

MODERN AGE

A QUARTERLY REVIEW



Do Majorities Have Rights?

DO MAJORITIES HAVE RIGHTS? One wonders. They seem to be helpless before minority claims, special interest lobbying, bureaucratic regulators, and social activists of one sort or another. Authorities, even if they have the will, do not seem to know how to resist minority claims. When should the majority get its way? When not? What has to be in place before any one person or group can claim rights? Some issues demand only prudential resolution; others entail profound philosophical commitments, the absence of which strikes at the very heart of democracy or self-government.

When, if ever, should minority claims trump those of the majority? In recent decades, in part because of past mistreatment of blacks, the larger white population has become aware of the mischief a majority can wreak on an unprotected minority. That awareness has been transferred from basic civil rights to countless other domains. Sensitivity for others has been extended from equality before the law to the disparate areas of lifestyle, literature, music, and art. "Who is to judge one thing better than another," goes the refrain. In a procedural democracy all claims have equal weight before government authorities. That a

claim may be the choice of an eccentric few counts for nothing before a government that considers itself neutral before all. Lost in the cultural arena is a concept of the good or the excellent. To the contrary, we have witnessed efforts to make segments of the population feel good about choices that in former times would have been regarded as reckless. A Christmas concert cannot be a straightforward celebration of the Feast but must include unrelated elements since the Feast itself is not recognized by all. A nativity scene must be accompanied by a menorah and both by purely non-religious symbols, if they are permitted at all.

Equally at odds with the wishes of the great majority, federal agencies regulate without due regard for the judgment and desires of those who are subject to their often ill-conceived measures. Similarly, advocacy groups often obstruct the will of the majority through litigation. Dubious claims regarding the proper use of land, the treatment of animals, the use of fossil fuels, and global warming are taken seriously and are often made the basis of legislation resulting in frustrating and adverse economic effects for the majority. The American Civil Liberties Union, representing a small and at times eccen-

tric minority, can, through litigation or threat of litigation, determine important public policy. This is not to deny the good legislative effect of many lobbying efforts.

In a democracy, a parliamentary debate is usually terminated by a vote in which the majority determines the outcome, an outcome to which the minority in the interest of the common good assents, perhaps to regroup for another engagement, but in the meantime abiding by the majority decision. It is presupposed, of course, that the decision was reached within the rule of law and with some sense of the welfare of all.

But good manners do not always prevail. Defeat is not accepted gracefully. In recent years we have witnessed on many fronts the unwillingness of minorities or special interest groups to accept a parliamentary outcome. No course of action is pursued without an appeal to moral principle; thus, the conviction of righteousness is not easily dampened and when frustrated often leads to uncivil action. What cannot be attained by persuasion is pursued by coercion through strikes, sit-ins, and sometimes violent behavior, often as not orchestrated for media coverage. We saw this in the 1960s with the so-called student movements. We see it constantly on the streets of major capitals the world over. Groups arrogate to themselves the prerogatives formerly associated with a sovereign and unconsciously, if not consciously, trample the liberal and democratic traditions of the nation.

The root of this civic disorder may be the loss of an objective standard of judgment or a refusal to recognize the existence of cultural standards that should be observed. When there is no sense of excellence, vulgarity has equal standing with the noble and uplifting.

Some basic truths, if remembered, may give us a vantage point from which to judge. Modern parliaments find their dis-

tant antecedents in the medieval *Magnum Concilium*, sometimes called a "Colloquium," brought into existence, particularly in England and in Scotland, to mitigate the power of the sovereign and the tendency of the crown to rule by decree. Decisions reached in Council were to prevail, and it took a daring monarch to act contrary to the decisions of a council.

