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THE PURPOSE OF HUMAN RIGHTS

*Franklin I. Gamwell**

Modern moral and political thought has often focused on the question of human rights: What rights, if any, belong to all human individuals solely because they are human? Within the past two centuries, theoretical attempts to define and defend such rights have been marked by a dominant consensus. It holds that a principle or principles of human rights must be independent of any comprehensive telos to which all human activity ought to be directed, that is, a telos defined by reality as such and, in that sense, metaphysical. On my reading, the most forceful moral argument for this independence insists that no comprehensive telos can consistently prescribe rights that should be respected whatever the consequences. This essay seeks programmatically to argue for a conception of human rights dependent on a metaphysical backing, specifically, the backing provided by neoclassical metaphysics, developed most fully by Alfred North Whitehead and Charles Hartshorne.¹

In doing so, I will offer summarily some reasons why the independence of human rights from a comprehensive telos is itself internally incoherent. Thereby, I intend to suggest that the dominant consensus should be re-examined. Indeed, I believe that no conception of justice as separate from a comprehensive good, whether focused on national or international order, can articulate a convincing moral ground for our common life, so that pursuit of this ground cannot abstract from our differences about what makes human life as such worth living. But my purpose here is not to argue for this conclusion. Rather, I intend to show how neoclassical metaphysics can be vindicated against the moral indictment of being inconsistent with universal rights and to outline the human rights that, on this account, are authorized by reality as such. With respect to the latter, I will argue that the good as explicated in neoclassical metaphysics implies an all-important distinction between formative and substantive justice and thus a conception of justice as compound. This distinction, moreover, corresponds to the difference between human rights that ought to be stipulated in a democratic constitution, on the one hand, and, on the other, human rights that ought to control the statutory and policy decisions taken through the political process so constituted.

The term “human rights” is a more recent formulation of the older concept of natural rights, and in the course of a long conversation, the latter concept has generally been inseparable from the idea of natural law. In the early modern period, political thinkers formulated a new conception of natural law, whose distinctive character has defined a distinctively modern tradition of thought about natural or human rights. A synoptic appreciation of this development will help clarify the dominant consensus and, thereby, the indictment to which this essay

* Shailer Mathews Professor of Religious Ethics, the Philosophy of Religion, and Theology at The University of Chicago Divinity School.

1. This essay, absent some minor revisions, was previously published and is republished here with permission. See Franklin I. Gamwell, *The Purpose of Human Rights*, PROCESS STUDIES 322-46 (Fall-Winter 2000). Prior to that initial publication, a draft of this essay was discussed at a conference on human rights sponsored by the Center for *Process Studies* and held in honor of Douglas Sturm. I am grateful to participants in that conference and to subsequent readers of *Process Studies* for their critical assistance, and the essay is dedicated to Douglas Sturm.

seeks to respond. In turn, that clarification will help set the terms in which the argument for a neoclassical conception of human rights can be given a programmatic statement.

I. THE INDICTMENT

Summarily speaking, the premodern conception of natural law was itself inseparable from the conception of a comprehensive telos, typically understood throughout medieval thought as defined by a divine purpose. For Thomas Aquinas, whose achievement culminates and, in that sense, represents the medieval consensus, law is “an ordinance of reason for the common good, promulgated by him who has the care of the community,”² and the natural law is “the rational creature’s participation”³ in the divine perfection that is the final end of all things. Accordingly, the first precept of practical reason is that “good is to be done and promoted, and evil is to be avoided,”⁴ which means that the natural law is somehow derived from the comprehensive good defined by the final end or divine purpose. Following the Reformation, its challenge to Roman authority, and the religious divisions thereby introduced into the Western world, the Renaissance included widespread doubt that there can be any reasoned agreement about an inclusive good. Against the background of thought for which morality as such depends on a comprehensive purpose, this doubt threatened to become a more or less complete moral skepticism. The distinctively modern conception of natural law emerged as an effort to articulate common moral principles notwithstanding disagreement about the highest or inclusive good.

J. B. Schneewind argues that Hugo Grotius presented the first sustained attempt to rethink morality in this way.⁵ Concerned principally with international conflicts, Grotius held that humans are, on the one hand, inherently prone to strife as a result of their conflicting purposes or ideas of the good and, on the other, socially-minded beings who want to live together. Accordingly, the moral question asks about the constraints properly placed on diverse pursuits in order that sociable desires may be fulfilled. “Grotius’s successors,” Schneewind summarizes, became “a distinctively modern school of natural law” because they accepted this “Grotian problematic.”⁶ On the new conception, in other words, the natural law defines obligations that make social peace possible because they are consistent with differing inclusive interests. Correspondingly, Grotius offered a new conception of natural rights, namely, moral qualities of being a person that are also independent of any highest good. These are, therefore, qualities that all others ought to respect, in the sense that such respect ought to constrain their own purposes.

2. ST. THOMAS AQUINAS, INTRODUCTION TO ST. THOMAS AQUINAS 615 (Anton C. Pegis ed., Random House 1948).

3. *Id.* at 618.

4. *Id.* at 637 (emphasis deleted).

5. J. B. SCHNEEWIND, THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY (1998).

6. *Id.* at 73.

Thomas Hobbes pushed the Grotian problematic to its extreme, denying that humans are naturally sociable and, thereby, removing the ground for any conception of duty.⁷ For Hobbes, natural right is exhausted by the right to preserve one's own life, which does not imply that others have correlative duties because, in the natural condition, prescription serves an individual's will for her or his own self-preservation. On this account, natural law is derivative from the right of nature, in the sense that the former consists in general precepts with which reason counsels the pursuit of self-preservation, and the social contract is based solely on those precepts. Moreover, the absence of duties to others follows from the absence of grounds for reasoned agreement about the good. "[G]ood, evil, and contemptible[] are ever used with relation to the person who useth them: there being nothing simply and absolutely so; nor any common rule of good and evil, to be taken from the nature of the objects themselves."⁸ What is taken to be good is solely a matter of an individual's nonrational desire. Since there is no rational question of better or worse desires, practical reason is exhausted by the instrumental question about means to the ends associated with self-preservation.

Most moral and political theory subsequent to Hobbes has, in one way or another, reasserted the correlation of rights and duties. For some, moreover, doing so involved a rejection of the Grotian problematic itself. This is transparent in thinkers influenced by Christian teleology,⁹ including those who advanced systematic revisions within the Western metaphysical tradition—especially Leibniz and, later, Hegel. Other alternatives to the new conception of natural law appeared in utilitarianism and, later, pragmatism. But a major tradition in modern thought has agreed that the moral problem must be solved independently of any inclusive telos or conception of the inclusive good. On a widespread reading, this agreement constitutes the principal form of modern political liberalism, and we may call this nonteleological liberalism.

With Immanuel Kant's achievement, the moral grounds for nonteleological liberalism were given their most decisive and subsequently efficacious statement. The categorical imperative to "treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as means only"¹⁰ was, for Kant, the "universal law of nature,"¹¹ and his understanding of it is the most radical conception of natural law in its modern sense. Convinced that no human purpose could define the moral law unless a metaphysical telos could be known, Kant was also convinced that metaphysical knowledge is impossible. He concluded that the moral law is completely independent of ends as objects of desire and can be defined only by the formal universality of freedom or practical reason. "Nothing can possibly be conceived in the world, or even out of it, which can be called good without qualification, except a *good will*."¹²

7. THOMAS HOBBS, *LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL* (Michael Oakshott ed., 1962).

8. *Id.* at 48-49.

