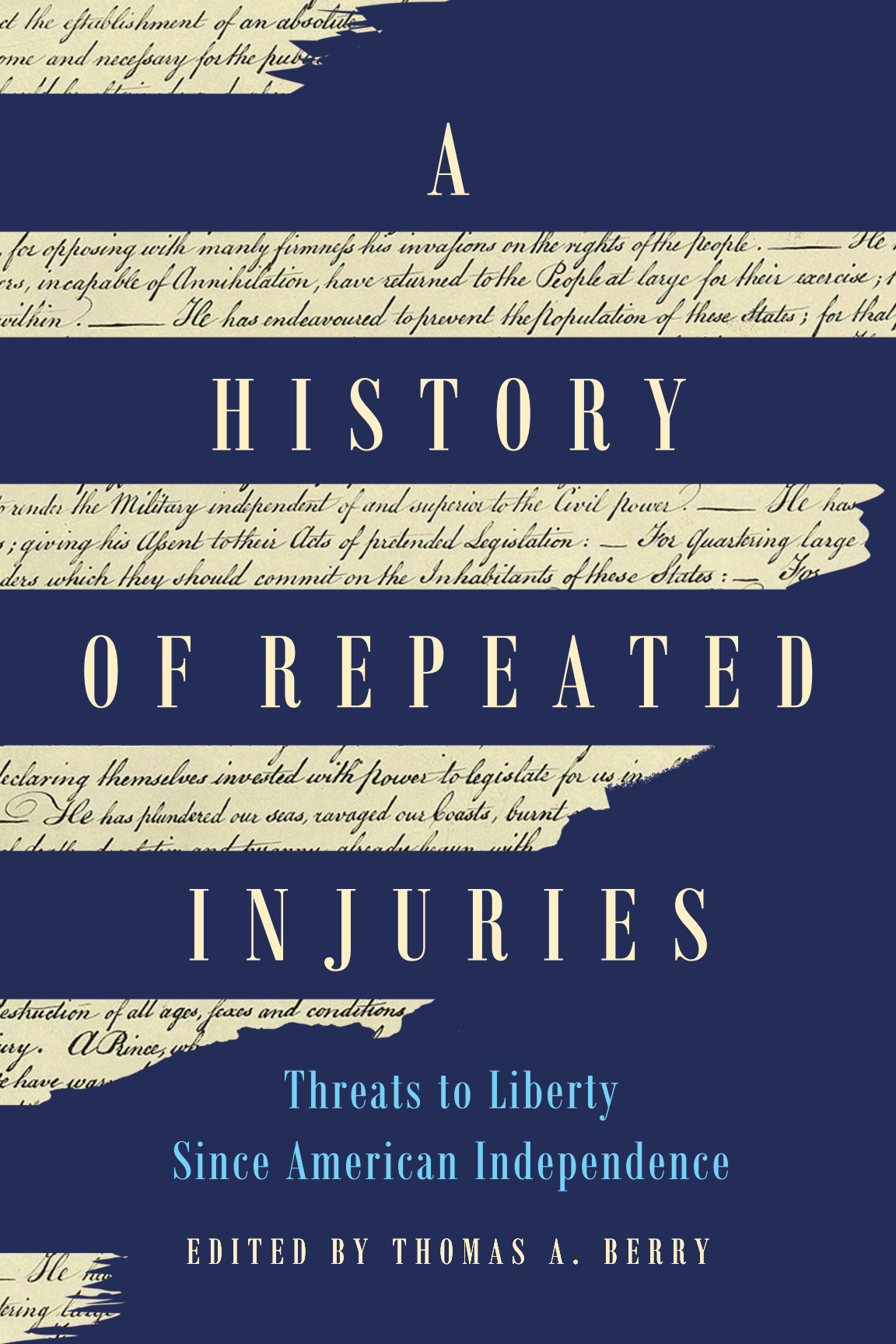

# A HISTORY OF REPEATED INJURIES

## Threats to Liberty Since American Independence

EDITED BY THOMAS A. BERRY

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# 1

## THE PURPOSE AND LIMITS OF GOVERNMENT

ROGER PILON

When America's Founders declared our independence from English rule in 1776, they did so through a document that has inspired countless millions around the world ever since: our Declaration of Independence. Written from "a decent Respect to the Opinions of Mankind," the Declaration set forth not only the immediate causes that impelled our political separation but a moral, political, legal, and economic vision that spoke to the ages. In a few brief lines, penned near the start of our struggle to secure our independence, the Founders distilled their philosophy of government: equal liberty for all, defined by rights to life, liberty, and the pursuit of happiness, secured by a government instituted for that purpose, its limited powers derived from the consent of the governed.

Yet today, too many Americans have lost touch with those principles and the ways they secure our freedom. Indeed, we have imposed on ourselves many of the abuses that drove the Founders to revolution. We are not alone in that, of course. Around the world today, even where the people purport to rule, we see expanding, largely unaccountable governments limiting liberty and trampling rights. As the

21st century's authoritarianism grows, we are thus called once again to breathe life into the foundational principles that have ever defined us as a people.

As we revisit our country's Founding principles in this volume, it will be crucial to learn from the experience of the past 250 years. For in setting forth their vision, the Founders sought not only to show how far English rule had strayed from that ideal, but more importantly, to lay a foundation for the legitimate but limited government they would soon seek for America. To a substantial extent they succeeded in that, for in the grand sweep of human events, America has fared rather better than many other nations that have also sought, in their own ways, to both authorize and limit new governments. We would be remiss, however, if we concluded from the Founders' relative success that their plan has worked as intended. In fact, it would take but a cursory reading of their writings to reveal that they intended nothing like our present American leviathan. Indeed, and again, many of the grievances the Declaration lists are today the ordinary stuff of American governments. It would surely pain those who pledged their lives, their fortunes, and their sacred honor to see how far we have strayed from the vision that so animated them.

With the aid of experience, then, this chapter will focus in particular on the theory underpinning the Declaration's universal insights, the moral order the Declaration sets out, and the place of government within that order. We will conclude, briefly, by showing how the Constitution, as completed by the Civil War Amendments, reflects those principles, yet how it has been undermined since then. Thus, our concern throughout is with that most basic of political ideals: legitimacy.[1] That was the main moral concern of the Founders as well, which the Declaration captures in but a single elegantly crafted line: "That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed." Reason and consent, the two traditional sources of political legitimacy, are there joined for "a candid World" to see. It is for us today to see more clearly how they go together to both authorize and limit government, lending it a substantial measure of legitimacy in the process. Once we do, and once

we see, toward the end of this chapter, what has become of the Founders' vision, we will be in a better position to begin restoring the design they so carefully crafted.

### The Declaration of Independence

As the Founders undertook their work, their immediate aim, as noted, was to justify their decision to declare our independence from England's distant rule, which they did by setting forth a theory of legitimate government, then demonstrating how English rule had grown distant from and abusive of that ideal. In outlining their theory of legitimacy, however, they could hardly have begun with government, for the whole point was to show how a legitimate government with legitimate powers might come about legitimately, not to assume government's existence and legitimacy from the start. Had they begun their argument with government already in place, they would have begged the very question they set out to address. They would have argued in a circle.

From the outset, therefore, the Founders were engaged in a tradition of moral and political thought that has come to be called "state-of-nature theory." Reasoning in that tradition begins by positing a theoretical "state of nature," a state of affairs we today call "civil society," where society and social intercourse of all kinds obtain, but questions about the need and justification for government and about its proper role remain to be answered.[2]

Thus, in the Declaration's famous second paragraph, the argument falls quite naturally into two parts. First, starting with the individual, and appealing to reason, the Founders sketched the moral order in such a world as described by rights and correlative obligations. Second, they drew forth the political conclusions implicit in that moral order. Thus, the first few lines in that paragraph make no mention of government; that comes only after the moral order has been outlined. Accordingly, the first concern is to determine whether, in this civil society, we have rights against each other and, if so, what those rights might be. Only then will we be in a position to determine whether a government might be necessary to secure those rights, which include

what rights we might have to bring a government into being, what rights or powers we might legitimately grant that government, and what rights we may have against it. Thus the justificatory strategy of state-of-nature theory.

