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ON CONSTITUTIONAL WELFARE LIBERALISM: AN OLD-LIBERAL PERSPECTIVE

By Michael P. Zuckert

I. Introduction

I have always been especially intrigued by the dishes one can find on some of the more elaborate Chinese menus, dishes like Thousand Year Old Bird's Nest Soup. I must admit I've never been tempted to order this dish: it has never been clear to me whether extreme aging would make a bird's nest more palatable or less. But the delicious hyperbole in that dish's name puts one in mind of the fact that we have had not just an old and a new liberalism, but nearly a thousand liberalisms. It is striking how subject to modification and evolution that now venerable political orientation has been since it first hatched in the seventeenth century.

II. The Original Liberalism

The original liberalism emerged with John Locke. Its chief features were captured in that marvel of concision, the American Declaration of Independence. Following Thomas Jefferson, we can identify six features of this original liberalism:

1. *Rationalism.* It is a rationalist doctrine in the sense that it looks to reason (public reason in a broad and nontechnical sense) for its bearings. As Locke said, reason must be our "only Star and compass."[1] That statement was made in the context of his refutation of the divine-right-of-kings political thinking of Sir Robert Filmer, who claimed to take his bearings not by reason but by scripture. Locke does not so much dismiss scripture as insist that on matters where reason can speak, scripture must be understood to agree with it. Since Locke considers politics a sphere of human activity within the legitimate scope of reason, that means that for all theoretical purposes scripture may be set aside, although for some practical purposes it must be deployed. The appeal to reason most definitely does not *ipso facto* rule out natural theology, however.

2. *Rights.* Lockean liberalism conceives each individual adult human being to possess rights, rights which derive from nature or God, not from government or society. Locke and the original liberals had a stable list of rights: life, liberty, and property. Jefferson's Declaration of Independence

[1] John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960), I.58.

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dropped the reference to property and added to their list the intriguing "pursuit of happiness," itself a Lockean idea, although nowhere identified by Locke as a right.[2] Nonetheless, it would not be much of a stretch for Locke to endorse such a right as a shorthand summation of all the other rights.[3] Locke also spoke of rights as property. He meant to suggest by that usage both the relation between the rights-holder and his or her rights and the relation of others to those rights. The rights or the objects of the rights are the possessions of the rights-holder. To have a right is to have a kind of sovereign power within the (limited) sphere of the right. A rights-holder's claims are also exclusive in the rights-holder. Locke means to reject Thomas Hobbes's odd conclusion that in the state of nature men can have rights to each other's bodies.[4] Locke captured the property character of rights when he called men "self-owners" and affirmed that all men have a property in their own bodies.[5]

3. *Equality.* From his various thoughts about rights, Locke concluded that "all men are created equal," meaning that no one has a natural claim to rule another. In particular, no one has a right to coerce another, unless that other harms or threatens to harm oneself or others. If human beings are self-owners, then it is a violation of right for one to harm or intrude upon the body of another. More broadly, so far as the pursuit of happiness can rightly be posited as a right, it implies that human beings have a right to pursue a shape and style of life that they think promises to lead them toward happiness. Such a right affirms, all things equal, a right to a very comprehensive control of one's own life by and for oneself. If human beings possess such a comprehensive right, it could not be the case that others have a right to rule them by nature, for the possession by another of a right to rule would be incompatible with one's right to shape one's own life.

4. *Ends of government.* Lockean liberalism is, of course, not anarchistic. Governments claim the right to do the very thing—coerce human beings—that Lockean rights theory seems to deny. The Lockean theory takes its point of departure from the problematical character of political authority. Is there any legitimate natural coercive authority whatever? Locke believes there is. We have the right forcefully to resist and punish those who violate our rights. That is the only legitimate coercion, the only coercion consistent with conceiving human beings as bearers of rights and as self-owners. Since there is no governing authority by nature, governments must be understood to be artificial, to be "instituted" by men. This

[2] John Locke, *An Essay Concerning Human Understanding,* ed. Peter Nidditch (Oxford: Oxford University Press, 1990), II.21.62.

[3] Michael P. Zuckert, *Launching Liberalism* (Lawrence: University Press of Kansas, 2002), 224.

[4] Thomas Hobbes, *Leviathan,* ed. Richard Tuck (Cambridge: Cambridge University Press, 1991), chap. 14, p. 91.