9. See SCHNEEWIND, *supra* note 5, at 286.

10. IMMANUEL KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS* 46 (Bobbs-Merrill 1949) (emphasis deleted).

11. *Id.* at 38 (emphasis deleted).

12. *Id.* at 11.

We may also say, then, that Kant provided a precise reason for replacing the term “natural rights” with “human rights.” Virtually all previous representatives of the modern natural law tradition, including Grotius and even Hobbes, had in some way or other related natural rights to divine power or command, which served as the source for the directives of natural law notwithstanding that these did not derive from a divine telos or comprehensive purpose. In this sense, these thinkers still grounded morality in something about the larger context of human life. With his deconstruction of metaphysical knowledge, Kant eliminated any such connection. To be sure, Kant himself spoke of God’s existence as a practical postulate, but this postulate depends on a logically prior recognition of the moral law, the necessity of which depends on nothing other than the character of rational freedom. Independently of anything about the larger context, in other words, universal rights are grounded in the moral qualities of human persons. What Kant defended, we might say, is the law of *our* nature as rational creatures, and the universal right to be treated as an end withal is, in that sense, a thoroughly human right.

Since Kant, nonteleological liberalism grounded solely in the moral qualities of persons has profoundly shaped both political theory and political practice, and most of the subsequent theorists who are principally responsible for this account of rights have been especially and avowedly indebted to his practical philosophy. In the current conversation, these theorists include Brian Barry,¹³ Alan Gewirth,¹⁴ Jürgen Habermas,¹⁵ and John Rawls.¹⁶ Still, such theorists also continue, as did Kant himself, the modern natural law tradition, at least in the following way: The duties prescribed by nonteleological liberalism are defined in terms of rights that are prior to any inclusive good; that is, these rights are separated from, and respect for them overrides, any inclusive telos humans might pursue.

For this reason, these liberal theories face a fundamental problem. Whatever one’s conception of the good, Barry himself remarks, “I take it to be unproblematic that it has motivational force. The problem is . . . to explain why people might do anything else,”¹⁷ that is, might act in accord with an independent principle or principles of rights. Barry and others attempt to give that explanation. So far as I can see, however, the nature of this problem prevents a solution, although here I will only suggest the dilemma: The chosen telos of human action defines the actor’s *inclusive* evaluation of her or his possibilities. Accordingly, any constraints on her or his purposes that an actor is motivated to accept are dependent on this evaluation. If the moral law does not prescribe an inclusive telos for the decision among possible purposes, then this decision cannot imply any obligation except that the actor be directed by the purpose chosen. In this sense,

13. See, e.g., BRIAN BARRY, *JUSTICE AS IMPARTIALITY* (1995).

14. See, e.g., ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* (1996).

15. See, e.g., JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 195-215 (Christian Lenhardt & Sheirry Weber Nicholens trans., 1990) [hereinafter HABERMAS, *MORAL CONSCIOUSNESS*].

16. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* (paperback ed. 1996).

17. BARRY, *supra* note 13, at 112.

Hobbes represents the logical consequence of the modern natural law tradition. With its separation of human rights from the good, moral theory loses, to adopt a phrase of Whitehead's, its "security of intellectual justification."¹⁸

In recent discussion, some so-called communitarian or republican thinkers have, in their own way, challenged the Kantian and, thereby, the modern natural law tradition. So far from "defining rights according to principles that are neutral among conceptions of the good," writes Michael Sandel, "republican theory interprets rights in the light of a particular conception of the good society," and such theory thereby affirms "a politics of the common good."¹⁹ We might say that this mode of political thought seeks to reaffirm a teleological conception of rights. Nonetheless, the shadow of Kant over virtually all contemporary moral and political theory is shown in this: With nonteleological Kantians, republicans typically agree, at least by implication, that there is no metaphysical good on which moral and political principles and thus human rights are dependent.

This means that virtually all on both sides of the so-called liberal/communitarian debate pursue their discussion within the common conviction that political theory is independent of the metaphysical project Kant exiled from the realm of possible knowledge and effectively banished to the margins of modern moral thought. Communitarians who share this conviction also face a fundamental problem. Accepting Kant's assessment of metaphysics but rejecting the implications he drew for moral theory, these political thinkers must somehow formulate and defend a conception of the inclusive or common good without appeal to a comprehensive purpose. On my reading, this task has not been successfully completed. Insofar as they do articulate the common good, communitarian or republican thinkers seem typically to assert a telos in all respects specific to some culture or historical community. So far as I can see, moreover, a teleological moral theory that insists on its independence from metaphysics cannot finally escape a kind of relativism that is inconsistent with the affirmation of universal or human rights. As a consequence, many nonteleologists find communitarianism wanting.

Naturally, these brief comments in critique of both nonteleological liberals and some of their communitarian or republican antagonists cannot be convincing absent an extended engagement with their proposals.²⁰ I offer those comments

18. ALFRED N. WHITEHEAD, *ADVENTURES OF IDEAS* 36 (1961). We can also say that nonteleological theories commit "the partialist fallacy." Any such theory is partialist because it defines the difference between moral and immoral action in terms of an abstract aspect of possible actions, namely, whether the alternatives for choice do or do not observe certain constraints on the pursuit of ends. Because the nonteleological principle or set of principles is independent of any inclusive end, the implication is that the alternatives in other respects are neither moral nor immoral. But, then, any such theory is fallacious because it implicitly asserts that alternatives in respects other than those marked by the nonteleological principle are morally indifferent, and that assertion is a moral evaluation of the alternatives in those other respects. The mistake committed when one equates a concrete entity with some abstract aspect of it is what Whitehead calls "the fallacy of misplaced concreteness." ALFRED N. WHITEHEAD, *PROCESS AND REALITY* 7 (David R. Griffin & Donald W. Sherburne eds., 1978). We can say that the partialist fallacy, a commitment of which mistakes the evaluation of some abstract aspect for an evaluation of possible actions as wholes, is the fallacy of misplaced concreteness as it appears in moral theory.

19. MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 25 (1996).

20. See, FRANKLIN I. GAMWELL, *DEMOCRACY ON PURPOSE: JUSTICE AND THE REALITY OF GOD* 231-79, 327-39, (2000) (arguing that the nonteleological proposals of Barry, Gewirth, Habermas, and Rawls, as well as the republican proposal of Michael Sandel, all fail to achieve a coherent account of democracy because they seek to be independent of any comprehensive purpose).

only to suggest the kind of arguments open to a theory of human rights backed by the resources of neoclassical metaphysics. But the preceding historical synopsis has sought principally to explicate the inhospitable contemporary context for that theory. Through its denial of metaphysical knowledge, Kant's critique of reason created a dominant consensus in subsequent moral and political theory. We can say summarily that a neoclassical address to the question of human rights is a return to pre-Kantian and largely premodern thought in a way that virtually all contemporary political theories find incredible.

Within the dominant consensus, as the historical synopsis has also shown, comprehensive teleology is rejected not only by all because it is metaphysical but also by some because it is teleological. The former circle includes communitarian or nonmetaphysical teleologists, while the latter is limited to nonteleological liberals. Accordingly, a metaphysical theory of human rights cannot be successful without defense against both indictments. But contemporary moral and political philosophers rarely offer sustained arguments against the metaphysical project as such. To the contrary, the impossibility of a critical metaphysics is taken for granted in pursuit of one or another alternative ground for moral theory. Still, many nonteleological Kantians do advance strictly moral arguments against teleological ethics. Although the target of those arguments is typically utilitarianism, it is generally clear that comprehensive or metaphysical teleology is thought to have similar failings.

