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PROCEDURAL VERSUS SUBSTANTIVE JUSTICE: RAWLS AND NOZICK

By David Lewis Schaefer

I. Introduction

For over three decades, it has been common to represent John Rawls's *A Theory of Justice* (1971, revised edition 1999) and his Harvard colleague Robert Nozick's *Anarchy, State, and Utopia* (1974) as exemplifying the fundamental alternative paths available for liberal political philosophy in the contemporary world.[1] Both authors hold that justice must take primacy over merely utilitarian considerations. Both authors, broadly imitating the social-contract tradition of early modern liberalism, derive the principles of justice from a hypothetical, prepolitical condition in which human beings are conceived as equal and free (although Nozick, unlike Rawls, refrains from founding justice on a hypothetical contract). Nonetheless, they differ over the implications of that freedom and equality for the content of justice.

For Rawls, the sense of justice that we share dictates that the parties who lay down the principles of justice be conceived as acting under a "veil of ignorance" that prevents anyone from knowing his particular abilities or even his conception of the good, so that he cannot bias the choice of principles to favor himself. One critical implication, according to Rawls, is that the principles of justice must be designed to safeguard each individual against the worst possible outcomes. As a consequence, Rawls argues, the parties would be most likely to agree on a set of principles that dictate (1) the priority of the equal, "basic" liberties for each person, guaranteeing him against the possibility of subjugation under a hierarchical regime, as well as against the elevation of other conceptions of the good over the one he will find he holds (once the veil is lifted); and (2) the regulation of primary goods other than liberty according to the rules of (a) legal equality of opportunity for all and (b) the "difference principle."

[1] John Rawls, *A Theory of Justice,* revised ed. (Cambridge, MA: Belknap Press of Harvard University Press, 1999); Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974). References to these two books—abbreviated as *TJ* and *ASU,* respectively—will be inserted parenthetically in the text.

Parts of Section VI of this essay derive from my article "Libertarianism and Political Philosophy: A Critique of Robert Nozick's *Anarchy, State, and Utopia*," *Interpretation: A Journal of Political Philosophy* 12, nos. 2–3 (May–September 1984): 301–34. Additionally, Section V draws on my forthcoming book *Illiberal Justice: John Rawls vs. the American Political Tradition* (Columbia: University of Missouri Press, 2007). I am grateful to the publishers for permission to reprint this material.

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The difference principle, in turn, ordains that inequalities in social and economic goods besides liberty are allowable only to the extent that they improve the lot of the "least advantaged" members of society, compared to what their lives would have been like without such inequalities (*TJ*, 266). Rawls uses the difference principle to mandate not only an extensive welfare state, but also the adoption of tax, antitrust, and other policies designed to guarantee that under a regime of private property, ownership of the means of production is "widely distributed." (Rawls leaves it open whether the difference principle is best effectuated in given circumstances under such a "property owning democracy" or a "liberal socialist" regime [*TJ*, 228, 235].)

By contrast, Nozick conceives the inhabitants of his prepolitical condition (which he calls the "state of nature") as more *like* actual human beings, in that he imagines no veil of ignorance to constrain their decisions. Moreover, unlike Rawls, he uses his account of the prepolitical condition to determine the nature of legitimate government, rather than to articulate comprehensive principles of justice. But his account of the prepolitical situation is no less abstract than Rawls's, since he portrays it as a condition of relatively peaceful coexistence among independent individuals, without attempting to demonstrate that such a condition ever has existed, or could exist, among actual human beings. Instead, he simply rejects Thomas Hobbes's account of the state of nature as a war of every individual against every other in which life is "solitary, poor, nasty, brutish, and short," on the ground that such "awful descriptions" of the prepolitical condition "rarely convince," since "[t]he subjects of psychology and sociology are far too feeble to support generalizing so pessimistically across all societies and persons." Moreover, Nozick maintains, the argument inferring the need for government from such fearsome accounts of the alternative is inconsistent, "since the argument depends upon *not* making *such* pessimistic assumptions about how the *state* operates" (*ASU*, 4; emphasis in original). It would be more useful and persuasive, Nozick believes, "to focus upon a nonstate situation in which people generally satisfy moral constraints and generally act as they ought." Only "if one could show that the state would be superior even to this most favored situation of anarchy, the best that realistically can be hoped for, or would arise [from it] by a process involving no morally impermissible steps" could one morally justify the existence of a state at all (*ASU*, 5).

I shall not trace here the process by which Nozick represents a "minimal" or "night-watchman" state, and *only* such a state, as hypothetically evolving from the prepolitical condition in a manner that conforms fully to moral constraints, in that it does not violate anyone's right to autonomy. Rather, I wish to focus on certain respects in which Rawls and Nozick, despite their seeming disagreement about whether just government must regulate the economy so as to ensure a "fair" distribution of wealth and income, *agree* on certain more fundamental points. Those

points of agreement include (1) the attempt to substitute a "procedural" account of justice for a substantive one; and (2) their view of the good and just society as one that is not grounded in any substantive view of the good life, but aims simply to provide human beings with the greatest freedom to live as they choose (so long as they obey the constraints of justice as the two authors respectively conceive it). After summarizing Rawls's procedural approach and Nozick's response to it in Sections II and III, I shall identify what I believe to be the root problems in that approach in Section IV. In Sections V and VI, I address the problems inherent in the moral libertarianism on which Rawls's and Nozick's visions of "utopia," or a perfectly just society, are grounded. Section VII pursues the contrast between their ultimately historicist visions of morality and the principles of natural right enshrined in the American Declaration of Independence. Finally, Section VIII more broadly contrasts the abstract visions of a free and just society devised by Rawls and Nozick with the actual, realistic constitutional-liberal principles on which the American political regime was founded.

II. Rawls's "Procedural" Justice

Central to Rawls's project, both in *A Theory of Justice* and in his later book *Political Liberalism*, is the aspiration to achieve a "consensus" on the principles of justice, the absence of which he thinks constitutes evidence that existing societies are not "well-ordered" (*TJ*, 4–5). He believes that deriving principles from an original position in which all human beings are fairly represented as "moral persons" can help to supply that consensus (*TJ*, 11). In turn, having a set of agreed-on principles by which to measure the justice of a given political, social, and economic regime should assist us in making actual societies more just.

When it comes to applying his second principle of justice (regarding the distribution of goods other than the basic liberties), however, Rawls acknowledges that we cannot expect actual regimes to embody a *substantive* justice, in the sense that individuals are likely to receive what their own particular merit or moral desert entitles them to. He treats the question of distributive justice "as a matter of pure procedural justice," with the "social system" being designed "so that the outcome is just whatever it happens to be," at least "within a certain range" (*TJ*, 74). The "principle of fair opportunity" insures this result: "against the background of a just basic structure, including a just political constitution and a just arrangement of economic and social institutions," this principle enables one "to discard as irrelevant" (that is, irrelevant to the problem of justice) information about "the varying relative positions of individuals" or about particular transactions (*TJ*, 76).