[5] Locke, *Two Treatises,* II.27.

is less a statement about history than it is about legitimacy: all legitimate government must be thought of as instituted. But if "instituted," then instituted to what end? Jefferson answers: "[T]o secure these rights, governments are instituted among men." The idea of institution thus leads to a precise notion of the legitimate ends of governance. Government is an entity with limited ends. These limitations do not derive from denying the value of many other ends, but from the fact that these other ends cannot connect up with the sole source of legitimate coercion. Thus, Lockean liberals do not necessarily deny salvation in the one true faith to be a valuable end, but imposition of that end does not attach to the source of legitimate authority. Likewise, Locke does not deny that certain states of character (i.e., the possession of certain virtues) are rationally desirable, but the imposition of these states of character does not attach to the source of coercive authority either. The original liberalism is thus a doctrine of limited government.

5. *Consent and the right of revolution.* Government exists for the sake of securing the rights of the governed and is best understood as the product of their institution. Government must be understood as arising from the consent of the governed in the sense that it is the massed or pooled legitimate coercive power of each that government wields. At the same time, government is or ought to be pervasively responsible to those in whose name and for whose sake it operates. The original liberalism was a bit vague about how deep this responsibility needed to go. At the very least, a body representative of some or all of the property owners in a society must be involved in the laying of taxes, and perhaps in the general making of laws. Likewise, the body of the people retain a right to "alter or abolish" government when they believe it is not living up to its trust. Thus, the so-called right of revolution is a prominent part of the original liberalism.

6. *Constitutionalism.* Locke (and even more his successors) recognized, however, that revolution is a very blunt instrument for enforcing responsible governance. The original liberalism was concerned from the outset, then, with issues of constitutional design, that is, with ways to structure governmental institutions and their interactions so as to maximize their likelihood of governing well. Among other institutions, original liberalism was partial to markets.

The original Lockean liberalism was modified in three important directions in the eighteenth century. While the new liberal emphases were not without potential tension among themselves and with parts of the original Lockeanism, for the most part liberalism emerged from these modifications relatively coherent and harmonious. The first addition to liberalism was Montesquieu's. In his magisterial *Spirit of the Laws,* Montesquieu took the somewhat underdeveloped Lockean emphasis on constitutional institutions and developed it into the sophisticated and powerful theory of separation of powers. He also took to heart

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Locke's concern with commerce and developed the implications for liberal polity and economy.[6]

The second modification of the original liberalism was effected by the American founders. They were Lockeans to a man, but they insisted that the only legitimate liberal order was what they called a "wholly republican" order. By that, they meant a representative democracy, which is what we in the twenty-first century most often mean by the term "democracy."[7] Only governance solely by the representatives of "the great body" of the people could be legitimate, they concluded.[8] In this they went beyond both Locke and Montesquieu, who accepted monarchic and aristocratic or oligarchic elements as legitimate or even desirable.

The final modification of liberalism in the eighteenth century reached its peak expression in Adam Smith's demonstration of the role of markets not only in producing wealth, one of the original liberalism's goals, but also in serving liberty.

In a gesture to Ockham's razor, let us refuse to multiply entities; let us gather together these elements of seventeenth- and eighteenth-century liberalism and call this "classical liberalism," or "the old liberalism."

III. Liberalisms in the Nineteenth Century and Beyond

After the classical synthesis, there were many new and (allegedly) improved forms of liberalism, but for our purposes let us paint in broad strokes and note just two new liberalisms prior to the more recent forms on which we wish to lavish our subsequent attention. Both emerged in the nineteenth century and continued to be developed in the twentieth. One was a liberalism more libertarian in character than the old liberalism. It had, in turn, two wings, which did not always, but certainly could, reasonably well coexist or even cohere in a unified political orientation. Both were characterized by a more doctrinaire or hard-edged direct commitment to liberty than was the case for the old liberalism. The first of these two wings is exemplified in John Stuart Mill's great classic of liberal thought, *On Liberty,* which formulated a hard and fast rule, a "bright and shining line" of political morality across which governments ought not to go in legislating. Mill's line was captured in his well-known "harm principle." The harm principle holds that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized

[6] Montesquieu, *The Spirit of the Laws,* ed. Anne M. Cohler, Basia C. Miller, and Harold S. Stone (Cambridge: Cambridge University Press, 1989).

[7] Alexander Hamilton, James Madison, and John Jay, *The Federalist* (Indianapolis: Liberty Press, 2001), No. 10, p. 46.

[8] Ibid., No. 39, p. 194.

community, against his will, is to prevent harm to others."[9] The harm principle was clearly a descendant of the Lockean-Jeffersonian notion that governments were limited in their legitimate undertakings to securing the rights of persons. But neither Locke nor Jefferson ever drew a line in the sand, or anywhere else, for they did not insist that government be strictly limited to direct rights protecting.