### "We hold these Truths to be self-evident"

It is crucial, therefore, to recognize that the Declaration's fundamental principles are grounded not in human will but in reason. Moreover, they are asserted not simply as "truths" but as "self-evident" truths, obvious immutable truths accessible through ordinary human reasoning.[3] Thus, from the start, America has rested on the long tradition of natural law—more precisely, on the natural rights branch of that tradition, which emerged from the Enlightenment, about which more below.[4] Standing opposed to moral skepticism, which holds that there are no moral truths or if there are we cannot know them; to moral dogmatism, which asserts all manner of often inconsistent, unjustifiable rights; and to legal positivism, which simply posits rights as reflecting the will of a sovereign, the Founders held, at the deepest level, that those self-evident truths were apodictic—unable to be rationally denied.

Notice, then, how the Founders' understanding of these self-evident truths was modest, yet, ironically, profound. They were skeptics, to be sure—skeptics of governmental power. But unlike many natural law theorists before and after them, to say nothing of modern welfare state advocates, they were focused not on any capacious "morals" claims, much less on today's "entitlements," but on liberty—liberty as a fundamental moral principle. They believed, quite simply, that there is a higher law of right and wrong from which to derive the positive law and against which to judge that law at any point in time. And at bottom, that higher law is the law of individual liberty—and individual responsibility.[5]

### "that all Men are created equal"

Substantively, the argument begins with a premise about moral equality, defined immediately thereafter by our unalienable rights to life, liberty, and the pursuit of happiness. By thus defining the limited sense in which we are all created equal, the Founders clearly meant

that we are all equal only, but crucially, in the sense that we all have equal natural rights—that no one has such rights superior to those of anyone else. Surely, the Founders could not have meant that we are otherwise equal, whatever that might mean. Nor could they have meant to imply that we can restrict liberty to promote equality—that our natural rights include the kinds of egalitarian "rights" the modern welfare state has created, which are purchased only at the expense of others' rights to liberty. For such rights would undercut the equal freedom that enables each of us, with our myriad differences, to flourish freely as we work our way through life.[6]

But if the premise of equality was not meant to imply modern egalitarianism, neither was it meant, as many in the natural law tradition have urged, to enable some to impose contested "morals" on others. If we are all equal in the limited but crucial sense that we all have equal natural rights to chart our own courses by our own lights, free from the interference of others, then we cannot be compelled to conform to the morality of others, however "superior" the views of those others might be as derived from a variety of subjective values. The only proviso is that, as we plan and live our lives, we respect the equal rights of others to do the same. A corollary of the premise of equality, of course, is equality before the law, a phrase that well captures the sense in which the Founders saw us all as equal, their actual practices aside. (In fact, in all that follows we must be careful to distinguish the Declaration's principles—our main concern—from the Founders' or our own adherence to those principles. Too often, as imperfect people, we have failed in that.)

### "that they are endowed by their Creator with certain unalienable Rights"

As we move now from the Declaration's premise of equality to the self-evident truths that purportedly follow, we are challenged to reflect on the source of our natural rights—and, indeed, on the fundamental question of whether we even have such rights. Those are not idle questions, for over the years, many have argued that the Declaration's claims are not true, much less "self-evidently" true. This is not the place for a deep dive into the epistemological foundations of the Founders' vision—into questions about how we know that we have

natural rights and how we can demonstrate that—but a brief outline of an answer is in order.

In the Declaration's first paragraph, the Founders had invoked "the Laws of Nature and of Nature's God" as justifying our independence. Here, in the second paragraph, they invoke a "Creator" who "endows" us with "certain unalienable Rights." Although history and prudence suggest that the Founders were employing ideas that resonated both with themselves and with those on behalf of whom they were speaking, sound justification requires more, especially in today's more secular world. In particular, it requires that we avoid a narrow, theocratic reading of those passages, one that implies, for example, that we have natural rights only because our Creator has endowed us with them. For again, that would amount to a circular argument, to simply positing a Creator rather than, say, a king or a parliament as the source of such rights.

Better it would be to begin not by asking about the source of our rights but rather by analyzing the essential character and operation of rights. At bottom, rights are adversarial relationships. To have a right is to have a justified claim against another such that that other has a correlative obligation to do or not do some particular thing.[7] But we don't normally assert our rights. We do so only if interfered with, in which case we "naturally," if only tacitly, demand a justification for the interference: "What are you doing? By what right do you interfere with my freedom?" If the other's justification fails, and he withdraws his claim, the prior status quo of equal freedom is restored. But if his claim against us is justified, and we act as thus obligated to, so also is an earlier status quo of equal freedom secured. Thus is the right to freedom "natural" and shown to be so by the pattern of behavior that naturally follows from interference. (More on this below.) And thus the importance of the Declaration's premise, its benchmark of equal liberty.[8]

Instead of reading the Declaration's line invoking a Creator narrowly, therefore, as the "source" of our rights—our "God-given" rights as is often said—it would be far sounder, logically, to draw out the line's deeper meaning and read it as asserting, at bottom, the universality of natural rights, quite apart from religious beliefs of whatever kind. Indeed, given that the Founders themselves held various reli-

gious beliefs; given that they were devoted to liberty, and to religious liberty in particular; and given, especially, that they were asserting universal principles and universal rights common to all humans, believers and nonbelievers alike, we should understand that they were deriving our natural rights through universal human reasoning and behavior, common to all, rather than through often disputed theological beliefs, the better to avoid undermining the universality they surely meant to convey.

Implicit in this passage, however, is a corollary of the greatest importance. For if human reasoning can demonstrate that we all have natural rights, then we do not get those rights from government; in fact, whatever rights or powers government has, as the Declaration goes on to say, are given to it by us. Indeed, where would government get its powers if not from the people? For the people create government and hence come before it. Both logically and temporally, therefore, people and their natural rights come first, government second, as a means to secure those rights.

Thus, we are not servants of government, beholden to it for our rights; rather, government is our servant, beholden to us for its powers. That principle will later manifest itself in the Constitution in the form of the doctrine of enumerated powers—the idea that government's powers, as enumerated in the document, are delegated to it by the people, who must first have them to delegate. Thus the importance of determining what powers we have, or do not have, to so delegate. Thus also, and again, the logical order of things: rights first, government second, an order found first here, in the Declaration, in the fundamental idea of preexisting rights, rights that preexist government—natural rights, which we have "by nature." Here is more evidence of the Founders' state-of-nature approach to the justificatory undertaking before them.[9]

Notice also that the Founders grounded their moral vision in the language of rights, not that of values, virtues, or other moral notions. Fully and properly fleshed out, the classical theory of rights orders individual acts and social affairs systematically along three deontic modalities: the prohibited, the permitted (the optional), and the required. Objective actions, not subjective mental states, are the primary concern of rights—and, accordingly, of governments. As claims against others

denoting adversarial relationships, rights invite moral justification through litigation and, eventually, positive law ordering, as we will see later in this chapter, all for the protection of liberty. In those and similar ways, the theory of rights distinguishes justified from unjustified right claims and thus orders human affairs in ways that values, virtues, and other moral notions are unable to do or do so clearly. In short, rights and correlative obligations are the language of law and liberty. Thus, when they addressed the purpose of government two lines later, the Founders got it right: to secure liberty through law, not to order virtue or impose contested values, much less provide all manner of goods and services. It was live and let live.

### "that among these are Life, Liberty, and the Pursuit of Happiness"

The Founders, and later on the Framers of the Constitution and its amendments, could hardly have listed or enumerated all of our rights. On one hand, we have an infinite number of rights, owing to the myriad facts that might enter into their descriptions and the possibilities that language permits. But on the other hand, looked at logically and systematically, we have only one right, the right to be free, from which all other genuine rights, however properly described, may be derived.[10] In a brief, general account of our rights, therefore, one wants to try to capture something of the essence of the matter, which the Founders did when they said that "among" our rights were those to "Life, Liberty, and the Pursuit of Happiness."

