THE MAJORITY
OVER
THE MAJORITY

THE ULTIMATE TYRANNY

The Majority over the Majority



Eugene J. McCarthy



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The letter of November 13, 1978, from Stewart R. Mott to the Hon. Neil O. Staebler is used by permission.

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THE ULTIMATE TYRANNY

The Book, the Harp, the Sword, and the Plow

Albert Schweitzer, speaking of the order of nature, said that if we lose our capacity to foresee and to forestall, we will end up destroying the earth.

In the order of politics, economics, and social organization, failure to foresee and forestall troubles may not destroy civilization, but this failure certainly is destructive of order and socially restrictive. Foreseeing and forestalling require historical judgment and also the understanding and application of ideas. Ideas do have consequences; so does the failure to apply good ideas and judgment in the social order. Knowledge and reason, limited though they may be, are the only defenses of civilization against ignorance and false fear. Together or apart, they give stability and direction to civilization.

In the United States there are at least four major areas in which the application of unsound ideas, or the absence of thoughtful application of principle and of historical judgments, has serious consequences.

The first is the Constitution itself, threatened by an overeagerness to amend it and interpret it in response to immediate pressures, real or imagined, without regard or attention to the principles and historical experience that underlay the drafting of that document. When the Constitution is amended by a three-fourths approval, that three-fourths places itself in a position of being subsequently held to their position by the one-fourth minority.

The second is the careless disregard for one of the major rights protected by the Constitution, freedom of speech. In particular, we tend to manifest willingness to tolerate and even justify limitations of freedom of speech by a monopoly press which does not understand its function, and to grant to a government agency—the Federal Communications Commission—powers to control culture, including the communication of political information and ideas.

The third concerns another constitutionally guaranteed right, freedom of assembly, which Alexis de Tocqueville said was next in importance in a democratic society to the right of individual liberty. This right is interfered with through the limitation of the right to organize for political purposes. The denial of this right was a principal cause of the American Revolution. The principal instruments through which limitations are imposed are state laws, many of which are unconstitutional, and, since 1974, the Federal Election Campaign Act, executed by the Federal Election Commission, which has been given arbitrary and bureaucratic control over the political processes of the nation.

The fourth is the proliferation of government bureaucracies and the danger that comes of delegating them power. As Frankenstein delegated power to the monster, so do we to impersonal, self-motivated institutions operating on a dynamism of their own. Such bureaucracies differ from one another in their sources of power, modes of operation, and political effects. They range from police and intelligence agencies such the FBI and the CIA, to bureaus and commissions and agencies like the Federal Trade Commission, the Environmental Protection Agency, and the Internal Revenue Service, to the newly established Department of Education.

An ancient Irish law held that society could not take from a person his book, his harp, his sword, or his plow in

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settlement of a debt. His book was the repository of knowledge and the sign of his intellectual, moral, and religious freedom; his harp the instrument of artistic expression; his sword the sign and agent of his political freedom; and the plow his means of livelihood, of economic independence.

Why are we threatening to burn our own books, destroy our harps, break our swords, and let rust the plowshares?

The Constitution

No society can make orderly, consistent progress unless its political policies and programs are reasonably consistent with both philosophical theory and experience.

At the founding of the United States, the three elements, philosophy, policy, and program, were in balance. Thomas Jefferson, John Adams, and their fellow conspirators in the Revolution held a philosophy of government summarized in the Declaration of Independence.

Gilbert Chesterton, in his book What I Saw in America, published in 1922, declared, "America is the only nation in the world that is founded on a creed. That creed is set forth with dogmatic and even theological lucidity in the Declaration of Independence; perhaps the only piece of practical politics that is also theoretical politics and also great literature."

The creed, theological and political, to which he referred was expressed in these words of the Declaration: "That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. . . ."

These words represent ideas taken seriously by the men who drafted the Declaration. They were not expressed merely as a justification for the Revolution, or as an inspiration, but were intended to persist beyond revolution to become the foundation upon which democratic institutions were built. They were taken seriously because the men who

wrote and subscribed to them were in danger of being shot or hanged if the Revolution failed.