Since they wrote before Mill pushed the issue, Locke and Jefferson never formulated very clearly why they did not go so far in a libertarian direction as Mill went. I would put their somewhat understated thought as follows. The legitimate end of government—securing rights—sets an orienting direction for thinking and acting politically but not a bright and shining line. One would not and could not limit governmental action to rights protection and only that, because there is much more to securing rights than securing rights. There are many features of society and individuals that are means to the securing of rights, and these, for Locke and Jefferson, are all things rightly within the ambit of governmental concern. This range of broad means to the end of securing rights I call the "rights infrastructure." To take an example Jefferson much emphasized, a rights-securing polity was one that required a citizen of a certain sort. A citizen had to be able to understand the rudiments of the principles of political right, that is, the basic theory of liberal politics. He had to be literate enough, alert enough, confident enough, and organizationally capable enough to serve as a sentinel of his own liberty vis-à-vis his rulers, who, however necessary they might be to producing a rights-secure world, were also potentially threatening to rights. Moreover, the only rights-secure (and happy) world is one where the citizens are not dependent on their "betters" to organize and conduct their affairs for them. From these and similar insights, Jefferson concluded that it is imperative that the state provide public education of a certain sort, for only that could help produce the kind of citizens needed in a rights-securing republic.[10] It was not his view that individuals had a direct right to a publicly supplied education, but rather that a polity organized around rights would have a legitimate interest in supplying public education. It would be neither a direct requirement of the rights of individuals nor a violation of the limited ends of government for government to supply public education. It was thus rightly within the realm of legislative discretion and control. Thus, although rights may be used as a stringent limitation on govern-

[9] John Stuart Mill, *On Liberty* (1859), in A. D. Lindsay, ed., *Utilitarianism, Liberty, and Representative Government* (New York: E. P. Dutton, 1950), 95.

[10] For Jefferson on education, see "A Bill for the More General Diffusion of Knowledge" (1779), in Joyce Appleby and Terrence Ball, eds., *Jefferson: Political Writings* (Cambridge: Cambridge University Press, 1999), 235–43; and Jefferson, *Notes on the State of Virginia*, query XIV, in Harvey Mansfield, ed., *Selected Writings: Jefferson* (Arlington Heights, IL: AHM Publishing Corp., 1979), 43–46.

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mental action (as, for example, they are used by Robert Nozick), the early liberals did not so use them.[11]

Mill was convinced that in an age of democracy, both formal and informal pressures for conformity with the majority endangered liberty and individualism. He was unable to rest easy with the rather loose notion of legitimate governmental action promulgated by his old-liberal predecessors. Perhaps (as much as anything) as a preventative measure, Mill thus promulgated his more rigid harm principle.

At the same time, Mill more or less broke with several of the central elements of the old liberalism. Partly following his one-time mentor, Jeremy Bentham, Mill eschewed any appeal to rights (although he was not so doctrinaire about rejecting rights as Bentham had been).[12] Mill accepted the old-liberal idea of public accountability of public authority, and even extended the democratic extension of that theme in his crusade for proportional representation.[13] He gave more weight to democratic representation and control than to separation of powers. This thrust of his work stood in some tension with his fears of majorities on behalf of individuals. His advocacy of proportional representation makes sense on the basis of his confidence that his "harm principle" could be entrenched in public opinion as "the public philosophy," whence it could morally discipline proportionally representative legislatures as they did their work. Moreover, and perhaps more importantly, he believed that proportional representation would be an impediment rather than an empowering of majorities through guaranteeing broader representation of all, minorities as well as majorities. The "winner-take-all" system of Anglo-American politics tended to artificially create or enhance majorities.

Mill was rather ambivalent about that other aspect of liberal institutionalism, the market; for by the end of his career, he came to flirt with socialism.[14] The second wing of libertarian liberalism more than made up for Mill's hesitations, for it developed a commitment to free markets far more doctrinaire than had been the case even for Adam Smith. The laissez-faire liberals were actually quite diverse in their thinking. Some, like David Ricardo and his fellow classical economists, were more narrowly economistic, and held that free markets were always or almost always best economically. Others, like Herbert Spencer, were rights-oriented: they

[11] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974). In Mill's own application of his harm principle, he was often less stringent than the explicit formulation of the doctrine would seem to require. Thus, for example, he also supported a system of compulsory, but not publicly provided, education. On Mill and education, see E. G. West, "Liberty and Education: John Stuart Mill's Dilemma," *Philosophy* (April 1965): 35–48.

[12] Mill, *On Liberty*, 97.

[13] See John Stuart Mill, *Considerations on Representative Government*, in Lindsay, ed., *Utilitarianism, Liberty, and Representative Government*.

