

Democracy is government *of* the people not only *for* the people but also *by* the people. In other words, the sovereign in a democracy is, precisely, the people themselves. The ground of their sovereignty, constituent as well as governmental, is their being created equal and each having certain inalienable rights and duties simply as human beings. Their equality as created means that none of them is marked out by creation either merely to govern others or merely to be governed by them. On the contrary, each has both the right to govern others and the duty to be governed by them, although none of them has the right to govern others except by their consent, even as no one has the duty to be governed by others without one's own consent. In this sense, government *of* the people *for* the people is government *by* the people.

Government by the people is exercised in two main forms: constituent and governmental. In its *constituent* form, it is exercised by constituting a democratic government through framing and ratifying the constitutional law necessary to that end. In its *governmental* form, it is exercised by actually governing under, or in accordance with, a democratic constitution so framed and ratified.

The purpose of a democratic constitution as such is neither to set forth the fundamental moral principles of government, i.e., the rights and duties belonging to all human individuals, nor to secure the substantive rights and duties of citizens that it is the purpose of government under, or in accordance with, such a constitution to legislate, interpret, and execute. The purpose of a democratic constitution as such is to secure the formative rights and duties of citizens by constitutional law, together with also establishing thereby the institutions and procedures necessary to securing these rights as well as their further substantive rights and duties as citizens by legislating, interpreting, and executing nonconstitutional ^{or statutory} law. If it is to achieve its purpose, however, a democratic constitution as such necessarily presupposes the fundamental moral principles of government even as it necessarily anticipates the actual process of the government it serves to constitute.

Accordingly, I should argue that, so far as the Government of the United States is concerned, the Constitution so largely achieves its proper purpose because it neither sets forth the fundamental moral principles of government, i.e., the rights and duties of all human individuals, nor stipulates any of the substantive rights and duties of citizens that it is the proper purpose of government under, or in accordance with, the Constitution to legislate, interpret, and execute. Instead, it confines itself to stipulating the formative rights and duties of citizens, together with also establishing the institutions and procedures necessary to securing them as well as to stipulating their further substantive rights and duties. I should also argue, however, that the Constitution so largely succeeds in achieving this its proper purpose not only because it so obviously anticipates the actual process of the government it constitutes, but also because it so clearly presupposes the fundamental moral principles of government set forth—not only but preeminently—in the Declaration of Independence.

Does this mean that, if one is to acknowledge the moral authority of the Constitution, one has to subscribe to the same natural law theory that the Declaration itself sets forth? I do not think so. The important philosophical question raised by this theory is not whether “natural law” is a defensible concept, but whether moral claims can be rationally defended or justified. To talk of “the laws of nature and of nature’s God” is one way to understand how moral claims can be rationally defended, as distinct from being “simply presumed or chosen.” But to understand how moral claims are rationally defensible hardly requires one to talk only, or even primarily, in terms of “natural law.”

This may also be expressed by saying that talk of “natural law” is a way of explaining why one does not accept “the deeper kind of relativity” typically insisted on by moral relativists. According to such relativists, “the most basic standards of right and wrong—like when it is and is not right to kill, or what sacrifices you’re required to make for others—depend entirely on what standards are generally accepted in the society in which you live.” But this deeper relativistic view is hard to accept, as Thomas Nagel puts it, “mainly because it always seems possible to criticize the accepted standards of your own

society and say that they are morally mistaken. But if you do that, you must be appealing to some more objective standard, an idea of what is really right and wrong, as opposed to what most people think. It is hard to say what this is, but it is an idea most of us understand, unless we are slavish followers of what the community says" (*What Does It All Mean?:* 72 f.). Clearly, talk of "natural law" is simply one way of trying to explain and formulate this "more objective standard," or "idea of what is *really* right and wrong."

Also pertinent here is Nagel's analysis of what it means to say that doing something is wrong, and of what, if anything, makes it true to say this. "To say it's wrong is not just to say it's against the rules. There can be bad rules which prohibit what isn't wrong—like a law against criticizing the government. A rule can also be bad because it requires something that *is* wrong—like a law that requires racial segregation in hotels and restaurants. The ideas of wrong and right are different from the ideas of what is and is not against the rules. Otherwise they couldn't be used in the evaluation of rules as well as actions" (59 f.).

Of all the objections that can be made to thinking and speaking of "natural law" as such, as distinct from somehow thinking and speaking about a "more objective standard" of right and wrong, perhaps the most serious is that it encourages the misunderstanding that being moral in the sense of doing what is right and avoiding what is wrong is a matter of following or not following the law, i.e., the rules.

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