These arguments present a special challenge to neoclassical metaphysics because they are advanced by those who, in a time when relativism in some form or other seems to be ascendant, share the affirmation of a universal moral principle or principles. These Kantian theorists, in other words, indict metaphysical teleology as inconsistent with the very universal or human rights for which both seek to provide a ground. To the best of my knowledge, neoclassical metaphysics has not adequately answered this charge. Accordingly, it is this indictment to which this essay seeks programmatically to respond, and we can approach that defense through reviewing the arguments against teleological ethics.

Teleological ethics deny universal rights, we are sometimes told, because pursuit of the telos must override all other moral norms. Any other duties such an ethic might affirm can only be obligations derived from the supreme imperative to maximize the good and, therefore, all other norms are merely *prima facie*. In the terms of a traditional distinction, there are no perfect duties, duties "not to do, or not to omit, an action of a certain [specific] kind," whatever the consequences, because all specific duties can be canceled by the imperfect duty "to promote a certain general end."²¹ Whatever rights we may seek to affirm, including basic rights to life and bodily integrity, they are at best provisional because subject to rebuttal by the intent to create the best consequences.

It is certainly possible for the adherent of teleology to bite this bullet and try to show that the conceivable circumstances in which rights would be overridden are extreme and rare.²² But nonteleologists argue forcefully that the very idea of

21. ALAN DONAGAN, *THE THEORY OF MORALITY* 154 (1977).

22. See, e.g., R. M. HARE, *MORAL THINKING* (1981).

taking or torturing or otherwise physically invading innocent human life under any circumstances is inconsistent with our deepest moral intuitions.²³ Human rights must be absolute in the sense that they cannot be overridden by any consequences. This is not to deny that rights themselves may conflict, so that those of one individual may be limited, or may in specified ways be overridden, by the rights of others. The point is, rather, that the community of rights cannot be overridden by pursuit of the maximal good and, therefore, teleological ethics cannot be valid.

On my intuitions, this conclusion would be convincing if indeed the very concept of a comprehensive telos implies what the critics assume that it implies—namely, that all moral norms other than the supreme teleological imperative are merely *prima facie*. But this assumption is fallacious, and its fallacy can be disclosed through attention to a second argument that makes no appeal to moral intuitions but, rather, purports to show how every teleological ethic is self-defeating. On this second argument, general adherence to any such ethic prevents maximization of the good. Since no individual can have settled expectations about the circumstances in which others will make their choices, the absence of any perfect duties means that she or he cannot have settled expectations about what others will do. For instance, one cannot count on another keeping her or his promise because circumstances at the time when the promise falls due may dictate or permit that it be broken in order to maximize the good. Moreover, the unpredictability is, as it were, cumulative. If a person who makes a promise finds, at the time when keeping it arrives, that the future she or he faces is less settled, then it will be less likely that keeping it is teleologically required. In sum, maximizing the good, at least on any plausible account of it, requires social cooperation and coordination and, therefore, social practices or institutions in which roles are to be played or duties are to be observed whatever the consequences. If they are morally permissible, promises should be kept because they are made, institutional commitments fulfilled because they have been accepted, laws obeyed because they have been enacted. Since it implies that all specific norms are *prima facie*, a teleological ethic self-destructs.

As Barry has pointed out, however, this second argument admits of a ready reply. If maximizing the good is prevented by a teleological principle that overrides the norms human cooperation requires, then the teleology in question may proscribe that understanding of its supreme principle. The criticism fallaciously assumes that a teleological ethic means “looking at each calculation in isolation, and not taking adequate account of the effects on a society’s capacity to function of its being known that all actions are taken on the basis of such calculations”;²⁴ each case, it is assumed, should be “separately taken.”²⁵ To the contrary, a teleological ethic may imply that at least some cases should *not* be separately taken, precisely for the reasons on which the criticism depends.

Let us restate the point in terms of a difference between direct and indirect applications of a teleological principle. The ethic may not prescribe that this

23. See, e.g., DONAGAN, *supra* note 21, at 172-89.

24. BARRY, *supra* note 13, at 219.

25. *Id.* at 224.

principle be applied directly to every human activity. At least in some circumstances, the required application may be indirect or may proceed through the specific norms of social cooperation that are necessary in order to maximize the good. It is one thing teleologically to validate a particular action “separately taken” and another to validate it by appeal to a system of norms or a social practice that is itself validated teleologically. In some circumstances, keeping a promise or obeying a law may be proscribed if pursuit of the comprehensive telos is directly applied; in the same circumstances the action may be prescribed as conformity to a pattern of social cooperation that is itself required to maximize the good—and, in this sense, the action is required whatever the consequences.

We may now return to the relation between teleology and human rights. If a principle that prescribes maximizing the good may be indirectly applied through social practices, then it is not transparent that every teleological ethic implies the merely *prima facie* character of the community of rights. At least, the way is open to argue that each individual has some perfect duties with respect to the treatment of all others, specific moral obligations that cannot be canceled by a duty to maximize the good. Whether a supreme teleological principle consistently implies such a community of rights depends entirely, it would seem, on what conception of the comprehensive good is in question. Still, the case against teleological ethics may here offer this response: Granting the difference between direct and indirect applications, this yields only the familiar distinction between “act-teleology” and “rule-teleology,”²⁶ and rule-teleology is problematic for the following reason: Social practices or patterns of social cooperation cannot be validated teleologically without a comparative assessment of the good and evil consequences differing possible systems of rules or norms (for instance, differing sets of rights) are likely, if adopted, to produce. Even if this assessment is not the same as taking each act separately, each actor must still decide whether probable consequences authorize a given social practice or some alternative set of rules. Thus, it is conceivable that any practice heretofore valid should now be violated in the interest of reform. This means that there can be no strictly human rights, those that cannot be overridden by any consequences.

Whatever its merits in other respects, however, this criticism depends on its assumption that a teleological validation of perfect duties must be empirical. I will argue programmatically that this assumption is also fallacious, at least if a teleological ethic exploits the resources of neoclassical metaphysics. In other words, I will argue for a universal social practice whose constitutive principle is nonempirical or a priori, even while its validation presupposes another or supreme moral principle. Accordingly, the remainder of this essay will proceed as follows: I will first seek to show that the meta-ethical character of every claim to moral validity includes a principle of social action by which a universal community of rights is constituted, so that no moral theory can be valid if it is

26. I do not object to the terms “act-teleology” and “rule-teleology” as long as we allow that the latter may have differing meanings. In contrast to some forms of rule-teleology, I understand indirect applications to mean that the comprehensive telos justifies social practices, that is, institutions or patterns of coordination in which the participating social actions cannot be described independently of constitutive norms or principles that bind actors whatever the consequences. Cf. John Rawls, *Two Concepts of Rules*, 64 THE PHIL. REV. 3-32 (Jan. 1955).

inconsistent with these rights. Just because it is meta-ethical, this principle itself presupposes another or supreme moral principle, and I will subsequently argue that the universal set of rights in question is an indirect application of the teleology backed by neoclassical metaphysics.

