

Our Unethical Constitution

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I. Introduction

Ayn Rand and Murray Rothbard each developed and defended an objective system of ethics, thereby bringing to the twentieth century a pivotal revival of a *science* of ethics in the face of the ethical relativism that had come to dominate the humanities and social sciences. Randian (Objectivist) and Rothbardian ethics share fundamental metaphysical, epistemological, and methodological premises and arrive at virtually identical core principles of political ethics, although the two scholars differ markedly when it comes to whether government is needed to implement those principles.

Both Rand and Rothbard assembled coherent systems of social philosophy and advocated ethical principles that should form the basis of a genuinely free, rights-based society. Clearly, the modern U.S. system of government has established an interventionist state that resembles neither Randian minarchy nor Rothbardian anarcho-capitalism, and can be called a “free society” only in generous, relative terms. Both Rand and Rothbard encouraged a transition in America to a society wherein individual rights are respected and force is used solely to protect those rights. However, neither thinker expressly tried to identify the ethics of the United States Constitution.

When theorizing about a paradigm shift away from interventionism, it is essential that any shift must begin from the status quo. For the United States that means a two hundred year history under a written Constitution that has shaped generations’ concepts of the role and power of government, rights, law, and justice. It is therefore useful and important to explicitly discern and evaluate the ethics of the current American system in light of Objectivist and Rothbardian

political ethics. Just as explication of the (perceived) defects in the Articles of Confederation provided the impetus and starting point for designing our current Constitution, a rational, principled elucidation of the deficiencies of our Constitution can provide the impetus and starting point for adumbrating a better system.

Identifying the precise similarities and differences between Objectivist and Rothbardian ethics, and then juxtaposing each against the Constitution¹ permits a more informed debate over the purpose, function, and substance of law and government by merging the discussion of abstract principles with appraisal of an extant system. Both Rand and Rothbard believed that their efforts to expound an objective ethics were not mere academic exercises but attempts to provide human beings with answers to fundamental questions of existence and to help them achieve happiness and fulfillment (Rand 1964, 13–14, 33; Rothbard [1982] 1998, xiv, 12, 25). With respect to political ethics the fundamental question is: Under what circumstances is force justified in interpersonal relationships?

Analysis of ethical principles in light of existing systems yields helpful insights about a process of transformation from the status quo to a better state of affairs. Toward that end, this paper examines principles of political ethics advocated by Rand and Rothbard and initiates an inquiry into whether the Constitution embodies those ethics, concluding that (1) Rand and Rothbard formulate virtually identical fundamental ethical principles, and (2) the Constitution does not ground American society on those principles.

II. Objectivist Political Ethics

Objectivism treats political ethics as a subset of the code of personal morality. Rand (1964, 110) identifies a “right” as “a moral principle defining and sanctioning a man’s freedom of action in a social context.” There is but one fundamental right: the right of each person to his own life (110). This right is a consequence of man’s nature and the metaphysical law of identity—A is A, man is man—and a right to one’s own life is a necessary condition for one’s continued existence (111). This right to life necessarily implies

corollary rights, such as the right to take actions to sustain and further one's life and to use force to defend oneself against physical coercion, violence, and aggression (110, 126). When people interact with each other, the metaphysical reality that each person possesses a right to life means that no person has the right to initiate force against the person of another. Each man's "rights impose no obligations on [others] except of a *negative* kind: to abstain from violating his rights" (110). The right to own, use, and dispose of justly acquired property is a corollary of the right to life because "the man who has no right to the product of his effort has no means to sustain his life" (110).

With this definition of rights universally applicable to all persons, the only purpose and role of a government is to secure individual rights by protecting men from physical violence (111). "The precondition of a civilized society is the barring of physical force from social relationships In a civilized society, force may be used only in retaliation and only against those who initiate its use" (126). Logically, the next inquiry is *how* to bar the initiation of physical force. To Rand, government "is the means of placing the retaliatory use of physical force under objective control—i.e., under objectively defined laws" (128). Thus, no ethical government may issue edicts that emanate from the whim of those in control of the government. Rather, an ethical government imposes and enforces only laws that protect individual rights from domestic and foreign aggressors (128).

The source of a government's legitimacy and authority is consent of the governed (129). In exchange for living in a civilized society where his rights are protected and enforced, each person must consent to following a single rule: "renouncing the use of physical force and delegating to the government his right of physical self-defense" (129).² In Objectivist philosophy, then, consenting to live under a government does not mean relinquishing any natural rights, since no one has a right to initiate physical force against another, and one's right of self-defense against aggression is merely delegated.³

Rand derives the purpose of an ethical government from the general metaphysical and epistemological tenets of Objectivism. For Rand, morality and ethics are identical, synonymously defined as "a code of values to guide man's choices and actions" (13). "Political"

ethics is simply application of morality to the sphere of interpersonal, socio-political relationships, particularly to the role of force in such relationships.

Rand derives the code of values prescribing man's personal choices from the objective reality of man's nature and the objective physical laws of the universe. Focusing on a single, individual man results in a moral code—a scale of values and the discovery of corresponding virtues by which those values are achieved. The purpose of ethics, or morality (including political ethics), is man's happiness, although happiness does not serve as a standard of values for man (33). "The task of ethics is to define man's proper code of values and thus to give him the means of achieving happiness" (33). The only guide to discovery of human ethics is reason, defined by Rand as "the faculty that identifies and integrates the material provided by man's senses" and directs the process by which man acquires conceptual knowledge necessary for his survival and fulfillment (21–22). The exercise of the faculty of reason is volitional; man may refuse to use his capacity for reason, but he may not escape the consequences of such refusal (23–24).

The standard of value for a system of political ethics is man's life, and the purpose of each individual's ethics (morality) is his own life (27).⁴ This standard of value is necessitated by the reality of man's very existence as a living being and the fact that nature provides him no automatic mode of survival, requiring him to acquire and apply conceptual knowledge in order to maintain his life *qua* man (26–27). When considering man's interactions with fellow human beings, "*trade* is the only rational ethical principle for all human relationships, personal and social, private and public, spiritual and material" (34). Applied to the concept of government and organized society this principle means that "no man may *initiate* the use of physical force against others" (36). Rand concludes that the expression "individual rights" is a redundancy, but the expression "collective rights" is a contradiction in terms (119). Only an individual can possess rights (117, 119), and groups of any kind are only composed of individuals. Thus, even governments are merely men, ethically bound to the same principles as all other men. Debates about the purpose, limitations,

powers, and functions of a government are thus debates about reality, human nature, and individual rights.

Rand largely passes on the challenge of delineating specific procedures to implement an ethical government, asserting that such complex problems belong to the province of political science and the philosophy of law (120, 131, 135). Objectivism as such provides only the fundamental principles to be implemented and the ultimate purpose and conceptual function of government: to protect individual rights by providing (1) police, to protect people from criminals, (2) armed services, to protect people from foreign invaders, and (3) courts of law, to settle disputes among people according to objective laws (131).

III. Rothbardian Political Ethics

Rothbardian ethics sets forth a “social ethic of liberty” that “deals with the proper sphere of ‘politics,’ i.e., with violence and non-violence as modes of interpersonal relations” (Rothbard [1982] 1998, 25). In his introduction to the 1998 New York University Press edition of Rothbard’s seminal treatise *The Ethics of Liberty*, Hans-Hermann Hoppe observes that Rothbard successfully lays out a human ethic— an objectively justified system of rules that answers the universal human dilemma: “[W]hat am I permitted to do right now and here, given that I cannot *not* act as long as I am alive and awake and the means or goods which I must employ in order to do so are always scarce” (xiv).

The chain of reasoning that forms Rothbard’s ethics begins with natural law and places a carefully defined concept of property rights at the center. Rothbard first defends the theory of natural law as developed by the Scholastics, Grotius, Pufendorf, Burlamaqui, Vattel and others. He goes on to define property in Lockean terms, but he builds upon the improvements made to Locke by Spencer and Spooner. Rothbard arrives at a theory of property rights that synthesizes the long history of natural-rights philosophy and removes many internal inconsistencies that had previously prevented the emergence of a complete libertarian social philosophy.

After defending the validity of natural law,⁵ Rothbard goes on to explain the purpose of his natural law ethics: “The natural law, then, elucidates what is best for man—what ends man should pursue that are most harmonious with . . . his nature” (12). In contradistinction to economic science and utilitarianism, which treat the ends man pursues as purely subjective valuations, Rothbard notes that “in natural-law ethics, ends are demonstrated to be good or bad for man in varying degrees; value here is *objective*—determined by the natural law of man’s being” (12). An important feature of ethics, Rothbard insists, is that the rules thus objectively derived are just, in the sense of being universally applicable for all men, in all places, at all times (42–43). Ethical propositions that apply only to some men, or to men only at certain times or under certain conditions, or to hypothetical or idealized men, cannot comprise a genuine *human* ethic.

To derive ethical principles from his natural law foundation, Rothbard starts by analyzing a “Crusoe philosophy.” Imagining that Robinson Crusoe has landed on a deserted island and has contracted amnesia, Rothbard deduces the primary “inescapable facts” that confront Crusoe, primarily his own consciousness and body, and the secondary fact of “the natural world around him” (29). Faced with these facts, Crusoe learns that “he must (a) choose his goals; (b) learn how to achieve them by using nature-given resources; and then (c) exert his labor energy to transform these resources into more useful shapes and places” (30).

