr. Halperin and Professor Schwartz. It is the approach of this symposium. And it is the approach of modern "declarations" of rights and theories of government. Yet it is an approach fraught with moral peril because it is utterly without moral foundation. Indeed, the process approach to legitimacy can as easily "justify" capitalism as socialism, liberty as tyranny, monarchy as democracy—or, indeed, one-party rule. More accurately, the process approach can justify none of those because politics as process is not a justificatory theory. It is a declaratory theory.

It may seem odd in this symposium on the American experience, aimed at drawing implications for South African reform, to be critical of democratic process, which is often thought to be America's contribution to modern political thought, and South Africa's deepest requirement. And shortly I will not be critical of democracy, properly conceived. But America at its birth was not about democracy; it was about liberty. And between the two there is all the difference in the world.

Why Democratic Process Does Not Justify

To examine that difference, let us see first just how it is that the process approach to legitimacy fails to justify the results that flow from the process by failing to answer the fundamental question of political philosophy: By what right does one man have power over another? As that question makes clear, the basic project of political philosophy, especially in the classical liberal tradition, is legitimacy. Toward that end, and out of a concern for methodological simplicity, to say nothing of moral imperative, the project begins not with the group but with the individual, in whom rights inhere if they inhere anywhere. Yet that is the starting point of the democratic process approach as well, for in standing opposed to various forms of authoritarianism, democracy turns to rule by the people, which derives whatever legitimacy it may have from the prior right of every individual to rule himself and himself alone. After all, if the authoritarian ruler is stopped short by the

people's question—By what right do you rule over us?—so too are the people themselves stopped short by the individual's question—By what right do you rule over me? Just as authoritarian rulers must try to answer the first question, so too democratic rulers must try to answer the second question—at least insofar as they pretend to legitimacy.

The classic answer to this question, of course, is found in consent. As the American Declaration of Independence states: "governments are instituted among men, deriving their *just* powers from the *consent* of the governed"[4] (emphasis added). To be just, or legitimate, power over another must be grounded in the consent of that other. For just as with any ordinary contract, the individual cannot be bound by the will of another unless he has agreed to be bound and, as a corollary, cannot be heard to complain if he has so agreed.

The problem for process theory, however, is in satisfying that consent requirement, in showing that consent adequate to yield legitimate power arises. Unanimity will work, of course, but unanimity is rarely, if ever, achieved. The resort to majoritarianism, however, will not work. For whether the majority is 50 percent plus one or 100 percent minus one, the minority, by definition, has not consented and so cannot legitimately be bound.

Understanding this, the classical theorists never argued that mere majoritarianism would produce legitimacy. Instead, they proposed the "social contract" whereby prior unanimous consent, in the original position, might serve thereafter to justify the results that flowed from the majoritarian process that had been agreed to in that original position. The problems with that approach, however, are that we still need unanimity to get the game going, and only those in the original position can be bound—a problem that becomes especially acute with subsequent generations, who have never given that original consent. Contractarians are thus driven to a theory of "tacit" consent: those who stay, after the majority has decided, are deemed to have given their tacit consent. Obviously, that answer is patently circular: it has the majority putting the minority to a choice between leaving or coming under its will—precisely the point that has to be justified, not assumed away. Moreover, the argument from tacit consent can be used to "justify" not only majoritarian but any other results, from one-party to one-man rule.

As these considerations should make clear, save in the all but nonexistent case of unanimity, the process approach does not produce legitimacy. Nor does mere participation in the process amount to the same

4. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

thing as giving one's consent to be bound by the outcome of the process. Doubtless it is better that the political process permit more, rather than less, participation among those affected by the outcome, for those affected might then have some opportunity to influence the outcome. But that participation should not be confused with giving consent to the outcome. Rather, it is more akin to pre-contract negotiations in the private realm. With private negotiations, however, the parties can always walk away if a bargain is not struck. No such option is available in the public realm, for those who do not consent will be bound anyway.