To flesh out the Founders' moral vision a bit more, however, we should begin by noticing the implicit distinction in this basic right "to the pursuit of happiness," a distinction between objective rights and subjective values. Clearly, the Founders were not saying that we have a right to happiness but simply to its pursuit. Nor did they tell us how to go about that. They left it to us, provided only that we respect the equal rights of others to pursue their own paths to happiness. Given our different interests and values, we will likely take different paths. As we do, the point simply is that we must respect those differences. We may criticize others' values, of course, and the paths they take, but we may not impose our values on them.[11]

This distinction between objective rights and subjective values, implicit in the right to the pursuit of happiness, is crucial, for it under-

pins a regime of rights that can be thought of as constituting a basic moral and, eventually, legal framework in which we are all free to plan and live our lives, free from the interference of others. The French *philosophe* Voltaire captured the essence of the matter as it pertains to speech: "I may disagree with what you say, but I will defend to the death your right to say it."[12] You have your values, with which I may disagree, but I will defend your right to live by them, provided only that as you do, you do not violate my or others' rights. In a free society, each of us may make as much or as little of life as we wish and can. As long as we respect the equal rights of others, we are free to choose our paths and are responsible for the choices we make, good and bad alike. That is the essence of freedom. Again, live and let live.

With that basic distinction in mind, we can proceed by drawing on the sources that largely informed the Founders: the English common law, which had evolved over the centuries and had been thought to embody "right reason";[13] and moral philosophers like John Locke, who more than any other can be said to have been the philosophical father of the Declaration, especially through his influence on Thomas Jefferson, its principal author.[14] In deriving more specifically described rights, however, care must be taken to ensure sound derivation and internal consistency; for "rights" dubiously entailed by the first principles of the system or conflicting with one another will undermine the entire rational foundation. Not every good is held by right, after all; we need to separate legitimate from illegitimate right claims.

Consulting the sources just noted, then, we find that theory, experience, and much of custom all show that rights are intimately bound up with the idea of property. Locke put it well: "Lives, Liberties and Estates, which I call by the general Name, *Property*."[15] James Madison, the principal author of the Constitution, made a similar point when he wrote: "As a man is said to have a right to his property, he may be equally said to have a property in his rights."[16] The Founders well understood that all legitimate rights, however described, can be thought of as property and, to aid in casuistry, reduced to property. If what we hold by right can be thought of as property—as something to which we hold a free and clear title or are "entitled"—then we have a place from which to start thinking systematically about our many rights—and thinking about the many claims that may turn out not to be

rights. After all, if all legitimate rights can be reduced to property, we will want to know who does and does not have title to that property.[17]

Thus, understanding rights as property—broadly conceived as lives, liberties, and estates—it is but a short step to thinking of right violations as involving the *taking* of that property, the taking of something that *belongs* free and clear—by right—to another. So doing, we can imagine a world in which people are free to live their lives, exercise their liberties, and build and enjoy their estates, provided only that in the process they refrain from taking what is not theirs to take—the lives, liberties, and estates that belong to others.

Notice, then, especially in the context of the modern welfare state, that in a free society there is no obligation to assist others who may need our help, although we are at perfect liberty to offer such assistance. Most, one hopes, will think it good to do so, but we cannot compel that assistance, for that would amount to taking the liberty that belongs to the person so compelled. Association must be voluntary, which is why committing torts, crimes, or contractual breaches—taking others' lives, liberties, or estates—is not only wrong but violates their rights. In a free society, we are free to be virtuous—or not. Indeed, only when virtuous acts are voluntary can they be called virtuous.[18]

Thus, objective rights are not the whole of morality. There is also the vast realm of subjective values that animate and guide our lives. Rights, by contrast, constitute the basic, minimal moral framework within which we are free to flourish, or not, as we wish. As "side-constraints" on our actions, they tell us that we may not take what belongs free and clear to another.[19] We may not commit torts, crimes, or contractual breaches. If we do, new rights and correlative obligations come into being, for we are then obligated to make our victims whole, to restore the prior status quo insofar as possible. Thus, when the Founders spoke of "unalienable" rights, they could have meant only that *others*, including government, may not gratuitously alienate our rights. *We* may alienate them, however, through voluntary contracts; or by committing torts, crimes, or contractual breaches, for which we may be held responsible. In either case, then, whether through voluntary transactions or forced or fraudulent associations, we alienate or extinguish certain rights and obligations and bring new

ones into being. Thus does the world of rights and obligations constantly change as we interact over time.[20]

As noted, in the abstract world thus far sketched, we are free to make as much or as little of our lives as we wish and can. In the real world, of course, most will do that mainly not as isolated individuals but through association with others. We come thus to the second basic font of rights: promises or contracts. Entailed by our most basic right to freely act, each of us has a right to associate with others, thereby alienating and creating whatever rights and obligations we wish, provided only that the association be voluntary on all sides, free of fraud regarding what we promise, and respectful of third-party rights. Through such acts—ranging from spot transactions to the creation and conduct of all manner of associations and institutions—people exchange their various holdings, and civil society in all of its rich variety arises.

Similarly, when we commit torts, crimes, or contractual breaches, we also alienate certain rights and obligations and bring new ones into being, but those are more specific. Thus, we create a right in our victims to be made whole and an obligation in ourselves to do so by alienating our right to such of our holdings as may be necessary to satisfy that obligation and right the wrong.

From a base of equal freedom, then, rights and obligations are constantly being alienated and created, either through force or fraud, as just noted, or voluntarily as people arrange and rearrange their affairs with others in ways that they believe will best serve their own interests. The only requirement is that freedom be respected and promises and contracts be kept—failing which, those who take others' freedom, fail to perform as promised, or defraud others must make their victims whole, as detailed in the various branches of the classic common law that treat such matters. As these events unfold, unequal rights and unequal holdings may result, of course. But as long as rights are respected in the process, including by making victims whole, those outcomes will be just, for no one can be heard to complain.

In all of this, however, it is crucial to notice, consistent with state-of-nature theory, that it is private people and institutions that order their affairs, not governments. Notice finally that to this point in the

Declaration, the Founders have addressed only the moral order—the world, when fleshed out, of moral rights and obligations that we have *toward each other*. We now turn to the role of government in securing that order.

### "That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed"

Were we in a world of perfect information and universal good will, we would need nothing more, for we would all know what rights and obligations we have toward each other and would respect those moral relationships. But universal reason takes us only so far. To complete the account of our rights, we will soon need to introduce values, about which reasonable people can and do have reasonable differences. How much nuisance or risk can we subject our neighbor to, for example, and who is to draw those lines? When contractual terms are unclear or unexpected issues arise, so too may disagreements. And when actual wrongs occur or are alleged, the value-laden procedures for adjudicating them and determining the remedies that may be needed raise only more opportunities for disagreement—and the need for third-party intervention. Finally, all of this is before any enforcement issues arise, so even if we did have perfect knowledge about what rights we have in such cases, we would also have to be of good will, respectfully satisfying our obligations, if not with alacrity, then at least without needing a nudge—or force. Would that we were all that good. Given all of that—and this only scratches the surface—were such disagreements to arise in the state of nature, either alleged injustices would go unaddressed or the parties would resort to force. As Thomas Hobbes famously put it, life in that state would be "solitary, poor, nasty, brutish, and short."[21]

## Creating and Empowering a Legitimate Government: Reason and Consent

We arrive, then, at the need for public institutions and procedures to resolve the differences that are inevitable in the state of nature, absent which life there would be intolerable. True, various anarchists have tried to show that we could avoid government and create voluntary

institutions to solve the uncertainty and enforcement problems.[22] But that approach has worked, when it has, only for small closely knit groups and only for short periods. And even then, justice has often suffered over time from opportunistic behavior by some or from the group's evolving internal dynamics. In fact, history has been unkind not only to socialist but to anarchist utopians as well. None of which is to say that governments, claiming a monopoly on the use of force, have fared much better—indeed, history speaks volumes on that. Thus, where private arrangements for dispute resolution work well, especially where competition improves such services, they should not be discouraged, much less prohibited. If they can resolve marital difficulties, contractual disagreements, and even tortious wrongs efficiently and peacefully, resort to legal force can be avoided. But such private institutions often work only because a public option stands behind them as a last resort.

