

TOCQUEVILLE AND EQUALITY

A Lecture by

W. B. Allen

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How the United States ought to present itself to the world will always be problematic. My preference if not my duty is to suggest a response in the form of her principles. The constitutive principles of the United States are equality and right—I say “right” in the singular rather than the plural because, in fact, the plural form only derives from the fact that one of the common effects of equality is to nourish particular claims that present themselves as claims of right. True, there is a “right” synonymous with “claim,” but there is also a transcendent right that is therefore singular. Now, individual claims, which are as numerous as the persons and their tastes, propagate to infinity. There it matters above all to distinguish right itself from the mass of individual claims and next to settle right with respect to equality.

My procedure stands thus: there has been in the United States an evolution in the meaning of equality operating so as to separate that term from transcendent right (and, by extension, from every ethical principle) and which transforms the latter into an enemy contradicting the givens of equality in the form of self-love and self-preservation. Therefore, in order well to know what has become of equality and right in the contemporary world, it is absolutely necessary to reconstruct clearly what they were at the moment of the founding of the United States.

Basic Equality and Right

The equality that constituted the foundation of the consent of the governed was originally nothing other than a moral or ethical principle. It naturally reflected the concept of “self-government, and that understood as a moral restraint. The concept of self-government, in its turn, derived from a conception of right or a way of acting according to which the conduct of every individual may be characterized either as orderly or subject to the control of another. Therefore, the original equality of the “Declaration of Independence” applied to human beings universally, no matter where; it established the limits of an ethical conduct for men in society; and it justified a transcendent right (called “the laws of nature and of nature’s God”) through which individual powers were definable as “certain unalienable rights.” The organizing principle of the “Declaration of Independence,” that “all men are created equal,” is ultimately hierarchical and moral.

Since the era in which the “Preamble” to the American Constitution was ratified, America has become a country of several races and beliefs. Nevertheless, it remains a country with a single right for everyone, in which the rule of law profits everyone and not only certain persons at the expense of others. It is a democratic country, in which the idea of majority rule comprises the idea of “justice for all.” The majority is a sacred and republican expedient, not a caste or a class. If the Americans should affect to recognize

in the majority, not the voice of republican liberty but, one group in opposition to other groups in the society, they will pervert their own heritage. The defenders of quotas by race or gender or any other criteria whatever may very well reject ideas like this as nothing but the pleadings of the majority in its own cause. But in this metaphorical and lyrical turn of phrase they should risk tarnishing a sacred emblem of republicanism and converting it into a mere racial epithet. Still worse, they should array race against race, man against woman, faith against faith, without any means of reuniting them.

Because the tensions at the center of contemporary American life present such challenges, and also because we see in those challenges, in the efforts to deal with them, an evolution with respect to conceptions of equality and right, we find ourselves obligated to reformulate the original conception of it. Thence we can easily analyze the contemporary world.

Concerning Ancient and Modern

They who will have studied Aristotle will easily know how equality comes to be situated at the center of political thought, whether ancient or modern. Further, they will recognize the very form of the compromise with right imposed by the discovery of the gulf between nature and convention. The compromise revealed a vision of political excellence that could not be realized in an actual regime, since, although wisdom may justly prevail over, it cannot dictate to strength or force.

Since wisdom is incapable of dictating to strength, the authority of wisdom is attenuated in the body politic. Nevertheless, there is one form of attenuation which continues to leave scope for the activity of wisdom: that is the democratic principle (i.e., modern principle) of consent, or what is the same thing, moral equality. Moral equality is partially a consequence of physical inequality and therefore of nature, but it exists and expresses itself positively—that is, in relation to citizens. In the universal sense moral equality only exists to the extent that it serves to reveal the circumstances that determine human political association.

For the ancients moral equality was not the source of politics, but it furnished the decisive means to establish wise political rule. Therefore it was in no way contradictory among the ancients to base themselves on an idea of consent even as they derived the necessities of life by means of slavery—which is to say, there was no contradiction for just so long as folk justified slavery by circumstances and never by interest or passion.

The principle of consent derives from the double discovery of what is right by nature and of its eventual corollary, the fact that what is right by nature is not prescriptive. All—or at least many—of the succeeding considerations sought to deny this corollary by defining natural right as a law—the natural law.