Moving from a Crusoe island to a world of social interaction, Rothbard deduces the logical possibility of a society in which each person is as free from physical coercion as the shipwrecked Crusoe, yet each person is better off because of the opportunity to participate in specialization and voluntary exchange with others. In a particularly eloquent passage, Rothbard says, “Absolute freedom, then, need *not* be lost as the price we must pay for the advent of civilization; men *are* born free, and need *never* be in chains. Man may achieve liberty *and* abundance, freedom *and* civilization” (41). Thus, like Rand, Rothbard insists that participation in civilized society does not necessitate a Lockean divestment of any natural rights. Confusion on this point, Rothbard notes, originates from failing to distinguish between

freedom and power (42).

In an unfortunately brief passage, Rothbard clarifies the difference between freedom and power, thus annihilating the claims of some modern philosophers who argue that freedom is illusory. This distinction is a powerful response to those who would have us abandon the pursuit of liberty because, they claim, man can never truly be free due to the constraints of natural laws. This misunderstanding of freedom leads to the spurious idea that a truly free society is utopian. Rothbard demolishes this charge by pointing out that these modern critics confuse freedom with power, implying that restraints on man's freedom imposed by *other people* are of the same quality as restraints imposed by *natural laws*. Rothbard explains, "[W]hen we say that 'man is not 'free' to leap the ocean,' we are really discussing not his lack of freedom but his lack of *power* to cross the ocean, given the laws of his nature and the laws of the world" (42). In Rothbard's thought experiment, "[I]n the sense of *social freedom* —of freedom as absence of molestation by other persons—Crusoe is *absolutely free*" (33), and Rothbard proceeds to demonstrate how this same degree of freedom⁶ is logically possible even in a complex society.

The key to preserving an individual's freedom while also attaining the benefits available through interaction with others in a society is recognition of the axiom of self-ownership. From the fundamental premise that each person has a right to own and control his own body, the boundaries of legitimate (legal) actions are derived. Any alternative to a premise of absolute self-ownership falls prey either to a contradiction of the universality requirement or to insurmountable practical problems that render the alternative definitionally incapable of aspiring to serve as a *human* ethic (45–46). Self-ownership implies the right to own and control property acquired through homesteading (mixing one's labor with an unowned natural resource). A further corollary to self-ownership is the title-transfer theory of contracts: the only method of legitimately acquiring ownership of any tangible thing is production, which includes homesteading and voluntary transfer of title (49). Rothbard's shipwrecked Crusoe possesses these basic rights, and those rights remain exactly the same when Crusoe is placed in an environment involving other people. The difference is only that

when isolated from other humans on an island there is no possibility of Crusoe's rights being *violated*. In an environment necessitating interpersonal interaction, the possibility (and probability) of violation of rights emerges and the issue of defense of rights must be confronted.

Rothbardian anarcho-capitalism follows from Rothbard's definition of government. Rothbard identifies government ("the State") by its essential characteristic: "*All other* persons and groups in society . . . obtain their income voluntarily: either by selling goods and services to the consuming public, or by voluntary gift. *Only* the State obtains its revenue by coercion. . . . That coercion is known as 'taxation' Taxation is theft, purely and simply" (162). Rothbard concludes: "If, then, taxation is compulsory, and is therefore indistinguishable from theft, it follows that the State, which subsists on taxation, is a vast criminal organization far more formidable and successful than any 'private' Mafia in history" (166).

Rothbard delved much further than Rand into deriving specific normative legal principles and doctrines—an endeavor Rand largely left for the field of legal philosophy. Each legal doctrine advocated by Rothbard ([1982] 1997) strictly applied his ethical principles, resting on clear definitions of rights, particularly each person's right to own and control his own life and his justly acquired property. Rothbard ([1982] 1998) recognizes that objective, rational rules are necessary to protect and enforce individual rights and ensure that individual rights are not violated in the process of defending rights (77–84). Because he had shown that government itself is unethical, Rothbard spent little time expounding political theory concerning the proper structures or institutions of government, instead focusing on the contours of proper legal prohibitions and procedures for achieving protection of individual rights (e.g., [1982] 1997).

IV. A Comparison of Objectivist and Rothbardian Ethics

Objectivism and Rothbardian ethics rely upon similar metaphysical and epistemological principles. First, with respect to metaphysics,

both agree that reality is objective and knowable to man. Rand begins with the law of identity (A is A, man is man), and Rothbard begins with the observation that all things in existence have natures, including man. Second, both epistemologically rely upon man's reason as the means to acquire knowledge of the answer to the basic (political) ethical inquiry: What actions is each person permitted to take?⁷ Third, both Rand and Rothbard methodologically build upon observations about reality using the axiomatic-deductive method (though Rothbard's method is more rigorous than Rand's). Fourth, Rand and Rothbard each steadfastly employ methodological individualism as the reference point for their arguments and proofs, in recognition of the metaphysical fact that only individuals exist and act. These shared metaphysical, epistemological, and methodological approaches lead Rand and Rothbard to virtually identical basic political ethical propositions: each human being possesses individual rights consisting of the right to own and control his or her own life and the corollary right to own and control justly acquired property. Rand arrives at this basic right as a derivation from the metaphysical facts of existence that require man to act upon conceptual knowledge to sustain and further his very existence.⁸ Rothbard arrives at this basic right as a deduction from the self-ownership axiom. For both Rand and Rothbard, the concept and definition of "rights" occupy center stage in all discussion of political ethics.

Rothbard's proof of the right to life, or self-ownership—or differently stated, that vis-a-vis other human beings, man must be treated as an end unto himself rather than as a means to someone else's end—is more rigorous than Rand's proof of the same. Rothbard ([1982] 1998) presents the range of possible relationships between human beings and tests them against the requirements of universality and reality. One of three relationships among human beings is possible:⁹ (a) each man is entitled to full self-ownership; (b) all people equally own everyone; or (c) certain people own certain other people (45). Alternative (c) violates the rule of universality required to state a human ethic (45). Alternative (b) is universal, but cannot achieve the status of a human ethic because it would leave every man paralyzed by inaction and is thus unrealistic—the require-

ment that every other person in society equally owns a man would prevent the man from acting at all without obtaining the consent of every other person (46).¹⁰ Rothbard's ethics make no claim about whether any individual should *choose* to subjugate his own life or property to another's will or control,¹¹ merely that in the realm of political ethics no man has the right to forcibly deprive another man of self-ownership and control.

For Rand, the proposition that every man is an end unto himself rather than a means to the ends of others is an imperative of both political ethics and personal morality. Not only is it politically unethical to *force* a man to serve the will of others, it is also *personally immoral* for a person to voluntarily subjugate his life to the will of others. Objectivism's defense of the proposition "each man is an end unto himself" in the political context is intertwined with its defense of the same proposition in the personal, moral context.

Rand's defense of the proposition in the political context is derived from her defense of it in the personal moral context; in contrast, Rothbard's proof of the same proposition is logically deduced directly from the axiom of self-ownership. Under Objectivist ethics, each individual man *must* hold his own life as his moral purpose and choose actions, values, and goals "to achieve, maintain, fulfill and enjoy that ultimate value, that end in itself, which is his own life" (Rand 1964, 27). "Man has to be man by choice—and it is the task of ethics to teach him how to live like man" (27). Living "like man" does not mean "a *momentary* or a merely *physical* survival" but rather pursuit of "the terms, methods, conditions and goals required for the survival of a rational being through the whole of his lifespan—in all those aspects of existence which are open to his choice" (26). Hence, Objectivism requires each person to endeavor to live *qua* man by holding his own life as his ultimate standard of value and practicing the cardinal virtues that enable the attainment of that ultimate value (27). This is a personal moral code rather than a political ethic; it prescribes what each individual man *ought* to do, not simply what every man is *permitted* to do.

For Rand, the proposition that every man is an end unto himself finds validity in the political context only as a derivation from defense

of the same proposition in the context of personal morality. One of the three cardinal virtues of Objectivist ethics (morality) is pride, which means “one’s rejection of the role of a sacrificial animal, the rejection of any doctrine that preaches self-immolation as a moral virtue or duty” (29–30). The very next sentence of Rand’s essay “The Objectivist Ethics” is: “The basic *social* principle of the Objectivist ethics is that just as life is an end in itself, so every living human being is an end in himself, not the means to the ends or the welfare of others—and, therefore, that man must live for his own sake, neither sacrificing himself to others nor sacrificing others to himself” (30). Within a few pages comes the declaration of Objectivism’s “basic political principle” that “no man may *initiate* the use of physical force against others” (36). The basic social and political principles of Objectivism are extensions or applications of the personal morality mandated by Objectivism.

As rationally derived as Objectivism’s moral code may be, Rothbard’s impeccable logical deduction of the political ethical proposition that each man is an end unto himself is not intertwined with any prior propositions about personal morality. To put it another way, Objectivism defends political ethics only by reference to a code of *personal* morality while Rothbard defends political ethics as a direct deduction from a logically unassailable axiom (i.e., self-ownership) without reliance on any code of personal morality.