Our concern here, however, is not to address the anarchist's every proposal but rather to come to grips with basic questions about moral and political legitimacy. Starting in the state of nature, as the Founders tacitly did, we have outlined a world of moral rights and obligations, at least as far as reason allows; and we have glimpsed the limits of reason and the need for a third party like government to complete that world and secure those rights. But can we create a legitimate government with a monopoly on the use of force, one with legitimate powers designed to address the definitional and enforcement problems, and do it without violating the rights of anyone?

After outlining our basic preexisting natural rights, the Declaration addresses those questions briefly: "That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed." Thus, reason and consent underpin political and legal legitimacy. Reason first justifies our preexisting natural rights. Consent then justifies government and its powers, including those needed to flesh out and enforce our rights. How could it be otherwise? We cannot rightly force people out of the state of nature; nor can we take from them powers they rightly have. In the state of nature we all have Locke's "Executive Power," the right to define our rights more precisely and then secure them.[23] Can we create a government and grant it those powers, to be exercised on our behalf, without violating

preexisting rights in the process? We'll first address the creation issue,[24] then consider government's powers, and finally ask if government can have purposes beyond securing our rights. That will take us to a question that deeply divides Americans today: What is the proper role of government?

Because those issues are complex and subtle, we can address them here only at a fairly general level. To do that, however, we will take the same course we took earlier in the chapter, the course that Locke took when he, too, thought about such questions; but we will press the issues a bit further than Locke did and ask first what rights we would have toward securing our various rights if there were no government, if we were in the state of nature. Those are the rights that come into play only after the rights outlined previously have been, or are about to be, violated. Merely stating the matter, however, reveals its complexity. For we are dealing now with a realm of considerable uncertainty in which, again, principles of reason go only so far. To be sure, enforcement rights must be justified with reference to the rights we have to be secured. But in addition, and beyond the question of derivation, these enforcement rights must be exercised in ways that respect the rights to be secured. Indeed, we can hardly violate rights in the name of securing rights and be thought to be doing so by right.[25]

### Creating Government: The Problem of Consent

If our move from the state of nature to a world with a government empowered to secure our rights requires our consent to be legitimate, as the Declaration says, two problems immediately arise. First, practically, is the absence in the state of nature of any public institutions through which to execute this political consent. And second, more important theoretically, if this move is to respect the equal rights of all equally, we will need *unanimous* consent.[26] Yet rarely if ever do we get unanimity with such matters. Indeed, if the need for government arises because reason has run its course, and we now disagree over how to complete the account of our rights, why should we expect agreement over the far more complex and fraught institutional arrangements for resolving those disputes—government?

We see, then, that just as the reach of reason in discerning our rights is limited, so too, *a fortiori*, is consent limited here, for the universal right to freedom that we derived earlier appears to preclude us from forcing others into our public world under governmental rule. Given our basic right to freedom, only those who consent may rightly be bound by government. But it is more complicated still, because consent reaches well beyond the primordial individual consent that we imagine taking place in some theoretical "original position." Perhaps America came closer to satisfying that ideal "origination" of government than any other nation, but even in America the franchise was limited. Most who would be bound by the Constitution did not vote; the voting was mostly not direct but rather for delegates to state ratifying conventions; and many delegates voted against the proposed Constitution. Moreover, once that document was ratified, making it positive law, and government was instituted, most voting since has not been directly for powers or policies but for candidates for the offices set forth therein—and again, there were electoral losers in all of this, bound nonetheless by the laws they had voted indirectly against.

Classical liberals understood this problem, of course, which is why they crafted more complex consent-based rationales for political legitimacy. But their arguments come up short. Again, the basic question here is whether consent short of unanimity can render a government or its powers thus created morally legitimate. Majoritarianism will not avail, of course, for on any given issue, starting with the creation of government itself, it amounts to the majority compelling the minority to its will when the minority, by definition, has not consented. So too, the "social contract" fails; by positing that we all agree *originally* to be bound thereafter by the majority or by some other fraction of the whole, it simply assumes unanimity in the original position while also failing to solve the problem posed by later generations who were never in that position and hence did not consent. Finally, the "tacit consent" argument—if you stay, you have implicitly agreed to be bound—fails also. Aiming to overcome the generational problem, the majority puts the minority to a choice between two of its entitlements: its right to stay, and its right not to be ruled by the majority. Given our basic right to be free, the majority must justify its

claim to rule, failing which it rules by force, not by right, thus arguing in a circle by assuming that right.

Clearly, there are real problems with resting political legitimacy on the consent of the governed, starting with this most fundamental of questions concerning the creation of a government. When we turn to the powers of government and their execution, as we soon will, the problems with consent-based justifications only grow. When the electoral process is complicated by representation, political parties, voting by legislative districts, gerrymandering, ranked-choice voting, and other such electoral procedures, variations of which we see in all democracies; and when all we are left with is a single vote, binding all for a period of time, it simply strains credulity to say that such processes, reflecting the consent of some to some things, render the outcome legitimate. Whatever the record of democracies toward disciplining government—plainly, it is mixed—if we are serious about moral and political legitimacy, we need to acknowledge the limits of political consent.

The attraction of democracy is that "we the people" control our government: Just as we controlled our individual lives in the state of nature, the argument goes, so too do we control our collective lives once we create a democracy. But that's a myth. The individual control we each have in the state of nature is drastically diminished when collectivized. We trade the complete control we each had over our own lives for a periodic vote over vast issues affecting us in countless ways, leaving us with little control—save to leave the collective, if allowed. During the 1960s, when the slogan "power to the people" was in vogue, University of Chicago economist Milton Friedman famously remarked that he agreed—save for the definite article.

To be sure, as Winston Churchill famously implied, other things being equal, it is better to have at least some control over one's government than none, as in nondemocratic regimes.[27] But if we're serious about maximizing our freedom, it is far better to delegate as little control to the collective as necessary and to reserve as much *individual* control as possible. (In truth, it is best to *optimize* our freedom, about which more below.) Of course, there will always be those who are uncomfortable with or even frightened by having the right and responsibility of making decisions over their own lives, but what right have

they to take that right from the rest of us? And there will always be those who encourage delegating power to government, confident that they will be in positions to wield it.

### The Basic Political Presumption: Government as a "Necessary Evil"

What, then, are we to say? Again, the dilemma is this: We leave the state of nature to create a government that will enable us to avoid arbitrary force to resolve differences that must be resolved, but government itself is a forced association, as anyone who has ever been in the minority on some important public question knows. Are we to conclude, then, that the anarchist is right, that government *as such* is illegitimate? Strictly speaking, we are, even if we cannot live with that answer, practically. We will revisit and qualify that disquieting conclusion shortly. But for now, notice the silver lining in this dilemma: the limited government implications.

We see, then, that for practical reasons, the Declaration's consent requirement for political legitimacy cannot really be satisfied, for in reality it leads not to universal consent but, at best, to democratic procedures like supermajoritarian constitutional ratification and periodic majoritarian voting, the latter, most often, not to approve particular powers or policies but to fill offices with officials who may or may not exercise those powers or pursue those policies. Democratic procedures bring us closer to moral and political legitimacy than we'd be without them. But as history shows, they still leave us with the prospect of both majoritarian and, more often, special interest tyranny, which the Founders and Framers, keen students of history, well understood and tried to guard against, as we will see. Thus, if moral and political legitimacy are our ultimate concerns, the anarchist cannot be ignored—except on practical grounds. Given the boundless inconveniences of life in the state of nature, only a fanatic would stay there. Yet fanatics too have rights.