Natural law regarded as binding upon reason or the human conscience dominated modern versions of equality, and to that extent eventually became rather the source of politics than a means to accomplish just political rule. Justice, then, came to be seen as a derivative principle rather than as the originating principle of political life.

This change has been elaborated with remarkable clarity in a classical text of American jurisprudence, Corwin's *Higher Law Background of American Constitutional Law*.

If one may lean upon Hegel, we may say that, for Corwin, as indicated in his title, the approval of the American Constitution was the absolute moment, the summit, of those theories and practices which began with the discovery of the gap between nature and convention.

In summary, we may say that the development of universal standards vitiated the claims to moral sufficiency of every existing regime. Ancient thought pointed to a single regime perfectly in accord with nature. In the meantime, although men everywhere could attain to the minimal exigencies of association, nowhere were men capable of attaining to the maximal exigencies. Therefore it is between these two poles—the origin of political exigencies, on the one hand, and the expected accomplishment of the good, on the other hand—that men become moral wanderers. It is, then, precisely in this circumstance that politics as we know it takes place.

This triumph of conventionalism (read positivism) seemed to prevail thanks to the impossibility of dealing with the political problematic by means of a collective will (read communism). Because we can not deal with every mind (read soul) as a single mind—and the best at that—what results in the second instance is to establish for every mind a single duty and, indeed, to attribute to every mind a capacity—to pronounce judgments of justice. Thus, a fundamental equality taken as ethical virtue—and which accords also with the importance or at least the utility of wealth and wisdom—becomes the foundation of political legitimacy.

Now, what results from this is that wisdom in the end may contribute to the salutary direction of political life, provided it be established by virtue; that is to say, right or the rational and objective “ought,” neither guides nor even influences human life except by means of ethical commands. The latter, in turn, can very well accord with a rational order but only by chance. We may conclude, therefore, that the consent of the governed, equality, may be an accident or a political convention by which men attribute to the wise legal authority but quite deliberately not political power.

In such a situation the idea that the opinions of the wise are the obligatory dictates of nature was a discovery of immense importance. The law of nature—its discovery—rescued humankind from the compromise of right. Regimes were no longer obliged to follow unforeseen accidents [see, *The Federalist Papers*, #1]. Consent persisted, but it conformed to a law natural to all humankind—every man in his right mind would consent to the dictates of nature. Consequently men's errors were no longer going to pose an obstacle to the common good.

This impossible standard could not survive, and it succumbed to the attacks of Machiavelli, Bacon, Hobbes, Spinoza, Locke, et. al. Nevertheless, Corwin insists, equality and its partner, consent, remains at the center with the law of nature. The new *instauration* converted the natural law from a voice speaking directly to the individual human soul into a general law of the universe (see Montesquieu, Book I, *Spirit of the Laws*)—souls in fact disappear. Purely descriptive laws replace purely prescriptive laws. De-

scriptive laws disclose human life such as it is, but, in consequence, re-formulate the conditions of legitimacy. Human association is legitimate when it is *the* means of securing the ends (and, therefore, the rights) to which the activities of human life are subject.

Now, foregoing much of the detail about the process that Corwin relates, he opposes Locke's version of natural law to the English constitution in the form elaborated by Coke. His emphasis is clear: it is Locke's universal aspect and, what is more, the transition from an objective right to heterogeneous rights that requires notice: "...those rights which are implied in the basic arrangements of society at all times and in all places."

Further, Corwin insists that Locke's detachment from the "historical method"—Coke's *stare decisis*—is the direct point of access to the issues that underlie an appeal to higher law in America. For Corwin this indicates the roots of the eventual conflict between the principles of the "rule of law" and "popular sovereignty," in which the former takes the expression of legislative sovereignty. The conflict is resolved, according to Corwin, by the conjunction of the concrete though indirect form given to popular sovereignty and judicial review. We have, in effect, an institutionalized version of what Leo Strauss called "natural public law."

If the argument remains obscure, that is because it is not at all evident how natural right or transcendent right—even when become descriptive—can be reduced to the struggle between legislative supremacy and popular sovereignty. The missing element is evidently the social contract, prefiguring as it does the separation of state and society. According to Corwin that is the very vehicle through which natural right is transformed into natural rights.

