

DEMOCRACY FOR AN AGE OF DISTRUST

PHILIP K. HOWARD

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WHAT JUST HAPPENED?

Democracy for an Age of Distrust

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Americans now have an historic opportunity to reimagine government. The key is to abandon the centralized operating philosophy which, in thousand-page rulebooks, purports to tell everybody how to do everything. We need to re-empower human agency at all levels of society.

The Trump revolution was not a Republican revolution. It was a revolt against Washington. Voters wanted someone who would shake things up.

The new President's mandate is for change, but what kind of change? The campaign did not exactly illuminate a new vision for how to govern. Since the election, Republican leaders have pulled off the shelf their standard agenda, including broad de-regulation. But I doubt if disaffected voters are dreaming about fixing Dodd-Frank or corporate taxes.

Voters seemed to be lashing out in every direction. Many are upset at stagnant wages and a perception that jobs are disappearing. But voters were angry at more than that. They seemed tired of being talked down to by political phonies and know-it-all bureaucrats. They were tired of political correctness and mindless bureaucracy in their schools, hospitals, and workplace. Anger comes from the gut, not the mind. No clear policy agenda emerged from the Trump campaign because the struggle was not about policy. It was about a sense of frustration, alienation, and powerlessness.

There can be a kind of wisdom in crowds. Democracy can't earn the allegiance of its citizens with centralized dictates. We need to have our say, and be free to do things in our own way. This crisis of democratic identity can't be resolved merely with new policies at the top. Top-down government is itself the problem.

Americans now have an historic opportunity to reimagine government. The key is to abandon the centralized operating philosophy which, in thousand-page rulebooks, purports to tell everybody how to do everything. Government must still protect against abuse—otherwise freedom will be destroyed by bad actors just as surely as it is by suffocating bureaucracy. But government can protect freedom by adopting an oversight role that guards against abuses rather than micromanaging daily choices.

Communities ought to be able to run schools and provide services in their own way, within broad boundaries. Regulatory dross of all sorts—HIPAA privacy forms, and most warnings and disclaimers—should be revised or scrapped, because they insult our common sense and cumulatively interfere with our ability to focus on what's important. There are some areas where centralized, detailed regulation is needed—say, pollution discharge limits. But in areas that hinge on human attitudes and competence—say, workplace safety or school discipline—too many rules and protocols are generally counterproductive. Far better for government to stand at a distance, making sure people don't breach the boundaries of reasonableness.



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Guarding outer boundaries is the traditional mechanism of law—acting as a kind of dike against misconduct. Law is vital to freedom because it affirmatively protects an open field of free interaction. Law sets “frontiers, not artificially drawn, within which men should be inviolable,” as Isaiah Berlin put it. Law today doesn’t protect an open field of freedom; it more often strangles daily choices with dictates that make no sense in the circumstances.

Scrapping the micro-regulation model is not a matter of degree—not merely cutting back on red tape. American government requires an historic shift of operating philosophy, one that puts humans back in the driver’s seat. Law must be the framework, but human responsibility must be the activating mechanism. The goal is to liberate people to try to do what’s right and sensible, accountable to those around them.

So far, so good. But there’s a bone here that will stick in throat of ideologues from both sides. Without a thick rulebook, the official must be free to use his or her best judgment. How else can he use common sense, when applying legal principles to the particular circumstances, to decide when conduct is unfair or unsafe? Oversight for results almost always requires human judgment. The paradox of freedom, forgotten in recent decades, is that empowering citizens requires empowering officials to fulfill their legal responsibilities. This is not just the Hobbesian requirement of police protection. The interdependence of the modern world puts a huge burden on government oversight. People you don’t know are taking care of your loved ones in schools and nursing homes. How can you influence them if the official in charge is not empowered to act sensibly? The parents’ ideas don’t matter if the principal doesn’t have authority to act on them.