II. THE FORMATIVE PRINCIPLE

“The meta-ethical character of every claim to moral validity” designates the common character of all such claims in distinction from nonmoral claims. Whatever else this designation includes, a claim to validity for some or other moral prescription is *in this respect* explicitly neutral to all moral prescriptions, that is, explicitly neutral to whether or not they are valid. In the respect that a moral claim is explicitly partisan in moral disagreements, it differs not only from nonmoral claims but also from one or more other moral ones. Considered meta-ethically, then, a claim to validity for some moral prescription claims validity for some obligatory evaluation of possible purposes, that is, some designation of choices as those agents ought to make or those reason requires. It follows that a putative moral prescription is meta-ethically senseless and thus cannot be valid if the individuals to whom it is said to apply cannot act as it requires and do so because the prescription is valid. If we emphasize the ability to act as prescribed, this meta-ethical statement means that “ought implies can.” A putative moral prescription is meta-ethically senseless if the alternatives of an agent to whom it is said to apply do not include the required action. If we emphasize the claim to validity, a putative moral prescription is meta-ethically senseless if an agent to whom it is said to apply cannot choose in a manner that expresses dissent, that is, expresses her or his decision that the prescription is not valid.

Let us now focus on action that affects another individual or individuals and call it social action. It follows from what has been said that moral prescriptions for social action prescribe *common* decisions, in the sense that each of the participants should and thus can choose to affirm the prescribed action because it is valid. If I am morally required or permitted to act in a certain manner, and if that action has effects on you, then the moral validity of the prescription on which I act means that your acceptance of those effects is required by reason—and, in that sense, the prescription implies a common decision. Thus, a prescription for social action or, as we may also say, the prescribed social action itself is meta-ethically senseless unless each participant can choose in a manner that expresses her or his dissent. When the prescription constitutes a social practice, moreover, the expression of dissent must be possible even if the practice is otherwise observed, that is, even if all other participants adhere to the principles or norms that purport to prescribe morally valid interaction. Every affected individual must be able to participate as an exercise of practical reason alone.

Consider in this context the social practice of slavery, where, for present purposes, this means an order of interaction whose norms prescribe that some human individuals ought to have exclusive disposal over the activities of others. If slavery is in force, in the sense that slave owners adhere to its norms and the political community enforces them, then slaves cannot choose in a manner that

expresses dissent from the putative validity of the practice. Having no standing in the community that creates the practice, they cannot politically or socially contest it. To be sure, slaves might seek to escape or rebel. But these ways of expressing dissent are not themselves recognized by the rules of slavery. To the contrary, the practice is meant to be so designed that such possibilities are coercively precluded, and they only betray that the practice cannot be fully established. That this practice is meta-ethically senseless is confirmed by the fact that individuals whose service to another depends on their participation in a common decision are not slaves.

Because it implies the possibility of dissent, the meta-ethical character of every social action prescribes by implication at least one social practice, namely, the specific practice designed to address disagreement about the validity of social prescriptions and, thereby, to pursue a common decision. In the face of dissent, common decision making is itself an associational process that requires norms of interaction. I will call this the practice of moral discourse, appropriating the term “discourse” from Habermas and designating with it the specific social practice that suspends other purposes in order to assess the validity of contested claims.²⁷ Hence, discourse may also be described as the practice of argumentation or common critical reflection in which claims are validated or invalidated by the giving of reasons. I recognize that the prescription of this practice remains vague until its meaning is clarified in terms of actual patterns or institutions of common decision making, and the attempt to pursue that matter will turn directly to political community. Before taking that turn, however, it is important to identify another implication of moral discourse.

As a derivation from the meta-ethical character of every claim to moral validity, the specific practice of moral discourse both implies and is implied by—and, in that sense, belongs to—a principle that constitutes social action universally. In all human relationships, individuals are morally bound to treat each other as *potential participants in moral discourse*. No social action can be morally valid if it treats another individual in a manner that denies the possibility of contestation and, therefore, of moral discourse. We can also say, then, that all human individuals always have the rights that define them as potential participants in moral discourse, one of which is the right to be or become an actual participant in such discourse, and these universal rights articulate a universal social practice. They cannot be overridden by any consideration of consequences. Indeed, they cannot be overridden by any other prescription at all, precisely because they are implied by the meta-ethical character of any claim to moral validity, whatever its content.

The principle constituting this universal social practice is itself meta-ethical, in the following sense: The social action prescribed is explicitly neutral to all moral disagreement.²⁸ On the face of it, one might object, a prescription of uni-

27. See JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* 17, 18, 25, 42 (Thomas McCarthy trans., 1984) [hereinafter HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION*]; HABERMAS, *MORAL CONSCIOUSNESS*, *supra* note 15, at 158-60.

28. To speak strictly, one should say that the principle is meta-ethical because the prescribed action is *insofar* or *in that respect* explicitly neutral to all moral disagreement. Any action that observes this principle will exemplify other characteristics in addition to such observance. But I will assume that “insofar” or “in that respect” is understood.

versal rights cannot be explicitly neutral to all such disagreement because it is not explicitly neutral to disagreement about the principle itself. But we should distinguish between the stated or propositional content of the principle, on the one hand, and the action prescribed, on the other. The stated or propositional content is indeed an explicit denial of its denial. But this is not the case with the action. Treating all individuals as potential participants in discourse is explicitly neutral even to disagreement about whether all individuals should be so treated, since that disagreement defines a question about what treatment reason requires.

We may call this meta-ethical principle a formative principle of social action, meaning precisely that adherence to it is explicitly neutral to all moral disagreement. As such, the principle is distinguished from all substantive prescriptions, adherence to any one of which is not explicitly neutral to all moral disagreement. Accordingly, the social practice constituted by this principle is a formative practice, and the rights it prescribes are formative rights. We may also say that the distinguishing mark of a formative prescription is its explicit neutrality to all substantive ones; that is, asserting the former does not explicitly affirm or deny the moral validity of any prescription whose prescribed action is partisan in some or other moral disagreement. This is equivalent to saying that the action prescribed by a formative prescription is explicitly neutral even to disagreement about itself because, were this not so, it would be a substantive prescription.

On my reading, Karl-Otto Apel states the meta-ethical principle of social action when he asserts that every claim to validity commits the actor to a recognition of all human individuals as persons. "All beings who are capable of linguistic communication must be recognized as persons since in all their actions and utterances they are potential participants in a discussion."²⁹ Following Apel, I will use the term "communicative rights" to designate the formative rights that belong to all humans as potential participants in moral discourse, and I will call the formative principle in question the principle of communicative respect. On Apel's account, these rights articulate the valid meaning that can be given to the second formulation of Kant's categorical imperative: "So act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as means only."³⁰

Since communicative rights define every human individual as a potential participant in discourse, their content can be derived from the necessary conditions of moral discourse as a specific social practice. As noted above, the defining purpose of moral discourse is to determine through argument the validity or invalidity of contested moral claims. Whether this practice achieves its common purpose, then, depends solely on the soundness of arguments, the opportunity for criticism, and common pursuit of the truth. Accordingly, its necessary conditions include equal freedom for all participants to advance and contest any claim and the arguments for it; the absence of internal coercion in the form of strategic

29. Karl-Otto Apel, *C. S. Pierce and the Post-Tarskian Problem of an Adequate Explication of the Meaning of Truth: Towards a Transcendental-Pragmatic Theory of Truth, Part I*, 63:3 *THE MONIST* 386-407 (1980).