Government as a Forced Association

Thus, social contract theory, which reflects the process side of modern constitutionalism, is no more than a useful device to show how a people at a particular point in time might constitute itself—as opposed to being constituted by a king, say, or by a party or some other fraction of the whole. It is a device that gets the political enterprise off the ground by involving all, or at least most, of the people affected at a given time rather than just some of those people. But again, involvement is not consent. Having a say is better than not having a say—that is the moral advance the social contract brings about. But rare is the individual or group that will give up autonomy simply to have a say.[5] Government is thus not like a private voluntary association, which one is free to join or leave on mutually agreed upon terms. Rather, it is a forced association. Thus, when the classical theorists spoke of government as a "necessary evil" they meant it was "necessary" to overcome the practical problems of enforcing rights in the absence of government; but it was "evil" insofar as it had about it this character of being a forced association. For this reason at least, they argued for limited government, since every expansion of government is an expansion of the inherent illegitimacy that surrounds government as such.

The importance of recognizing this inherent character of government, even democratic government, as a forced association cannot be overstated. For the modern tendency has been to think that once an authoritarian regime has been overthrown and "the people" have at last come to power, then all—or at least the basic—problems of illegitimacy are past. The reality, of course, is much different, for "the people," as just shown, never do rule. At best, a majority of the people rule on a given issue at a given time. That gives rise to the very real potential for tyr-

---

5. *See* ROBERT P. WOLFF, IN DEFENSE OF ANARCHISM (1970).

anny by the majority; indeed, given the myth of legitimacy that surrounds democratic rule, the potential for majoritarian tyranny is doubtless much greater than for tyranny by the minority, which hardly pretends to such legitimacy. Yet the true situation is still worse, for as modern experience shows, not even majorities really rule. Representation, periodic elections, the packaging of legislation, expansive government, and much else all combine to give us government that reflects the interests not of the majority but of the forces that are best able to manipulate the political system to their narrow advantage. Thus, rule by the people is really rule by the majority; and rule by the majority is really rule by special interests—indeed, is the tyranny of the special interests.

Yet this progression is found everywhere that government is found, for it is inherent in government as such, as economists from the Public Choice school have repeatedly shown.[6] And it was understood well before Adam Smith, which is why America's Founders sought to contain it through constitutional constraints. As long as we ignore those constraints, however, as we in America have done for better than half a century, the progression from the people, to the majority, to special interests will only get worse—not least because it is cloaked in the mantle of democratic legitimacy. Indeed, if the problem is inherent in government as such, the answer is not to try to more fully "democratize" government—a common response from those who notice the problem, yet cling to the myth of democratic legitimacy. Rather, it is to do *less* through government, where illegitimacy is inherent, and more through the private sector, where people can pursue ends through free, voluntary association. We turn, then, to the true foundations of the American experiment—not democracy and the public pursuit of policy but individualism and the private pursuit of happiness.

On Doing Things Right

Nowhere is the American vision—and this idea that freedom comes first, government second, as a means to secure freedom—more clearly set forth than in the American Declaration of Independence, the seminal phrases of which have inspired countless millions around the world for better than two centuries. It is crucial to notice, however, that those phrases begin not with the premise of moral equality but, more importantly, with the proposition that that premise and all it entails are true

---

6. *See* JAMES M. BUCHANAN, THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN ch. 9 (1975).

and, more important still, self-evidently true—true as a matter of reason. At the outset, that is, America's Founders placed us in the natural law tradition, which holds that there is a higher law of right and wrong, grounded in and discoverable by reason, against which to judge positive law, and from which to derive positive law. Without such a compass, positive law is mere will, the expression of the will of those in power. And as we have seen, mere will, whether of the king or of the majority, does not give law its legitimacy. Only principles of reason can do that.

Natural Law and Constitutionalism

We come, then, to the great divide among constitutionalists, between those republicans who believe that the entire enterprise of constitutionalism is constrained by certain principles of right and wrong, rooted in canons of reason, that not even "the people" may abridge; and those democrats who believe that the people have more—perhaps unlimited—latitude to shape their political society along lines that a majority or, more often, some supermajority may wish. As indicated above, I believe that the democrats face profound difficulties in justifying their position *on its own terms*. For the right of the people to chart its own destiny turns, in the end, on the right of each member to chart his own destiny. And when the former starts to conflict with the latter, we have to ask, as a matter of rational consistency, how that "group right" could conflict with the individual right if in fact it is derived from the individual right. Insofar as we are concerned with rational justification, that is, it turns out that the right of "the people" to chart their own destiny is rather more limited than many democrats may have realized. In particular, it is constrained by the right that each of us has to chart his own destiny, which sets the boundaries for any rights the people may have.