Going beyond these claims, Rawls justifies his difference principle by denying that any individual deserves his "native endowments," or even

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"the superior character that enables us to make the effort to cultivate our abilities." Hence, Rawls denies that those blessed with superior endowments, or with the disposition to make the best of their endowments, "deserve" the greater rewards that those endowments might enable them to attain, unless those rewards are somehow "compensated for" to benefit the less advantaged (for instance, by spending "greater resources . . . on the education of the less rather than the more intelligent") (*TJ,* 86–89).

Finally, Rawls challenges the tendency of "common sense" to suppose that "the good things in life . . . should be distributed according to moral desert," so that the notion of justice as "happiness according to virtue" should be regarded as an "ideal" that society ought to aim to approximate. To the contrary, in Rawls's theory, "the principles of justice that regulate the basic structure" of society "do not mention moral desert, and there is no tendency for distributive shares to correspond to it." Since even "the effort a person is willing to make is influenced by his natural abilities and skills," there is no reason to try to reward such effort as a matter of justice. Thus, even under the best circumstances, there is "no tendency for distribution and virtue to coincide." Instead of seeking such a coincidence, we should be satisfied with knowing that "a just scheme gives each person his due" only in the sense that "it allots to each what he is entitled to *as defined* by the scheme itself," and the principles of justice that are selected in the original position "*establish* that doing this is fair" (*TJ,* 273–76; emphasis added).

III. Nozick's Response

Nozick offers a trenchant critique of Rawls's account of distributive justice in chapter 7 of *Anarchy, State, and Utopia.* As Nozick observes, the very term "distributive justice" is misleading, since it implies that all goods originate in some "central distribution," rather than being acquired by individuals from others "in exchange for something, or as a gift" (*ASU,* 149). Nozick invites us to imagine a set of Robinson Crusoes, each working alone for two years on a separate island. Once these Crusoes eventually came into contact with one another, they would not "owe" some part of their product to the others, merely on account of that contact. Similarly, the sheer fact of social cooperation on which Rawls grounds his second principle of justice does not obviously entail such a debt (*ASU,* 185–86). And in a single society, if the better-endowed in Rawls's sense "manage to accomplish something of great advantage to others, such as new inventions" or the exercise of great productive skills, are they not *already* benefiting their less-advantaged peers? Why punish their industry by demanding that they pay a further "tax" to profit the less advantaged? (*ASU,* 193–95).

Rawls's veil of ignorance, Nozick observes, invites the parties to the original position to treat goods as if they "fell from heaven like manna,"

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rather than having any connectedness to the individuals who produce them (*ASU,* 198–99). And doesn't Rawls's treatment of particular human excellences, including even the disposition to cultivate one's talents, as "the products of factors outside the person's control," and hence morally "arbitrary," embody an "unexalted picture of human beings" that sits uneasily with the conception of "human dignity" that Rawls wishes to advance? (*ASU,* 214). Moreover, doesn't Rawls's treatment of individuals' natural abilities as a "collective asset" embody precisely the fault that he attributes to the utilitarians of failing "to take seriously the distinction between persons"? (*ASU,* 228).

These are powerful objections to Rawls's view of justice. Yet it is not evident that Nozick himself offers a more solid foundation on which to build an account of justice. He seems to represent Rawls's theory as a "patterned," "current time-slice," or "end-result" account, one that aims to actualize a certain vision of what the just "distribution" (level of inequality) ought to look like at any particular moment (*ASU,* 153–64, 198–204). By contrast, Nozick's own "entitlement" theory is a "historical" one, which determines the justness of a distribution simply by examining "how it came about" (*ASU,* 153). "If the world were wholly just," Nozick writes, "justice in holdings" would be determined entirely by whether individuals had justly acquired a given good (through a just acquisition or transfer), and nobody would be entitled to a holding except by that means (*ASU,* 151).

The hypothetical premise I have just quoted, however, undercuts the very foundation of the entitlement theory. There is no reason to suppose that any actual person's present holdings derive from an unbroken series of "just" transactions stemming back to the origins of human history. Within existing polities, of course, the settlement of disputes among private parties over the title to a given piece of property commonly depends on the legal origins of that title, and whether it was transferred to anyone else in a legal manner. But the quest to authenticate a title in a court of law ordinarily ends, in even the most extreme cases, with the historical foundation of the political and legal regime from which the court derives its authority. (Even suits by American Indian tribes to regain title to lands represented as having been wrongly confiscated by other Americans depend on alleged violations of treaties signed with American governmental authorities, not on broader claims that the whole of America "belongs" to the Indians.)

Recognizing this difficulty, Nozick is forced, for the sake of consistency, to take back what he had "given" with his entitlement doctrine through what he calls "the principle of rectification." Having concluded that Rawls's principles by themselves offer no justification for mandatory economic redistribution, Nozick then suggests viewing "patterned principles of justice" such as Rawls's "as rough rules of thumb meant to approximate the general results of applying the principle of rectification of injustice." Since we lack "much historical information" about the ultimate origins of

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present holdings, Nozick even proposes adopting Rawls's own difference principle, on the (admittedly questionable) hypothesis that "those from the least well-off group" in a society "have the highest probabilities of being the (descendants of) victims of the most serious injustice who are owed compensation by those who benefited from the injustices." This assumes that those beneficiaries (or rather, it would appear, their descendants) are now among "those better off" (*ASU,* 230–31).

Nozick, then, offers no justification on his own terms for barring government from instituting far-reaching programs of economic redistribution, or racial and ethnic quotas in hiring and education. Indeed, his suggestion of targeting the rich as the most likely beneficiaries of past "injustice" not only flies in the face of continuing evidence of a high degree of intergenerational socioeconomic mobility in a constitutional democracy with a (largely) free-enterprise economy like the United States, but contradicts Nozick's own earlier criticism of Rawls for denying people moral title even to those goods they acquire as a result of their own efforts to develop their talents.[2]

IV. "Procedural" versus Political Justice

Nozick thus proves to be no real friend of economic liberty or of the principle of treating people as individuals (as called for under the natural-rights doctrine of the American Declaration of Independence), rather than as members of more or less arbitrarily defined economic, racial, or ethnic groups. But his failure to offer an effective defense of liberty is rooted, I suggest, in the abstract, "theoretical" approach that he adopts to justice, in common with Rawls—an approach that ignores the actual human or political circumstances in which issues of justice arise, and gives short shrift to what Rawls called our "common-sense" (but, according to Rawls, erroneous) opinions about justice.

[2] Since the fact of continuing socioeconomic mobility in the United States not only undermines the ground for Nozick's proposed application of his rectification principle, but also challenges the need for anything like Rawls's difference principle, it will be worthwhile to cite some of the relevant evidence. Statistics commonly cited to show the alleged persistence of fixed economic differences among "classes" in America commonly mislead because they fail to follow the course of *individuals'* economic circumstances over time: even as the incomes of many members of the "lower" class rise over time, their place is often taken by new immigrants who most often start at the bottom. Individual incomes naturally rise, as well, as people age, then decline once they retire. Hence the economist Thomas Sowell notes that studies that tracked individual Americans over a period of years "have found that most do not stay in the same quintile of the income distribution for as long as a decade," and that "only 3 percent of the American population remained in the bottom 20 percent for as long as eight years. More who began in the bottom 20 percent had reached the top 20 percent by the end of that period than remained where they were." Thomas Sowell, *The Quest for Cosmic Justice* (New York: Simon and Schuster, 1999), 38–39. See also Bruce Bartlett, "Class Struggle in America?" *Commentary* 120, no. 1 (July–August 2005): 33–38, at 34; and W. Michael Cox, "It's Not a Wage Gap but an Age Gap," *New York Times,* April 21, 1996, p. 15 (citing the University of Michigan Panel Survey on Income Dynamics).