Undergirding a parliamentary or democratic system is a commonly accepted code of values. Presupposed is adherence to the rule of law, a respect for time-honored customs, and a commitment to the common good. It has long been recognized, to use the words of the twelfth-century jurist Gratian, that "those who differ among themselves cannot form a council since they cannot reach agreement on any one thing." That is one lesson, and another is also provided by Gratian in the *Treatise on Laws*. Like Cicero before him and Aquinas later, Gratian gives custom the force of law. "Custom," he writes, "is a sort of law established by usage and recognized as ordinance when ordinance is lacking." Recognition of the power of custom can put a whole different slant on things. It must be acknowledged that contemporary attitudes toward the inherited undercut the power of custom. Tutored by the "progressive" educators of the early decades of this century, generations have been taught to challenge the inherited. For the progressive educator custom counts for little. All is ripe for revision. Time-transcending standards disappear before the "now-directed" impulse. It is not surprising, then, that historical illiterates with the fury of Soviet revisionists deny the religious patrimony of the country and seek to erase even the remembrance of the nation's founders.

Can our basic institutions long survive consistent attack if we permit such anarchical tendencies to prevail? The law, written and unwritten, must be de-

fended. The first line of defense is, or should be, the courts. But judges themselves, appointed through the political process, are not immune to the *Zeitgeist*. Abandoning the common law tradition of Anglo-American jurisprudence, they often rule without regard for tradition or custom, contrary to the sentiment of the majority. Precedent is abandoned without attentiveness to the long-term consequences of novel rulings. The law, representing a storehouse of wisdom, is thus negated without debate in favor of desired outcomes or the politically expedient. Time and again we have witnessed the will of the people as expressed in local and state-wide referenda struck down by activist courts. There are exceptions, of course.

The judiciary is not alone in its propensity to ignore the wishes of the majority. Government agencies may be even worse usurpers of the common will, taking upon themselves policy decisions that would never muster the assent of the majority if debated in a public forum. Bertrand de Jouvenal, writing in France in the early 1940s when the Roosevelt administration was barely ten years old, feared that the commissions and agencies created by the New Deal, with their legislative, executive, and judicial power under one roof, would in the long run work to the disadvantage of the American people. True there are public hearings of proposed regulations, but these unfortunately are often merely cosmetic.

Assuming that the nation has been served well by its founding spirit and traditions, in the light of which grievous wrongs have been addressed, how ought those basic principles be preserved? Many seem to be forgotten, ignored, and even repudiated. Unless we are willing to turn over our affairs to an elite that claims to know better than the populace what is good for it, the rest of us have to attend to the principles that undergird self-government and insist that they be acknowl-

edged and adhered to. The late Isaiah Berlin frequently reminded us that countless individuals have been slaughtered on the altars of great ideas, ideas advanced in the name of justice, progress, or the happiness of future generations.

II

Diagnosis is easier than prescription. To recognize that something has gone wrong is not to propose a remedy. A call for a serious debate about first principles may be little more than a voice crying in the wilderness. Yet certain basic principles have to be proclaimed and acknowledged before rights can be asserted. Those principles are to be found in the intellectual and the moral traditions that have shaped the West. They are to be found in the common law tradition which provides the basis of our Constitution and legal practice. That tradition itself finds its ultimate source in classical antiquity and in the medieval canon law tradition which built upon Greece and Rome. It is a tradition shaped by philosophical and theological debate, a tradition that holds that truth can be attained, that truth is not a private matter, that not all views are equally representative of what is to be found in nature or what ought to be found in society.

Obviously education for citizenship must begin with the young. Even to believe that there are such things as rights, one needs to have been introduced to the literature which has shaped, defined, and defended these rights. One finds in the traditional literature basic distinctions and concepts indispensable to a discussion of rights at any level.

The first distinction to be made is between "human" and "civil" rights. A list of fundamental human rights would not be long. Those rights would necessarily be predicated of the whole of the human race, from the inhabitants of a Peruvian mountain village to those of Vicksburg, Halifax, London, and Crakow.

A human right extends to all persons. It is not limited to some group or class of persons.