There is a growing disposition to accept that the Constitution and the ideas that were built into it have little validity; that they were all right for another time, but need not be respected today.

A typical depreciating statement comes from Stephen Hess of the Brookings Institution, who, in an essay supporting an amendment to the Constitution, justifies it by observing that "the Constitution was written by politicians." Politicians, he then notes, are compromisers and have to settle and satisfy their constituencies.

This is consistent with popular observations of those who would change the Constitution, disregard or circumvent it. The Constitution was, it is true, drafted by a handful of men nearly 200 years ago. They were under political pressure to put forth a document that would receive the support of the number of states necessary for ratification. There were compromises in it, some with principle, as in the recognition of slavery and in the three-fifths compromise by which slaves were counted in the allocation of representation in the Congress. Some were compromises with the realities of power—for example, concessions to the small states as against the large in the allocation of Senate seats.

The men who participated in the drafting of the Constitution acknowledged the reality of compromise and anticipated that not everything they did would stand the test of history.

At the same time, they believed that the principles upon which the new republic was founded were valid and would remain so. They did not look upon what they were undertaking as "the American Experiment," as it is sometimes called, but rather as a test of reason and of historical lessons in a new context.

They did not consider that the intellectual and moral basis for their proposals came from delegates in the convention who were especially gifted or chosen. The principles of government which they introduced at the constitutional convention were as old as political history and philosophy. Thomas Jefferson, George Mason, John Jay, Alexander Hamilton, and others who directly influenced the political thought underpinning the Revolution and the Constitution were not new political thinkers, although most had some new ideas. They were students of politics and of history. They brought with them to the drafting convention the wisdom and the experience of ancient political thinkers as well as those who, by their standards, were due to be considered modern political thinkers.

Plato and Aristotle were at the Convention, as were Montesquieu and *The Spirit of the Laws*, Locke, Hobbes, Adam Smith, and Rousseau.

Plutarch was there as a special resource for both history and political theory, as were the historians Thucydides and Tacitus.

Contemporary, or nearly contemporary, historical sources were used. Jay, for example, in the fifth essay of the Federalist papers, quotes from a letter of Queen Anne of England to the Scotch Parliament in which she emphasizes the importance of union between England and Scotland as vital to peace. There are touches of Machiavelli, although he is not identified, and there is the continuing force of biblical thought.

The compelling political force of the Constitution, which has been honored for nearly 200 years, came not from the special gifts of the handful of men who drafted it, or from any special quality of wisdom and integrity existing among the citizens of the thirteen states which ratified and accepted that Constitution, but from its internal strength, based on, and tested in, centuries of thought.

In the 120 years between the adoption of the Constitution (including the ten amendments which comprise the Bill of Rights) and the passage of the Sixteenth Amendment in 1913, the Constitution was amended only five times. Three of those amendments, the Thirteenth, the Fourteenth, and the Fifteenth, were related to the abolition of slavery, the protection of individual rights against state infringement, and the guarantee that the right to vote should not be denied because of race, color, or previous condition of servitude.

Between 1913 and 1971, a period of less than sixty years, the Constitution was amended eleven times. Eleven! Other amendments have been, and are now, under consideration.

The amendments adopted between 1913 and 1971 fall into four categories: first, those that are essentially technical and practical; second, those which, although not absolutely necessary, may be justified on practical grounds as consistent with the principles of the Constitution; third, amendments that do little more than tinker with the Constitution with little justification, either on record or in anticipation of future difficulties; and fourth, those that challenge and change constitutional principles and provisions.

The Sixteenth Amendment, adopted in 1913, was essentially technical and practical. It followed from a Court decision in 1895, in which a divided Supreme Court held that an attempt on the part of Congress in 1894 to tax incomes uniformly throughout the United States was unconstitutional. The Court held that the income tax was a direct tax, which, under the Constitution, had to be apportioned among the states on the basis of population—this despite the fact that in 1881 the Court had unanimously sustained the imposition of a similar tax during the Civil War.