This is not the place to enter into a discussion of the epistemological foundations of that individual right, which is our starting point. Suffice it to say that much work has been done in recent years to secure the rational foundations of the theory of rights against the criticisms of moral skepticism that have been with us since antiquity.[7] For our purposes, it is enough to assume the right, since the same assumption un-

---

7. *See* Roger Pilon, A Theory of Rights: Toward Limited Government (1979) (Ph. D. dissertation, University of Chicago); Roger Pilon, *On Moral and Legal Justification*, 11 SW. U.L. REV. 1327-44 (1979). *Cf.*, ALAN GEWIRTH, REASON AND MORALITY (1978); DERYCK BEYLEVELD, THE DIALECTICAL NECESSITY OF MORALITY (1991); DOUGLAS B. RASMUSSEN & DOUGLAS J. DEN UYL, LIBERTY AND NATURE (1991).

derpins the enterprise of the democratic theorists. So assuming, it turns out that our premise of moral equality, defined by this basic right, yields a moral world rather different than the one Mr. Halperin has drawn by implication, through his emphases and omissions, and Professor Schwartz has drawn explicitly. In fact, what emerges is a unity of rights, not a bifurcated world of political and civil rights on one hand and social and economic "entitlements" on the other. In particular, the political and civil rights Mr. Halperin outlines are but a part—and by no means the larger part—of a world of rights and correlative obligations that are all derived from the fundamental right to be free; but among those rights we do not find the entitlements Professor Schwartz discusses—on the contrary, such entitlements, if enacted in positive law, are in direct conflict with our right to be free.[8]

We return, then, for a closer look at the Declaration of Independence, where we discover that the seminal phrases are divided in two parts: in the first part the moral vision is set forth; in the second part we find the political and legal vision. The moral vision is composed of a premise of moral equality, defined by our equal rights to life, liberty, and the pursuit of happiness. The political and legal vision sets forth the purpose of government—to secure those rights—and the character of a legitimate government—one whose powers are derived from the consent of the governed. Although the two parts are intimately connected, it is crucial to distinguish them and to appreciate their order and the relationships between them. The moral vision comes first: it pre-exists government; it is not created by government; on the contrary, it is what we create government to secure. Thus, we do not get our rights from government; on the contrary, it is we who give government whatever powers it has. The political and legal vision comes second: the reason we create government, and give it its powers, is to secure our rights, to secure the pre-existing moral order.

To understand the proper function and scope of government, therefore, it is imperative that we understand first the character of the moral order—the theoretical state of nature, governed by reason—that government is created to secure. For that order will set the bounds of legitimate government power. More precisely, since consent alone cannot legitimate those bounds, as we saw earlier, government power must derive its legitimacy from substantive, not from procedural, considerations. In particular, we can imagine yielding up to government only

---

8. *See* Roger Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171-96 (1979).

those powers that each of us first has in the state of nature, prior to the creation of government. As a corollary, to be legitimate, any power of government must have been held first by individuals prior to the creation of government. If not, where would government have gotten such a power, since individuals, in the original position, never had it to yield up?[9]

To illustrate these points, each of us has the executive or police power in the state of nature, the power to secure his own rights.[10] Accordingly, we can imagine yielding that power to government, to exercise on our behalf. And the scope of the power would be constrained by the rights of others. By contrast, none of us has a redistributive "welfare" power in the state of nature—a power to take from some to give to others—for such a power would violate the rights of others to be free from such takings. Thus, there is no such power to yield up to government, and any such power claimed by government must accordingly be illegitimate—first, because government cannot show its derivation and, second, because the exercise of such a power would violate the rights of others, exactly as the private exercise would.