The current void of human authority disempowers everyone. People don’t feel they, or anyone around them, can roll up their sleeves and fix things. The answer to every frustration is the same: “The rule made me do it.” (President Obama, explaining why the 2009 stimulus couldn’t be used to fix broken infrastructure: “There’s no such thing as shovel-ready projects.”)

The solution to powerlessness—the only solution—is to re-empower human agency at all levels of society. I'll assert two first principles that hold the key to remaking a healthy democracy:

Principle One: Human choice at implementation is required for accomplishment. Nothing good in the history of mankind was created except when a human, or group of humans, made it happen. Rules, and law in general, can prevent bad things from happening, and can establish protocols for joint action. But even those negative goals cannot be accomplished with a self-executing legal structure. Following rules mindlessly crowds out what Michael Polanyi called “tacit knowledge,” the vast store of instincts and know-how that resides in our subconscious. Most people don't know and cannot clearly articulate how they get things done. Trial and error—the opposite of compliance—is the secret sauce of progress. No endeavor can succeed, management expert Peter Drucker found, without “a principle of management that will give full scope to individual strength and responsibility.”

Principle Two: Personal ownership of choices is required for self-fulfillment. People want to make a difference. It gives us a sense of self-worth. Doing things in our own way requires freedom to adapt, adjust, and try new things. Being stymied by a rulebook, or trudging all day through compliance checklists, makes people miserable. Anomie, now hardened into anger, comes mainly from a feeling of personal unimportance. People with rote jobs have higher levels of stress and heart disease, while, paradoxically, people with more responsibility and personal risk feel less tension and are healthier.

Tocqueville here as in other areas put his finger on the misery of self-executing systems: “It is especially dangerous to enslave men in the minor details of life. For my own part, I should be inclined to think freedom less necessary in great things than in little ones” because, otherwise, “their spirit is gradually broken...”

Humans need to be in charge. Only then can things get done sensibly. Only then does democratic accountability mean anything. Today, the FAA certifies new aircraft as “airworthy” based on their expert judgment, not detailed specifications like how many rivets it has. This is not “de-regulation,” but an all-too-rare liberation of American common sense inside government.

When humans are allowed to take responsibility, law becomes far simpler and more effective. A few legal principles can replace a thousand rules if people are free to take responsibility for implementation. To regulate nursing homes, Australia replaced a thick rulebook with 31 results-oriented principles, such as to have a “home-like setting.” Within a short period nursing homes had improved markedly. Why? Professors John and Valerie Braithwaite found that all stakeholders—nurses, regulators, and families—now focused on making homes better instead of mindless compliance with a thousand input-oriented rules.

Letting humans focus on results would transform every area of public concern. For example, within a year we could get America rebuilding its decrepit infrastructure—just by giving an environmental official the job of deciding when there's been sufficient environmental review. Today, multi-year environmental reviews obscure, not illuminate, vital issues, and often cause environmental harm by prolonging bottlenecks. Schools and government agencies would have a lot more zip if principals and managers could make basic personnel decisions without having to endure a years-long legal trials to prove that someone doesn't do the job. Everybody knows who the bad teachers are; site-based oversight committees could guard against vindictive or unwise decisions. Recently Bill Bradley, Mitch Daniels, Tom Kean, and Al Simpson joined with the nonprofit Common Good, which I chair, to launch a campaign (“Who's in Charge Around Here?”) advocating the radical simplification of government so that people can take charge again. Learn more at www.simplifygov.org.

Human responsibility was, of course, the founding concept of our Republic: Elect and appoint people who have the job of using their best judgment for the common good. James Madison could hardly have been clearer: “It is one of the most prominent features of the Constitution, a principle that pervades the whole system, that there should be the highest possible degree of responsibility in all Executive officers thereof; anything, therefor, which tends to lessen this responsibility is contrary to its spirit and intention.”

Principles-based regulation would actually make law comprehensible to real people—a core tenet of the rule of law ignored by the mandarins in Washington. Again, Madison: “It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood.”