In a series of cases after 1895, the Court, by redefini-

tion of income and other legal devices, began to move away from the 1895 decision. The Sixteenth Amendment properly put an end to the uncertainty as to whether the Court, without a constitutional amendment, would continue along the lines it was following, gradually rejecting the 1895 decision. The Sixteenth Amendment, it is generally agreed, conferred no new powers of taxation, but it did limit the power of Congress to impose taxes free of court definition. It is likely that if today's income tax had been anticipated at the time the Constitution was adopted, a more careful definition of the purpose to which taxes are put (stated in the Constitution, "to pay the debts and provide for the common defense and general welfare of the United States") would have been included.

The Seventeenth Amendment, also adopted in 1913 and also practical, removed one stage which the Constitution provided for the selection of senators. The practical justification for the amendment was the evidence of malpractice in the selection of senators by the legislatures. There were cases of deadlocks in which legislatures left vacancies unfilled for long periods of time while they waited for new state elections, or for other developments that might affect the choice of senators. There was the possibility of corruption: special-interest groups or party factions often sought to purchase votes or secure political support for potential senators. There was also popular demand for a direct vote in the election of senators—a demand justified in large part because the function of the Senate had greatly changed in the 125 years since the Constitution was adopted. Also changed were the responsibilities and the general political concerns of U.S. senators as distinguished from state legislators.

When this amendment was under consideration there was no thought given to changing the existing weighting of

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Senate membership in favor of small states. Rather, the amendment formalized recognition of the fact that senators were no longer acting mainly in foreign policy with limited responsibility and in confirming ambassadors, members of the judiciary, and officers of the executive branch. It stated the broader responsibilities for which they are held account-

able directly to the electorate.

The Twenty-third Amendment, ratified in 1961, also falls into the category of the technical and practical. It gave to the District of Columbia the right to participate in presidential elections, by assigning to the District a number of presidential electors equal to those to which a state was entitled. The arguments for the amendment were largely those of equity, since the District then had nearly 800,000 people (a number larger than the population of at least eleven states). The amendment did not give the District any of the other attributes of statehood, nor did it change the constitutional powers of Congress to legislate for the District of Columbia.

A grant of representation in Congress (that is, voting rights in both the House of Representatives and the Senate) would have given the District more political power, as would the granting of home rule, not given by statute until 1973.

This was an amendment of minimal consequence, to be faulted on two counts: first, that it did not consider the larger political problems of the District of Columbia, both as to self-government and as to its place in the structure of the federal government; and second, because since it was so minimal in its effect, it encouraged easy tampering with the Constitution, opening the way to superficial amendment, if not disrespect.

In the second category of amendments adopted in this century, those that may not have been absolutely necessary

(because of trends in political practice and court decisions) but may be consistent with the spirit and principles of the Constitution are the Nineteenth and the Twenty-sixth.

The Nineteenth Amendment, ratified in 1920, provided that the right to vote shall not be denied or abridged by the United States or by any state on account of sex. This amendment was adopted after sixty years of advocacy (beginning in 1869) by women who had given up on attaining their goal through changing state laws. In fact, there was some agitation for women's suffrage as early as the 1830s, but it was minimal. In 1838, Kentucky authorized and approved the right of women to vote in school elections—an act that was followed by some other states. Then in 1869, Wyoming, as a territory, accorded women suffrage on equal terms with men. When admitted as a state in 1890 it continued the grant. But following that breakthrough there was little progress. By 1914, only ten more states had extended equal voting rights to women.

The constitutional case for the necessity of the Nineteenth Amendment was clearer than that for the current Equal Rights Amendment, since there is some substance to the argument that what is sought by the ERA, in view of recent court decisions, is already largely secured by the Constitution. The counter argument is that whereas this may be true, the process of court actions case by case puts the burden in the wrong place, on those suing for their rights, whereas the adoption of the amendment would place the burden of defense where it should be, and would accelerate the movement toward equal rights for women. In short, the history of the effort to secure the passage of the Nineteenth Amendment argues for the adoption of the Equal Rights Amendment against the gradual process of court cases and modification of federal and state laws.

Of the same order as the Nineteenth Amendment is the Twenty-sixth. Although there was no constitutional bar to