We see, then, how the very approach of the Declaration—with the moral world first, the political and legal world second—serves at once to both legitimate and constrain government power. To accomplish those dual functions, however, the theory of rights, which is the centerpiece of the Declaration, must be clearly understood. That means turning to philosophy. But to help flesh out the theory in a consistent, rationally grounded way, it is also useful to draw upon the background common law. For the common law—discovered by judges, not made by legislatures—was the law of private relationships that constituted for the most part the moral world America's Founders had in mind for government to secure. Indeed, the connection between that law and natural law has been well noted by Edward Corwin: "The notion that the common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law."[11] Let us look more closely, then, at this basic law of right and wrong.

---

9. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 6 (1974).

10. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT ¶ 13.

11. *See* EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 26 (1955).

The Moral Vision

Central to the common law were three principles: (1) that rights are relationships, between right-holders and correlative obligation-holders;[12] (2) that our rights are defined, at bottom, by property and contract; and (3), as a corollary of (2), that property defines our natural or general relationships with common-law strangers, and contract defines the special relationships that arise from voluntary agreements.[13] Add a realistic causal theory for torts,[14] and the common law can order the entire world of private relationships, the world of rights and obligations that it becomes the business of government to secure.

When the Declaration speaks of our rights to life, liberty, and the pursuit of happiness, it starts with the natural or general right that each of us has to be free, to plan and live his own life free from the interference of others, provided only that in exercising that right we respect the equal right of others.[15] And that right, however described, can be usefully reduced to property. John Locke, whose thinking made its way to the center of the Declaration, stated the matter plainly: "Lives, Liberties and Estates, which I call by the general name, *Property*."[16] Each of us has a property in his life, his liberty, and the property in the world that he acquires without violating any right that others may have in the property. That right is good against the world—hence, it is "general." And it is violated when others "take" the property. To understand what our natural or general rights are, then, we have to be clear about the many forms the property we possess in ourselves and in the world can take, from life to liberty of action to freedom from trespass upon our person or property. Included among our natural rights, then, are both liberties (of action) and immunities (from the torts or crimes of others), both of which have property as their foundation. In general, whether in

---

12. *See* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING, (Walter W. Cook ed., 1946).

13. On general and special relationships, *see* H.L.A. Hart, *Are There Any Natural Rights?* 64 PHIL. REV. 175 (1955).

14. *See* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

15. The discussion that follows draws upon Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, *in* MARKET LIBERALISM: A PARADIGM FOR THE 21ST CENTURY (David Boaz & Edward H. Crane eds., 1993).

16. Locke, *supra* note 10, ¶ 123.

the area of expression or religion or commercial activity or privacy, we are free to enjoy what is ours except insofar as doing so prevents others from enjoying what is theirs.

Broadly understood, then, property is the foundation of all our natural rights. Exercising those rights, consistent with the rights of others, we may pursue happiness in any way we wish. One way to do that, of course, is through association with others. We come then to the second great font of rights, promise or contract. (The rights we create through contract are not natural rights—we do not have them "by nature"—but like natural rights they are a species of moral right.) Through voluntary agreements with others we create the complex web of associations that constitutes the better part of what we call civilization. Here, the rights and obligations created are as various as human imagination allows, whether they arise from spot transactions or from enduring agreements creating institutions ranging from families to churches, clubs, corporations, charitable organizations, and many others.

Legal Recognition

In outline, then, this is the moral world—described by our moral rights and obligations, both natural and contractual—that the American Founders created government to secure. In fact, when we look to the American Constitution, the Bill of Rights, and the Civil War Amendments, we find explicit recognition of those rights. The Fifth Amendment's takings clause recognizes the right to private property, for example, as the Constitution itself recognizes the right to contract. In the Fifth and Fourteenth Amendments we find that no one may be deprived of life, liberty, or property without due process of law. (And by "law" the drafters could hardly have meant mere legislation or the guarantee would have been all but empty.)[17] Similarly, the Thirteenth Amendment abolished at last the practice of slavery or involuntary servitude, making it plain that no one may own another, that each of us owns himself and himself alone.