30. KANT, *supra* note 10, at 46 (emphasis deleted).

activity or, stated positively, uncompromised commitment on the part of all participants to seek the truth; and the absence of external coercion that might influence the acceptance or contestation of claims.³¹

With the term "external coercion," I mean coercion that is not specific to the practice of discourse. A specific social practice occurs in the context of social relationships generally and, therefore, may specify more general norms or principles of social action. The latter are, then, external normative conditions of the specific practice. For instance, valid norms of criminal law are external normative conditions of, say, the specific practice of economic bargaining. In the nature of the case, the external normative conditions cannot be suspended by the internal norms of the specific practice. If there is a legal prohibition of assault, for instance, then assault cannot be a permitted procedure in economic bargaining. Thus, if some or all participants in the specific practice of discourse were permitted to coerce others in relationships generally, the coercion could invade the discourse and corrupt its pursuit of the truth. Let us suppose, for instance, that slavery is morally permissible and a master and slave are to have a discourse about some matter. Under these conditions, the norms of slavery are external conditions that cannot be suspended, and it would be morally permissible for the master to control the supposed discourse by a threat of harsh treatment once the discussion has ceased. Reaching agreement by the force of argument alone would not be morally required. Hence, the necessary conditions of discourse include the absence of external coercion that might influence the contestation or acceptance of claims.³²

To be sure, "coercion" can occur in many specific forms. Generally defined as "dominating, restraining, or controlling another forcibly," coercion involves interference with freedom, where "interference" means that the freedom in question is lessened in comparison with what it would have been had the interfering individual or group not acted at all, and this broad designation leaves open to dispute what kinds of interference are immoral. But the relevant meaning of "coercion" is determined by the formative character of communicative respect; that is, the proscription of interference must be explicitly neutral to all substantive prescriptions. Every such prescription is itself subject to dissent, and, therefore, the relevant freedom cannot be defined in a manner that explicitly answers any question about substantive norms or principles of social action. This means, if we abstract from the actual practice of discourse, that rights to communicative respect protect only those freedoms that can be defined without explicit reference to human association. Insofar as freedom cannot be so defined, a proscription on external coercion requires a substantive principle or norm of social action.

There is, in other words, a strictly individualistic character to the freedoms in question, and they include: freedom to affirm one's own future as an individual, freedom to control one's own body, freedom to use personal property, and freedom to choose one's own understanding of the good. We can speak of corre-

31. Cf. HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION*, *supra* note 27, at 25; JÜRGEN HABERMAS, *JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS* 31 (1993).

32. Cf. Karl-Otto Apel, *Types of Rationality Today: The Continuum of Reason Between Science and Ethics*, in *RATIONALITY TODAY* 307, 342 (Theodore Geraets ed., 1979).

sponding rights to life, to bodily integrity and movement, to the use of personal property, and to conscience—where having the right means that all others have the duty not to interfere. I will call these formative rights the rights to *private liberties*, where the term “private” means here that the freedoms in question can be defined without any explicit reference to human association. Clearly, the principle of communicative respect does not mean that the private liberties to which any given individual has a right are unlimited. The freedom of each is morally constrained by, and is subject to interference in order to prevent her or his invasion of, the rightful freedom of all others. Moreover, each has a right to equal freedom, because equal freedom is a necessary condition of the specific practice of discourse. But it remains that this community of rights cannot be overridden by any other moral prescription.

It is now important to show that the private liberties cannot exhaust the freedoms protected by communicative rights, because they include the right to be an *actual* participant in discourse. Attention to that right returns us to the question about actual patterns or institutions of common decision making. In one sense, moral discourse can occur at any time and any place. This specific practice requires only that two or more individuals agree to suspend other purposes in order to assess the validity of contested moral claims. But it seems wrong to say that an individual is morally bound to engage in discourse whenever a recipient of her or his action contests its moral validity. This would mean, for instance, that participants in an economic transaction are bound to halt their activity whenever any one of them or any affected individual objects to it, or a criminal court judge is bound to halt the trial’s proceedings if the accused dissents from a specific rule of the judicial system. Social action would or, at least, could be constantly disrupted. Moreover, the decision to halt other social action in order to engage in discourse is itself a social action, and a principle that prescribes that decision whenever social action is contested should itself be subject to contestation and common decision. But this is not possible unless there is a particular discourse in which common decisions are taken about when and where actual discourse ought or is permitted to occur.

What the formative principle of communicative respect prescribes, then, is a particular practice of discourse in which the widest possible common decisions are taken. Indeed, ad hoc engagements in discourse always presuppose this widest possible discourse because any argument about the validity of social prescriptions is potentially an argument about the most general moral principles and thus about social action generally. Whatever else is involved, in other words, the right to engage in moral discourse must mean the freedom to participate in a particular association that is constituted as the widest possible moral discourse and in which common decisions may determine the character of social action generally. Given this association, it is not necessary that all social action be disrupted whenever any participant contests its moral validity. Whether and, if so, when more local engagement in discourse is required or permitted can itself be a common decision of the wider discourse, because every individual’s right to discourse is fulfilled by her or his opportunity to express dissent in the particular association whose common decisions are about the moral permissibility of all specific projects or practices.

In sum, the right to participate in moral discourse is the right to participate in political discourse, that is, a particular association or social practice that has nonetheless a general character because its distinguishing purpose is to order or govern all action and association in a society. I will formulate this conclusion by saying that the formative principle of communicative respect prescribes a democratic political association. Moral grounds for the distinctively legal character of political decisions are, I believe, included in this prescription. Because the communicative right to participate in democratic discourse cancels the right to halt at any time any social action whose moral validity one contests, the principle of communicative respect includes the right to have democratic decisions coercively enforced. An association that makes common decisions governing all social action does not honor each individual's right to dissent from the moral validity of any social action unless the association prevents other individuals from violating its governing decisions. It now follows that the constitutive principles of this association must also be legal in character; that is, an institutional process through which governing activities are properly determined must itself be coercively enforced.

The proper provisions of a democratic constitution institutionalize the formative principle of communicative respect. In sum, we can say that the political association should be constituted as a full and free political discourse. It should be free in the sense that all individuals who are subject to the common decisions in question have equal rights to participation, and the discourse should be full in the sense that it takes no moral principle or norm to be immune from dissent. Calling this association a discourse means that every proposed principle or norm, if questioned, can be redeemed only by argument. "Full and free discourse" is, in other words, a summary expression of the *internal* conditions of discourse noted earlier: equal freedom of all participants to advance and contest any claim and the arguments for it, and uncompromised commitment on the part all participants to seek the truth. "Full and free *political* discourse" means that these internal conditions characterize the process by which governance is determined.

For this reason, a democratic constitution should institutionalize the state and stipulate the decision-making procedures through which officials of the state are selected and legislation is enacted, interpreted, and enforced. The constitution should also stipulate the procedure by which the constitution itself can be changed, allowing that whether any actual constitution is in fact democratic is itself subject to debate. These general requirements do not imply any specific set of political institutions, such that the constitutions of all democracies should be identical in detail. Whatever the detailed provisions, however, they are not democratic unless they allow the political association to maximize the measure in which the taking, interpretation, and enforcement of political decisions is effected through full and free discourse.

