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HOW DOES THE CONSTITUTION SECURE RIGHTS?

Edited by Robert A. Goldwin¹ and William Schambra.²
Washington: American Enterprise Institute. 1985. Pp. ix,
125. Cloth, \$13.95; paper, \$5.95.

*Charles Umbanhowar*³

How does the Constitution secure rights? This may strike the reader as an obvious question with an equally obvious answer. Robert Goldwin, however, has made a credible career in writing about public affairs asking equally obvious questions and then demonstrating through carefully selected readings the inadequacies of conventional wisdom. He is ably assisted in this book by William Schambra. It is the third in a series published by the American Enterprise Institute titled *A Decade of Study of the Constitution*.⁴ The book contains six essays written by well-known scholars who provide their answers to the question raised in the title. The piece by Herbert Storing, *The Constitution and the Bill of Rights*, is reprinted from another collection of essays. The essays of Owen Fiss and Henry Shue are more developed versions of previous papers. The contributions of Robert Rutland, Walter Berns, and Nathan Tarcov appear to be original undertakings for this book.

This collection provides a kaleidoscope of conflicting opinions, well-calculated to induce us to reconsider our own thoughts about how the Constitution secures rights. The discourse is sufficiently searching and fresh to recommend the book as a useful supplement to courses in American government and constitutional law.

Rutland and Storing are concerned with the political origins of the Bill of Rights and in particular Madison's motivation in leading the campaign for its adoption. Rutland interprets Madison's efforts as being based on a desire to line up with public opinion. Storing demonstrates persuasively that Madison was not simply motivated by such calculations but saw the Bill of Rights as an instrument for consolidating political consensus behind the new Constitution and undermining anti-Federalist opposition. Rutland never really addresses the question raised in the title, but undertakes to provide historical background.

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4. The others, by the same editors, are *HOW DEMOCRATIC IS THE CONSTITUTION?* (1980), and *HOW CAPITALISTIC IS THE CONSTITUTION?* (1981).

Fiss and Berns disagree over the role of the federal judiciary in American politics. Fiss argues for a judicial activism designed to protect the individual from large-scale organizations. He labels this model of adjudication "structural reform" because it involves judges in the role of reforming the structures of such organizations. He finds the older, common law model of adjudication, which emphasizes individual rights and duties and a minimal role for government, to be inadequate. Berns, on the other hand, is opposed to judicial activism and supports his view with a tightly written summary of natural rights theory. Berns considers this theory to be the basis of the Constitution's authority for the securing of rights. In addition, he asserts that judicial activism in general is based upon an unjustifiable reading of the first section of the fourteenth amendment and urges a return to the intent of its framers.

Henry Shue, like Fiss, argues for an expansion of the traditional conception of rights, but employs the more conventional concepts of economic and social rights or, more simply, "subsistence" rights. He suggests that the Constitution obligates the American government to guarantee human rights to all humans, not just Americans: "Most of the people whose subsistence rights are not being fulfilled today live outside of the United States. Thus, it is U.S. foreign policy that has the greatest potential for increasing the enjoyment of subsistence rights."

Tarcov, in more elaborate fashion than Berns, reexamines the fundamentals of the natural rights theory of government. Governments, he reminds us, are formed by peoples living in political association in order to protect themselves from one another and from nonmembers of the political association. Reading Tarcov, we are led to conclude that the basic relation between citizen and government is violated by Shue's notion of rights protection, which extends beyond the government's jurisdiction.

Of the five authors who address the question in the title, all agree, albeit for different reasons and in different ways, that while the Constitution itself does not secure rights, it is formulated on a theory of government that treats rights as paramount and authorizes and describes governmental and political institutions designed to secure them. They all tend to downplay the idea that the Bill of Rights is crucial in securing rights. Storing suggests that the content of the Bill of Rights represents a precise list of exceptions from national government power and not a guarantee of protection of natural rights. He sees a limited, checked-and-balanced but activist national government created in the body of the Constitution as the securer of rights. Fiss believes that adjudication—the "process by

which the values embodied in that text are given meaning"—is central to the securing of rights. He argues that his concept of structural reform is connected to values embodied in the text. Berns advances Hamilton's well-known argument against adopting a Bill of Rights and emphasizes the role of our pluralist political process as the insurer of the rights of minorities from potentially oppressive majorities. Tarcov sees anti-democratic institutions like the filibuster, veto, and judicial review as balancing the fundamental democratic thrust of the regime in a way that secures rights for all. Shue, most originally, envisions the State Department in cooperation with international organizations as the guarantor of human rights everywhere!