Thus, as we force such recalcitrants out of the state of nature and into our emerging political world, or force them to leave the polity, we ourselves, being both rational and practical, are forced to face the implications of this brief, systematic analysis of political consent. Yet

those implications, *mirabile dictu*, turn out to be salutary. In fact, they give us a crucial and far-reaching framework for going forward. Because reason justifies our right to freedom and consent justifies association, including the association that purports to govern and, in fact, will be a government; because absent such actual consent, that institution will amount to a forced association for those who haven't consented; because life in the state of nature is unbearable, practically, "forcing" us to leave it, as it were; and because life under government entails both a forced association in itself and many other forced associations as government unfolds and expands, we arrive at a clear and inescapable moral presumption *against* doing things through government, where force is inevitable, and a clear and inescapable presumption *for* individual liberty, with a heavy burden on those who want to do things through government to show why they must be done there rather than left to the private sector where they can be done freely and hence in violation of the rights of no one. Government, in short, should be a *last* resort, turned to only when freedom fails to protect our rights. Hold that thought. It is rich with implications.

There, in a nutshell, is the moral and political argument for *limited* government, which Thomas Paine stated succinctly: "Government, even in its best state, is but a necessary evil; in its worst state, an intolerable one."[28] Necessary, for the reasons we have canvassed, but evil because government compels our involvement in matters many of us may want no part of—and it gets worse as government grows. On the question of moral and political legitimacy, therefore, the Founders got it right. Modern progressives who turn so regularly to government not as a last but as a first or early resort, as do modern conservatives oftentimes, get it wrong, not simply practically but morally, seemingly oblivious to the essential character of government as a forced association, threatening and often using force in all it does—even when its ends and means are otherwise perfectly legitimate and, indeed, must be pursued, not just for legal but for moral reasons too.

Quite apart, then, from how actual governments have been brought into being, if the consent of the governed matters for the legitimacy of a government's very existence, and actual consent from only a part of the governed is the best we can do as a practical matter, then government truly *is* different, morally, from private associations. It claims

and mostly has a monopoly on the use of force. And we do not "join" government like we join private associations. At bottom it is a forced association with an air of illegitimacy about it. Not for nothing did the Founders and Framers keep government at arm's length.

But given the practical necessity of government, prudence suggests that we search for arguments that might lend this institution a bit more legitimacy—while still preserving the basic presumption. Here, we will do that by drawing from a consideration of risk. Again, we are faced with the lack of consent from the few holdouts who want to remain in the state of nature. Like us, they too claim the right to interpret and enforce their rights—their right of self-defense—as an implication of their right to be free. But unlike them, we have a keener sense of the risk that *individual* self-enforcement entails for all of us and a greater appreciation of the need, accordingly, to reduce that risk—as an exercise, indeed, of *our* rights of self-defense. We're more risk-averse than they appear to be—or, at least, we view enforcement by individuals as riskier than by government, about which there are reasonable differences, not surprisingly. It is the risk that individual self-defense poses that, for us, justifies institutionalizing and regularizing our enforcement rights to reduce the risk—not entirely, but enough to justify, at least for us, the creation of government for that purpose. Thus, our right of self-defense justifies for us, in turn, the limited force required to bring government over all into being. In a context where there are no bright lines, risk, yet where we cannot just walk away if rights are to be enforced efficiently and safely, we are simply defending ourselves, by right.

To be clear, that is not an apodictic argument, for assessments of risk, however well-reasoned, are rarely dispositive. Rather, we turn to it because we are at an impasse arising from risk in an especially acute, basic context requiring resolution: enforcement. If we disagree about our enforcement rights in the state of nature—not about the broad principles but about their more precise contours and applications—we cannot simply agree to disagree and walk away, for our rights will then be little more than aspirational—or private force will result (apart from that which, admittedly, we employ here to bring government about). To avoid either outcome—and to protect the rights at issue—we will need binding public institutions. That

necessity will itself lend a measure of legitimacy to the government we create for that purpose.

True, the argument does not address the particular character and scope of the enforcement rights that are entailed by our right of self-defense, which could change as our assessment of risk changes. But it is implicit in the Declaration's consent requirement. When we are thus "forced" to consent, at least as best can be done in this uncertain context of risk, we grant government enforcement powers we already have as individuals in the state of nature. To that extent, therefore, they are legitimate.

Soon we will see two related arguments that will lend a bit more legitimacy both to government and to its powers, but the argument just outlined is enough to get us out of the state of nature and into a world with a government. Creating a government from scratch in a state of nature entails many other practical, institutional, and administrative considerations, of course. Who counts as a member of the polity? What geographical boundaries define our jurisdiction? What institutional arrangements will best serve the government's functions? How to select officials? Those and other such practical questions remain to be addressed. Important as they are, however, our central concern going forward will be less with such matters than with the legitimacy of governmental powers that bear directly on individuals.

At a broader level, of course, we can speak of governments as being more or less legitimate, and that is no small matter. Thus, a government that arises through a majority or, better still, a supermajority vote of the governed will be seen as more legitimate, other things equal, than one that is forced on the governed by a cabal, to say nothing of one that is imposed by outside powers. And it will be thought so because, as the Declaration implies, consent counts toward legitimacy—and the more the better. But here we have to be careful: We have to distinguish between a *government's* legitimacy—for purposes of international diplomacy, for example—and the legitimacy of its *powers and actions*. Thus the other-things-being-equal caveat just mentioned. Once we move beyond original consent, however, tacit consent thereafter—people not leaving, if they can—will count too, but it will not be the only or even the most important measure of a government's legitimacy. We could have supermajoritarian tyranny,

for example. A more important measure, therefore, will be whether a government, even if imposed on a people, respects rights. That will bear in turn on the perceived and actual legitimacy of the regime itself. To that issue we now turn.

## Empowering Government: Basic Powers and Their Execution

With the presumption against resorting to government still securely before us, we now have a government in place with at least a modicum of legitimacy based simply on how it arose, much like our own federal and state governments. But in this still theoretical world we have yet to determine the legitimacy of this government's powers and the execution of those powers as they concern individuals. Here again, consent counts, the Declaration says, but not only consent. In fact, just as consent goes only so far in lending legitimacy to the *creation* of a government, so too it does *a fortiori* in lending legitimacy to government's *powers* and the *execution* of those powers. A power that allowed government arbitrarily to take from *A* to give to *B*, for example, would be illegitimate, even if a supermajority consented to it: first, because *A* has a preexisting right to what is his (no line-drawing problem here, as with risk); and second, because no one had such a power to yield up to government in the first place. Thus, once we get past the creation of a government and ask whether its powers and the execution of those powers are legitimate, individual rights loom large, including the rights we do *not* have and thus cannot rightly give to government to be exercised by it as powers.[29]

### The police power

We can address those issues in a general way by distinguishing three basic powers that we might grant to government, ranging from the most to the least legitimate. The first has come to be called the general police power, which in America belongs to the states, the federal government having only a limited police power.[30] The most basic of government's powers, the police power is held by all in the state of nature, where we have the power to define our rights more fully and then secure them—Locke's "Executive Power." Consistent with our discussion of risk earlier in this chapter, when we authorize a

government through a constitution, we grant it various powers in the process, including the police power, as the Declaration says. That power authorizes the government thus created to recognize our natural and moral rights, to define them more than reason alone allows, and to secure them against domestic and foreign threats, ex ante and ex post. By tradition, the police power has also been used by government to regulate "health, safety, and morals" and to provide for the "common good" or "general welfare."

Because each of us had the state-of-nature version of the police power, it cannot be said that we gave government a power that was not ours to give. Thus, our having granted government that power takes nothing from its legitimacy. The only person who could be heard to complain is the anarchist who made no such delegation but is now mostly prevented from exercising his enforcement power by virtue of the government having a monopoly on the use of force.[31] Fortunately, such anarchists are few. Once government has the police power, it must be exercised in a right-respecting way, of course. Due process rights loom large here. But so too must the scope of the power be restrained.