Thus, the constitution must also stipulate the right of all individuals or citizens to be participants in the democratic discourse. The duties correlative with these rights must be explicitly neutral to all substantive social prescriptions precisely because the discourse is about those prescriptions in their pertinence to legal norms. Properly speaking, a democratic constitution provides the one set of legal prescriptions that must be explicitly accepted by all citizens as partici-

pants in the political discourse, including discourse about whether the actual constitution is in fact democratic and, indeed, whether democracy itself is the proper form of the political association. We might say that the constitutional rights of citizens are those that all political participants must explicitly accept in order to have a political discourse about what all political participants must explicitly accept in order to have a political discourse—and it is this character that makes the rights formative. In addition to the rights to private liberties previously discussed (for instance, the rights to life, bodily integrity and movement, personal property, and conscience), then, a democratic constitution must also stipulate a set of rights to *public liberties*, which includes the familiar rights to freedom of speech, freedom of the press, freedom to assemble and petition, due process, and equal protection of the laws.

The public liberties also include the right to religious freedom. Indeed, religious freedom may be understood as the inclusive constitutional right of democratic citizens, in the sense that all other constitutional rights are conditions of it.³³ In saying this, I assume that religious freedom is the right of each citizen to choose her or his explicit belief about the most fundamental character of reality and human purpose, and thus a democratic constitution stipulates that no such belief is illegitimate.³⁴ Given that assumption, the right to choose one's religion is the right to free participation in a political discourse that is also full, a discourse in which no claim that purports to be a contribution to political decision is immune to criticism and, if contested, requires argumentative redemption. Hence, the principle of religious freedom also implies that constitutional stipulations should do nothing more than institutionalize the formative principle of communicative respect; they cannot properly require of any citizen as a political participant explicit adherence to any substantive prescription for social action. But just because the constitution is formative, protection of the rights it stipulates cannot be overridden by any other moral prescription, including any religious one, that is pertinent to the activities of the state.³⁵

33. See FRANKLIN I. GAMWELL, *THE MEANING OF RELIGIOUS FREEDOM: MODERN POLITICS AND THE DEMOCRATIC RESOLUTION 162* (1995) (arguing "that religious freedom is the constitution, in the sense that other constitutional prescriptions are, properly speaking, stipulations necessary to the full and free political discourse that religious freedom constitutes"). See also *Religious Freedom, Modern Democracy, and the Common Good: Conference Papers*, 12 *J. LAW & RELIGION* 565-94 (1995-96) (conference papers devoted to THE MEANING OF RELIGIOUS FREEDOM).

34. I do not mean that every explicit belief of this kind is a religious one. Some may be merely philosophical or ideological in nature. A religion, on my intention, is a cultural formation or cultural system in terms of which adherents of the religion seek to mediate or cultivate their implicit beliefs about the fundamental character of reality and human purpose—where any such implicit belief is a decision for a self-understanding with which a person leads her or his life. As a political principle, however, freedom to choose one's religion in this sense implies the freedom to choose one's explicit belief about reality and human purpose as such, even if that belief is merely philosophical or ideological in nature. This is because the freedom to choose one's religion is the freedom to decide whether any given religion is true, and, since all given religions may be false, the freedom so to decide must be included within religious freedom.

35. Given the possibility of constitutional amendment, some may argue, it is not necessary to limit constitutional stipulations to formative conditions. Substantive constitutional prescriptions do not contradict a full and free political discourse because the provision for constitutional change stipulates that even these prescriptions are subject to dissent. But this argument misses the point. Because explicit acceptance of the constitution defines citizens as participants in the political process, only formative constitutional prescriptions are consistent with the possibility of discourse about the constitution itself. In contrast, constitutional stipulations that are substantive contradict the provision for constitutional change because they falsely assert that they must be explicitly accepted by any political participant who seeks to change them democratically. The contradiction becomes fully apparent if we recognize that the argument for permitting substantive constitutional prescriptions also permits an established religion.

III. THE COMPREHENSIVE PRINCIPLE

I have pursued an outline of formative human rights in order to argue programmatically that a moral and political theory backed by neoclassical metaphysics may be understood to prescribe the universal principle of communicative respect as an indirect application of a comprehensive telos. Some may propose, however, that a convincing argument for communicative rights achieves too much because it contradicts the assertion that moral theory requires such a telos. In the nature of the case, this assertion implies that no moral prescription is valid independently of the comprehensive good. Against that implication, it might be said, the argument for formative human rights validates the norms of a universal social practice without appeal to any conception of a comprehensive good. Indeed Apel himself, to whom the previous argument is indebted, draws precisely that conclusion. On his account, the principle of communicative respect is “a meta-norm for communicatively generating material norms,”³⁶ where this means that the former is independent of any of the latter, and thus there are no universal moral principles that are substantive in character.

Apel does not mean that the principle of communicative respect is the only valid social prescription. This formative principle presupposes that moral claims can be accepted or contested because they can be valid or invalid and, thereby, presupposes the possibility of valid substantive prescriptions. Nor can this consequence be avoided by saying that, substantive prescriptions aside, a valid claim could still be made for the principle of communicative respect itself. It cannot be the case that the only prescription from which it makes sense to dissent is a prescription about whether one has a right to dissent, because this prescription implies that there is something else one might contest. In the end, this is just to say that democracy makes no sense in the absence of something about which citizens may engage in full and free discourse. If the political practice constituted by communicative respect is a democratic discourse, this discourse cannot be solely about the norms of that practice. This would mean that democratic politics has nothing to argue about except its own constitution, and it would be senseless to constitute a discourse for the sole purpose of constituting it. To the contrary, the discourse is about the activities of the state or about legislated norms by which all social action will be governed. Were valid claims for substantive prescriptions impossible, political decisions could not be the consequence of discourse, and governance by discourse could not govern.

For Apel, then, no other valid social prescription is, like the principle of communicative respect, universal. This principle presupposes *that* there are or, at least, can be valid substantive prescriptions but implies nothing about *what* they are. Hence, the principle is formal or independent of any material norm. So far as I can see, however, this position is self-contradictory. The presupposition that substantive prescriptions can be valid is senseless unless the principle of communicative respect also implies the meaning of “valid substantive prescription,” that is, implies the criterion in terms of which substantive prescriptions can be distin-

36. Apel, *supra* note 32, at 335.

guished as valid and invalid. But a criterion for this distinction is itself a substantive moral principle. It is, moreover, a universal substantive principle, since the implications of universal principles are themselves universal. I recognize that, for Apel, the universal criterion of valid substantive prescriptions is simply that they can be redeemed by argument or in moral discourse. But the meta-ethical character of moral discourse cannot itself be the criterion in terms of which sound and unsound moral arguments can be distinguished in or through discourse. To the contrary, this distinction requires a principle of substantive moral validity, such that a sound argument shows the conformity of a given prescription to that principle. Hence, a democratic constitution implies not only the possibility of valid substantive prescriptions but also a universal principle to which all the activities of the state or legislated norms governing social action ought to conform.

If we use the term “principles of justice” to designate specifically political principles, we can say that the universal rights of communicative respect imply that justice has a compound character. In other words, a valid theory of justice requires an internal distinction between the formative principle or set of principles that should be explicitly articulated in a democratic constitution and the substantive principle or set of principles that ought to determine decisions taken in or through the full and free political discourse. Because this distinction must be internal to the theory, the character of justice must be “self-differentiating,” and the nature of this self-differentiation may be stated as follows: The substantive principle or set of principles consistently implies as an aspect of itself the overriding formative principles of a democratic constitution, and thus the formative or constitutional principles imply as their own ground the substantive principle or principles of justice, even if it is no business of the constitution to stipulate what is substantively required.