Rand and Rothbard arrive at virtually identical fundamental principles of political ethics, which this paper will refer to as the “individual rights ethic”:¹² each man has the right to own and control his own life, and no man may initiate force against another. In Rothbardian ethics, this basic socio-political principle follows from the self-ownership axiom; in Objectivism, it follows from facts about nature (existence) that dictate man’s life *qua* man as the ultimate standard of value. (Of course, Rand and Rothbard diverge sharply on whether implementation of the individual rights ethic requires a government, as discussed below.)

From the perspective of seeking a paradigm shift from the current political state of interventionism to a free (i.e., ethical, rights-based) society premised on the individual rights ethic,¹³ Rothbardian ethics

provides proof of the validity of a free society that potentially appeals to a greater number of people than does Objectivist ethics. This is because Rothbardian ethics do not necessarily contradict most of the various personal moral codes held and practiced in modern society. It is not necessary to “convert” religious people (“mystics” in Rand’s terminology) to Objectivism’s moral code to convince them of the validity of Rothbard’s defense of a human rights society. For example, Christians who believe they *should* practice self-sacrifice for the benefit of others are perfectly free to do so in a human rights society founded on the individual rights ethic. By contrast, if a religious person is presented only with Rand’s defense of a human rights society, she finds that she must rationally justify the individual rights ethic only by reference to a moral code that requires her to renounce belief in the “supernatural”¹⁴—a request to which few true believers will ever acquiesce.

Given the prevalence (and diversity) of religious and other moral views in modern America, Rothbardian ethics has more potential than Objectivism for convincing rational thinkers of all varieties of moral codes of the validity and appeal of a human rights society. With its tightly-reasoned axiomatic-deductive methodology, Rothbardian ethics deals a blow to ethical relativists on the one hand, and to ethical revelationists on the other hand. For utilitarians and other ethical relativists, Rothbard’s axiomatic-deductive proof of the right to self-ownership and its deduced political principles undermines the attempt to keep ethics outside the realm of science by proving ethical propositions true much the same way mathematical theorems are proved true. For traditionalists and other ethical revelationists, Rothbard’s reliance on only the secular premises of natural law devastates the attempt to link all ethical propositions to supernatural revelation, refuting Dostoyevsky’s contention that “if God does not exist, everything is permitted.” Rand also powerfully counters ethical relativists (“subjectivists,” in her terminology) and ethical revelationists (“mystics”) by expounding an objective ethics. One important distinction, though, is that Rothbardian ethics leaves room for *moral* relativists and revelationists of many stripes, but Objectivism welcomes none of them.

A paper purporting to compare Objectivist and Rothbardian political ethics would be incomplete without examining the stark contrast between Objectivism's defense of limited government (minarchy) and Rothbard's insistence on abolishing all government in favor of a private, voluntary social order (anarcho-capitalism). Rand and Rothbard both arrive at the same basic political ethical principle—the individual rights ethic. From that point, Rand argues that a centralized monopoly on the use of retaliatory force (i.e., government) is necessary for the protection of individual rights (1964, 126–27): “If a society provided no organized protection against force, it would compel every citizen to go about armed . . . and thus bring about the degeneration of that society into the chaos of gang-rule, i.e., rule by brute force, into perpetual tribal warfare of prehistorical savages” (127). “The use of physical force—even its retaliatory use—cannot be left at the discretion of individual citizens” (127). Apprehension, prosecution, and punishment of criminals must be performed by an institution following “objective rules of evidence to establish that a crime has been committed and to prove who committed it, as well as objective rules to define punishments and enforcement procedures” (127). These assertions in support of government express a belief that although individual rights imply a right of self-defense and a need to restrain violent aggressors, only a centralized, organized body following objective procedural rules (a body to which all members of society must submit, by force if necessary) can achieve those goals without endangering individual rights in the process. That is, Rand appears to assert that leaving self-protection to individuals would itself result in violations of individual rights—namely, the rights of people not to be disproportionately punished or punished for a violation of rights they did not commit. Rand apparently believes that such violations would occur either because individuals are incapable of agreeing on objective procedural rules without centralized authority, or because men's passions would depress reason in the realm of self-defense and reactions to (real or perceived) aggressions. Rand concludes that only a government with narrowly defined authority, strictly limited to its only ethical purpose, can fulfill the role of protector and enforcer of individual rights.

As for the concept of government as a “necessary evil” to accomplish protection of individual rights, Rothbard argues that while government is indeed evil, it is by no means necessary. “If, in fact, we cast a cold and logical eye on the theory of ‘limited government,’ we can see it for the chimera that it really is, for the unrealistic and inconsistent ‘Utopia’ that it holds forth” ([1982] 1998, 175). Rothbard points out that a government has many incentives to extend its power and influence, but no incentive to remain “limited” or “minimal” (175–76). Furthermore, Rothbard quotes Barnett on why “the State, *qua* state, therefore, is an illegal system”; by its nature (imposing compulsory taxation and monopolizing defense services), the state violates the very laws that it sets down for its subjects (179–80). An additional contradiction inherent in the concept of limited government is the question of “how much” taxation should be levied and “how much” protection to provide (180–81). Utilizing insights gleaned from sound economic theory, Rothbard points out that government cannot rationally calculate how much of any good or service to provide; with no means for economic calculation such governmental decisions can only be arbitrary (181).

Rand’s further arguments regarding the necessity of government include the possibility of a system of voluntary taxation (i.e., payment for government services), and the role of a constitution in restraining government (1964, 111–12, 135). *If* government were funded by voluntary taxation, and *if* a constitution actually restrained government to performing *only* the function of protection of individual rights, government would be merely a vehicle for the protection of individual rights rather than a criminal enterprise. Without the coercion of involuntary taxation, Rothbard’s case for anarcho-capitalism appears weakened. However, Rothbard ([1982] 1998, 180–81) responds that various “Utopian schemes” to dispense with involuntary taxation but retain a government that monopolizes the provision of defense would still fall prey to the objection that there is no rational way for any institution other than a free, private market to determine *how much* of a good or service to provide.

In a direct counter to anarcho-capitalism, Rand submits, “Ask yourself what a competition in forcible restraint would have to mean”

(132) and offers a simple illustration intended to highlight the impracticality of competition (i.e., a free market) in defense and protective services: Smith, a customer of Government A, believes that Jones, a customer of Government B, has robbed him. When the police officers of Government A come to confront Jones they are met at the door by police officers of Government B who declare they do not recognize the authority of Government A. Rand concludes, “You take it from there” (132). Rand’s point is that if multiple agencies purport to have authority to use force only disastrous consequences can result. A centralized, monopolistic authority charged with the single duty of protecting individual rights is the necessary procedure to protect and enforce individual rights.

The debate over minarchy and anarcho-capitalism rages on among libertarians, classical liberals, and other advocates of a human rights society, and the issue is unlikely to be resolved in a manner that convinces either camp to admit logical defeat because the best arguments on both sides depend largely on assumptions and conjecture.¹⁵

V. The Ethics, *vel non*, of the Constitution

In certain aspects and degrees, the individual rights ethic advocated by Objectivist and Rothbardian ethics finds expression in the United States Constitution.¹⁶ For the most part, however, Randian and Rothbardian ethics are glaringly absent from, and even contravened by, the Constitution. Any effort to abandon, amend, revise, or clarify the Constitution with intent to create a human rights society will require explication of these aspects. The current state of affairs in the United States exists against the backdrop of a written Constitution that purports to be the supreme Law of the Land. Attempts to change the status quo will require exposition of the defects of the Constitution in light of the principles necessary for a human rights society.

The individual rights ethic meets the criteria for a human ethic—universality and realism. (“Realism” is intended in two senses: first, based on unavoidable facts of nature; second, capable of implementa-

tion in the real world).¹⁷ From the individual rights ethic, the rules for socio-political interactions can be legitimately derived.¹⁸ Particular doctrines of political science and legal theory must be consciously “measured” against the individual rights ethic in order to devise a genuinely ethical socio-political framework. Despite the different conclusions reached by Rand and Rothbard about whether government is necessary, the individual rights ethic serves as the logical point of comparison between the Constitution and both Rothbardian and Objectivist ethics. According to the principles advocated by both Rand and Rothbard, the Constitution is an *ethical* Law of the Land only to the extent that it embodies and implements the individual rights ethic.

A. Contextual Factors Surrounding the Declaration and the Constitution

At best, the Constitution is a morass of ethical confusion. At worst, the Constitution actually institutes and perpetuates a profoundly unethical metasystem of government. Even reading the Declaration of Independence “into” the Constitution cannot produce a consistent endorsement of the ethical principles required by the individual rights ethic. Rand and Rothbard each praise the American Declaration of Independence, and Rand also expresses admiration for the U.S. Constitution. Rothbard points to the Declaration of Independence as a “notable example of the revolutionary use of natural rights [theory],” which underlies Rothbard’s own ethical theory ([1982] 1998, 23). Rothbard particularly lauds the Declaration’s second paragraph with its proclamation of “self-evident” truths that all men have “unalienable Rights” including “Life, Liberty and the pursuit of Happiness” ([1979] 1999, 178). Rand similarly praises the Declaration, interpreting its phrase “the right to life, liberty and the pursuit of happiness” as a recognition of the fundamental right of every man to his own life and “the freedom to take all the actions required by the nature of a rational being for the support, the furtherance, the fulfillment and the enjoyment of his own life” (1964, 110).