Much of the health and safety regulation government does today pursuant to its police power, including a good measure of its environmental regulation, is simply part of its power to define our rights more precisely and then secure them. Those powers can be misused, of course, as when government fails adequately to take costs and benefits and their distribution into account when defining the relevant rights and obligations, or when it wrongly assigns responsibility. But the power itself, properly used, is legitimate. Indeed, it is precisely because we do not agree in the state of nature about where to draw many such lines or who may be liable that we turn to a third party to adjudicate those differences.

But the regulation of "morals" through the police power is harder to justify in the name of protecting rights. In colonial days, for example, sumptuary laws regulated extravagant apparel. In our own time, states have used their police power to criminalize interracial marriage, the sale and use of contraceptives, various sexual practices and lifestyles, and more. Here we have the regulation of behavior and activities that merely offend enough people to generate a demand for the

regulation—majoritarian tyranny concerning behavior that usually violates no one's rights. True, some cases may implicate rights, especially the rights of children. But in other cases the police power is used to regulate or ban otherwise rightful behavior or activities, however offensive, everything from blasphemy to hate speech, alcohol consumption, smoking, drug use, prostitution, pornography, gambling, public nudity, bull and cock fighting, wanton cruelty to animals, and more. Just to be clear, I would be among the first to support prohibiting some of that, like public nudity or wanton cruelty to animals, though not in the name of protecting rights—it is difficult enough to show that *humans* have rights, much less animals—but in the name of a vague idea like "decency" or a "humane society." The problem, of course, is that once you do that, you are on a slippery slope, at the bottom of which is tyranny—to say nothing of the corruption that has ever attended the zealous prohibition of vice. In this domain, a strong but rebuttable presumption against government looms large, as discussed earlier, almost as large as good judgment.

Perhaps some of that morals regulation can be justified as serving the "common good," but the police power is more easily justified when it is employed to provide what economists call "public goods," goods enjoyed roughly equally by all but not likely to be provided privately in a state of nature due to the "free-rider" problem.[32] Genuine public goods like law enforcement, national defense, clean air and water, and certain infrastructure are characterized by "nonexcludability" and "nonrivalrous consumption," meaning that once they are provided by some, others cannot be excluded from enjoying them (nonexcludability), and the marginal cost of another person's consuming them, once they have been produced, is zero (nonrivalrous consumption). In the state of nature, even if we could overcome the coordination problems, private parties would be disinclined to provide such goods if there are substantial numbers of free riders—people willing to enjoy but unwilling to bear their share of the costs of such goods—so they generally will not be produced. It is crucial, however, to distinguish these goods from private goods like education, housing, health care, childcare, retirement security, and so on, which may be goods for all but which individuals can and will provide for themselves through markets to whatever extent they wish and can. In fact, a useful test for

whether a good is public or private is whether the market is already providing it; education and housing, for example, are likely goods for all, but they are readily available in the private market.

Thus, here, with due respect for government's duty to treat all equally, we have a proper function of government that goes beyond the strict protection of rights. And in addition to our earlier argument lending legitimacy to government from a concern about the risks of private enforcement in the state of nature, we now have another rationale for government, one that eases the air of illegitimacy that arises from the absence of actual consent. For government—created ultimately through force, to be sure—will enable the production of goods that would otherwise not be produced, yielding roughly equal implicit compensation and a net gain for all. Put it this way: Better that we all, as individuals, police our own rights, our air quality, our health during pandemics, and threats from abroad, or forgo basic infrastructure? Quite apart from the absence of genuine public goods in the state of nature, the positive gains for all from the public provision of such goods will render untenable any arguments against government based on the absence of actual unanimous consent. It is the opposite with the public provision of private goods, where costs and benefits are invariably distributed unequally, yielding a gain for some and a loss for others. For that reason, it is crucial to distinguish genuine public goods from goods that are private and thus will be provided individually as the beneficiaries may wish and can, weighing their own costs and benefits.[33] We will return to this point after we discuss a second basic power of government, eminent domain.

### Eminent domain

In general, then, the police power, properly executed and constrained to little more than its core functions of securing our rights and providing genuine public goods, is the most legitimate of the powers we might grant to government, for we all had that power in the state of nature, save for the morals and public goods parts. Not so with government's second great power, eminent domain, an instrumental power that enables government to take private property for public use while executing another power or pursuing another end like building a military base or a public road, but only if just compensation is paid

to the owner from whom the property is taken. In the state of nature, none of us had a right to take our neighbor's property without his consent, even if we did put it to a better or public use and paid him just compensation. Known in the 17th and 18th centuries as the "despotic power," eminent domain is said often to be an "inherent" power of government. From a consideration of first principles, however, to say nothing of circularity, there are no inherent powers of government, only powers delegated by the people as enumerated in a constitution. How, then, can eminent domain be said to be legitimate if none of us had such a power in the state of nature and thus had it to delegate?

In America, insofar as our limited consent can be said to justify a power, there is, first, the language of the Constitution's Fifth Amendment, "nor shall private property be taken for public use without just compensation," which implicitly recognizes the power of eminent domain while explicitly recognizing the right of just compensation pursuant to its use. But second, economists justify eminent domain as "Pareto superior," which means that at least one party is made better off by its use—here, the public, as evidenced by its willingness to pay—and no one is made worse off because the owner gets just compensation, meaning that the owner is indifferent as to whether he keeps the property or gets the compensation. Thus, when so used, because the property is worth more to the public than the cost of obtaining it, while the owner remains indifferent, eminent domain increases net social welfare by moving property to a higher valued use: one winner, us, and no losers.

Unfortunately, rarely in practice does the owner get just compensation. At best, the owner ordinarily gets market value, which is not just compensation if his property is not up for sale, for that means that it is worth more to the owner than the amount it would fetch if on the market. Because it is a despotic power, eminent domain should be used only when necessary, as when a holdout takes advantage of his "monopoly" situation to demand exorbitant compensation for the last parcel needed to complete a public road. Otherwise, just like with any private party, government should bargain for the property it needs, not use its power to get property "on the cheap." For the same reason, "public use" should be read narrowly, not as "public benefit," which is an open sesame for the promiscuous use of the power. Finally, when

government provides the public with goods like lovely views or wildlife habitat by restricting a property owner's otherwise legitimate uses, thus devaluing the property, eminent domain should apply to compensate the owner for his losses, just like when the entire property is taken.

Notice, then, that the Pareto superior rationale for eminent domain is not unlike both the earlier risk-based rationale for creating government and the constructive consent rationale for public goods. And similar rationales come to the fore in many other cases, like oil and gas extraction, for in each such case, faced with impediments to a fully voluntary agreement—coordination problems, high transaction costs, free riders, and holdouts, for which the "pure" libertarian theory based on actual consent has no answer—an implicit equal compensation or efficiency argument can be employed, showing no actual loss for anyone (including the anarchist) and a net gain for all. Still, to be morally legitimate, to overcome any absence of actual consent, the compensation must be roughly equal for all and sufficient to warrant the bargain. When invoking such an approach, we must be careful, of course, for it can easily be extended to situations where individual choice and responsibility should remain or where we are not *all* better off. But when we all are better off, what rational person would not consent to such an outcome? Here, in short, we have arguments based on constructive consent that reasonably satisfy the Declaration's consent requirement.

### The redistributive power

If the eminent domain power is less legitimate than the police power, prima facie, the third great power of government, the nonegalitarian redistributive power, is altogether illegitimate, yet today it describes government's main business—transferring property, including liberty, from *A* to *B*. This power takes two forms: material and regulatory. Material redistribution is done through government's power to tax and spend. Regulatory redistribution is done by prohibiting some from doing what they would otherwise have a right to do or requiring them to do what they would otherwise have a right not to do, all for the benefit of others. As such, regulatory redistribution is distinct from the legitimate regulation that is needed to flesh out and enforce

our rights, which is entailed by the police power. And unlike with eminent domain or the constructive consent cases, here there are no roughly equal benefits for all. Rather, we get winners and losers.