The privileges and immunities clauses of both the Constitution and the Fourteenth Amendment hark back to our "natural liberties," as William Blackstone observed.[18] Likewise, the Seventh Amendment's refer-

---

17. *See* Roger Pilon, *Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY 183 (James A. Dorne & Henry G. Manne eds., 1987).

18. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765) 125-29.

ence to and, by implication, incorporation of the common law reminds us of Edward Corwin's observation, noted above, that the common law embodied right reason. The First Amendment's guarantees regarding religion, speech, the press, assembly, and petition; the Second Amendment's recognition of the right to keep and bear arms; the several guarantees in the Constitution and the Bill of Rights regarding criminal investigations and prosecutions; and finally the Ninth Amendment's reminder that only certain of our rights are enumerated in the Constitution, the rest remaining unenumerated and retained,[19] are among the many indications, ranging over nearly 100 years, of the kind of world America's earlier generations had in mind for government to secure.[20]

That world, the moral vision the American Founders first set forth, was one of private individuals standing in private relationships with one another, each with a right to make of himself as much as he wished and could, and each responsible for his choices and actions, good and bad alike. It was a world both static and dynamic. The minimal legal framework, designed to secure our rights and obligations, was static in the sense that it was derived from immutable principles of right and wrong, reflecting the human condition as such. Yet the Founders' world was fundamentally dynamic in that it allowed for—indeed, protected—the rich variety of human experience and experiment that we all know is possible under conditions of freedom.[21] That dynamism was expected to come from individuals, however, not from government. In particular, it was not government's responsibility to promote prosperity. Rather, that was the business of individuals, alone or in private association with each other.

It is especially important to notice too that the world America's Founders envisioned was largely a world of private law, which enabled people to prosper or fail, protecting them only from the depredations of others. It was not a world of public law, especially public redistributive law, which could only encourage people to look to government both for prosperity and for protection from failure. No, the purpose of government, as the Constitution states, is to promote the *general* welfare—that is, the welfare of all—by establishing justice, ensuring domestic tranquility, and securing the blessings of liberty. If government limited itself to those ends, individuals would be free, in their private capacities, to

---

19. *See* RANDY E. BARNETT ED., THE RIGHTS RETAINED BY THE PEOPLE (1989).

20. *See* Terry Brennan, *Natural Rights and the Constitution: The Original "Original Intent"*, 15 HARV. J.L. & PUB. POL'Y 965 (1992).

21. *See generally* FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY (1960).

pursue their own welfare, for which they alone are responsible.

The Political and Legal Means

To secure that moral vision—a vision of individual liberty and individual responsibility, recognized in law—government was created and government powers were authorized. As discussed earlier, however, America's Founders recognized that consent was an imperfect route to legitimating those powers, that government was a forced association and a necessary evil. Accordingly, given the need for government, they sought to limit government's powers through constitutional restraints. The practical problem they faced in this was one of creating a government that was at once strong enough to secure our rights yet not so strong as to violate those very rights in the process. Thus, they created a set of limited powers; but realizing that power tends to corrupt, they checked and balanced those powers at every turn. One such check, of course, was the electoral process, about which Mr. Halperin speaks. Yet that process was itself checked by everything from representative government to the indirect election of senators and presidents to the lifetime appointment of judges. At the same time, power was divided between the federal and the state governments, with most reserved to the states, where presumably it could be more immediately controlled by the people. Meanwhile, at the federal level, power was separated among the three branches, each of which had checks upon the others. The final check was the power of the judiciary to review the acts of the political branches and the states and rule them unconstitutional.

But the most important restraint, especially given the power of judicial review, was meant to be found in the central strategy of the Constitution, which made it clear that ours was to be an extremely limited government. First, the Constitution was a document of enumerated powers, meaning that the federal government was to have only those powers that were strictly enumerated in the text. Second, the exercise of those powers was to be restrained by the necessary and proper clause, which authorized Congress to exercise its limited powers only through laws that were necessary and proper for doing so. And finally, a bill of rights was added to the Constitution, which together with the guarantees in the original document itself made it plain that the federal government was to be further restrained in the exercise of its enumerated powers by both enumerated and unenumerated rights.[22] Thus, while the federal govern-

22. *See* Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L.

ment was given enough power to govern, the Founders' idea of governing was extremely limited, especially when contrasted with the governing done by European governments at the time and our own government today.

