interpretation
A JOURNAL OF POLITICAL PHILOSOPHY

May & Sept. 1986 Volume 14 Numbers 2 & 3

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Volume 14 numbers 2 & 3

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Annual subscription rates individual $15; institutional $18; student (3-year limit) $7.50. There are three issues of INTERPRETATION a year.

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How Does the Constitution Secure Rights? Edited by Robert A. Goldwin and William A. Schambra. (Washington and London: American Enterprise Institute for Public Policy Research, 1985. 125 pp.: cloth, $13.95; paper, $5.95.)

WILL MORRISEY

The discrepancy between political speeches extolling rights and the unrighteous deeds of political men has not gone unremarked. Some of this discrepancy results simply from the difference between theory and practice. But much of it does not. Most regimes today fail to defend rights. Their rulers give every sign of unwillingness or inability to do so. Their citizens—and that is scarcely the term—have almost no civil recourse against tyrannical abuses. Because the United States Constitution does not merely mention rights but actually helps to secure them, understanding it can make "a valuable contribution to the safety and happiness of the people of the world." The editors have selected six essays intended to strengthen that understanding—three by 'liberals,' three by 'conservatives.'

The first two essayists present historical interpretations of Constitutional rights, focusing on Madison's campaign to add the first ten amendments, the Bill of Rights. Historian Robert A. Rutland writes that Madison "became the father of the Bill of Rights" when hostile voters threatened to reject the Constitution in its original form. Rutland argues that public opinion and the "national and state bills of rights" are reciprocally influential. He goes so far as to call the Constitution "a living, breathing document" for this reason, although his one example of this (that we no longer have slaves) required nothing less than a civil war and an amendment to be effected, as we lived and breathed.

Rutland evidently regards the Bill of Rights and the Fourteenth Amendment (as interpreted by twentieth-century Supreme Court justices) the principal Constitutional guardians of Americans' rights. Public opinion alone rarely protects our rights adequately, he contends. Abolitionists, religious zealots, suspected Confederate sympathizers, IWWs, pacifists, conscientious objectors, "supporters of the newborn Soviet Union," labor leaders, and suffragettes were "denied" their civil liberties until the Supreme Court "spread [the] broad umbrella" of the Fourteenth Amendment to cover all public speech and action that do not immediately threaten the peace. To this day, public opinion "can never be ignored" in our republic, but public opinion continues to favor abridgement of rights; accordingly, "the Supreme Court and an executive branch dedicated to the preservation of our individual rights must be strong enough to withstand the vagaries of public opinion," which "today is not nearly so well informed" as in previous eras. Rutland deplores apathy, indifference, and the Reagan Administration. He remarks a "wide difference between public opinion and the more advanced judicial interpretations of certain civil rights," although the meaning of 'advancement' becomes obscure when the 'liberal' faith in progressive enlightenment dims.

The late political scientist Herbert J. Storing contradicts Rutland's prime assumption by denying "the common view that the heart of American liberty is to be found in the Bill of Rights." In his campaign for the Bill of Rights, Madison intended to seal the Antifederalists' defeat by separating them from "the large group of common people whose opposition did rest, not on fundamental hostility to the basic design of the Constitution, but on the broad fear that individual liberties were not sufficiently protected." Storing doubts that the Bill of Rights makes Americans' rights any more secure. Without it, "our courts would probably have developed a kind of common law of individual rights to help to test and limit governmental power."

To use the Bill of Rights as a "set of maxims to which people might rally" is to risk "undermin[ing] stable and effective government." The Federalists identified "the main political business of the American people" not as self-*protection* against political power but as self-*government*. "Even rational and well-constituted governments need and deserve a presumption of legitimacy and permanence," Storing suggests, echoing Madison. Persistent recurrence to the Bill of Rights as if it were a statement of maxims or 'first principles' can interfere with this presumption, and thus with the practical business of republican self-government. Accordingly, the Bill of Rights comes "at the tail" of the Constitution, not the beginning.

> The Bill of Rights provides a fitting close to the parenthesis around the Constitution that the Preamble opens. But the substance is a design of government with powers to act and a structure arranged to make it act wisely and responsibly. It is in that design, not its preamble or its epilogue, that the security of American civil and political liberty lies.

One might even infer that Storing suspects some enthusiasts of the First Amendment go so far as to use it to further amend the Constitution without popular consent.

The second two essayists discuss contemporary ways of interpreting the Constitution. Law scholar Owen M. Fiss contends, first, that "rights are not premises, but conclusions" emerging "through a process of trying to give concrete meaning and expression to values embodied in an authoritative legal text," and second, that "a new form of constitutional adjudication has emerged," coinciding with a newly-emerged set of rights. Called "structural reform," this form of adjudication assumes that "the operations of large-scale organizations" threaten "our constitutional values" more formidably than individuals do. It further assumes that these organizations must be restructured, an assumption "reflect[ing] a healthy skepticism about the existing distribution of power and privilege in American society." The reformers intend to "create a new status quo." Their enterprise "requires a measure of activity on the part of the judge that is at odds with the picture of him as a passive umpire, simply choosing between two neighbors." The judge now "becomes the manager of a reconstructive enterprise." Fiss

charges that the older "dispute resolution" model of judicial conduct "begin[s] with indifference toward public values or ignorance of them." He does not substantiate this charge.