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Despite Nozick's distinction between his ostensibly "historical" account of justice and Rawls's "time-slice" or "end-result" account, Nozick explicitly *agrees* with Rawls that a just distribution of goods is not to be measured by people's moral desert (*ASU,* 217), and more generally that the justice of any given distribution should be assessed solely by the justice of the *procedure* that generated it (*ASU,* 151, 159). The apparent difference in their conclusions is simply a consequence of the different aspects of human existence that they abstract from at the outset. Nozick rightly takes Rawls to task for abstracting from the fact of human individuality and (partial) self-ownership, which entails that no one's natural gifts or efforts may justly be treated as if they were merely a "common asset" whose fruits may be redistributed in accordance with some theorist's fancy. In turn, however, Nozick himself abstracts from the essentially political character of human existence, which entails that no individual can properly be regarded as the sole producer or "owner" of the goods he lawfully acquires, without any concomitant obligations to his fellow citizens. Contrary to Rawls, it is not the vague fact of "social cooperation" that makes us interdependent, but our mutual dependence on a political structure of government and laws, as well as on the readiness of other citizens to risk their own lives, when necessary, to defend the lives and liberties, and the property, of their countrymen.

Nozick dismisses the social-cooperation argument by comparing it to the demand that any inhabitant of a neighborhood that establishes a "system of public entertainment" or a street-sweeping program is obliged to contribute to it, just because he benefits from it (*ASU,* 93–94). But government, unlike entertainment or even clean streets, is not an "optional" benefit for human beings. Contrary to Nozick, Hobbes's argument that stable government is the precondition of all other worthwhile human activity depends not on a "pessimistic" view of humanity—Hobbes explicitly denies such a claim[3]—but rather on the evident facts of human life, specifically the natural conflict of interests and desires among human beings, given their unlimited desires and the limited stock of good things (including honor and political power as well as economic goods) available to satisfy them.

While Hobbes may have underestimated the need to structure government so that it does not itself become oppressive of the rights that it is properly instituted to secure, his successor John Locke fully anticipated Nozick's counsel against that danger. But while Locke is the immediate source for Nozick's account of just acquisition, Locke's treatment of how an individual might become the "owner" of an object or piece of land simply by applying his labor to it is a prepolitical one. While asserting that each human being is naturally the proprietor of

[3] See Thomas Hobbes, *Leviathan,* ed. E. M. Curley (Indianapolis, IN: Hackett, 1994), chap. 13, par. 10: "The desires and other passions of man are in themselves no sin."

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his own life, liberty, and property, Locke also notes that these rights would be wholly ineffectual—for practical purposes, meaningless—in the absence of a government established to protect them. And agreeing to the establishment of government entails forfeiting our unlimited right to "execute" the laws of nature against trespassers—in return for more secure, albeit limited, rights to the security of our lives, lawfully acquired property, and lawful liberty under government.[4] As Locke observes near the end of the chapter on property in his *Second Treatise,* "in Governments the Laws regulate the right of property, and the possession of land is determined by positive constitutions."[5] Contrary to Nozick's hedging assertion that taxation of people's earnings is "on a par with forced labor" (*ASU,* 169), Locke holds that the critical security against abusive taxation (as well as other forms of oppression) is a government whose authority ultimately derives from the governed, in which legislative and executive authorities are separated, legislators are themselves subject to the laws they enact, and taxes may not be levied without the consent of the people's elected representatives.[6]

Of course, there is no *guarantee,* under the Lockean system or under any other, that people's earnings or wealth will be proportionate to their effort or their moral desert. Certainly, however, the Lockean presumption against arbitrary confiscation of one's property (and against arbitrary imprisonment or arrest), as well as the institutionalization of government by consent, makes it *more likely* than under an absolutist dictatorship or monarchy (or a hereditary caste system) that individuals will enjoy the opportunity to advance themselves in accordance with their own efforts and talents. This fact itself should weaken the disposition toward the envy of other people's attainments that Nozick rightly suggests underlies Rawls's doctrine (*ASU,* 229).

Nonetheless, the mere fact of having to acquire wealth through one's own labor (or that of one's parents or ancestors) will not suffice to legitimize a political or economic regime, unless the system is seen *on the whole* to encourage desirable moral traits besides economic enterprise. How can real human beings be brought to suppress their common-sense judgments of morality and justice in favor of a procedure that merely "defines" what is just as the outcome of a certain procedure?[7] Can any successful

[4] John Locke, *Second Treatise,* in Locke, *Two Treatises of Government,* ed. Peter Laslett (New York: New American Library, 1963), chap. 9.

[5] Ibid., chap. 5, sec. 50, lines 14–16.

[6] Ibid., chap. 7, sec. 94 (lines 20–32), and chap. 11, secs. 138, 140–42. For a thorough analysis of the meaning of consent in Locke, stressing its democratic implications, see Peter Josephson, *The Great Art of Government: Locke's Use of Consent* (Lawrence: University Press of Kansas, 2002).

[7] Cf. David Wiggins's response to Rawls's account of "pure procedural justice": "It is not an accident that human beings have always made it a requirement on human justice that one should be able to see as just that which really is just." Wiggins, "Neo-Aristotelian Reflections on Justice," *Mind* 113, no. 451 (July 2004): 506. On the need for the system of free enterprise

political regime be founded on the demand that we avoid assessing the substantive justice of the way of life it engenders, as Rawls and Nozick would have us do?

These questions lead me to address a further commonality between Rawls's and Nozick's doctrines: their representation of an ideally just society as a regime in which government makes no moral demands, and sets no moral restrictions, on its citizens, other than those directly entailed by each author's respective account of justice.

V. Rawls's Utopia

It is symptomatic of the narrowness of focus of much of today's academic, liberal political philosophy that Rawls and Nozick are commonly treated as if they represent almost polar opposites, because of their seeming difference on the issue of economic redistribution, or "social justice," when they agree so thoroughly on other aspects of the good and just society. This agreement is evident if one compares Rawls's interpretation of his first principle of justice (mandating the priority of equal liberty over other goods), along with his account of the good society in Part III of *A Theory of Justice,* with the last chapter of Nozick's *Anarchy, State, and Utopia,* titled "A Framework for Utopia."

One of the more curious aspects of Rawls's veil of ignorance is his mandate that the parties who are to arrive at principles of justice must be kept ignorant not only of their particular talents and abilities (so as to prevent them from "fixing" the rules to favor their own interests), but also of their conceptions of the good. Rawls justifies the latter requirement by articulating his "notion of a free person." He describes free individuals as people "who do not think of themselves as inevitably bound to . . . the pursuit of any particular complex of fundamental interests," but rather "give first priority" to preserving their liberty to "revise and alter their final ends." It follows, according to Rawls, that they will want to rank that liberty above other goods in order to guarantee "their highest-order interest as free persons" (*TJ,* 131–32).