On the Unity of Rights

From this outline of both the substantive moral world America's Founders had in mind for government to secure, and the political and legal powers they created to secure it, it should be clear, with respect to "political and civil rights," that our civil rights come first, our political rights second, as means of securing those civil rights. And our civil rights—however variously described, in various contexts—rest on a foundation of property and contract. About this, Mr. Halperin has said nothing, save for his brief discussion of the right to be free from arbitrary arrest, detention, and punishment. Those are important rights, to be sure. But they are only a small part of a much larger body of civil rights, which protect us not simply from arbitrary arrest but, more broadly, from the takings of our liberty and property—whether through taxation or regulation—that have come to be the daily stuff of modern government.

Professor Schwartz, by contrast, has defended such takings, for they are a necessary pre-condition of the "social and economic rights" he advances. Thus, he has denigrated, by necessity, the civil rights that must be invaded if his "entitlements" are to be enforced. And make no mistake, there are no two ways about it: the degree to which we are entitled to the goods and services of others—including restrictions on their otherwise rightful liberties—is the degree to which those others are unfree to plan and live their own lives. None of which, of course, is to denigrate Good Samaritanism. But there is as much difference between private Good Samaritanism and "public charity" as there is between private charity and theft. In our private capacities, we have a perfect right to assist others—and ought to do so if we are decent people. In our public capacities, however, we have no more right to forcibly transfer assets from one group to another than we would have in our private capacities to do the same.[23] And the authorization of a majority—which

---

REV. 1127 (1987).

23. *See* Symposium, *Richard Epstein's* Takings: Private Property and the Power of Eminent Domain, 41 U. MIAMI L. REV. 49, 80 (1986) [hereinafter Symposium]; JAMES M. RATCLIFFE ED., THE GOOD SAMARITAN AND THE LAW (1966).

may be the very majority that receives the assets—changes that conclusion not in the least.

By his omissions, then, and by his focus primarily on the rights of political participation, Mr. Halperin may be supposed to be of that modern school of democrats who believe that political power may direct a nation's activities, especially its economic activities, toward various public purposes, and about this there are no burning issues of right or wrong. If that is a fair reading of his position, I hope to have shown that it is profoundly mistaken, for it fails to recognize the essential unity of the theory of rights. The right to be free, the right to plan and live one's own life, is invaded equally by measures that restrict economic practices as by measures that restrict religious practices, by measures that restrict commercial liberty as by measures that restrict political liberty. In thinking about justice, we must not confuse rights with values. The right to pursue whatever values we wish, consistent with respecting the same right in others, is what the liberal society is all about. The government of such a society must make no judgment about values, except at the margin. Its concern—as a matter of right—must be limited instead to rights, to securing the right of each individual to pursue his own values. But to give effect to that concern, it must understand those rights—and the distinction between rights and values—and that is where we in America, over the years, have gone wrong.

The Demise of the American Vision

Throughout most of the 19th century, America's constitutional safeguards remained largely intact. Not that there were not efforts, virtually from the start, to enlarge government's powers. But attempts to engage Congress in "general welfare" programs were generally resisted—in that body, and on constitutional principle. And when such measures did get out of Congress, presidents were often quick to veto them—again on constitutional principle, usually on the ground that no power to pursue such measures could be found in the Constitution.[24]

Nevertheless, the climate of ideas had been slowly changing throughout the century. In ethics, we saw the decline of natural rights theory and the rise of utilitarianism. In politics, republicanism was being replaced by democratic theory. And in law, pragmatic instrumentalism—the idea that law should be used as an instrument for

24. *See* Symposium, *supra* note 23; CHARLES WARREN, CONGRESS AS SANTA CLAUS (1978).

accomplishing social goals—was gaining ground.[25] The advent of the Industrial Revolution, with its accompanying urbanization and "social problems," only hastened that change. Thus, by the time the Progressive Era was upon us, late in the century, we were no longer thinking of government as a necessary evil, to be constrained at every turn; rather, we were thinking of it as an institution for doing good, an instrument for solving social problems. That shift from a conception of government instituted to secure rights to one of government empowered to pursue social goals marked a fundamental change. Because it was a shift from principle to policy, it made inroads in the political branches especially. During the early decades of the 20th century the Supreme Court made halting efforts to resist the expansion of government, but that resistance was episodic and never deeply grounded.