A familiar objection to such vigorous activity by judges is the rhetorical question, 'Who elected *them*?' Fiss replies that judges and courts form part of our political system, which is based upon consent. Judges' authority rests not on "some personal moral expertise, of which they have none, but on the process that limits their exercise of power and constitutes the method by which a public morality must be construed." This process involves dialogue, responsibility, and independence. One might note that although the power bringing independence also brings responsibility—obviously, the more powerful you are the more you are responsible for—it does not of course bring the responsibility meant by the phrase 'a sense of responsibility.' Further, a keen sense of responsibility can yield different, even opposite, results depending upon the public morality a judge derives from his authoritative legal text. Fiss himself suggests some of this by conceding that the judiciary itself becomes bureaucratized—itself becomes one of those dangerous, large-scale organizations—when given so much to do. Worse, "the danger is ever present that judges will temper their idealism and their commitment to justice by what is realistic." Fiss colors the picture darkly: "They will negotiate [he warns]; they will bargain; they will become adaptive." That is to say, having become politicized, judges get political.

Political scientist Walter Berns considers current notions of judicial conduct to be unusual, even irregular and eccentric. Under the Constitution, judges "owe their independence to the framers' judgment that only with it could they effectively exercise the power that by natural right belongs to someone else, the constituting people" who ordain, establish, and amend the Constitution. Judges today nonetheless "create rights," doing so "openly and avowedly," using the Fourteenth Amendment as if it empowered the courts instead of Congress to provide the substance of privileges and immunities. Until the 1925 case *Gitlow v. New York*, the Bill of Rights and the Fourteenth Amendment had not been conjoined. But subsequent justices have made up for lost time.

Far from commending 'idealism,' the American founders sought "to devise a system in which moral differences would not become political issues." The founders, Berns argues, conceived of rights in the modern way, as natural rights discovered in a nature with no *telos* except self-preservation and with such subsidiary rights (notably liberty) as self-preservation entails. Without spurning declarations of rights, the founders never supposed mere declarations sufficient. The defense of natural rights requires an artificial structure "designed to ensure that the country will be governed not by simple majorities but by constitutional majorities, majorities that respect constitutional limitations that are defined by private rights." This defense also requires another kind of artificial structure, a civil society sufficiently extensive and commercial to contain diverse interests, none strong or fanatical enough to dominate the others. While not noble, this

"great modern project" is "not ignoble"; it encourages liberty, prevents tyranny. Berns cautions that "while rights, properly understood, can be secured, not all wants can be satisfied." These wants include the ignoble wants of criminals, but they also include some of the noble wants of moralists. Berns tempts us to think the latter at least as dangerous as the former.

The assertion that human beings have not only the right to eat but the right to be fed combines the 'low' concern for survival with the 'high' language of 'idealism' in a manner that may be peculiar to our time. Few moralists before now could regard *governmental* alleviation of hunger as a superior moral undertaking. Charity has earned praise for centuries, but enforced charity, charity as a demand based upon "subsistence rights," appears mostly on recent lists of moral goods. Political scientist Henry Shue praises a document called the "International Bill of Rights." The "core rights" set forth therein are rights to "minimum economic security." Shue emphasizes the obligatory rather than the libertarian character of rights; "the whole point of having rights is to limit the liberty of other people by imposing duties," justifiable demands, upon them. Having the right to life, for example, means you can justifiably demand that I refrain from killing you. "Subsistence rights" extend the right to life to contemporary circumstances, wherein human beings control nature to a larger degree than ever before. Famine is no longer so much an act of nature as an act of men; "specification of sensible, well-informed principles for the allocation of responsibility is, I think, one of the central tasks of contemporary political philosophy."

Shue criticizes the Reagan Administration's replacement of "human rights" with "political rights" that foster "cold war goals." He charges the Administration with hypocrisy because, he claims, it overlooks human rights abuses by such allies as Turkey and Marcos' Philippines while condemning abuses in the Soviet bloc. "Genuine subsistence rights [are] betrayed in the pursuit of illusory ideological gains"—illusory because the Soviets see our hypocrisy and therefore will not change their own unjust tune. Leaving aside the question of whether the Reagan Administration actually has overlooked human rights abuses by allies, and leaving aside the pretty claim that the Soviets might repent if only they thought us sincere, it must be said that Shue here fails to argue consistently. If, given the extent to which men have conquered nature, famine now ranks as a political crime—Stalin in the 1930s and the Marxist rulers of Ethiopia today serve as obvious examples of this—then one cannot ignore the political or "ideological" reasons for the decision to cause famine. Attempting to separate "human rights" from "political rights" makes no sense if human beings are political animals who act differently in regard to "subsistence rights" when their conceptions of "political rights" differ. If commercial republics rarely or never deliberately cause famine, and if other regimes do, then the issue of political rights *is* an issue of human rights. If, moreover, certain kinds of regimes that spurn commercial republicanism (e.g., communist regimes) wield considerably more power than certain other kinds of regimes that also spurn commercial republicanism (e.g.,

right-wing dictatorships) then there is no hypocrisy or even inconsistency in concentrating one's public attention on the former and not on the latter. The decision to do so involves prudential deliberation and may be called into question by prudential deliberation. But to make that decision *primarily* a matter of rights undermines the exercise of the practical judgment that defends rights.