Whether justice in this compound sense itself depends on a comprehensive purpose is another question. An affirmative answer to this question takes issue with moral thinkers such as Gewirth, who fully agree that universal moral principles cannot be exhausted by the formative rights I have identified but also hold that the supreme substantive principle is nonteleological.³⁷ Although I think that Gewirth’s proposal is subject to the criticism of nonteleological ethics I suggested summarily near the outset, anything approaching a decisive resolution of this issue in favor of teleological ethics will require nothing less than a more or less complete case for a metaphysical proposal. I cannot pursue such a resolution here.³⁸ Instead, I will assume that the case for neoclassical metaphysics can otherwise be made and attempt programmatically to show that the comprehensive purpose it formulates grounds justice as compound, grounds a substantive princi-

37. See GERWIRTH, *supra* note 14.

38. In *Democracy on Purpose*, I provide a more complete argument that the presumed separation of politics from comprehensive teleology puts democracy on an intellectually insecure foundation. GAMWELL, *DEMOCRACY ON PURPOSE*, *supra* note 20. I also argue for a metaphysical and, further, theistic conception of what makes life distinctively human and seek to show how this provides a coherent account of human freedom that supports our democratic commitment. *Id.* at ix. See also Mark C. Modak-Truran, Book Review, 26 J. LAW & RELIGION 823 (2001) (reviewing FRANKLIN I. GAMWELL, *DEMOCRACY ON PURPOSE: JUSTICE AND THE REALITY OF GOD* (2000)).

ple of justice that consistently implies the formative human rights of communicative respect.³⁹ Toward the conclusion of this argument, I will also seek to identify an inclusive human right that is substantive in character.

In order to proceed with this task, I will here merely stipulate what I take to be conceptions of the comprehensive purpose and thus the comprehensive good backed by neoclassical metaphysics. On this metaphysical account, reality as such includes as its primal source and final end a divine individual that is distinguished from all others by virtue of its complete relativity to all actual things as actual and all possible things as possibilities. As implied by this divine sociality, all other individuals are also socially constituted and are defined by their fragmentary or partial relativity. Thus, the basic metaphysical notion is “creativity,” which means that actualization consists in the unification of diverse relations. Accordingly, “good” in its metaphysical sense consists in the realization of unity-in-diversity as a contribution to the all-inclusive divine creativity, and the greater good is the realization of greater creativity. The comprehensive purpose is maximal unity-in-diversity realized in the world and, therefore, in the divine reality.

In comparison with nonhuman worldly existence, human activities enjoy opportunities for good that are vastly extended. The difference is finally a difference of degree, but the degree of difference is so dramatic that Whitehead can say “the Rubicon has been crossed.”⁴⁰ For this reason, future human creativity occupies a preeminent place in our pursuit of the comprehensive telos. With respect to that pursuit, moreover, there is a sense in which we act best toward the natural world when we aim at the maximal human future. Greater possibilities everywhere depend on a greater order of creativity in the relevant past. “The universe,” says Whitehead, “achieves its values by reason of its coordination into societies of societies, and in societies of societies of societies.”⁴¹ Given the dramatically higher possibilities in human existence, it follows, at least in a summary sense, that our effects on the coordination of nonhuman societies in the world maximize value in the universe when they maximize the possibilities of human achievement—and, by implication, in the long run. This is emphatically not to say that good is identical with human achievement, much less with the satisfaction of human wants and preferences. To the contrary, unity-in-diversity is intrinsically good wherever it is achieved because every realization of it makes a difference to the divine good. The conclusion here concerns the teleological order within the world as a principle for practical deliberation and, in that sense, asserts a coincidence between maximizing creativity in the world as such and maximizing future human good.

On this conclusion, the comprehensive purpose as a principle for moral decisions may be formulated: maximize creativity in the human future as such. Even granting something like the teleological order I have asserted, however, some

39. It may be worth emphasizing that the substantive principle of justice in a teleological ethic (or, for that matter, any ethic at all) is invalid unless it consistently implies the formative human rights of communicative respect. Since the principle of communicative respect is meta-ethical, it is implied, consistently or inconsistently, by any ethic at all.

40. ALFRED N. WHITEHEAD, *MODES OF THOUGHT* 38 (Capricorn Books 1938).

41. WHITEHEAD, *ADVENTURES OF IDEAS*, *supra* note 18, at 206.

may doubt that this formulation adequately states our responsibilities to our natural habitat, especially responsibilities to the diversity of species in the nonhuman world and to individual animals, at least within species whose members exhibit the capacity to suffer. Prescribing pursuit of maximal human good may appear to authorize an instrumental treatment of the natural world in ways inconsistent with its importance to the divine good. The issues implicit in these considerations require a longer discussion than the focus here on the question of human rights allows. Perhaps pursuit of the maximal human creativity should be constrained by the following principle of environmental respect: A purpose that reduces natural creativity relative to some alternative for the decision in question is a violation of the maximal divine good unless the purpose is required in order to maximize human creativity in the long run.⁴² All implications considered, I expect that maximizing human creativity itself includes adherence to this principle. Precisely because the nonhuman world is intrinsically valuable, the good we realize is greater, other things equal, when our relations to the natural habitat appreciate the nonhuman world for its own sake. In any event, I will assume the principle of environmental respect as I also assume the coincidence of maximizing human good and maximizing creativity as such.

The distinctive character of human life that grounds this coincidence further implies a coincidence between maximizing human opportunities as such and maximizing the order of creativity in the relevant human past. The higher possibilities of human achievement are a gift from past human achievements, favorably ordered, where the human past includes both the previous activities of the individual in question and the communities of individuals to whom she or he relates. Because the contribution to value of any given activity is greater when, other things equal, it affects subsequent activity more widely, we can say that the comprehensive telos prescribes the pursuit of our maximal common humanity—and, by implication, in the long run. What should be maximized, in other words, is the creativity shared between or among human individuals. On my reading, this was Whitehead's point when he attached to "statesmen" the hope that "variously coordinated groups should contribute to the complex pattern of community life, each in virtue of its own peculiarity. In this way individuality gains the effectiveness which issues from coordination, and freedom obtains power necessary for its perfection."⁴³

The term "common humanity" is sometimes used to mean descriptively the characteristics or normatively the rights that are universally human. In contrast, I designate thereby the common world insofar as it is constituted by the communication of distinctively human achievement. Because this distinctively human order should be maximized, it has a certain self-surpassing character; relativity to a greater common humanity offers individuals the possibility for a greater contribution to it, and the possibility realized amplifies opportunity further. To be

42. In terms of this principle, I expect, one might speak of the *prima facie* "rights" of nonhuman animals, at least of those that are conscious, and in a more extended sense of the term, the *prima facie* "right" of the natural order to its own diversity.

43. *Id.* at 67.

sure, the possibility may not be realized; individuals may compromise the achievement they might otherwise contribute or debase the human order of which they are the beneficiaries. Thus, the self-surpassing character of our common humanity is a teleological or normative feature; it identifies what is meant to be the case.