The question becomes: Can the consent that accompanied natural right be the same as the consent implied in the social contract? And, if it is not, is it still justified? Locke's consent assures the minimal conditions of association, but it also seems to restrict the purposes of association to fulfillment of those minimal conditions. Therefore, the discovery of individual rights (strictly deduced from natural laws) is in fact the enunciation of a system of concerns or a moral horizon. But, if the main interest is self-preservation—even comfortable self-preservation—this minimum becomes in consequence a maximum.

Thus, it is undeniable that it requires no more wisdom than, in principle, every man possesses, in order to understand such a goal. As a guide to human action, therefore, this natural law can acquire the force of a *first positive law*—and the only one obedience to which would be guaranteed by nature. Men may, therefore, appeal to it as a source of justification for lesser laws and actions. This doubtlessly explains why resistance to aggression is a universal trump.

Summarizing the argument: consent became important when it was put forth as an intermediate course in the struggle between strength and wisdom (meaning, as well, revelation) and against conventionalism. But the emergence of consent did not eventuate in a democratic age of necessity. It is only when consent became identified with reason or the principle of nature that it could become the ultimate convention—that is, the ultimate source of political legitimacy. Thus, it was as a law above ordinary law and precisely as above ordinary law that consent, and by analysis, equality, came to prevail.

Ascendant, Which is to Say, Democratic Right

Let us now introduce Tocqueville in order to learn how equality understood in this fashion developed. His analysis of the 18th century leads inexorably to an understanding of contemporary practices and dilemmas and also to the habits of mind and character that conform to them. In the first chapter of *Democracy in America* Tocqueville demonstrated how nature and circumstances anticipated the emergence of the regime of equality in North America. Chapter two explained the political or constitutional provisions which opened the way to the regime of equality. Chapter three described the social conditions of the regime of equality, but in such a manner as to reveal the political practices necessary to it. Tocqueville attained the objectives of chapter one by opposing natural or climatic circumstances to the practices of both the indigenous Americans and the European pioneers. A second contrast opposed Northern Europeans to Southern Europeans. The consequence of the two contrasts is to establish moral and political causes as prevailing over natural or climatic causes.

On the basis of the reflections in Tocqueville's chapter one, we may establish the "new American" as a paradigm for studying the nature and origins of the moral and political causes at the foundation of democratic civilization. Initially Tocqueville observed the condition of the European pilgrims who were nearly in a state of nature. Then he considered them as distinguished by conflicts and difference—conflicts and differences that turned about what President Ford might have called, in another era, "quality of life" as opposed to mere life questions. In other words they struggled over the question, how should one act as opposed to the question of whether one had the right to act. The pioneers manifested a high regard for their fellow citizens—the sense of their moral value. They pursued the idea of consent by reason of its moral value and not on account of any intellectual or moral default. Therefore, they operated without a fully worked out theory of the rights of individuals, beyond the right to property, which was an instrument of good action as well as of survival.

The anomaly of the American legislation of the pre-revolutionary era, then, was its pursuit of more or less aristocratic or even utopian objectives by democratic means. It is nevertheless evident that Tocqueville considered the democratic means to have prevailed decisively over the aristocratic objectives. This led ultimately to the ascendancy of democratic ends. He did not call this development a derailment [One may well ask why not?], but he did strongly imply that the initial piety was perhaps less certainly the American goal than the end of comfortable preservation which is associated with the democratic constitution and its necessary emphasis on equal rights. A people who study themselves may be civilized, but they are not necessarily honest with themselves.

In chapter three Tocqueville traces the idea that a social condition may be determined by political or constitutional laws—the spirit of the laws. He found the spirit of American laws by analyzing the changes brought to bear on the laws of inheritance, primarily primogeniture and entail. Their spirit was equality, the consequence of which is to reveal a process of progressive or advancing equality among the citizens.

Now, the first three chapters of *Democracy in America* constitute three concentric layers, each of which builds upon the preceding chapter, and all of which together

provides the theoretical foundation for the whole book. Chapter one provides a natural and universal foundation that we consider not only relative to America but relative to the whole of political life. Next we look at the particular origins of the moral cause of the American regime. Then we analyze the particular form of that moral cause insofar as it is a specific political law.

Tocqueville's View of the Americans

Chapter one initially presents a view of the entire breadth of the continent of North America; next it shows what is the most habitable portion of it (the continental United States); then it focuses upon, finally, that dearest part, that most fit to nourish and support civil life—rich, fertile, and protected by great mountain chains and oceans. We next read just how civil life actually developed (along the exposed, harsh, inhospitable upper Atlantic coast), and where it remained three hundred years later.