As to the Constitution itself, Rand posited that its purpose was “to protect man from the government,” noting with approval that the “Bill of Rights was not directed against private citizens, but against the government—as an explicit declaration that individual rights supersede any public or social power” (112). Rothbard agrees that the U.S. Constitution was “the most ambitious attempt to impose limits on the State,” but the seemingly inexorable expansion of government power throughout American history led Rothbard to view the Constitution as an illustration of how even the most deliberate attempts to create and maintain limited government fail, largely because the only true checks and balances on government power are enforced by government agents themselves ([1974] 2000, 71–72). Considering the Declaration and the Constitution together, Rand asserted that the individual rights ethic espoused by Objectivism “was the essential meaning and intent of America’s political philosophy” although “it was not formulated explicitly, nor fully accepted nor consistently practiced” (1964, 112). Rothbard similarly argued in his revisionist history of the American Revolution that American independence was the result of profound, passionate, radical libertarianism ([1979] 1999, 442–43).

Undoubtedly, the Declaration of Independence justified the political independence of the American colonies by appealing to principles of natural rights and natural law, grounded in the concrete realities impelling the Revolution. However, this extolment of the Declaration by both Rand and Rothbard glosses over crucial contextual factors surrounding the origin and historical function of the Declaration and the Constitution that prevent either document from effectively establishing the individual rights ethic as the foundation of American government.

As shown in Sections II, III, and IV above, Objectivist and Rothbardian ethics share metaphysical, epistemological, and methodological premises that lead each to espouse the individual rights ethic, even though they arrive at it by different routes and depart from it to divergent conclusions about the role and necessity of government. Whether the Declaration and Constitution share these premises serves as at least a rough indication whether the American system of

government rests upon the individual rights ethic.

1. The Declaration of Independence: Purpose and Function

Aside from the observation that Thomas Jefferson and other American founders employed insights and perspectives born of the rationalist Enlightenment, the metaphysical tenet of objective reality and the epistemological primacy of reason and logic can be discerned in the very language of the Declaration. As justification for dissolving the “political bonds” that tied the American colonies to Britain, the Declaration speaks of events that *cause* such a separation and presents for the world’s inspection a specific list of *facts* justifying the revolution. The declaration of freedom from the dictates of the British monarch springs from people’s right and duty to “throw off such Government, and to provide new Guards for their future security” based on principles believed to best secure people’s safety and happiness. Such a right and duty emanates not from the will of God, or from the will of the majority of colonists, but from the “Laws of Nature and of Nature’s God.”¹⁹ The metaphysical premise evident in the Declaration is that human action should be rationally dictated by objective reality. The epistemology of the Declaration is clearly one of reason as the means to acquiring knowledge and truth, evidenced by the concepts of cause and effect, justification for action based on fact rather than whim, the capacity of men to recognize “self-evident” truths discerned in the Laws of Nature, and our human ability to order the world in accordance with man’s inalienable rights.

However, the Declaration is not methodologically committed to individualism. While the second paragraph declares the equality and inalienable rights of all men, the Declaration throughout speaks in collective terms, using phrases like “one people” and “Right of the People,” and claiming its sentiments on behalf of “these Colonies.” Moreover, the ultimate purpose of the Declaration was to declare “That these United Colonies are, and of Right ought to be Free and Independent States.” The entire document was a message from one government (or alliance of governments) to another. The abuses

listed in the body of the Declaration consist chiefly of *political* injustices perpetrated by the British crown, particularly encroachments on the autonomy of colonial *governments*. From this perspective, the Declaration was not complaining so much of violations of individual rights by government as violations of political autonomy by one government against other governments.²⁰

The pronouncement that the legitimate purpose of government is to secure man's inalienable rights may have more to do with clarifying the proper *source* of government power than about inherent *limits* on government power. In the historical context of rebellion against the tyranny of the King, a reasonable inference is that the American colonists were more concerned with rule by consent of the people as opposed to hereditary monarchy, than with substantive limits on government *qua* government. The triad of basic human rights (life, liberty, pursuit of happiness) in the Declaration may be more a statement about the equal right of all men to participate in forming and managing their government than about the equal right of all men to own and control their own lives without violation. As convenient as it is for modern classical liberals and libertarians to "lift" the triad out of the Declaration and display it as an eloquent articulation of the individual rights ethic, such glorification is sorely misplaced, and probably accounts for the seeming paradox of such a (supposedly) brilliantly libertarian founding document failing to secure a human rights society.

2. The Constitution in Historical Context

Even if the common libertarian rendition of the Declaration is correct and that document does declare the core principles required by the individual rights ethic, did the Constitution adopted a dozen years later strive to implement those principles (namely, commitment to the inalienable, equal rights of all people to life, liberty, and the pursuit of happiness, and securing those rights as the only purpose of government)? A telling observation in this regard is that the *Federalist Papers* contain just one direct reference to the Declaration of Independence (No. 40),²¹ and this was an appeal to the right of the people

to “abolish or alter their governments as to them shall seem most likely to effect their safety and happiness” (quoted in No. 40²²). Publius was responding to contemporary charges that the delegates to the Constitutional Convention exceeded their authority by proposing a new Constitution, since their commissions authorized them only to revise and alter the Articles of Confederation to render the Articles “adequate to the exigencies of government and the preservation of the Union” (quoted in No. 40). Even Publius, its most ardent, verbose, and articulate contemporary advocate, did not bother arguing that the Constitution aimed solely (or even substantially) to protect the triad of inalienable rights arguably expounded in the Declaration. Publius’s single citation of the Declaration defends the authority of the delegates to design an entirely new constitution and create an entirely new national government. By contrast, Publius discussed the Articles of Confederation no fewer than 35 separate times, evidencing a primary concern with fixing the technical problems of the structure of the central government rather than with creating a system of government for the sole purpose of protecting individual rights.

Crucial to identifying the political ethics of the Constitution is recognizing that the Constitution was almost solely a document of political theory—not legal theory, not political philosophy, and not political ethics.²³ As Rand (1964, 37) pointed out, however, every system of government rests upon *some* ethical premises. If those ethical premises are not stated expressly, they still exist implicitly. The fundamental defect of the Constitution is its failure to define human rights, and its concomitant failure to assign to government the narrow role of enforcing and protecting those human rights. Instead, the Constitution assigns to government certain powers that contemporary wisdom and political theory deemed proper functions of government. Like the Declaration, the Constitution employs metaphysical premises of objective reality, and demonstrates an epistemological commitment to reason and logic. Also like the Declaration, the Constitution blatantly rejects methodological individualism, proceeding from the fictional premise that “the People” can and do act as a collective entity.

The Constitution never intended to define human rights and

establish government for the sole purpose of protecting those rights. The Constitution focuses instead on designing and perpetuating stable, efficient governmental institutions. For Publius, the question of the merit of the new Constitution boiled down to: given that government is necessary and entails a trade-off of natural rights for security, should Americans “divide themselves into separate confederacies and give to the head of each the same kind of powers which they are advised to place in one national government[?]” (No. 2). From the start, the Constitution was a document of political theory or science rather than political philosophy.²⁴ As such, the best arguments in favor of the Constitution focused little on constraining government *qua* government or protecting individual rights, and instead frame the issue as a structural choice between many State governments loosely confederated, or a truly national government.

The avowed purpose of the Constitution, according to its Preamble, was to form “a more perfect Union.”²⁵ This vague goal was not clarified much by the other statements of purpose in the Preamble, and the body of the document itself abandons focus on overall purpose, delving into the particular devices, institutions, rules, and powers of the national government. The Constitution made no effort to set forth a coherent statement of political ethics. In response to critics of the proposed Constitution who complained that the document contained too few safeguards of individual liberties and limitations on government powers, Publius defended the Constitution by listing provisions that fall within the ambit of such guarantees and limitations.²⁶ After several States agreed to ratify only on the condition that a Bill of Rights be added, the first ten Amendments specified additional safeguards and limitations on government power. Importantly, the Bill of Rights applied only to the national government; not until ratification of the Fourteenth Amendment after the War Between the States did the Supreme Court begin applying the Bill of Rights against the States.

B. Specific Features of the Constitution

The other basic issue that concerned Publius was also a question

of political science rather than political philosophy: justification of the uniquely American *form* of government designed by the Constitution. The America of 1787 was suffering an identity crisis: Would the people of the several States remain divided into neighboring autonomous governments or submit to Union under a national government? The debate did not center on the total power or proper role of government *qua* government. Rather, Publius set out to convince the people (1) that Union was the necessary and preferable vehicle for attaining security and happiness, and (2) that the structural particulars of the proposed Union, especially federalism and republicanism, were necessary and sufficient to achieve that security and happiness.

1. Federalism

The Constitution imposed a federal, two-tiered system of government, evidenced by the doctrine of enumerated powers²⁷ and reinforced by the Ninth and Tenth Amendments.²⁸ The Constitution allocated specific tasks and powers to the national government (implicitly taking such powers away from State governments) and instituted a handful of specific prohibitions on State autonomy.²⁹ However, the Constitution established precious few limitations on government *qua* government, leaving the total scope of government power and function wide open, and phrased the *purpose* of government in vague, collective terms rather than granting to government the narrowly-defined role of protecting individual rights.