This argument is tautological. It amounts to saying that people who prefer freedom to other goods will also prefer to be governed by principles that elevate freedom over other goods. One must question, however, whether this account of the relation between people's freedom and their "final ends" is at all coherent or psychologically intelligible. If people's first priority is to retain the right to revise their final ends whenever they choose, it appears that *no* end is ever meaningfully final. In what sense can we speak of such individuals' expressing "devotion to these ends"

to be perceived as resting on a higher moral principle than that of sheer self-interest, see Irving Kristol, "Horatio Alger and Profits," and "When Virtue Loses All Her Loveliness," in Kristol, *Two Cheers for Capitalism* (New York: Basic Books, 1978), 84–89, 257–68.

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(*TJ,* 132), as opposed to being devoted to their right to revise them? Doesn't devotion to an end, a cause, or another human being entail committing oneself *not* to desert them? Despite Rawls's pretense of making the deliberations in the original position independent of any particular conception of the good, it would appear that he has actually presupposed a particular, highly questionable view of the good—preeminently, the merely abstract "freedom" to change one's commitments—without submitting this view to critical assessment.

Be this as it may, Rawls infers from the priority of liberty as he understands it a sweeping right to "liberty of conscience" that encompasses far more than that right has traditionally been understood to entail. Since (thanks to the veil of ignorance) the parties in the original position "do not know . . . what their religious or moral convictions are, or . . . the particular content of their moral or religious obligations as they interpret them," and do not even "know that they think of themselves as having such obligations" at all, "they cannot take chances with their liberty" by adopting a principle that would allow "the dominant religious or moral doctrine to persecute or to suppress others." What is in question, however, is not merely religious "suppression" or "persecution" as these terms are ordinarily understood. Rather, beyond specifying that "the state can favor no particular religion" and may not penalize dissenting religious sects (*TJ,* 186), Rawls holds that in accordance with the principle of neutrality among conflicting moral beliefs, government must also avoid regulating people's conduct on the basis of any particular view of human excellence or dignity. Hence, he explains, government may not prohibit sexual relationships that are thought to be "degrading and shameful," since such judgments reflect "subtle aesthetic preferences" about which individuals may disagree (*TJ,* 291).

Rawls's prescription of strict governmental neutrality on issues of personal morality accords well with political beliefs that are widespread in the contemporary academy, as well as with the thrust of numerous Supreme Court decisions over recent decades (for instance, the Court's 2003 ruling in *Lawrence v. Texas* that state laws against homosexual sodomy are unconstitutional, and earlier decisions severely restricting the capacity of local governments to prohibit the dissemination of pornography). But even the Supreme Court has not (yet) pushed the principle of moral neutrality to its logical limit (e.g., by striking down laws banning polygamy). Moreover, regardless of whether one judges this judicial policy to be sound, it is hard to see how the prescription of governmental neutrality regarding sexual morality can properly be described as a pure dictate of impartial *justice.* (Contrary to the misleading impression engendered by Rawls's veil of ignorance, justice is normally understood to entail the impartial treatment of actual human beings, not an unqualified agnosticism regarding alternative conceptions of the good.) Rather, in holding that government must be firmly neutral among competing religious and moral beliefs

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on the ground that to do otherwise would improperly make some individuals the interpreters of other people's religious and moral duties (*TJ,* 182–83), isn't Rawls really setting *himself* up as the authoritative interpreter of everyone's religious and moral duties?[8] And what qualifies him to exercise this authority?

Having devised the rules of justice so as ostensibly to accommodate the greatest diversity in people's conceptions of the good or "life plans," Rawls then proceeds in Part III of *A Theory of Justice* to try to show how such diversity is at the same time compatible with or conducive to the greatest possible degree of social unity. Here he explains that his doctrine views human beings as social creatures who share "final ends" and value their "common institutions and activities." Borrowing from the nineteenth-century liberal theorist Wilhelm von Humboldt (a source for John Stuart Mill's notion of individuality in *On Liberty*), Rawls explains that it is only through social union that each person overcomes the limitations of his own capacities and opportunities so as to share in his fellows' "realized natural assets." This community extends over time, so that we profit from our predecessors' achievements and in turn develop our own capacities for the benefit of our descendants (*TJ,* 458–60). When all citizens have "a shared final end and accepted ways of advancing it" that facilitate "public recognition" of everyone's attainments, we can say (as Socrates ironically maintains of the best city in Plato's *Republic* [462c–d]) that "all find satisfaction in the very same thing" (*TJ,* 462).

Such profound thinkers as Edmund Burke have plausibly represented civilization as a partnership among generations.[9] Indeed, the notion of political society as having a shared good that transcends individual interests can be said to characterize preliberal political philosophy as a whole, as well as liberal political thought as articulated by statesmen like Abraham Lincoln. Yet outside the realm of religious prophecy, no serious thinker ever promised such a unity of "satisfaction" among citizens as Rawls attributes to his well-ordered society.[10] (Isn't this unity more nat-

[8] Cf. Benjamin Barber, "Justifying Justice: Problems of Psychology, Politics, and Measurement in Rawls," in Norman Daniels, ed., *Reading Rawls* (New York: Basic Books, 1975), 313–14; Victor Gourevitch, "Rawls on Justice," *Review of Metaphysics* 28, no. 3 (March 1975): 494–98; and John Gray's valuable distinction between Rawlsian neutrality and toleration properly understood in Gray, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (London: Routledge, 1995), 19–20.

[9] Edmund Burke, *Reflections on the Revolution in France,* ed. J. G. A. Pocock (Indianapolis, IN: Hackett, 1987), 85.

[10] Perhaps the most sweeping call for civic unity in the tradition of American political thought is John Winthrop's appeal, in his 1630 shipboard sermon on "Christian Charity," that the Puritan settlers "abridge our selves of our superfluities, for the supply of others' necessities" and endeavor to "delight in each other, make others' conditions our own, rejoice together, mourn together, labor and suffer together." But the ground of this ideal of community (an exemplary "city upon a hill") is the Christians' communion with God, a promise of salvation that, of course, has no counterpart in Rawls's utopia. See Winthrop, "Christian Charity: A Model Thereof," in Edmund S. Morgan, ed., *Puritan Political Ideas* (Indianapolis, IN: Bobbs-Merrill, 1965), 92–93. (I have modernized Winthrop's spelling and punctuation.)

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urally to be approached in a harmonious marriage, or in the relation of close friends?)