Fiss and Shue are, in different ways, for expanding the list of rights beyond the traditional ones. Berns and Tarcov are for holding the line. Tarcov states the differences in the following manner: "The form of our rights is that they are primarily *rights to do, keep, or acquire things* and corresponding *rights not to have things done to us or taken from us*. This form contrasts, therefore, with alternative conceptions of *rights to have things done or given to one*."

Shue describes the same dichotomy in a slightly different way: "The best government is the government that most fully honors human rights. Sometimes honoring human rights means simply not violating rights, . . . but sometimes, too, it means protecting rights with institutions well designed for the job."

I believe that these two statements tend to obscure the distinction that both are attempting to make. The traditional and the new view each hold that life, liberty, and the pursuit of happiness are the fundamental rights. The significant difference is that traditionalists believe that property rights are the necessary means to securing the more fundamental rights. Accordingly, government's most important task is to protect property claims. The advocates of "new rights," on the other hand, feel that this emphasis on property rights is excessive. Fiss, for instance, is concerned about reforming structures in order to lessen the effects of property claims gone wild. Shue, in emphasizing subsistence rights, is attempting to create a social "safety net" for those without property. By using the term "human rights," advocates of the new rights attempt to draw our attention back to the fundamental rights and lessen the importance of property rights. Not convinced that the protection of property leads inevitably to the protection of people, they would prefer that government devote itself to protecting other types of rights. Another way of viewing the difference is to contrast the political economy of *laissez-faire* capitalism with that of welfare state capitalism.

Tarcov and Berns argue for the more abbreviated version of rights by asserting that the framers of the Constitution subscribed to a traditional natural rights theory that cannot support the broader conception of rights. But Fiss and Shue feel that this traditional conception is too narrow and not in tune with the times. Each in his own way argues that an expansion of the rights described under the traditional theory is justified. Fiss stresses changed circumstances, while Shue stresses the original meaning of natural rights.

The vulnerability of human beings is the result of our physical fragility. It is extraordinarily easy to put a human being out of business by damaging the workings of his or her body. To make an analogy with war, the damage can be produced either by direct attack or by deprivation of vital supplies. A few minutes without breathable air, a few days without potable water, or a few weeks without edible food, and the physical damage to a human being can be as severe, irreversible, and fatal as the damage from a bullet or a bomb.

...

My own view is that when the abstract distinction between physical security and subsistence is doing more to confuse matters than to keep them straight, as it is here, theorists should stop insisting upon that distinction and simply think in concrete terms of social guarantees, which will always involve some negative duties and some positive duties against serious, general, and remediable threats.

No government can recognize all claims as enforceable rights. As Tarcov reminds us:

Our Constitution secures the rights of individuals to seek satisfaction for their desires, but it is compelled to distinguish lawful from lawless desires. Exclusive reliance on rights generates irritable litigiousness and empty yearning. Our public discourse is impoverished if we only invoke our rights and never debate what is good for us, if we only assert our right to pursue happiness and never discuss what would make us happy.

The rhetoric of rights is appealing to theorists because it appears, although in fact it is not, to be above the realm of consent and mere politics. It conjures up visions of justice. Rights theory encourages the notion that the rights of men can be discovered by reason and are in some sense self-evident or at least subject to objective determination. It is indeed true that rights may be determined in this fashion. However, when rights become practical, they require the expenditure of government resources (courts, policemen, bureaucrats, etc.) in order to be secured. We cannot blithely assume that the citizenry will consent to any definition of rights that sounds attractive to a theorist. This, plus the tremendous cost, is what makes Shue's call for a universal human right of subsistence, protected by the American government, so problematic.