From 1778 to 1787, the several States operated under the Articles of Confederation, which bound the States into a “firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare.” The Articles dubbed the confederacy of States “The United States of America,” and the Articles themselves operated upon the State governments rather than individual citizens. Dissatisfaction with this arrangement inspired calls for a national government; as Publius put it, “A Nation, without a National Government, is, in my view, an awful spectacle” (No. 85). The new Constitution proposed a federal system, with States retaining significant measures of control over their inhabitants

and the national government stepping in with powers over supposed national affairs.

The issue of whether a Union is preferable to fifty autonomous States yields no obvious answer under the rubric of the individual rights ethic. Rothbard championed the proposition that a lover of liberty must always resist measures that centralize government power—i.e., state power is preferable to national, and local is preferable to state (Hoppe 1998, xli–xlii). However, that position is not necessarily compelled by the individual rights ethic itself, and is more likely an outgrowth of the Rothbardian conclusion that *no government* can be ethical—thus, opposition to centralized government furthers the goal of no government. Having admitted the propriety of limited government, Objectivism would probably pass on judging the merits of federalism, leaving that responsibility to the field of political theory—at least so long as political theorists bear in mind that the individual rights ethic requires observance of the same ethical principles no matter how large or small the geographic territory covered by a government and no matter how many different “levels” of government are created.

The fact that the Constitution created a federal system somewhat confounds Rand’s analysis of American government. For Rand (1964, 111), the “great achievement” of the United States was recognition that there exist two potential sources of violations of individual rights: criminals and government. According to Rand, the U.S. drew a distinction between those two sources “by forbidding to the second the legalized version of the activities of the first” (111). However, this picture fails to account for the design and function of American federalism. In the American system, government is not a monolithic concept or institution. American citizens live under the watchful eye of many levels of government—national, state, and often multiple layers of local government (e.g., county, city). The Constitution as originally adopted placed very few restrictions on the authority of State and local governments to violate individual rights, and did almost nothing to impose upon State or local governments the narrow responsibility for protecting individual rights. Instead, the Constitution defined certain powers of the national government, thereby

displacing certain avenues of State authority.

From a political science viewpoint, federalism helped achieve a rational, efficient distribution of government powers. Publius asserted that federalism ensured that the State governments retained expansive powers to regulate the affairs of their inhabitants, granting authority to the national government only over “certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any” (No. 14).³⁰ Thus, one of the core structural features of the Constitution, federalism, did absolutely nothing to limit total government power. Rather, federalism aimed to address concerns of practicality and efficiency, transferring certain powers to a national government to make the business of regulating the lives of citizens run more smoothly. In its basic design, the Constitution intended to create a power sharing situation among State and national governments, paying scant attention to the cumulative scope or function of those powers or the impact of such total power on individual rights. The Constitution failed to articulate ethical principles binding either level of government. The Constitution’s overarching federalist scheme is designed against a background of vague notions of “good government” (e.g., No. 1) rather than protection of individual rights.

From the individual rights ethic perspective, federalism could be a useful practical device to accomplish the goal of protection of individual rights across a large geographical territory. Under the individual rights ethic, the only proper function of government is to protect individuals from foreign and domestic aggression (i.e., violations of life and property from whatever source). Utilized ethically, federalism would assign responsibility for protecting individuals against foreign aggressors to the national government and leave responsibility for protecting them against domestic aggressors to state and local governments. American federalism, however, inadequately protects individual rights because it concerns itself chiefly with dividing up powers among levels of government without bothering to define (a) the proper role of government *qua* government, and only then (b) the division of responsibilities that would most prudently carry out that narrow role.

2. Separation of Powers

Federalism allocated total government power among State and national governments, while another core structural feature of the Constitution—separation of powers—divided powers among the three branches of the national government. Like federalism, the concept of separation of powers also belongs to the realm of political science rather than political philosophy or ethics. Publius argued that separation of powers among the legislative, executive, and judicial branches ensured preservation of the “excellencies” of republican government and “lessened or avoided” the imperfections of such a system (No. 9).

Acknowledging the “political truth” that consolidation of the legislative, executive, and judicial powers in the “same hands” is the “very definition of tyranny” (No. 47), Publius defended painstakingly the carefully crafted provisions of the Constitution commonly referred to as checks and balances (No. 48, 51). Publius claimed that the particular features of each office of government instilled in its occupants “the necessary constitutional means and personal motives to resist encroachment of the others,” commenting pithily that “ambition must be made to counteract ambition” (No. 51). Publius acknowledged Rothbard’s insight into the difficulty of asking government to control itself when the only constitutional controls are to be enforced by government officials themselves (No. 51), but expressed faith that the Constitution established the various departments of the national government with just the right amount of autonomy and reliance on each other for each to remain robust but in check.

Taken together, Publius called federalism and separation of powers the “double security” to the rights of the people (No. 51). According to Publius, the Constitution protects the people from abuse of the power surrendered by the people to government by first dividing such power among State and national governments, and then further dividing such power among the separate departments of the national government (No. 51). In a Rothbardian analysis, such multiple divisions of power can only be seen as liberty-enhancing

from the perspective that overlapping governments are likely to be inefficient, thereby accomplishing less government interference with individual liberty. However, Publius relied on principles of political theory rather than ethics, insisting that such power sharing would enhance liberty by encouraging intergovernment and intragovernment competition for the affection and loyalty of the people (No. 17).

From the vantage point of the individual rights ethic, separation of powers as a principle of political theory may indeed be a useful structural feature of a constitution, as concentration of power certainly leaves more room for abuse than diffusion of power.³¹ What the Constitution lacks, however, stunts the efficacy of its intricate design of checks and balances: the Constitution fails to define individual rights, and fails to make protection of individual rights the sole purpose of cumulative national government powers. Separation of virtually *unlimited* power does little to advance the ethical principle that force must only be used to protect and enforce individual rights.

3. Republicanism

More than any other single structural feature of the Constitution, Publius proclaimed republicanism as the greatest accomplishment of the new American system of government. The double security to the people's rights that Publius attributed to the combination of federalism and separation of powers was buttressed by the republican character of the new government. Republicanism of the American variety, Publius argued, served to protect individuals from oppression by other individuals and groups. The issue of monarchy or democracy versus republicanism, and the subissue of whether a large republic presents advantages over small republics, once again exists in the realm of political theory rather than ethics. The chief advantage of a republic over a democracy or monarchy is protection of individuals against majority rule or tyrannical whim (No. 51). A large republic yields benefits not found in small republics because an expansive geographical territory can function as a Union without sacrificing the interests of the minority to majority whim. The uniquely American form of government instituted a constitutional republic, allowing

government by consent of the governed while avoiding the deprivations certain to occur in direct democracies and small republics. The key, writes Publius, is control of factions (No. 10).

The problem of faction, explains Publius, springs from the political reality that there exist a multiplicity of groups whose interests conflict: “A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views” (No. 10). Unwilling to attempt to abolish factions, as such an undertaking would annihilate all personal autonomy and expression, Publius advocated the Constitution’s approach of controlling the destructive effects of factions by balancing competing interests such that all have access to the process of government and none find themselves trampled upon by others. Representative government filters competing interests through “the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations” (No. 10).

The Constitution endeavored to find an Aristotelian “golden mean” with respect to balancing competing interest groups. Glaringly absent from this endeavor is any focus on inalienable individual rights or the purpose of government in protecting such rights. Publius is quick to point out that individual liberties and property rights remain vulnerable under direct democracies, subject to seizure at majority whim (No. 10), but places all confidence in the elected representatives of an extensive republic (i.e., politicians!) to guard those liberties and property rights and act for the “public good.” Thus, instead of carefully defining individual rights on principle and instituting government for the sole purpose of protecting those rights, the Constitution effectively and intentionally designed a political battlefield where almost no individual right is absolute; so long as the process spelled out for legislative, executive, or judicial action is followed, almost any encroachment can be stamped constitutional. (The few specific encroachments banned by the Constitution are discussed in the next section.)

Rand (1964, 128) praises the Constitution for creating a nation of laws rather than men, but the Constitution actually designed a system of government based on what Rand would call the Cult of Compromise (1967, 206; see also Rand 1964, 79–81). By the time she penned her essay “The New Fascism: Rule by Consensus” in 1965, Rand clearly discerned the twentieth-century impact of the “balance of interests” approach designed by the Constitution: in the modern American “mixed economy,” the only principle “is that no one’s interests are safe, everyone’s interests are on a public auction block, and anything goes for anyone who can get away with it,” leaving us with a system that “breaks up a country into an ever-growing number of enemy camps, into economic groups fighting one another for self preservation . . .” (1967, 206). Rand still did not abandon the rose-colored view that the United States was intended to function as a society whose government existed solely for the protection of individual rights. In fact, the Constitution explicitly intended to create the political free-for-all operating on the “principle” of compromise that Rand denounced, under the mistaken conviction that faction control was the best a government of men could offer (No. 10).

Under the individual rights ethic espoused by both Rand and Rothbard, clear definitions of rights resolve every apparent interpersonal conflict. There are no competing interests (e.g., farmers versus merchants, or labor versus management) that need to be resolved through the political process (i.e., by the use of force), *if* individual rights are properly defined and determinedly enforced. Conversely, when every conflict of individual or group interests is supposed to be resolved politically, no person’s *rights* are guaranteed.