Remarkably, after having based his doctrine on the assumption that the only objective ("primary") goods are those for which we compete with others (wealth and power) or at least seek to enjoy without other people's interference (liberties), Rawls now justifies his doctrine on the basis of an abstract, communized conception of humanity in which the individual's identity collapses into the whole. In place of any natural wholeness that the individual might achieve through understanding—the reason why Plato's Socrates represents philosophy as an essentially erotic activity—or at least through love, friendship, and family, as well as a meaningful public or private vocation—Rawls offers only an artificial "happiness," reducing the individual to a cog in the social machine, extending the division of labor from the factory floor to the whole of life.[11]

What is most distinctive about Rawls's notion of community—unlike Socrates' ostensibly just city in the *Republic*—is its nonjudgmental character. In accordance with the principle of "democracy in the assessment of one another's excellences," Rawls stresses that high scientific, artistic, cultural, or religious achievements "have no special merit from the standpoint of justice." It is better, he suggests, to understand social cooperation on the model of a game, in which each person's "zest and pleasure" presupposes a joint commitment to "fair play."[12] Every individual is fitted neatly within his society, so that his "more private life . . . [is] so to speak a plan within" society's overall plan. And all members of society appreciate "the collective activity of justice" as "the preeminent form of human flourishing" (*TJ,* 462–63). (Rawls proffers no evidence to support the latter judgment.)

The most fundamental difficulty with Rawls's account of the just society as a union of social unions is that it abstracts from the existence of deep-seated *disagreements* about ends, such that it misleadingly assumes that everyone else's development of his potentialities, or the fullest development of all kinds of particular unions, necessarily contributes to *my* happiness or well-being. It is obvious that, say, Hitler's or Saddam Hus-

[11] Again, we are reminded of the ironic "best regime" in Plato's *Republic,* which eliminates the family in the name of the greatest civic unity, thereby evincing Plato's view of the dangers of a fanatical pursuit of justice. Cf. Aristotle, *Politics,* II.1–4; and Mary Nichols, *Socrates and the Political Community* (Albany: State University of New York Press, 1987), chap. 3.

[12] Rawls's game metaphor, which played a key role in the original development of his theory, is not apropos here for several reasons. First, even though a game presupposes its members' playing by the rules, their "final end" within the game is typically to win rather than to ensure the maximum of fairness. Second, within a game, some actions (hitting a home run) are clearly ranked above others (striking out). Finally, whereas the rules of a game are by definition artificial, the same cannot be said of the activities of society as a whole. Don't we inevitably think of some undertakings (such as the education of youth, or the governance and defense of one's country) as more serious than other, purely recreational ones?

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sein's full development of his potential for tyranny is contrary to the happiness of nearly all other human beings.[13] In a similar vein, it is highly doubtful that from the standpoint of a believing member of one religious faith, the fullest development of alternative religious possibilities is desirable—as distinguished from a unity of human belief that is grounded in the true religion. Moreover, if we take seriously Rawls's mandate of nonjudgmentalism with respect to artistic or scientific excellence, it would follow that the scientist is obliged to applaud the "advance" of astrology and alchemy, and to acknowledge that these "sciences" are no less praiseworthy than mathematical physics. Similarly, "art" works like "Piss Christ" (a statue of Christ immersed in a bottle of the artist's urine that earned a temporary celebrity in the 1990s) must be accorded recognition as the equivalent of a Rembrandt portrait, lest the self-esteem of the "creator" of the former be weakened. How could any political society subsist on the basis of such a merely formal agreement among its citizens' ends?

VI. Nozick's Utopia

Unlike Rawls, Nozick does not assert the possibility of a society in which all individuals' life plans harmonize neatly with one another. Instead his utopia is a "meta-utopia," a "framework" within which people whose aspirations differ may form their own associations, thereby enabling all "to do their own thing" (*ASU,* 312). This utopia, however, like Rawls's counterpart, rests on a premise supposedly derived from the observation of human diversity: the fact that "different individuals find their happiness in doing different things" (*TJ,* 359), or that "people are [so] different . . . in temperament, interests, intellectual ability, aspirations, natural bent, spiritual quests, . . . the kind of life they wish to lead [and] the values they have" that "[t]here is no reason to think that there is *one* community which will serve as ideal for all people and much reason to think that there is not" (*ASU,* 309–10; emphasis in original). In what he appears to offer as decisive evidence in this regard, Nozick rhetorically asks whether there is "really *one* kind of life which is best" for each of the personages on a long list he supplies, ranging from Moses to Hugh Hefner, and including Socrates, Yogi Berra, Thomas Jefferson, drug guru Baba Ram Dass, the Lubavitcher Rebbe, and the reader's own self and parents (*ASU,* 310; emphasis in original).

[13] More generally, as John Schaar observes, it is impossible for all talents to be "developed equally in any given society," since each society will inevitably admire and reward some potentialities more than others. John Schaar, "Equality of Opportunity, and Beyond," in *Nomos IX: Equality,* ed. J. Roland Pennock and John W. Chapman (New York: Atherton, 1967), 230. Rawls himself stresses the need for particular conceptions of the good to be constrained by justice, thus ruling out tyranny as a way of life. Nonetheless, to the extent that he overcomes the problem of conflict among human ends by excluding from the just society any ways of life that don't fit, his representation of that society as entailing a complementarity of ends reduces itself to tautology.

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For both Rawls and Nozick, the sheer fact of human difference suffices to demonstrate that political society has no need or right to try to provide its citizens with authoritative guidance on how to live—as if the only alternative to extreme open-endedness in this regard were a Spartan-like regimentation. (Whereas Rawls was particularly concerned to uphold the right to engage in sexual practices that others might judge degrading, Nozick is eager to advertise his own recreational drug use [*ASU,* 221] as well as rendering homage to Baba Ram Dass.)

But let us note how Nozick's list of diverse personages begs the essential questions: (1) it presupposes that the best way of life for a person must be the one he presently desires or "values" (*ASU,* 309); (2) it implies that no particular model of the good society can allow for an adequate diversity of ways of life to accommodate the natural differences among human beings, unless it is arranged to be entirely "nonjudgmental" about how they live;[14] and (3) it emphasizes the differences of belief and inclination among people who have already been formed by their respective societies, thus ignoring the possibility that Hugh Hefner (to take an extreme example) might have chosen a different way of life from the one he did—and one much less opposed to Moses'—had he been reared in a community that was governed according to the Mosaic law. Given that people's aspirations are inevitably shaped in part by the character of the political society in which they live, shouldn't a healthy regime seek to encourage the young to aspire to emulate individuals like Socrates, Picasso, or Jefferson rather than Hugh Hefner or Baba Ram Dass?

The feature that seemingly distinguishes Nozick's utopia from that of Rawls is Nozick's stress on "experimentation." In the spirit of the pragmatist thinkers John Dewey and Oliver Wendell Holmes, Jr., Nozick treats the construction of the good society as an experiment in which nothing can be known to be good or bad, right or wrong, without first having been "tried out" in practice. (And even if it was tried before and failed, it should still be "retried" to see whether it can be made to work under different conditions [*ASU,* 315–17].)[15] Even "crackpots" and "maniacs"

[14] Nozick acknowledges that "no utopian author has everyone in his society leading exactly the same kind of life," but infers from this fact that no single kind of *community* can be best for all men either (*ASU,* 311). Yet the contrary inference would seem to follow just as easily, or more so.

[15] See John Dewey, *The Public and Its Problems* (New York: Henry Holt, 1927). For Holmes's experimentalism, see his dissenting opinions in *Abrams v. United States,* 150 U.S. 616 (1919), and in *Gitlow v. New York,* 268 U.S. 652 (1925), stressing the need for a "free" society to remain open to the possible triumph of "proletarian dictatorship"; and especially his opinion in *Buck v. Bell,* 274 U.S. 200 (1927), sanctioning another sort of experimentation (mandatory sterilization of the retarded) to enable society to "prevent those who are manifestly unfit from continuing their kind."