Since each individual must decide what to make of the opportunity she or he is given, our maximal common humanity may be reformulated in terms of the conditions of emancipation. On this suggestion, "emancipation" means the opportunity to be creative, the measure of power that "issues from coordination," and individuals are more or less emancipated depending on the natural and human context in which their lives are set. Because the order created by human achievements is greater insofar as each individual benefits from and contributes to it, our comprehensive telos prescribes pursuit of everyone's emancipation. For any given individual, the conditions of emancipation are complex, consisting in part of those that are distinctively hers or his and extending through those specific to intimate and local associations to those shared within increasingly wider communities. In their widest form, we may speak of "general conditions of emancipation," those that are important or potentially important to the creativity of any individual. I have in mind conditions such as those of health, economic provision, education, cultural richness, environmental integrity, and the general patterns of associational life itself. These, on my accounting, are the subject matter of justice. Summarily speaking, the pursuit of justice seeks to maximize the general conditions for more distinctive local associations and individuals and, thereby to maximize everyone's emancipation.

During the earlier review of the case against teleological ethics, I argued that a comprehensive teleology may ground its own indirect application through social practices or institutions, whose norms are morally binding whatever the consequences of action "separately taken." Indirect applications are prescribed insofar as the social coordination and cooperation such practices make possible is required in order to maximize the good. It should be evident that maximizing the emancipation of all and, thereby, our common humanity prescribes a wide range of social practices. Emancipation would be quickly reduced to primitive levels in the absence of norms that steady and enhance the character of human interaction.

Moreover, this teleological validation of social practices is not merely empirical, such that any given or proposed social practice should be assessed through a consideration of its contingent consequences. To the contrary, this telos grounds the meta-ethical principle of communicative respect and thus the universal practice constituted by it, because our maximal common humanity prescribes pursuit of everyone's emancipation. Greater emancipation means a greater range of possible purposes. Whatever the possibilities given to an individual by some morally valid social action of which she or he is a recipient, the possibility of accepting those effects because they are morally valid is always consistent with them—and the absence of this freedom lessens emancipation. Whatever social action is morally prescribed, in other words, an individual's range of purposes is greater if she or he can also choose whether to dissent from her or his social context. Being a recipient of communicative respect is, we may say, a formative condition of emancipation

This means that our maximal common humanity also grounds teleologically a democratic political association, because democracy is prescribed by the principle of communicative respect. The right to participate in the widest possible moral discourse, through which social practices are legislated and justice is pursued, is also a formative condition of emancipation. Moreover, the substantive principle of justice that ought to be convincing in democratic discourse and, through the discourse, to control political decisions is implicit in what has been said. Because the general conditions of emancipation are the subject matter of justice and legislated social practices should serve our maximal common humanity, this substantive principle of justice may be formulated as follows: Maximize the measure of general conditions of emancipation that is equally available to all. But the phrase “the measure of” is redundant, given the term “maximize,” so that we may restate the principle more concisely: *Maximize the general conditions of emancipation to which there is equal access.* Let us call this the principle of *justice* as general emancipation, using the term “general” to express not only the kind of emancipatory conditions with which justice is properly concerned but also the prescription to maximize the measure of those conditions that is generally available or equally available to all.

Naturally, much more needs to be said in order adequately to clarify this conception of justice in a manner that is internally coherent and practically consequential. Among other things, one must explicate how maximizing the opportunity equally available to all relates the several differing general conditions of emancipation to each other. But if we assume that this larger task can be successfully completed, we have reason to assert that justice so conceived is self-differentiating in the sense that marks the compound character of justice. Given that our maximal common humanity grounds teleologically the formative principle of communicative respect and thus a democratic political association, the substantive principle of justice as general emancipation consistently implies as an aspect of itself the overriding formative principles of a democratic constitution. Whatever legal norms increase the measure of general emancipation to which there is equal access, this measure is less than it might be unless all are subjects of the rights to private and public liberties. Thus, the political duty to secure these communicative rights cannot be canceled by any other duties justice may prescribe. This is simply to repeat that these alone are the rights properly protected by a democratic constitution, with which all other political decisions should be consistent.

Success in clarifying the substantive principle of justice will also make possible the formulation of a universal human right that I will call *the right to general emancipation*. In contrast to the formative rights properly stipulated in a democratic constitution, this is a substantive right, and it may be stated as follows: Human individuals as such have a right to the greatest measure of general emancipatory conditions that a legal order can provide or promote equally for all. The associational order or set of social practices that is legislated by a political association has as its specific purpose nothing other than securing for all individuals this universal right. Having done so, moreover, the norms of the legal order override direct application of the comprehensive purpose. These norms are to be observed whatever the consequences. Thus, we can say that our maximal com-

mon humanity prescribes a compound set of human rights, an inclusive substantive right to general emancipation that consistently implies as an aspect of itself the formative rights of communicative respect.

Conspicuously absent from justice so conceived is the constitutional guarantee of any substantive rights—for instance, the right to assistance with basic economic necessities if one cannot provide them for oneself or the right to some level of health care or the right to some measure of education. This absence may seem to put a democratic constitution at odds with itself, because the formative right to equal participation in democratic discourse is in fact worthless unless one's substantive right to general emancipatory conditions is at least in some measure secured. There is something quite disingenuous in saying, for instance, that citizens of the United States who suffer economic and social deprivation can be nonetheless equal participants in the political process. But the affirmation that all human individuals have certain substantive rights democratic communities should secure is one thing, and the assertion that these rights should be stipulated in a political constitution is something else. If democratic politics can be constituted only as a full and free discussion and debate, then the constitution should be explicitly neutral to all substantive principles and norms of human association, any claim for which is subject to contestation within the discourse.

This is not to deny that democratic discourse is impaired by substantive inequalities that the political community can and should alter. But whether the political process is in fact democratic cannot be guaranteed by the constitution. For instance, the constitution cannot enforce a commitment to discourse itself in distinction from the use of political procedures strategically to pursue one's own interests. To the contrary, the constitution can only anticipate that citizens will engage in a pursuit of the truth. Similarly, although for different reasons, we must say that a democratic constitution *anticipates* substantive justice in the activities of the democratic state. Democracy itself is not possible unless the constituted political process is in large or, at least, tolerable measure successful, so that governance fulfills its moral obligations by pursuing justice as general emancipation. It then follows that the citizens of a democracy have a substantive right, under certain circumstances, to alter the current regime by extra-legal means. At least when the substantive barriers to full and free discourse are intolerable, the anticipation of the constitution itself may permit activity that violates statutory law. But this substantive right is also characterized by severe constraints. The practice constituted by rights to private liberties may not be violated and, further, rebellion is bound by something like the following principle: Extra-legal attempts to establish the substantive conditions of a full and free discourse are not permitted unless the changes are more likely to occur or to occur more quickly in this manner than through legal activity, and the democratic political process is likely to sustain the changes once they are made.

Assuming that this statement of principles for a conception of human rights backed by neoclassical metaphysics can be given a detailed formulation and defense, we may repeat that a moral and political theory of this kind is the more important because the alternative it offers is largely neglected in the contemporary discussion. In agreement with most nonteleological expressions in the liberal political tradition, this theory affirms that rights articulate a universal or natur-

al moral law; but, against the persisting weight of the modern natural law tradition, the universal right to general emancipation is not bound to the assertion that human rights are independent of any inclusive good. In agreement with some recent communitarian proposals, this theory affirms that rights are inseparable from a common good; but, against the assumption that this good is in all respects historically specific, the right to general emancipation is inseparable from a comprehensive good. The comprehensive purpose exiled from modern moral and political thought is reasserted as the purpose of human rights. They are secured morally and politically by the telos of our maximal common humanity and, through it, the maximal divine good.