Democracy will be revitalized when officials can take responsibility for results. Focusing regulation on goals will also allow people in different communities to do things in different ways. They can take ownership of their choices. As legal philosopher Jeremy Waldron has argued, a principles-based structure offers humans the dignity of being able to argue about right and wrong with a real decision-maker. People won’t feel so powerless any more.

The Wages of Distrust

Distrust is the mortar that keeps the current America governing philosophy firmly in place. Distrust of democracy went into high gear in the 1960s, when we woke up to abuses of racism, pollution, lies about Vietnam, neglect of the disabled, and more. Making law as detailed as possible was the solution chosen to balance against supposedly bad values. There would be no room for abuses of authority if official decisions were prescribed in thick rulebooks.

Even some libertarians joined in. They believe in the power of human freedom, of course, but legal control of officials is how they strive to preserve freedom. Nobel economist Friedrich Hayek, usually a font of wisdom, pronounced in early writings that “government in all its actions . . . [should be] bound by rules announced and fixed beforehand.”

It is now received wisdom, among liberal professors as well as industry lobbyists, that laws and regulations should be as detailed as possible. The Volcker Rule is 950 pages of casuistry because lobbyists wrote it that way.

Obsessive legal control is a formula not for better freedom, but for mutual powerlessness: *The tighter the shackles on the regulator, the tighter the shackles on the regulated.* If the nursing home inspector is shackled to a thousand detailed rules, so are the nurses in the nursing home—even if the rules do little or nothing for the quality of the home.

Freedom turns out to be a concentric concept. If the traffic cops aren’t free to do their job, then pretty soon you’ll be stuck in gridlock. The citizen’s vote matters only when the President is free to make genuine choices. John Locke, no fan of centralized authority, concluded that “many things...must necessarily be left to the discretion of him that has executive power in his hands.”

The fear that keeps everyone quivering in the legal jungle is also based on a misconception: There’s no need to trust any particular flesh-and-blood official. What’s required is to trust the framework of our republic—to rely on human checks and balances, in which each official is surrounded by other officials who check his fidelity to legal principles. An official or judge is not, as Justice Benjamin Cardozo put it, “a knight errant roaming at will.” Just as free citizens are not free to breach contracts or cheat others,

officials are constrained by their legal mandate. As Ronald Dworkin has put it: “Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.... An official’s discretion means not that he is free to decide without recourse to standards of sense and fairness.”¹ Havel viewed democratic authority as a temporary delegation that “is lost when a person betrays that responsibility.”

Our paranoia about official authority is ironic. The rule of law famously fosters trust because it gives people confidence that, say, contracts will be honored and abuse not tolerated. What we’ve forgotten is that law itself is tethered to norms of good faith and reasonableness, applied by judges and officials taking responsibility to do justice in the particular case. Hayek himself recanted his views on the “supposed greater certainty [when]...all rules of law have been laid down in written and codified form.” Law can only support freedom when a judge or official applies it in a way most people consider reasonable. “Law floats in a sea of ethics,” as Chief Justice Earl Warren put it. Without giving it much thought, Americans generally trust the judges and others who enforce broad principles of civil and criminal law. Government, too, must be tethered to norms of reasonableness.

Putting official authority into solitary confinement, hemmed in by impregnable and obsessively detailed law, was supposed to enhance our freedom. Instead, we locked ourselves in as well. The “simultaneous recession of both freedom and authority in the modern world” is no accident, Hannah Arendt observed. Without a coherent theory of authority, we are “confronted anew...by the elementary problem of human living-together.”

Rebuilding Trust Through Responsible Choices

Here we are in 2016, with half the country in revolt, needing to find a way to live together. We shouldn’t worry too much about abandoning the de facto technocratic regulatory system as it has evolved. Our government “has outgrown the structure, the policies and the rules designed for it,” Peter Drucker observed, with the result that it is “bankrupt, morally as well as financially.” It was an heroic effort but, like central planning, it was doomed to fail because it was built on “the arrogant belief, “as Vaclav Havel put it, “that the world is merely a puzzle to be solved, ... a body of information to be fed into a computer in the hope that sooner or later it will spit out a universal solution.”