Holmes also voted to uphold the constitutionality of a state law authorizing a form of indentured servitude, perhaps a step in the direction of a right to sell oneself into slavery (a right supported by Nozick [*ASU,* 331]): see Holmes's dissenting opinion in *Bailey v. Alabama,* 219 U.S. 219 (1911).

should be given the chance to try out their schemes (*ASU*, 316); who are we to say what sanity is?

Nozick himself is prepared to carry the experimental principle to the extreme of guaranteeing an individual's right "to sell himself into slavery" (*ASU*, 331). It is not entirely clear why he does not go further and sanction the retrial of some of the more terrifying social "experiments" of the last century. To be sure, not all the participants or victims of such experimentation participated voluntarily, as Nozick insists they must in a legitimate system (although he qualifies that caveat, as I will note below). Nonetheless, if no political truths can be fixed without having been "proved" through social experimentation, how do we know that freedom itself has such merit as Nozick attributes to it? Once the principle of scientific experimentation is given primacy over belief in an objective morality, consistency seems to dictate that no holds should be barred.

These problems aside, it is not obvious how Nozick's account of the utopia-building process can be reconciled with his previous defense of the minimal state. His identification of the latter with the "framework for utopia" depends critically on a distinction he draws "between a face-to-face community and a nation" (*ASU*, 322). According to this distinction,

> though there is great liberty to choose among communities, many particular communities internally may have many restrictions unjustifiable on libertarian grounds: that is, restrictions which libertarians would condemn if they were enforced by a central state apparatus. For example, paternalistic intervention into people's lives, restrictions on the range of books which may circulate in the community, limitations on the kinds of sexual behavior, and so on. But this is merely another way of pointing out that in a free society people may contract into various restrictions which the government may not legitimately impose on them. Though the framework is libertarian and laissez-faire, *individual communities within it need not be*, and perhaps no community within it will choose to be so. (*ASU*, 320; emphasis in original)

The main ground of this distinction between the legitimate spheres of state and communal authority is that "[i]n a nation, one knows that there are nonconforming individuals, but one need not be directly confronted" by them, whereas "in a face-to-face community one cannot avoid being directly confronted with what one finds to be offensive." Additionally, "[a] face-to-face community can exist on land jointly owned by its members, whereas the land of a nation is not so held." For both these reasons, a community is free to regulate the ways in which its members live, in a manner that Nozick's principles forbid to the nation as a whole (*ASU*, 322). But how far can this distinction hold, and how adequately can it reconcile the competing demands of liberty and community?

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I note, to begin with, that Nozick's distinction can apply only to nations large enough to have a number of face-to-face communities within them. It would not apply to a polity that was coextensive with one such community, that is, something like the ancient *polis.* (It would seem to follow that the members of a city-state are free to restrict liberty in an indefinite variety of ways, including interference with what Nozick had previously represented as nigh-absolute individual rights.) And how far can members even of a community that is part of a large nation really avoid being confronted with phenomena that they reasonably find morally offensive—porn theaters situated in a city's downtown, prostitutes soliciting customers, or drug addicts wandering the streets after procuring their latest (legal) "hit," for instance—if the larger government is prohibited from interfering with them? Nor does the criterion of joint ownership of land add anything: since no present property-holders can demonstrate their possession of an unblemished "title" to their land deriving from its first "owners," in the fundamental sense the "property" of *every* political community *is* "jointly held" by its citizenry, if it belongs to anyone at all. All private land titles, in other words, are subordinate to, and derivative from, the collective one.

We must next ask how far Nozick's nation-community distinction actually serves to protect liberty, even within those polities to which it applies. On the surface, it appears to offer very great protection: individuals are free to institute whatever sorts of community they desire, and no one is subjected to restrictions to which he personally has not chosen to submit. However, this seeming liberty operates fully only at the time when communities are originally founded: Nozick denies that an already existent community is obliged to accommodate an individual who wishes to reside there but "opt out" of its practices (*ASU,* 321–22). Ultimately, once communities have been formed throughout the nation or the world, presumably choosing to occupy the most desirable land, the nonconforming individual may have few, or no, real options:

> Even if almost everyone wished to live in a communist community, so that there weren't any viable noncommunist communities, no particular community need also (though it is to be hoped that one would) allow a resident individual to opt out of their sharing arrangement. The recalcitrant individual has no alternative but to conform. Still, the others do not force him to conform, and his rights are not violated. *He has no right* that the others cooperate in making his nonconformity feasible. (*ASU,* 322; emphasis added)

Only when the foregoing passage is put together with several other aspects of Nozick's account of the "framework for utopia" does the passage's full significance emerge. These aspects include (1) Nozick's recognition of each community's right to restrict "the range of books which

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may circulate" within it (*ASU,* 320); (2) his inability to resolve the conflict between children's right to be informed of "the range of alternatives in the world" and their parents' possible desire to withhold such knowledge from them (*ASU,* 330); (3) his affirmation of people's "right" to sell themselves into slavery (*ASU,* 331); and (4) his hesitation even about how far the individual possesses a right to emigrate from a community, "if [he] can plausibly be viewed as *owing* something to the other members of a community he wishes to leave" (*ASU,* 330; emphasis in original).[16] Strikingly, after considering these remarks together, we find that Nozick—starting from a "libertarian" perspective—has succeeded in offering a recipe for universal tyranny! All that a universal network of tyrannical communities need do to legitimize itself, it would appear, is demonstrate that each community's original founders determined its rules on the basis of a free contract. But after a period of some years (or centuries) had elapsed, during which an appropriate censorship of books was maintained, who would know the truth of the matter? Moreover, from the perspective of an individual who comes on the scene after all communities have been founded, and who therefore "has no alternative but to conform," what possible difference can it make?

No doubt providing a rationale for universal tyranny was the farthest thing from Nozick's mind when he wrote *Anarchy, State, and Utopia*. Nonetheless, the fact that his argument seems to culminate in such a rationale confirms the insufficiency of his understanding of freedom. Even though Nozick's reasoning on behalf of the utopian framework is intended to be independent of his previous argument for the minimal state, with which it nonetheless ultimately "converges" (*ASU,* 333), we must note that the latter argument is not really separable from the former. The reason is that the minimal state, taken by itself, is by Nozick's own account too "pale and feeble" to command people's deepest loyalties or give adequate "luster" to their lives (*ASU,* 297). Life lived in a merely minimal state is banal and meaningless; but life in the total "community" that the minimal state is intended to facilitate may leave no room for freedom. Has Nozick not gone radically astray somewhere?

VII. Experimentalism versus Natural Right

In calling for the establishment of a federation of communities that are free to experiment with the institution of various ways of life, without being subject to most of the restrictions that the American government (or any other government) imposes on them, Nozick curiously recapitulates, at a broader level, the position taken by Stephen A. Douglas in defense of

[16] Rawls, similarly, alludes vaguely to the need for "suitable qualifications" to the right of emigration. See John Rawls, *Political Liberalism,* rev. ed. (New York: Columbia University Press, 1996), 222, 277.