4. Guarantees of Individual Liberties

The Constitution *sans* Bill of Rights provided a handful of key limitations on government power and guarantees of individual liberties. These include the right of habeas corpus, prohibitions on bills of attainder and ex post facto laws, and prohibitions on the impairment of contracts (see note 26), all of which applied to State and national governments.³² The first ten Amendments, comprising

the Bill of Rights, applied only to the national government, and enshrined specific protections like separation of church and state, freedom of speech, religion, and the press (First Amendment), the right to bear arms (Second Amendment), the right to refuse to quarter soldiers in one's home (Third Amendment), freedom from unreasonable searches and seizures (Fourth Amendment), protection against double jeopardy, freedom from self-incrimination, the right to due process, the right to just compensation for the taking of private property (Fifth Amendment), the right to a speedy and public trial by jury, the right to confront witnesses, the right to assistance of counsel (Sixth and Seventh Amendments), freedom from cruel and unusual punishments and excessive fines (Eighth Amendment). The Ninth Amendment attempted to ensure that the specification of the foregoing rights did not deny the existence of other rights not specified, and the Tenth Amendment confirmed that the national government is one of enumerated powers.

Publius downplayed the need for a Bill of Rights, arguing first that the Constitution provided enough in the way of protection of liberty, and second that listing particular liberties posed the danger that government officials would use such a list to show that any rights absent from the list must not exist (No. 84). History proved Publius correct on that point (witness the modern debate over so-called "unenumerated" or "penumbral" rights like privacy), but the solution Publius suggested would also have been sorely inadequate to ensure protection of individual rights. Publius argued that the Constitution alone contained sufficient guarantees of individual liberties and apparently assumed that State governments would protect any additional liberties the people thought important.

From the perspective of the individual rights ethic, the Constitution completely misses the point. The Constitution concerned itself with explication of numerous (albeit limited) *powers* of government, and specified a few particular individual liberties to be respected *by government*. But it had nothing to say of the *rights* of men vis-a-vis all other men. Without a clear understanding and definition of inalienable human rights, those specific limits and protections end up meaning little. Concern with enumeration of powers and a handful

of specific intrusions off limits to government is very different from concern with enforcing and protecting rights as such. Without a principled explication of rights, the enumerated powers inevitably, if not by definition, permit rights to be infringed, except where such infringement is specifically barred by particular limitations on power spelled out as enumerated liberties.

Rand (1964, 112) extols the fact that the Bill of Rights operates only to limit *government* action rather than private action, but this sharp division between “liberties” that only government can violate, and human rights that each individual possesses vis-a-vis every other individual, has confused the entire concept of rights. Historically, the concept of “liberty” has carried a distinctly political flavor, referring either to a positive liberty consisting of participation in government, or to negative liberty requiring government to refrain from interfering (Hill 2002, 117–19).³³ But under the individual rights ethic developed by Rand and Rothbard, genuine fundamental rights possessed by each individual in equal measure exist and must be respected by every other individual, whether a private actor or government official. That is, one’s right to own and control one’s own body cannot ethically be infringed by *anyone*, regardless of status as a government official. The distinction between supposed rights or liberties that only government can violate, on the one hand, and rights that can be infringed by private actors, on the other hand, is artificial and spurious. Certainly, from a historical perspective, particular infringements are most commonly committed by governments, such as coercive suppression of the press. But infringement of that “liberty” is really only a specific circumstance of what can be characterized as a violation of a person’s rights to life and property, and such rights exist regardless of the identity of the violator.

Assuming the propriety of some form of government, the individual rights ethic demands that the only proper purpose of government is protection of individual rights. Those rights are exactly the same for each individual as against every other individual, including against government officials. This is the heart of the Constitution’s inadequacy measured by the individual rights ethic: first, the Constitution fails to define human rights, and second, it fails

to assign to government (at all levels) the sole function of protecting those rights. The Constitution specifies a few *political* liberties that protect individuals against certain forms of government intrusion, but fails to identify genuinely fundamental human rights and then limit government's purpose to their protection.

As discussed above, certain features of the Constitution like federalism and separation of powers might very well serve valuable purposes in a government founded on the individual rights ethic, but no such structural features will protect individual rights under the current Constitution because the Constitution does not fundamentally concern itself with protection of individual rights.

C. Constitutional Evolution

Two major forces have impacted the evolution of constitutional law in the United States: the Thirteenth, Fourteenth, and Fifteenth Amendments, and Supreme Court jurisprudence. Adopted in the wake of the War Between the States, the Fourteenth Amendment in particular altered significantly the role and reach of the Constitution by imposing obligations concerning individual liberties against the States. For example, with the advent of the Fourteenth Amendment, state and local governments were held to standards of due process of law and equal protection. The Supreme Court also began applying many of the Bill of Rights provisions against the States. Thus, for instance, no State or local government can constitutionally deny freedom of speech, perform unreasonable searches or seizures, or deny trial by jury to criminal defendants.

The area of constitutional law that most sharply divides the modern High Court concerns interpretation and application of the Due Process Clause of the Fourteenth Amendment, which reads "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Supreme Court has divined a distinction in that clause between "procedural due process" and "substantive due process." Procedural due process generally requires a state or local government to provide notice and meaningful opportunity to be heard before depriving a person of life, liberty, or property. The real

battles occur over the meaning and extent of substantive due process, which is the jurisprudential home of infamous controversies like the one over rights to sexual privacy.

Because the Constitution fails to define individual rights *per se* and focuses instead only on specifying certain particular individual liberties, it is no wonder that the constitutional battle rages on concerning which supposed “rights” are constitutionally protected. A system of government founded on the individual rights ethic would resolve the confusion by providing clear definitions of human rights and giving government the very narrow job of protecting those rights. Instead, we have a federal, republican system of government that gives government as such nearly unlimited “police powers” to regulate the health, safety, morals, and welfare of its citizenry, carving out a few aspects of individual autonomy off limits to government intrusion. (Even these supposedly off-limits niches of individual autonomy generally can be infringed if the government demonstrates a compelling state interest.)

With no principled definition of fundamental rights embodied in the Constitution, Supreme Court justices determined to preserve individual autonomy have sometimes succeeded in finding constitutional authority for so doing, but other justices bent on legitimizing state and national regulations and intrusions have also successfully justified their rulings. In 1905, Justice Oliver Wendell Holmes, dissenting from a Supreme Court decision that struck down a New York law imposing restrictions on the number of hours a baker could work per week, wrote: “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics*” (Holmes 1905, 75). As much as liberty-lovers everywhere might want to disagree with that statement and accuse Justice Holmes of imposing a statist interpretation of the Constitution unjustified by the document itself, Holmes got it right. The Constitution was never meant to implement a libertarian regime, or to express any ethical principles at all. For better or worse, Justice Holmes could just as correctly have written: “The Constitution does not enact Ayn Rand’s or Murray Rothbard’s political ethics.”

VI. Conclusion

Proponents of any set of normative propositions understandably claim to find their propositions in a culture's current or historical traditions; this is one way to persuade people that such propositions are not unworkable, abstract notions but tried-and-true ideas. Modern conservatives, libertarians, and even leftists cite aspects of the American founding they claim lend credibility to their respective political, social, or legal propositions. Libertarians supportive of the political ethics of Rand or Rothbard often insist that as originally enacted and intended, the U.S. Constitution founded American society on the individual rights ethic. These warriors for a human rights society attempt to portray American history as a story of a decently libertarian Constitution abused by tortured interpretation, resulting in ever-expanding government power. Viewed in historical context, the Constitution was never intended to ground American society on the individual rights ethic. Moreover, in its current formulation the Constitution is hopelessly devoid of a consistent, rational political ethics. The contributions to political science devised by the drafters of the Constitution may or may not represent valuable advancements in that science, but the lack of articulated political ethical principles to support the mechanics of the Constitution dooms the Constitution to perennial failure as a foundational document for a genuinely free and ethical society.

Contrary to popular belief, the U.S. Constitution did relatively little to institute the kind of limited government demanded by the individual rights ethic. Rand and Rothbard each recognized that the particular institutions and mechanisms of government must either rest on sound principles of political ethics or else end up implementing severely defective ethical norms. However, neither Rand nor Rothbard seemed to want to admit that from the very beginning, the great American experiment rejected or abandoned efforts to institute an ethical society.

When arguing for ratification of the Constitution, Publius wrote that contemporary opposition to the proposed Constitution “renders a full display of the principal defects of the [Articles of] Confederation

necessary in order to show that the evils we experience do not proceed from minute or partial imperfections, but from fundamental errors in the structure of the building, which cannot be amended otherwise than by an alteration in the first principles and main pillars of the fabric” (No. 15). More than two centuries later, we owe it to ourselves to once again examine our current system of government and recognize that “fundamental errors in the structure of the building” require “an alteration in the first principles” if we desire to build our social structure upon principles of genuine human ethics.