America requires a new operating philosophy that embraces the unavoidable humanness of governing. Getting past the pervasive distrust is the challenge. Years of public failure and powerlessness feed the distrust. If there were any trusting souls left in America, the 2016 campaign showed that it’s “us versus them.”

The stakes are high. Trusting cultures tend to prosper, as Francis Fukuyama and others have demonstrated, because people can stride toward their goals without fear of ambush. Shared values of fair dealing and common purpose are reinforced by shared norms of reciprocity; you do your part, others will do theirs. People feel they own their own choices, and feel comfortable with trial and error. Success feeds on itself.

Distrust, by contrast, corrodes the foundations for success. Like acid, it weakens our willingness to move forward because we don’t trust other people to do their part. People become defensive, and tiptoe through the day.

Transactions slow to a crawl, or don’t happen at all. In Edward Banfield’s study of a backward village

¹ Ronald M. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), pp. 31, 33.

in Italy, pervasive distrust removed the conditions for cooperation. Neighbors could not get together to fix roads and other common resources. The local Mayor refused outside subsidies because, he said, his constituents would assume he would pocket much of it.

For the past half century, America has looked to law not only to change values, a good thing, but also to dictate daily choices. Now Washington overflows with law, but it is also a cesspool of distrust. As in Banfield's village, America's leaders can't get together to fix broken roads. People in Washington also huddle within defensive bubbles, treating outsiders as enemies. Political leaders from different parties no longer break bread, much less forge deals to move forward. The White House has walled itself off from the Executive Branch it supposedly runs.

Do Americans really differ on basic values of hard work and fair play? I don't think so. I think government drove us apart, with the best of intentions, by clogging up society with a giant bureaucratic hairball and by removing our ability to try to work things out for ourselves. People don't want to be trapped in red tape, and they're obviously sick of political leaders who act like "puppets... in a giant rather inhuman theatre," as Havel put it.

Rebuilding trust starts at the top: Leaders must make choices that are trustworthy. President Trump will not be reluctant to start making decisions.

But his decisions must be viewed as fair and sensible, with due respect for differing interests. Trust is also a two-way street. If Trump empowers others to do things in their own way, they will be more likely to reciprocate. If his decisions are viewed as high-handed, however, we'll soon fall back into the maw of too much law.

This is an historic and perilous moment. Change is overdue. But it's not the change advocated by either party. The change needed, to liberate American citizens and to fix American government, is to return to our founding philosophy: to honor humans by creating a framework that empowers them to take initiative, act on their beliefs, and make a difference.

About This Reprint

This article originally appeared in the November 16, 2016 issue of *The American Interest*. Philip Howard is chair of Common Good and the author of, most recently, *The Rule of Nobody* (2014).

About Common Good

Common Good is a nonpartisan reform coalition which believes individual responsibility, not rote bureaucracy, must be the organizing principle of government. We present proposals to radically simplify government and restore the ability of officials and citizens alike to use common sense in daily decisions.

Common Good was founded in 2002 by Philip Howard. Our Advisory Board includes leaders from many areas of society, including former Senators Bill Bradley and Alan Simpson, former Governor Tom Kean, former Speaker Newt Gingrich, and Professors Francis Fukuyama and Jonathan Haidt.

In late 2016, Common Good launched a national bipartisan campaign—titled “Who’s in Charge Around Here?”—to build support for basic overhaul of government. The campaign is co-chaired by Philip Howard and former Senator Bill Bradley. Learn more at www.simplifygov.org.



One Metrotech Center, Suite 1703, Brooklyn, NY 11201

Phone 212.681.8199

www.commongood.org

Email commongood@commongood.org