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the principle of "popular sovereignty" during the slavery controversy that culminated in the American Civil War. According to the view Douglas maintained in his debates with Abraham Lincoln over the extension of slavery, such an extension was not to be judged by parties other than citizens of the state or territory involved, but should be left to local citizens themselves to "try out," as it were, if they chose.[17] Nozick's experimentalism is really a form of historicism: the denial that there is any natural standard accessible to human reason for assessing the justice or goodness of alternative ways of life. Similarly, Rawls observes near the end of *A Theory of Justice* that, in devising principles of justice, "we must rely upon current knowledge," including the "scientific consensus," but must "concede that as established beliefs change . . . the principles of justice which it seems rational to acknowledge may likewise change." While Rawls cites the movement away from "the belief in a fixed natural order sanctioning a hierarchical society" as favoring his two principles (*TJ,* 480), I would note that, by his account, there is no such order sanctioning people's equal, inalienable rights, either. In their abstraction from nature as a standard for justice, both Rawls and Nozick leave our fundamental rights on much shakier ground, or rather on no ground at all.

As the historian Wilfred McClay observes, it is a misuse of language as well as a violation of the principles of the Declaration of Independence to treat constitutional government as if it were an endless "experiment," with even the most fundamental moral principles, as well as the broad institutional means of fulfilling them, forever up for grabs. The purpose of a scientific experiment is to test a hypothesis: the experiment either confirms or disconfirms the hypothesis. When the authors of *Federalist No. 1,* and Lincoln in his Gettysburg Address, represented the United States as a test of free government, they did not mean that Americans must remain committed to an endless process of experimentation, in which the principle of natural rights and the Constitution itself are to be regarded perpetually with only tentative approval, pending further tests.[18]

For Nozick, "utopia" is itself only an endless "process," as distinguished from the "static" visions of the good society advanced by other theorists (*ASU,* 332). In fact, within the framework of the Constitution, American society continues to exhibit a remarkable dynamism, inventiveness, and spirit of enterprise. But how could a mere process, severed from any substantive moral foundation (and hence from appropriate reg-

[17] See especially Douglas's remarks in his 1858 debate with Lincoln at Alton, Illinois: "We in Illinois . . . tried slavery, kept it up for twelve years, and finding that it was not profitable, we abolished it for that reason, and became a free State." Robert W. Johannsen, ed., *The Lincoln-Douglas Debates* (New York: Oxford University Press, 1965), 299.

[18] Wilfred McClay, "Is America an Experiment?" in Gary L. Gregg II, ed., *Vital Remnants: America's Founding and the Western Tradition* (Wilmington, DE: ISI Books, 1999), 1–32. For *Federalist No. 1,* see Alexander Hamilton, John Jay, and James Madison, *The Federalist Papers,* ed. Clinton Rossiter (New York: Mentor Books, 1999).

ulations in support of morality) command the attachment—let alone the "eloquen[ce]" (*ASU,* 332)—of anyone other than a philosophy professor, issuing pronouncements from his ivory tower?

Let us note, finally, the misleading character of the claims both Rawls and Nozick make to found their teachings about liberty on the recognition of "diversity." As I have noted, in purporting to derive justice from an impartial treatment of various conceptions of the good, Rawls really imposes his own view of the good on other human beings. And as Nozick suggests, Rawls's difference principle, far from treating actual human beings with equal regard for their rights, actually entails subjugating more talented or industrious individuals to the service of their less-successful peers. In response to individuals who might doubt that Rawls's principles actually serve *their* good, whether through economic collectivism or through moral libertarianism, Rawls's ultimate response is simply, "their nature is their misfortune" (*TJ,* 504). (In other words, tough luck!) As for Nozick, after misleadingly implying that individuals like Moses or Socrates could flourish in one of the subordinate communities his utopia would allow, he responds to "imperialistic utopians" who demand "universal realization" of their own vision of how people should live (as distinguished from Nozick's) by remarking, "Well, you can't satisfy everybody" (*ASU,* 319–20). Some diversity!

VIII. Conclusion

Let us return, then, from the world of utopian theorizing to an actually existent liberal polity, the United States. Nozick's strictures about the extent of "redistributive" legislation notwithstanding, the example of this country (as well as other constitutional, liberal democracies) demonstrates that it is possible for a nation to survive and flourish while leaving its citizens free to pursue a relatively wide variety of particular ways of life, if not that of Napoleon or Mohammed. (A majority of the individuals on Nozick's list of personages exemplifying diverse vocations and views of the good were residents of the United States, few of whom encountered legal obstacles to their pursuits.)[19] Americans have also traditionally enjoyed a broad freedom to form voluntary communities of various sorts: religious communities, socialist communities, etc. (During the golden age of utopian experimentation in the first half of the nineteenth century, among the better-known of such communities were Robert Owen's socialist village New Harmony in Indiana; its counterpart in New England, Brook Farm, fictionally depicted by Nathaniel Hawthorne in *The Blithedale Romance*; and the various

[19] The exceptions to the latter qualification include a tax protester (Henry David Thoreau), a militant anarchist (Emma Goldman), and a purveyor of illegal drugs (Baba Ram Dass, né Richard Alpert).

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Shaker religious communities.)[20] Indeed, Alexis de Tocqueville, in *Democracy in America* (written in the 1830s), represents Americans' knowledge and practice of the "art of association" as one of the keys to our political prosperity.[21]

What fundamentally distinguishes the context of such communities from Nozick's "framework," however, is that the national and state governments do not grant particular associations the latitude Nozick would award them to control their members' lives, or to violate what are generally regarded as the moral foundations of civil life in a free republic. Hence, all children must be granted an appropriate education; slavery is illegal, whether "voluntary" or not; polygamy is banned; and no community may prevent one of its members from departing because of what he "owes" to it. Nor can membership in a particular community excuse anyone from obeying the other laws by which citizens in general are bound, including the laws requiring him to pay taxes for the support of the common welfare and defense.

Even though a liberal regime like the American one will never satisfy religious fanatics (along with various other "crackpots"), the broad support it has traditionally given to fundamental precepts of moral decency and even (*pace* the recent Supreme Court) to a generalized, nonsectarian piety enables it to earn the respect of most religious human beings as well as sensible nonbelievers. By outlawing debilitating habits like the use of mind-altering drugs, the American government at the same time fortifies the character required of an independent, self-governing citizenry. And by proscribing such practices as prostitution and polygamy, it reinforces the sense of human dignity on which respect for our equal rights as individuals depends.

Similarly, despite Rawls's unsupported denunciations of the United States and other existing liberal polities for their allegedly grave injustices toward the poor (e.g., *TJ,* 246–47), he never succeeds in demonstrating (nor could anyone) that the economic inequalities that exist in this country violate his difference principle. That is, he never demonstrates that these inequalities are not the inevitable by-products of a system that, by leaving people relatively free to pursue economic gain through lawful means, generates a high level of economic growth that raises the standard of living, as well as the opportunities, available to the poor far beyond what they would otherwise be. Nor does Rawls consider the inherent link between economic and political freedom: because the opportunity to

[20] For an intriguing account of the fate of New Harmony and other secular socialist communities modeled on it, and the lessons that anyone with a genuinely empirical outlook might have learned from the experience of these communities, see Joshua Muravchik, *Heaven on Earth: The Rise and Fall of Socialism* (San Francisco: Encounter Books, 2002), chap. 2. The median lifespan of those communities, Muravchik reports, was two years (ibid., 51).