Notes

1. Of course, because a constitution by definition establishes and delineates a government, the Constitution will never approach Rothbardian anarcho-capitalism. However, measuring the Constitution against Rothbardian ethics is still a fruitful endeavor, particularly if one is convinced of the truth of Rothbard’s ethical system, because any transition to such a system will require a firm grasp of the “distance” between the status quo and the desired condition. The distance between Randian minarchy and the Constitution is much less than between Rothbard’s vision and the status quo because of Rand’s belief that limited government is necessary.

2. Although Rand does not draw this distinction, under Randian principles a person need not delegate his *entire* right of self-defense to the government, if for no other reason than such delegation is not practicable. E.g., if one is physically attacked, one has the right to use physical violence to repel the attack. Complete delegation of that right to the government would in most cases vitiate the right so as to make it meaningless; when under physical attack, in most instances one cannot effectively request and receive the aid of a governmental protector in time to prevent the damage to one’s life. Perhaps a better phrasing of Rand’s principle is that life in a civilized society requires each person to renounce the use of physical force to exact revenge or retribution from an aggressor by delegating that aspect of the right of self-defense to government.

3. John Locke’s theory of the origin of government postulates that in a “state of nature” (i.e., no government) all men are “free, equal and independent” (Laslett 1960, 330), and that by joining civil society each man “devests himself of his Natural Liberty” (331). In contrast, Rand’s concept of government does not entail any divestment of one’s rights, but is only a means to secure those rights. For Rand, there is no trade-off between rights and security in the formation of an ethical, proper government.

4. Objectivist ethics holds itself out as an absolute code of values determining every choice a human being faces (i.e., personal morality), as well as providing the absolute principles governing the use of physical force (i.e., political ethics). It is the political ethics of Objectivism that are most relevant to this paper, but it is worth noting that there is a range of actions that Objectivist political ethics would declare immoral but not illegal (i.e., it is wrong to do them, but the use of force to deter and punish them is not justified). These actions include anything that contradicts one’s values yet does not impose physical force, coercion, or violence on another person. For example, stealing someone’s work product and calling it your own without the consent of the owner is both immoral and illegal. However, taking someone’s work

product and calling it your own *with* the consent of the owner would be immoral, though not illegal.

5. Rothbard ([1982] 1998, 25) explicitly disclaims that *The Ethics of Liberty* attempts a full defense of natural law philosophy, but surveys and synthesizes enough of the venerable tradition to arrive at his fundamental premises from which his “natural law” ethics may be derived.

6. Rothbard prefers the term “liberty” to “freedom” precisely because of the common confusion of freedom with power. Rand seems to prefer the term “rights” to either liberty or freedom, probably because an Objectivist definition and application of the concept “rights” applies with equal force in all human interactions, whether among private persons or between government and citizens. Liberty, on the other hand, tends to have a distinctly political connotation and historically denotes either freedom from forms of *government* coercion, or the positive freedom to participate in democratic self-government (Hill 2002, 118).

7. Objectivism actually answers the broader question (“What actions *should* every man take?”), while Rothbardian ethics is intentionally silent on this question. For example, while Rothbardian ethics positively identifies man’s right to dispose of his own property as he wishes, it says nothing of the morality or immorality of, e.g., suicide. Or, while Rothbardian ethics insists on a woman’s right to rid her body of an unwanted fetus, it is silent on the morality of abortion.

Rothbard’s rationalist ethics denotes the “rights of man” but conspicuously defers any and all discussion of the “oughts of man.” In short, Rothbardian social philosophy is a synthesis of economic science and *political* ethics, but it consciously ignores *personal* ethics. Rothbard ([1982] 1998, 25, 152) explicitly says in *The Ethics of Liberty*: “It is not the intention of this book to . . . elaborate a natural-law ethic for the personal morality of man. The intention is to set forth a social ethic of liberty.” In contrast, Rand expressly sets forth principles to guide each person’s personal choices and actions even within the bounds of legal conduct (1964, 49–56).

8. This deduction would benefit from making explicit the logical step from the metaphysical requirements of man’s survival to the “right” (defined by Rand as a moral sanction defining his sphere of action) to life by borrowing Rothbard’s argumentation ethic ([1982] 1998, 32–33) demonstrating *why* life is the proper human standard of value: if one wants to deny that life is each person’s standard of value, then to avoid self-contradiction one would have to quit living before even beginning to express such a denial. Thus, no such denial can logically be made by anyone.

9. Rothbard ([1982] 1998, 45 n. 1) notes that a fourth possibility has been raised by philosophers, namely, that *no one* owns himself or anyone else. Rothbard dismisses this possibility as unrealistic: “since ownership signifies a range of control, this would mean that no one would be able to *do* anything, and the human race would quickly perish.”

10. Though not stated explicitly in this section of *The Ethics of Liberty*, the conclusion that no man would be “able” to do anything is a theoretical concern, not simply a problem of technological feasibility. That is, even if society consisted of just two people, under the proposal that each fully and equally owns the other, neither would have the right to act without the consent of the other—but obtaining such consent would require action.

11. Rothbard ([1982] 1998, 134–35) discusses this in the context of the enforceability of contracts in a free society. Political ethics says nothing about a man’s *voluntary choice* to agree to follow the orders and whims of someone else (135), and in fact he is ethically entitled to do so. However, the person to whom our voluntary slave submitted has no legal right to *enforce* that submission; if our voluntary slave changes his mind and no longer wants to follow orders the law will not enforce the agreement (135). This is because the title-transfer theory of contracts controls what

types of agreements merit legal enforcement (that is, enforcement by means of legally sanctioned, legitimate physical violence), and in the case of voluntary enslavement, the slave has transferred nothing to his new master (136). Metaphysically, a person's very will—control over his own mind and body—*cannot* be alienated and transferred to anyone else; in Rothbard's words, "Each man has control over his own will and person, and he is, if you wish, 'stuck' with that inherent and inalienable ownership" (135).

12. Using the phrase "individual rights" has the disadvantage of potential confusion, since modern political and legal discourse uses the phrase to mean quite different propositions than the one shared by Rand and Rothbard. Today, modern liberals use the phrase to mean entitlements—a person's "individual rights" entitle him to a minimum wage, to non-discrimination by business owners, etc. Modern conservatives use the phrase too narrowly, to mean freedom from government restraints only in certain areas of life. The modern Supreme Court rarely uses the phrase, preferring the word "liberty" and applying it against the government most often in the modern liberal sense of "entitlement," occasionally to prevent government interference with personal choices (i.e., use of contraception, gay and lesbian sex), and almost never to prevent government interference with economic choices (i.e., the doctrine of "liberty of contract" has been vitiated so badly that a state or federal government can void a private contract without much justification at all). Generally, the only arena where the term "rights" comes into play in modern constitutional law is criminal prosecutions. Here, the Supreme Court interprets and guards the "rights" of the accused mostly to various *procedural* safeguards, such as the right to a jury trial, the right to counsel, etc. The Supreme Court has dropped the context of individual rights, however, when it comes to *what activities* a legislature may properly deem criminal in the first place. Thus, today, federal criminal law is a morass of vague statutes carrying criminal penalties for things like spilling oil in U.S. waterways and cultivating one's own property that some federal agency has deemed a wetland. All the procedural safeguards in the world cannot maintain a just system without ethical *substantive* rules dictating the use of force to control men's actions.

13. This paper will refer to the vision of a society premised on the individual rights ethic as a "human rights society" rather than as a "free society" or "libertarian society." Full explanation of this choice of vocabulary will have to wait for another paper, but the brief justification is that freedom and liberty are conditions descriptive of a society that respects individual rights, and respect for rights is the fundamental requirement of a society that aims to provide each person with equal opportunity to achieve his own happiness.

14. This is so because a cardinal virtue of Objectivism's moral code is rationality, which Rand (1964, 28–29) defines as "the recognition and acceptance of reason as one's only source of knowledge, one's only judge of values and one's only guide to action" and "the rejection of any form of *mysticism*, i.e., any claim to some nonsensory, nonrational, nondefineable, supernatural source of knowledge." Rothbardian ethics, by contrast, demands no such renouncement of the supernatural from a religious believer (Rothbard [1982] 1998, 4); it demands only rational thought and judgment regarding the proper use of force, leaving one free to non-contradictorily believe, e.g., that a "supernatural" Creator designed the world and endowed men with reason, or that what a man *should* do within the realm of what he is *permitted* to do under the law is guided by revelation, the Bible, prayer, or any other source.

15. Assumptions in Rand's arguments include the assertion that enforcement of individual rights left in the hands of individuals would lead to violations of others' rights; however, Rothbard and other anarcho-capitalists have cogently explained how and why individuals would have the incentive to form and participate in enforcement agencies not unlike the way private security firms or insurance companies operate

today (e.g., Hoppe 2001, 247–65). Assumptions in Rothbard’s arguments include the assertion that no structural features of a government could provide incentives to keep government’s use of force limited to protecting and enforcing individual rights. However, Hoppe, for example, explains through economic analysis in *Democracy: The God that Failed* why democracy provides perverse incentives more than, say, monarchy (xix).