This long apprenticeship in “efforts concentrés de l'industrie humaine” appears the price of gaining access to the rich interior. It differs altogether from the indulgent and illusive ease of the lush tropical regions, where men are seduced by passions from attending to the cause of “efforts concentrés.” regard for the future, for preserving oneself and one's kind. The “cradle of America” was “created to become the domain of intelligence,” the necessary condition for united efforts. That means that the circumstances or conditions, nature, were opposed to man and had to be conquered.

Nevertheless another path remains open for man—namely, to accept nature's inhospitality as necessary or providential and to stay the hand of improvement. The aborigines adapted in this manner, thus revealing no concern for that cultivation (of lands or of minds) which is the exclusive sign of civilization arising. The Indians occupied the whole space of the continent, but remained too primitive to benefit from it—that is, to “possess” it. Possession requires improving, mastering over nature. Accordingly they produced a society in which each minded his own business, but in which none took it to be the business of man to pursue goodness as such.

One might well recall here the general query to which Thomas Jefferson responded [*Notes on the State of Virginia*, 1783], namely, whether the North American climate produced inferior creatures in general. Tocqueville agreed with Jefferson; it does not. Excepting the moral-political virtues, the Indians showed all the excellences of humankind. Nevertheless, it is precisely moral-political causes that distinguish the inferior and superior among societies. Tocqueville offered proof in the form of a high civilization that disappeared before the primitives arose and another such to arise thereafter. Civilized peoples appeal to human memory. The intermediate Americans failed to do so. Historical time is characterized by the passage of civilizations that leave tracks behind.

Reasoning from effect to cause, Tocqueville holds that Providence may have intended to supplant the Indians with an industrious people—exploiting the natural advantages of the country. But he reasoned also from cause to effect—producing a slightly different result. The ruin of the Indians did not begin autonomously but rather from the moment the European appeared. The European who displaced the Indian arrived in America ready and determined to develop civilization. He brought theories—unknown

and thought impracticable—to bear on the task. The origins were ominous; but the uncertain prospects were ultimately bright.

One sees in America, therefore, the entire evolution of a society from its origins. Tocqueville's second chapter portrays that evolution and establishes at its center equality as its moral and political foundation. The great uncertainty in the matter reposes in the question: How to maintain good morals in a democracy. The Americans undertook initially to follow holy writ in matters of morality, which led to the union of the extremes of narrow sectarianism and political liberty. This means that there wanted a source of limitation on the power of the majority.

The error was essential, not incidental. "L'infériorité de notre nature [est] incapable de saisir fermement le vrai et le juste," even in the most favorable circumstances at the founding of a utopia (in New England there existed in the beginning an almost "perfect" democracy.) We cannot question the honest intentions of the Puritans but only the outcome of the appeal to natural or divine laws as a conclusion of reason.

Nevertheless the defect of Puritan piety contained the means of its own correction, for it left open the way to rational inquiry. "C'est la religion qui mène aux lumières." Piety gives authority to Babel, where before it had been denied. This results from the strict separation of religion and politics, and the necessity to encourage good morals independent of politics. The Puritans became "d'ardents sectaires et des novateurs exaltés" at the same time. Hence, for the first time organized Christianity was denied the place of political superintendence as such.

Let us next distinguish between a people's social condition and its political condition, following chapter three of *Democracy in America*; for the latter we look to the political law, for the former "faits" and "des lois réunies." The Americans previously allowed a natural aristocracy to prevail in their politics. In the society at large, however, "un certain niveau mitoyen" came to prevail, and, soon or late, that social condition must conform the political law to its own measure. Equality, arising outside of politics, becomes the very soul of politics.

The balance of *Democracy in America* elaborates upon these principles, which Tocqueville uses to explain the character and the future of democracy in the middle of the 19th century, above all distinguishing equality and the menace of majority tyranny. By the end of the 20th century we must modify these concepts as a direct result of the War of American Union, in which the Americans freed themselves from the dilemma of slavery in the very manner that Tocqueville least anticipated—that is, the brothers' war. In the process Americans discovered a new, or perhaps latent, dilemma—that is, the dilemma of race. This dilemma newly imposed the need for elaborations of the meaning of equality and right and the new meanings imposed on the contemporary world thereby.