The crisis came at last during the Depression when President Roosevelt threatened to pack a recalcitrant Court, which had stood athwart his New Deal programs, with six additional members. The scheme failed on the surface, but the Court got the message, stepped aside, and constitutional restraints on expansive government were thereafter all but ignored. In fact, in its 1938 *Carolene Products* decision,[26] the Court laid the foundation for modern constitutional jurisprudence in America when it distinguished two kinds of rights—"fundamental" and "nonfundamental"—and two levels of judicial review—strict scrutiny for legislation implicating the former, minimal scrutiny for legislation implicating the latter. Among the "fundamental rights" were certain "political and civil rights," such as the right to vote and rights of political opposition, the very rights Mr. Halperin has highlighted. Among the "nonfundamental rights" were all the economic liberties, including rights of property and contract, the very rights Mr. Halperin has ignored, which would thereafter be all but unprotected by the Court. And in all of this, the Constitution itself changed by not a word. Indeed, the new attitude was perhaps best reflected in a 1935 letter from President Roosevelt to the House Ways and Means Committee: "I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation."[27]

---

25. *See* Michael S. Moore, *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism*, 69 CORNELL L. REV. 988 (1984); Robert Summers, *Pragmatic Instrumentalism: America's Leading Theory of Law*, 5 CORNELL L.F. 15 (1978).

26. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

27. Letter from President Franklin D. Roosevelt to Representative Samuel B. Hill, House Ways and Means Committee (July 6, 1935), *in* 4 THE PUBLIC PAPERS AND

Thus, the ideas of the Progressive Era—especially the idea that government should be more actively involved in trying to solve a whole host of "social problems"—were instituted through the politics of the New Deal, notwithstanding a Constitution that offered no support whatever for those ideas—indeed, stood athwart them. What is worse, the idea that government could run roughshod over property rights and economic liberties, in the name of public policy, was soon buttressed by the idea that the recipients of public transfers were "entitled" to those goods "by right." Thus emerged a new category of "rights," the "social and economic rights" Professor Schwartz advances, to complement the (narrowed) "political and civil rights" the exercise of which could only enlarge those "entitlements" as more and more learned to play the political game. The result, of course, was entirely predictable—and indeed was predicted by the classical theorists when they wrote of that war of all against all.

Today in America, as our recent election debates have illustrated, we no longer think of principle but of policy. We speak not about who we are but about what we want. And our political life is dominated by the view, held by politicians and citizens alike, that the purpose of government is to solve our private problems, from unemployment to health care, retirement security, economic competition, child care, education, and on and on. Having thus socialized our problems, however, our flight from individual responsibility does not end. For once we realize, however dimly, that social benefits require social costs—either taxes or regulations—we then seek to foist those costs upon the wealthy or the industrious. Yet that move has its limits—the rich and industrious can afford to leave, after all. So we try next to shift the costs of our appetites to our children in the form of the federal deficit. Tax and spend thus becomes borrow and spend as the flight from responsibility, and reality, continues.

That pattern cannot continue forever, of course, for the end of increasing socialization is the economic collapse we have seen recently in so many parts of the world. And when that comes, the price is extraordinary, as we are seeing. Socialism is terribly easy to get into, terribly difficult to get out of. Recognizing that, America's Founders tried to prevent the slide through constitutional restraints. They succeeded for a time, but at last were overcome by changes in the climate of ideas. Thus, it is to the world of ideas that friends of freedom must turn their

---

ADDRESSES OF FRANKLIN D. ROOSEVELT 297, 298 (Samuel I. Rosenman ed., 1938).

attention. That is the principal lesson to be learned from the American experience.