Often ignored when claims are made is the fact that one person's right entails another's obligation. A human being cannot be said to have rights *vis-à-vis* nature. Right presupposes a relationship whereby the claimant has some lien on the one obligated. Examples of rights which tend to be universally acknowledged begin with the child's right to life and with the claims it can make on its parents. These claims extend from sustenance in infancy to educational support. Parents may be said to be obligated to nurture, care for, and educate their offspring, but the mode of fulfillment of these obligations varies. Education beyond simple skills for self-maintenance is relative to the social and economic structures of the community. Other rights commonly mentioned are the right to a livelihood, the right to marry, the right to property, and rights such as freedom of speech and of worship. Most of what we today call "rights" Aristotle would have called "political rights." But, again, any claim depends on a commonly accepted outlook within a community and, for its fulfillment, upon the resources available to the community. Entitlements cannot be generated in the abstract. Logically and justly one has to be a member of a community to claim benefits from it.

If we are to ask, "What is the ground for making a claim to some good," or ask, "Whose duty is it to answer such a claim," we immediately enter the arena of justice and the common good. Life in a community entails responsibilities and duties, which all people have to each other and to the whole community. Respect for the rights of others is the minimum condition for life in a community. Love of neighbor and a sense of solidarity are not uncommon attitudes, but when they are absent, we find demands for exceptions to charters, codes, and standards to ac-

commodate those who cannot meet them, often with the intent of subverting the rule or the organization attempting to uphold it.

There may be no remedy for the aberrant or selfish demand, but such demands need to be recognized and exposed for what they are by the judiciary and in the media. Where a respect for the common good and a sense of community solidarity are fostered, demands for the alteration of rules to accommodate the maverick individual may be more easily resisted. Civic education which leads to the recognition of the common good and its heuristic role may be a Herculean effort. It is easy to arouse sympathy for the aggrieved individual—tears, anger and all before the camera—but far more difficult to articulate what the exception, if granted, may do to the rule of law and the rights of others.

While majority interests may not be synonymous with the common good, still less so are the eccentric claims that seek to replace it. The question which remains to be answered is: What contributes to an appreciation of, or leads one to keep, the common good in mind? Some would say personal moral virtue, a sense of community, call it "solidarity," and a willingness to respect the wishes of others—in short, good will; Aristotle would call it "civic amity." What disposes one to such an attitude requires an inquiry at yet another level and leads to a discussion of education and curriculum objectives.

John Dewey, America's foremost educational theorist, placed a heavy emphasis on education for citizenship; he even attempted to codify what he called "a common faith." The kind of debate which took place in a previous generation between Dewey and his disciples, such as Sidney Hook, on one side, and Will Herberg, Walter Lippmann, and Jacques Maritain, on the other, needs to be revisited. Maritain argued for the recognition

not only of a material but of a spiritual common good. He maintained that if any claims, majority or minority, are to be recognized, it will have to be in the light of the intellectual patrimony characteristic of the West. Dewey worked from the legacy of the Enlightenment, Maritain from that represented by Athens, Rome, Jerusalem, and medieval Paris. Both sides recognized that the individual can flourish only in a well-ordered community, and conversely that a well-ordered community is possible only when the citizenry is possessed of civic virtue.

The body politic, we may conclude, has the duty to promote amity among its citizens, mainly through education. Civic amity is not an impossible goal. Citizens possessing quite different, and even opposite metaphysical or religious outlooks, can converge, not by any identity

of doctrine, but by sharing some practical, secular creed, provided they similarly revere truth and intelligence, human dignity, freedom, brotherly love, and the value of moral good. The state cannot impose a philosophical or religious creed which would present itself as the only possible justification of the truths we hold. In the last decade we have witnessed many calls for the recognition of diversity, but there have been few calls to a recognition of the need for unity. *E pluribus unum* is not a vacuous motto. A civil society is possible only if most people most of the time act in accord with a commonly shared sense of the good.

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