Taxation is not illegitimate per se. Along lines discussed earlier, it is part of the bargain we strike in the original position: We no longer have to police our own rights; we pay government to do it for us because we believe that on balance it is safer and more efficient than trying to do it ourselves; so we tax ourselves to pay for the service, absent which there would be no taxes—or service. Altogether different is redistributive taxation, designed expressly to transfer funds from *A* to *B*, to take from *A* and give to *B*. Yet even legitimate taxation raises problems; for government, belonging to all of us, must treat us all equally, a notoriously difficult principle to apply, even where there are objective, quantifiable measures, as with taxation. A word or two on this morally fraught subject will suffice.

A use tax might be a good place to start because it seems to satisfy the equal treatment principle by tying the beneficiary of the public service to the cost of providing it, at least in principle. Taxation for law enforcement might be thought of as a kind of use tax. But to respect our right to equal treatment by government, a use tax needs to be carefully constructed and applied. Gasoline taxes, for example, are meant to impose the costs of public roads proportionally on those who use them, but people with electric vehicles often escape the tax, and the funds collected are often redirected to public transportation, so what starts out as a use tax can easily become redistributive taxation.

An equal head tax would satisfy equal treatment, but of course its effects would be unequal due to the unequal distribution of individual wealth; and the benefits received would be unequal due to unequal individual circumstances. Should equality be a function of the tax itself—$10 a head—or should we take its effect into account such that a $10 tax on a person with assets of $100 and a $100 tax on a person with assets of $1,000 satisfies equal treatment? Then too, should equal treatment take causal and beneficial factors into account? Should criminals who cause greater need for law enforcement pay more in taxes, for example, or should those who need more protection because they have more to lose from crime pay more? A flat income tax tends

toward equality of effect but not equality per se because high earners pay more. A graduated income tax satisfies neither; it simply takes advantage of the diminishing marginal value of increasing income and wealth. Finally, a consumption tax, by affording more tax choices to the taxpayer, might seem to satisfy equal treatment, but its regressive effects suggest otherwise.

The conclusion to be drawn from this brief, inconclusive discussion—which hasn't even mentioned the many other forms of taxation, much less the use of taxation for extraneous policy objectives—is straightforward: Since it is nigh on impossible to construct a tax system that treats all equally, we can ameliorate that problem only by demanding fewer goods and services from government. Markets, including insurance markets where companies are allowed to discriminate according to actuarial risks, match buyers and sellers far more equitably and efficiently than monopoly government ever could. Here too, then, the moral principle of equal treatment by government should impel us to do as little as necessary through government and as much as possible in the private sector.

Yet the course of the past century has been mostly in the other direction: ever more governmental goods and taxation not even pretending to be for such things but instead for straightforward redistribution. When we include countless forms of regulatory redistribution—more difficult to quantify but doubtless more extensive today than material redistribution because it is done "off-budget" and hence less noticeably than taxation—we have a massive transfer society. And the transfers are not executed efficiently through individual choices in free markets but inefficiently by government planners, confident that they can order our affairs better than we ourselves can, left to our own devices.[34]

To be clear, I do not mean to be understood as arguing that once we leave the state of nature and establish government, we are morally prohibited from helping the unfortunate of various kinds through public transfer programs. Rather, I am arguing, as a matter of principle, that we not do so in the name of "rights" or as "entitlements" rather than, under the circumstances, from necessity, as a last resort, with the burden of persuasion on those who would replace private with public action; for treating public charity as a matter of right strips

us of the moral discipline the theory of rights affords.[35] Americans have always been a generous people. We still are. For much of our history we did not rely for the most part on public charity. With the rise of Progressivism, however, the push was on not simply to supplement but to "crowd out" private charity, replacing it with public charity undertaken by "professional" social workers. Alas, *forcing* people to "do good" through government undermines the moral order by undermining the individual responsibility that underpins freedom. As earlier noted, there is no virtue in forced beneficence.[36]

But the modern welfare state is only partly about helping the unfortunate. Today, it reaches far beyond with countless middle-class, upper-class, and corporate welfare schemes, privileges, and immunities that introduce perverse incentives not only against ending but also for expanding and multiplying those programs. Indeed, many such schemes are not even seen as "welfare." To the extent that government controls or at least influences the nation's monetary system, for example, it can move interest rates to below the rate of inflation, thus favoring both government borrowing and that of favored private entities while transferring wealth from savers and creditors to debtors, including the government itself. Taken together, all of this, of course, is leading us increasingly toward insolvency while undermining our character. As history demonstrates—in fact, is demonstrating today with our uncontrolled, unsustainable public debt—this cannot end well.[37]

What are we to say, though, when it appears, as in modern democracies, including our own, that large majorities sometimes willingly support an ever-expanding state? Given that a minority does not, we have here the classic problem of the tyranny of the majority, pitting individual rights against majoritarian consent, the individual against the collective—at bottom, the problem of political consent as a ground for legitimacy, seeming to justify that tyranny. And this is not limited to typical economic redistributive schemes involving retirement, health care, education, labor unionization, and the like. Grounded in their histories, many nations today, even democratic nations, still self-identify, redistribute, or regulate to some extent along religious, racial, ethnic, or other discriminatory lines. Are we to say that all of this is morally illegitimate? Insofar as equal treatment is concerned, we are,

although there may be some exceptions for clear historical or security reasons, such as with the state of Israel.

When majoritarian democracy is privileged over individual liberty other than for basic functions like line-drawing to flesh out our natural and moral rights or providing genuine public goods—that is, when democracy is the presumption and liberty becomes its contingent product—we have three basic models: one fully coercive, one less so, one not so. The first illegitimate model compels all citizens to participate in the public program, sometimes restricting even religious freedom—seen now in certain health care and antidiscrimination contexts. The less illegitimate model makes participation in such programs voluntary, thus allowing for minority rights. Rarely, of course, is that model entirely voluntary. Instead, one might be allowed to opt out in favor of a private service, yet still be taxed for the public program, as with public education. Best would be the third model, which would allow individuals to opt out entirely from the program, including from any tax or regulation pertaining to it, the better to be able to afford (or to forgo) a private service.

In America today, we are well along a socialization continuum running from limited to largely unlimited government—and many are urging us to go even farther. No wonder we are so divided. That raises a basic question: Who asked for all of these programs and the accompanying taxation, regulation, and public debt? The short answer is that too many of us have—believing, to be sure, the "free stuff" promises of the politicians we have elected. Thus, many have lost touch with the vision set forth in our Founding document, while many more have never been exposed, given how civics is too often taught today, to the idea that government exists not to solve our every problem but to enable us, through the rule of law, to face the challenges of life by living lives of freedom and dignity. Democracy is not an end in itself. Nor is it a legitimate means, certainly, for compelling others to join in public projects they may want no part of. In fact, at bottom, America is not really a democracy in the classic sense of that idea. It is a constitutional republic, dedicated to securing for each of us the blessings of liberty: "That to secure these *Rights*, Governments are instituted among Men, deriving their *just* Powers from the Consent of the Governed."

## Notes

1. I have discussed the issue of legitimacy more fully in Roger Pilon, "Individual Rights, Democracy, and Constitutional Order: On the Foundations of Legitimacy," *Cato Journal* 11, no. 3 (1992): 373–90.

2. In the state-of-nature tradition, the Founders drew primarily from John Locke's "Second Treatise of Government" (1690), in *Two Treatises of Government*, ed. Peter Laslett (Mentor, 1965). For a more recent argument in that tradition, see Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974).

3. On the tradition of moral rationality, see Alan Gewirth, *Reason and Morality* (University of Chicago Press, 1978); and Roger Pilon, "A Theory of Rights: Toward Limited Government" (PhD diss., University of Chicago, 1979).

4. For useful discussions of the ideological currents surrounding the Declaration, see Bernard Bailyn, *The Ideological Origins of the American Revolution* (Belknap, 1967); Carl L. Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (Harcourt, Brace and Company, 1922; repr., Vintage, 1958); and Morton White, *The Philosophy of the American Revolution* (Oxford University Press, 1978).