[21] Alexis de Tocqueville, *Democracy in America,* trans. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), I.ii, chap. 4; II.ii, chap. 5.

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acquire wealth independently of government enhances citizens' overall self-sufficiency, it fortifies their capacity to dissent from governmental policies.[22] Meanwhile, following the argument of *Federalist No. 10,* economic liberty diversifies people's interests in a way that reduces the homogeneity of their political opinions and hence mitigates the danger of majoritarian tyranny.

The natural-rights teaching enshrined in the Declaration of Independence on which American institutions rest is neither libertarian (in Nozick's sense) nor socialist. On the one hand, the Lockean property-rights doctrine reflected in that document clearly entails a right to derive profits from the ownership of means of production, rather than being limited to employment by the state.[23] On the other hand, not only does the secure ownership of one's property entail the obligation to pay taxes for the common good, as ordained by the people's elected representatives; the enjoyment of our rights also requires submitting to those regulations minimally necessary to preserve the moral requisites of citizenship and national prosperity. As Michael Zuckert observes:

> Government conducted under the aegis of the Declaration's theory is not committed to indifference on moral matters. . . . Various qualities of character, e.g., a disposition to respect others and their rights, conduce to the institution and maintenance of a reliably rights-protecting society. No liberal society can be merely indifferent to the existence of these qualities in its citizens; no liberal society is required to be "neutral" among all possible character types or life styles.[24]

Zuckert notes, moreover, that a liberal government, dedicated to the aim of securing rights, has both the right and the need to enact legislation providing for a "rights infrastructure" (such as public education) as a means of securing those rights. While "the natural rights theory is quite certain in affirming the ends of political life" (i.e., protecting our natural rights) and government is *ipso facto* prohibited from pursuing policies that

[22] On the inherent link historically between the security of private property and individual and political liberty, see Richard Pipes, *Property and Freedom* (New York: Random House, 1999). On Locke's intention in this regard, see Harvey C. Mansfield, "On the Political Character of Property in Locke," in Alkis Kontos, ed., *Powers, Possessions, and Freedom* (Toronto: University of Toronto Press, 1979), 33–38.

[23] For Jefferson's upholding of the natural right to property, despite its omission from the triumvirate of rights mentioned in the opening paragraph of the Declaration, see his Second Inaugural Address, in Adrienne Koch and William Peden, eds., *The Life and Selected Writings of Thomas Jefferson* (New York: Modern Library, 1944), 344; and his letter to Samuel Dupont de Nemours, April 24, 1816, in Gilbert Chinard, ed., *Correspondence of Jefferson and Du Pont de Nemours,* reprint ed. (New York: Arno Press, 1979), 258. On the status of property rights in Jefferson's thought and in the Declaration, see also Michael Zuckert, *Launching Liberalism: On Lockean Political Philosophy* (Lawrence: University Press of Kansas, 2002), 220–23.

[24] Zuckert, *Launching Liberalism,* 227. See also William Galston, *Liberal Purposes* (Cambridge: Cambridge University Press, 1991), esp. chap. 12.

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would manifestly violate those rights, such as the establishment of a national church to which all must subscribe, the theory still leaves open "a great range of possibilities" regarding the means of protecting our rights.[25] In a constitutional, republican regime like the American one, it is elected officials and the civil servants subordinate to them who make the particular decisions on what policies best serve the ends enunciated in the Declaration and the Constitution—subject, ultimately, to the will of the electorate.

Policies developed in this manner will never meet the theoretical demands of philosophy professors who seek to devise precise formulas for "just" public policies. Then again, the failure of those widely esteemed thinkers Rawls and Nozick to develop meaningful and salutary standards suggests the imperviousness of human and political phenomena to the demand for theoretical neatness, and the impossibility of subsuming political phenomena under "moral philosophy," as such writers would have us do (*ASU*, 6).[26]

Above and beyond recognizing the impossibility of transforming political life to conform to the demands of any "theory" of justice, and the folly of trying to do so, one should view with caution the rhetoric that Rawls and Nozick sometimes employ to demonstrate the gap between the American liberal regime (and others) as they exist and these theorists' ostensibly more elevated standards. Examining this rhetoric can serve as a reminder of the dangers of political utopianism grounded in abstract theorizing. Consider the ringing words with which Nozick concludes *Anarchy, State, and Utopia,* informing us that no state other than his "minimal" one is "morally legitimate" or "tolerable" (*ASU*, 333). Can he really have believed that the American regime, which Abraham Lincoln termed the "last best hope on earth" for justice and freedom, is morally intolerable? Even more striking are Rawls's repeated disparagements of the United States in his later writings for its many "grave injustices," such as the lack of public campaign financing, the existence of "a widely disparate distribution of income and wealth," and the failure to provide universal, governmentally financed health care.[27] Elsewhere, Rawls even questions whether the contemporary United States is more democratic than "Germany between 1870 and 1945" (i.e., including the Nazi period).[28]

Respect for the people's right of self-government—and gratitude for the benefits that all Americans, but especially college professors, enjoy

[25] Zuckert, *Launching Liberalism,* 226.

[26] For a critique of an early attempt to reduce political phenomena to theoretically neat categories, see Aristotle, *Politics,* II.8. On why Aristotle does not propound a "theory" of justice, see Delba Winthrop, "Aristotle and Theories of Justice," *American Political Science Review* 72, no. 4 (December 1978): 1201–16; and Bernard Yack, *The Problems of a Political Animal* (Berkeley: University of California Press, 1993), chap. 5.

[27] John Rawls, "Reply to Habermas," in Rawls, *Political Liberalism,* 398, 407.

[28] John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2002), 101n.

thanks to America's political regime and the sacrifices of their fellow citizens and forebears to support it—would suggest the need for academics to temper their indignation at their fellow citizens for failing to adopt the particular policies that the professors happen to favor. As an antidote to the ingratitude that Rawls and Nozick display toward the American constitutional regime, by disregarding and hence effectively denying the vast moral differences that distinguish it from most regimes that have existed and still exist in the world, I shall close this essay by quoting the judgment of a young American Jewish journalist, Bret Stephens, upon visiting his grandfather's homeland in Moldova. Considering what would have befallen his family had they not emigrated to America following the pogrom of 1903, Stephens remarks, "It was only because of the United States that they were saved."[29] This remark could be multiplied by many millions of similar stories.[30]

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[29] Bret Stephens, "Coming to America," *Wall Street Journal,* January 2, 2002, A18.

[30] As Joshua Muravchik reports of Robert Dale Owen, the most distinguished of Robert Owen's five children (all of whom led accomplished and successful lives in America once they abandoned the socialist hopes with which their father had imbued them and took advantage of the opportunities available to all in a land of lawful freedom), he "found the 'Land of Promise' not in New Harmony, but in America itself" (Muravchik, *Heaven on Earth,* 59).

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