John Locke might associate "subsistence rights" as Shue conceives them with patriarchalism. For example, Confucius tells the Chinese emperor to feed the people, who are his 'children.' The absence of state-guaranteed "subsistence rights," as distinguished from the natural right to consume the fruits of one's labor, perhaps reflects Locke's reservations about the ruler-as-father, reservations originating in the philosopher's dislike of tyranny and his esteem for human industry. In the volume's most substantial essay, Nathan Tarcov examines the conception of rights seen in the Declaration of Independence and the Constitution. He finds it more individualistic than Shue does, but not simply individualistic.

Tarcov observes that the Declaration of Independence speaks of both individual and collective rights. But the latter exist to secure the former. A "people," in the Declaration, does not mean an organic entity, a race or nationality. Shared sentiment helps constitute a people, but that is not enough. A people constitutes itself by its acts: emigration to a new land, the acquisition of that land by labor and by the risk of individuals' lives and fortunes.

> The acts of naturally free individuals, in particular the expenditure of life, liberty, and property that by nature belong to each of them, are what constitute a people. The Declaration recapitulates and reconfirms that ultra-Lockean origin by its final pledge of signed individuals' lives, fortunes, and sacred honor.

Although Tarcov is surely right to call this definition of a "people" ultra-Lockean, one should also notice that the Declaration's closing formulation—lives, fortunes, and sacred honor—differs significantly from its opening formulation—life, liberty, and the pursuit of happiness. Go so far as to concede that the pursuit of happiness means the attempt to acquire property (a concession that decisively confirms the Declaration's Lockean character, although it is not a concession that need be made), and you still cannot accurately contend that "sacred honor" makes sense in Lockean terms. The sanctity of honor sounds far more aristocratic than anything Locke endorses, and more careful research is needed to fix the meaning of this evocative phrase.

This notwithstanding, Tarcov clearly shows the relation of individuality to collectivity in the Declaration. The Constitution, he argues, embodies an analogous relation between the country and humanity. Universalist but humanitarian, Constitutional rights inhere in human nature itself "but their security is primarily something each people must accomplish for itself." Locke teaches that "civil society has the right to secure the rights only of those who have consented to it"; accordingly, "we have believed that American patriotism is the most effective form of philanthropy." American nationhood, then, directly serves the rights of the individuals who consent to participate in it while indirectly serving (by exam-

ple) the vast numbers of human beings who cannot participate in it. Against those who contend that the Fourteenth and Fifteenth amendments fundamentally alter the Constitution's moderate individualism, Tarcov observes that "the amended Constitution protects the rights of individuals against violation on the basis of their race, not rights of racial or ethnic groups as units"; "the interests of classes derive from the more fundamental property rights of individuals." *Constitutional* majorities rule not as classes (as the Athenian *demos* did) but as shifting coalitions of individuals and interests whose views are refined and enlarged by their elected representatives. Extensive use of the power of judicial review to effect policy thus undermines the very constitutionalism it depends upon—by stripping constitutional majorities of their proper function.

Tarcov distinguishes the natural rights of individuals protected by the Constitution from natural right as propounded by classical political philosophers. Classic natural right involves the distribution of goods, the direct cultivation of virtues, the fostering of political unity, and the teaching of truth. The classical *politeia*

> . . . is the form taken by a political community, determined by who rules it. The dominant characteristic of the ruling part determines both the political goal of the whole regime and the personal goals of the individuals in it. This conception reflects the view that political rule is natural. The American conception of a constitution, in contrast, is that of a fundamental law, preferably written in a single document, understood as the expression of the will of the whole people. The Constitution grants powers of government from the natural right of individuals, not so that some can rule others or form their goals, but so that the remaining rights of all can be more secure.

The Constitution does not constitute a classical timocracy (*Federalist* #8 explicitly contrasts the agricultural and commercial pursuits of the American states with the ancient republic, a "nation of soldiers"), an oligarchy ("Securing property rights is of special advantage not only to the wealthy but to those who would acquire wealth"), or a classical democracy.

Tarcov does not mean that the Constitution recommends blinding ourselves to the question of the desirability of our several desires. While securing rights, the Constitution 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.

In protecting the right to speak by means that reward civility and rationality, the Constitution subtly orients some American souls toward distinctively human happiness and away from either the irritable self-righteousness of men who mistake themselves for gods or the appetitive yearnings of men who mistake themselves for beasts. Both these mistakes incline men to tyranny.