5. See Richard A. Epstein, *Simple Rules for a Complex World* (Harvard University Press, 1995).

6. See Maurice Cranston, "Human Rights, Real and Supposed," in *Political Theory and the Rights of Man*, ed. D.D. Raphael (Indiana University Press, 1967), pp. 43–53; Roger Pilon, "Ordering Rights Consistently: Or What We Do and Do Not Have Rights To," *Georgia Law Review* 13, no. 4 (1979): 1171–96.

7. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1946).

8. See also Roger Pilon, "On Moral and Legal Justification," *Southwestern University Law Review* 11, no. 4 (1979): 1327–44.

9. I have discussed the constitutional aspects of this point more fully in Roger Pilon, "A Government of Limited Powers," in *Cato Handbook for Congress* (Cato Institute, 1995), pp. 17–34; reprinted as "Restoring Constitutional Government," in *Cato's Letter*, no. 9, Cato Institute, 1995.

10. See H. L. A. Hart, "Are There Any Natural Rights?," *Philosophical Review* 64 (1955): 175–91.

11. None of this is to say, of course, that no values are "better" than others or that we cannot reason about values. Clearly, we do reason about values; and we can make powerful prudential arguments about which values are superior to others. But in the end, values are subjective in the sense that, unlike natural rights, they vary from person to person; and in the more analytical sense that statements about values are neither true nor false, there being no ultimate criterion of value that is immune to skeptical challenge. I have discussed this issue more fully in Roger Pilon, "The Right to Do Wrong," in *Flag-Burning, Discrimination, and the Right to Do Wrong*, ed. Roger Pilon (Cato Institute, 1990), pp. 1–7; repr. in *The Libertarian Reader*, ed. David Boaz (The Free Press, 1997), pp. 197–201; and Roger Pilon, untitled essay in "E Pluribus Unum? A Symposium on Pluralism and Public Policy," The American Jewish Committee, Washington, DC, 1997, pp. 61–64.

12. Evelyn Beatrice Hall, *The Friends of Voltaire* (G. P. Putnam's Sons, 1907), p. 199. This line may be Hall's paraphrase of Voltaire's views rather than a direct quotation.

13. Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (Cornell University Press, 1995), p. 26.

14. See especially Locke, "Second Treatise of Government."

15. Locke, "Second Treatise of Government," para. 123 (emphasis in original).

16. James Madison, "Property," *National Gazette* 1, no. 44 (March 29, 1792): 174–75; repr. in *Letters and Other Writings of James Madison*, vol. 4, *1829–1836* (Philadelphia, 1865), pp. 478–80.

17. I have developed these points more fully in Pilon, "Ordering Rights Consistently."

18. I have discussed this issue more fully in Pilon, "Ordering Rights Consistently." See also James M. Ratcliffe, ed., *The Good Samaritan and the Law* (Doubleday, 1966).

19. See Nozick, *Anarchy, State, and Utopia*.

20. Sometimes we use the word "forfeit" to mean "alienate" by one's own actions; for example, a murderer is said to have forfeited or alienated his right to his liberty and perhaps to his life. Likewise, through promise or contract, we alienate and create rights and obligations on a regular basis, as will be discussed shortly. Often, however, the question whether we can alienate various of our rights is conflated with the question whether a given right, having been alienated to another person, will be secured or enforced. Care must be taken to notice that those are separate questions. In particular, in the nature of things—given the vagaries of life—not every right, including rights we may have alienated to others, can or should be enforced.

21. Thomas Hobbes, *Leviathan*, ed. J. C. A. Gaskin (Oxford University Press, 2008), p. 76.

22. See, for example, Bruce Benson, *The Enterprise of Law: Justice Without the State* (Pacific Research Institute for Public Policy, 1990). For a discussion of how that might work, but would ultimately fail, see Nozick, *Anarchy, State, and Utopia*, part III.

23. Locke, "Second Treatise of Government," para. 13.

24. Although the Declaration speaks of just or legitimate powers, not just or legitimate governments, the legitimacy of government itself, as an institution, is a function, presumably, of our having "instituted" it and hence, to that extent, consented to come under its rule. Just how much that consent serves to lend legitimacy to ongoing governments is a question we take up next, by implication, when we consider whether consent justifies powers more extensive than the enforcement power and, more generally, whether consent justifies anything in the political context.

25. It is no accident that the Fourth Amendment speaks of the right to be free from "unreasonable" searches and seizures; that it requires "probable" cause before warrants can be issued; and that the Eighth Amendment speaks of "excessive" bail and of "cruel and unusual" punishment. Those areas of the law, in their nature, require value judgments. It would have been highly imprudent for Madison, when drafting the Bill of Rights during the first Congress, to have drawn those provisions more precisely.

26. It is noteworthy that the Constitution's ratification clause, Article VII, reflects the social contract model of legitimacy, thus consent: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this

Constitution *between the States so ratifying the Same*" (emphasis added). Setting aside the problem posed by the consent coming from state conventions rather than from the people directly, the point to notice is that only those states that had ratified the Constitution could be bound by it. Thus, it took *unanimity*, among at least nine states, to get the Constitution off the ground; and, as a corollary, that consent bound only those states.

27. Winston Churchill, speech given in the House of Commons, November 11, 1947, London, England.

28. Thomas Paine, *Common Sense* (Philadelphia, 1776).

29. However, just as individuals can contract around otherwise wrongful actions—for example, boxers before they enter the ring—so too, through "constructive consent," we *could* grant government powers that none of us had in the state of nature. Hold that thought; we will develop it shortly.

30. Consistent with federalism principles, such police power as the federal government has applies only over federal territory, wrongs against federal officials, or the enforcement of federal law, which is why most criminal and civil enforcement in America is undertaken by state agencies.

31. At this point in our argument, the justification for government's monopoly on the use of force, except when self-help is necessary, rests on the need to avoid the risks of individual enforcement in the state of nature, as discussed earlier.

32. The classic work on public goods was by James M. Buchanan, *The Demand and Supply of Public Goods* (Rand McNally & Co., 1968).

33. Here is Abraham Lincoln on this point: "Government is a combination of the people of a country to effect certain objects by joint effort. . . . The legitimate object of government is to do for a community of people whatever they need to have done, but cannot do at all, or cannot so well do, for themselves, in their separate and individual capacities." Abraham Lincoln, "The Nature and Objects of Government, with Special Reference to Slavery," in *Life and Works of Abraham Lincoln*, ed. Marion Mills Miller, vol. 3 (The Current Literature Publishing Company, 1907).

34. Perhaps no one advocated this course toward more government planning more frankly than Columbia University's Rexford Tugwell, a member of Franklin Roosevelt's "Brain Trust" and a principal architect of the seminal New Deal programs that have grown and grown more numerous ever since. Writing early in 1932 in the *American Economic Review*, Tugwell said: "fundamental changes of attitude, new disciplines, revised legal structures, *unaccustomed limitations on activity*, are all necessary if we are to plan. This amounts, in fact, to the abandonment, finally, of *laissez faire*. It amounts, practically, *to the abolition of 'business.' This is what planning calls for.*" We aren't quite there yet, but give it time (emphasis added). Rexford Tugwell, "The Principle of Planning and the Institution of Laissez Faire," *American Economic Review* 22, no. 1 (March, 1932): 75–92, p. 76.

35. A core conceptual problem with the United Nations' 1948 Universal Declaration of Human Rights, promoted assiduously by Eleanor Roosevelt, is its inclusion of "social, economic, and cultural rights" (mostly redistributive rights), treating them on a par with our basic right to liberty. It's no accident that countries that privilege such "rights" are generally less free, often far less free, than those that don't. Fortunately, the United States has not yet ratified the international covenant on such rights.

36. I have discussed these issues more fully in Roger Pilon, "Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles," *Notre Dame Law Review* 68, no. 3 (1993): 507–47.

37. A question that often arises is whether laws authorizing such illegitimate powers, if enacted and upheld *pursuant to predetermined neutral legislative and judicial procedures*, are "good law." Many natural law proponents hold, for example, that positive law inconsistent with natural law is "no law at all." The better answer, I submit, is to recognize the distinction between the two, to acknowledge that legislators and judges make mistakes, and to abide by the positive law until it can be corrected or otherwise overturned.