Civil rights are the natural rights claimed by individuals that

governments are willing to protect. To have civil rights an individual must live in a civil society. If he were to live outside that society, he might assert his natural rights, but he would have to find a way to secure them. The American Constitution guarantees the natural rights of all *citizens* not because of their gender, race, previous nationality, family, religion, and so forth, but because they are humans. It is this non-discriminatory, egalitarian feature of the American Constitution that leads human rights advocates, such as Shue, to propound the notion that our Constitution somehow supports a universal human right of subsistence. However, under rights theory the government is obligated to extend rights only to those who are members of the political association. To broaden its commitment to those outside the political association would be to weaken its agreement with its own citizens, place an impossible demand upon its services, and risk confrontation with other governments. Recent events in Ethiopia tend to illustrate in practice some of these theoretical tensions. Is the solution, as Shue suggests, the creation of "large-scale" international organizations as the securers of subsistence rights? Or is it the creation of one world government with one world political association?

The issue of which rights are protected by the American Constitution is not to be resolved in an exchange between scholars; it is the function of the American government, activated by the political process, to do this. No government can honor all of the claims of all of its citizens; governments do, however, adopt a pattern in securing rights. This pattern ordinarily conforms to the principle of the regime. The task, which Tarcov so ably begins, is to discover the first principle of the American regime and use that as the standard for making critical judgments as to selection.

Tarcov suggests that the goal or purpose of America is the development of the human faculties. In order to clarify and substantiate his claim he calls upon Madison: "The 'first object of government,' according to *Federalist* No. 10, is the protection not of 'the rights of property' as such but of 'the faculties of men,' from which those rights 'originate.'" With all due respect, I believe that Tarcov has not read far enough, for in the very next sentence Madison writes: "From the [equal?] protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results . . ."

The faculties referred to are those for acquiring property. They may have other functions, but Madison chooses to highlight their relationship to property. We might further inquire of the manner in which one protects these faculties if not by creating

rights of property. It would not be surprising to anyone, I trust, if the goal of America were found to be the promotion of commerce through the protection of property. Of course, Madison's claim is not sufficient to make it so. We would wish to consider the history of distributive justice in America. Having done that, however, I suppose we would find that the Madisonian formula would fare very well indeed.

LIFE IN THE BALANCE: EXPLORING THE ABORTION CONTROVERSY. By Robert N. Wennberg.¹ Grand Rapids, Mich.: William B. Eerdmans Publishing Co. 1985. Pp. xi, 184. Paper \$7.95.

*Michael Levin*²

It may sound odd to say this about a discussion of a topic as grim and contentious as abortion, but Robert Wennberg has written an extremely agreeable book, a model of philosophical method. Professor Wennberg is an accomplished enough philosopher to be unafraid of writing clearly, and of admitting that every position on abortion, including his own, will be unsatisfying in some way. Simply as exposition and a display of intellectual flexibility, *Life in the Balance* is quite superior to Michael Tooley's 1984 book, *Abortion and Infanticide*, the only comparable survey of the abortion issue by a philosopher working in the analytic tradition.

Wennberg devotes most of this book to arguing that the developing fetus has a right to life. Crucial to the articulation of his case is Wennberg's well-taken insistence that the question "Does the fetus have a right to life?" be distinguished from the question "Is the fetus a person?" where a *person* is "a being who possesses the developed capacity to engage in acts of *intellect* (to think, to use language, etc.), acts of *emotion* (to love, to hate, etc.), and acts of *will* (to make moral choices, to affirm spiritual ideals, etc.)." What Wennberg dubs the "actuality thesis," that only beings that are actually persons have a right to life, is a substantive moral thesis in no way implicit in the concept of a right to life. Actualism, construed as a substantive moral thesis, does have the advantage of resolving the abortion issue very cleanly: since the cerebral functioning of even a very late term fetus is insufficiently integrated to create per-

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