16. This conclusion takes into account that “the Constitution” is actually a complex concept—does “the Constitution” mean the four corners of the document itself? The “original intent” (if such can be discerned) of those who drafted and/or ratified it? A political philosophy advocated by the founders and/or framers? Judicial decisions interpreting and applying the Constitution? This paper relies on the meaning and intent ascribed to the Constitution by original proponents of the Constitution, represented here by the authors of the *Federalist Papers*, to analyze “the Constitution” in historical perspective. The positions of those men (James Madison, Alexander Hamilton, and John Jay, who wrote the *Federalist Papers* under the pseudonym “Publius”) are not the only available positions, of course, but they provide a representative collection of the most influential statements in support of the new Constitution. The *Federalist Papers* were essays originally printed in New York newspapers in installments from October 1787 through April 1788. Hereinafter, references to the *Federalist Papers* will refer to the essay number (1 through 85).

17. A proposition cannot “count” as a genuine human ethic if it is not realistic in the two senses described here. The use of “realism” here follows Rothbard’s reasoning: “If an ethical ideal is inherently ‘impractical,’ that is, if it *cannot* work in practice, then it is a poor ideal, and should be discarded forthwith” ([1974] 2000, 5). For example, an “ethical” proposition that claims, “Every person is entitled to three square meals a day and comfortable housing” cannot serve as a socio-political ethic because it fails the criterion of realism in the first sense described; that is, it ignores facts of the universe that define the nature of material goods fit for human use. Where do “meals” and “housing” come from? They must be produced—human effort propelled by human reason must transform naturally existing materials into materials fit for human use. In a metaphysical sense, every person *cannot* be entitled to these things because the claim is really that some people must produce these materials for other people’s use. This of course violates the universality requirement. Or, an “ethical” proposition that claims, “Every person must be treated with respect by every other person,” fails to meet the realism criterion in its second sense because it is impossible to implement in this world. (It may or may not be a legitimate proposition of *personal morality*, but it cannot serve as a human political ethic.) Bearing in mind that political ethics deals with the proper use of *force* in interpersonal relationships, it is clearly impossible to implement a demand that all interpersonal relationships be based on respect (or love, or kindness, etc.), even ignoring the problem of defining “respect.” While use of force may coerce people to *act* in certain ways, force can never achieve a genuine human sentiment in an unwilling mind. In illustration, recall the last four words of George Orwell’s *1984*: “He loved Big Brother.” The use of force to produce a human sentiment in an unwilling mind reached its breaking point, yet there is no doubt that the “love” imposed was a far cry from a genuine *human* feeling. Force may break a person’s spirit and mind into submission but what remains of the victim is a mere shell. What the proposition recommends cannot be accomplished, so it is unfit to serve as a human ethic.

18. It is not necessary to try to start from scratch with respect to establishing laws and rules governing a human rights society. The rules, institutions, and procedures that have evolved over the course of history need not be torn down; they need only be consciously evaluated in light of the individual rights ethic and modified

accordingly. For example, the numerous procedural protections granted to criminal defendants probably serve, for the most part, purposes consistent with the individual rights ethic, which would insist on objective proof of guilt and proportionate punishment for violations of the rights of others. See Rothbard [1982] 1997.

19. To say that the right and duty to throw off the British crown sprang from natural law and natural rights rather than from the will of a majority of colonists is to make a philosophical statement about the nature of the Revolution, not to deny that logistically and practically a majority of colonists had to decide in favor of fighting for independence and take action to achieve it. Nor, as Rothbard ([1979] 1999, 423–25, 443) points out in his description of the decidedly illiberal persecution of Tories during the Revolution, did the motivating principles of the Revolution always prevent its own proponents from betraying those very principles in the course of the war.

20. Rothbard ([1976] 1999, 262–64, 267) asserts that the Boston Tea Party represented rebellion not against excessive taxation without representation, as we all learn in our grammar school history lessons, but against government monopoly; namely, the extension of the East India Company monopoly into the colonies. Even if this were the more egregious aspect of the Tea Act of 1773 in the minds of colonists, at least two observations caution against claiming this as evidence of early America's "[o]pposition to a governmentally privileged monopoly" on "high principle" (263). First, as Rothbard duly notes, the East India Company had been responsible for causing one of the most terrible famines in history by its "depre-dations, monopoly, and ruinous taxation" (263), so Americans' collective recoil at the thought of being subject to this particular company would have been understandable on grounds other than a principled stand against government monopolies. Second, when the Constitution was adopted just over a decade later, government-established monopolies were by no means anathema to it (for example, nationalized mail services, national monopoly power over coinage and regulation of currency, and a national monopoly power to grant patents and copyrights). In the *Federalist Papers*, "Publius" defended each of these government monopolies on goods and services, remarking as to the post power: "The power of establishing post roads must, in every view, be a harmless power. . . . Nothing which tends to facilitate the intercourse between the States can be deemed unworthy of public care" (No. 42).

21. According to the Index of Ideas in Rossiter 1961, 638.

22. Publius "quotes" the Declaration for this proposition, which appears in the second paragraph of the Declaration, though differently worded (Kesler 1999, 612).

23. A related criticism of the Constitution, reserved for a future article, is that the document does not state consistent or developed economic principles. A document purporting to govern a society cannot avoid adopting or promoting, at least implicitly, some economic premises (just as it cannot avoid some version of political ethics).

24. In No. 84, Publius argues that no bill of rights is necessary, and expressly states that the Constitution as proposed "is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bills of rights and which would sound much better in a treatise of ethics than in a constitution of government." Clearly, for Publius, the Constitution did not attempt to define, articulate, or even implement principles of political ethics. Publius further comments that the Constitution "is merely intended to regulate the general political interests of the nation," not to regulate "every species of personal and private concerns" (No. 84); the latter was left to the province of the States.

25. The Preamble reads, "We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of

Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

26. In No. 84, Publius countered the call for a Bill of Rights by identifying the following provisions in the body of the Constitution that Publius classified as “privileges and rights” of the same substance as a bill of rights: Art. I, sec. 3, cl. 7 (impeachment of federal officeholders); Art. I, sec. 9, cl. 2 (habeas corpus); Art. I, sec. 9, cl. 3 (no bills of attainder or ex post facto laws); Art. I, sec. 9, cl. 7 (no titles of nobility); Art. III, sec. 2, cl. 3 (trial by jury); Art. III, sec. 3, cl. 1 (proof necessary for conviction of treason); Art. III, sec. 3, cl. 2 (no Corruption of Blood as punishment for treason). Additional, similar provisions include Art. I, sec. 10 (no State may impair the obligation of contracts) and of course, the eventually-ratified first ten Amendments comprising the Bill of Rights.

27. The doctrine of enumerated powers means that by granting specific powers (e.g., Article I, Section 8) to the national government, the Constitution forbids exercise of any other powers by the national government: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite” (No. 45).

28. The Ninth Amendment reads, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The Tenth Amendment reads, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.”

29. For example, the Constitution prohibits states from passing bills of attainder or ex post facto laws, and from interfering with private contracts. Art. I, Sec. 10.

30. Publius evinces a strong desire to put the national government on equal footing with other world governments; hence, Publius argues time and again that the Union must have the power to, e.g., levy troops, build and equip fleets, and raise all the revenue required to maintain an army and navy “in the customary and ordinary modes practiced in other governments” (No. 23). Nowhere in this line of argument does Publius seem concerned with whether the proper role of government ought to be confined to protection of individual rights.

31. Witness the twentieth-century creation of the modern administrative state; legal scholars often refer to federal administrative agencies as the fourth branch of government, but once they are created, in reality federal agencies operate more like independent kingdoms than interdependent branches of the national government. Many of them possess powers of investigation, prosecution, adjudication, and execution of verdicts, and any non-agency judicial review or appeal is severely limited and deferential to the findings of the agency. The alphabet soup of such agencies includes, for example, the Securities and Exchange Commission, the Federal Trade Commission, the Federal Election Commission, the Federal Communications Commission, the Federal Aviation Administration, the Internal Revenue Service, and the Environmental Protection Agency.

32. Notably, each of these provisions has been whittled away to almost nothing by the Supreme Court over the years. For example, the era in which the Supreme Court trenchantly enforced the Contracts Clause against states to strike down economic and social regulations is ridiculed almost universally within modern legal scholarship. That span of Supreme Court jurisprudence, derisively dubbed the “Lochner” era (after a 1905 Supreme Court decision striking down as unconstitutional a New York law prohibiting employers from requiring or permitting employees to work more than sixty hours per week) lasted until the beginning of the New Deal.

33. Professor Hill (2002) goes on to postulate that modern American constitutional jurisprudence has developed a third concept of liberty that has its roots

in the political thought of James Madison and focuses on “counter-balancing all forms of social power” (119). Hill’s thesis of modern American liberty concerns more than just the relationship between government and citizen, but unfortunately also presumes that government should play a role in “balancing” private, social relations. Rothbard ([1982] 1998, 216, 219) favors the “negative” concept of liberty but does not limit the concept to *government* coercion, with “coercion” carefully, narrowly defined to include only aggressive physical violence or threat of violence. Rothbard similarly views rights as negative, in that a genuine right “requires no positive action by anyone except noninterference” (249). Rand (1964, 113) also conceives of rights as negative: “Any alleged ‘right’ of one man, which necessitates the violation of the rights of another, is not and cannot be a right There can be no such thing as the ‘*the right to enslave*’.” For reasons to be expounded in a future article, Rand’s consistent focus on rights is much more incisive in the process of formulating political ethics than is Rothbard’s concentration on liberty.

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