[14] For Mill on socialism, see his "Chapters on Socialism," in Stefan Collini, ed., *J. S. Mill: "On Liberty" and Other Writings* (Cambridge: Cambridge University Press, 1989), 219–80.

held that legislative interference with markets was violative of private property rights, whether economically beneficial or not.[15]

The two wings of libertarian liberalism were products of the early and mid-nineteenth century. The latter parts of that century saw the emergence of another kind of liberalism. Let us call it "welfare liberalism" or "egalitarian liberalism." In one form or another, it is this that gets the name "liberalism" in ordinary political discourse in the United States today. It too is quite diverse—at best a family of liberalisms rather than a clear and distinct doctrine. In retrospect, it is much clearer what welfare liberalism was *against* than just what it was *for.* It arose in explicit and intense opposition to libertarian liberalism, especially the latter's laissez-faire wing. The welfare liberals, such as the Progressives in America or the philosopher T. H. Green in Britain, challenged both the economic efficiency of markets (at least as constituted in the late nineteenth and twentieth centuries) and their justice. The welfare liberals were persuaded that the distribution of goods by markets was not necessarily just and in practice was certainly not so. They were thoroughly committed to the notion that a more egalitarian distribution per se was preferable to the greatly inegalitarian distributions markets tended to produce. Alternatively, they were convinced that the plenty produced in market economies could be allocated in a way that would meet far better the vital needs of a far larger part of the population than was being done.

The welfare liberals shared many of these concerns with some radical critics of the established order, for example, socialists. The welfare liberals tended not to go as far as socialists and call for the socialization of productive property; the welfare liberals, for the most part, were committed to maintaining private property. But they shifted from both the original ("old") liberalism and libertarian liberalism in emphasizing much less the limits of governmental authority, and they developed instead an ideology of strong, active, big government. Governmental interventions were to be of two sorts: regulation of the private sector to produce more efficient results and to curb concentrations of private power; and redistribution of the economic product in a more egalitarian or needs-satisfying direction.

Although welfare liberalism (in America especially) stopped well short of the socialist or Marxist agendas, it did take over or put forward critiques of the substructure of the old liberalism that paralleled critiques by the more radical left. Motivated by a desire to dislodge rights-based property claims, the welfare liberals developed a critique of rights-based thinking that led them to posit rights as social allocations rather than as natural

[15] See, e.g., Lionel Robbins, *The Theory of Economic Policy in English Classical Political Economy* (London: Macmillan and Co., 1953); Jacob Viner, "The Intellectual History of Laissez-Faire," *The Journal of Law and Economics* 3 (October 1960), 45–69; and Ellen Frankel Paul, *Moral Revolution and Economic Science: The Demise of Laissez-Faire in Nineteenth-Century British Political Economy* (Westport, CT: Greenwood Press, 1979).

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possessions of individuals.[16] Somewhat ironically, however, twentieth-century welfare liberals also came up with ever larger lists of rights to which they held all were entitled, rights of the sort embodied in Franklin D. Roosevelt's call for a "Second Bill of Rights" and, later, in the Universal Declaration of Human Rights.[17] President Roosevelt proposed his "Second Bill of Rights" in 1944, in a now little known speech delivered toward the end of World War II. Roosevelt's proposal, unlike the first Bill of Rights, called not only for protections from government, but also for a set of new rights or protections of citizens by government. Roosevelt called for such things as the recognition of rights to employment, to adequate food, clothing, and shelter, to education, to recreation, and to medical care. The Universal Declaration of Human Rights, adopted in 1948 by the United Nations General Assembly, had an even longer list of rights. Many were the sorts of rights protected by the original American Bill of Rights (e.g., the right not to be arbitrarily deprived of property, the right of free expression), or by the Fourteenth Amendment (protection against discrimination in rights on the basis of race). Others were much more like the new rights of FDR's "Second Bill of Rights" (e.g., a right to rest and leisure, a right to social security). The welfare liberals broke with what they saw as the false and morally suspect individualism of the old liberalism. They thus modified the substructure of liberalism to a fair degree, taking issue with the core idea of rights, and redefining the emphasis on limited government while greatly expanding the notion of the ends of government.[18]

In the American context, welfare liberalism was promoted by the Progressive movement and came to a political peak of sorts in the New Deal and Great Society eras of the twentieth century. Perhaps the theoretical peak of this liberalism was John Rawls's *A Theory of Justice* (1971), a book that attempts to supply a more comprehensive grounding for welfare liberalism than had been theretofore presented.[19] Rawls was particularly eager to show how this variety of liberalism could retain a great concern for liberty as well as for equality and welfare, and thus legitimately belonged to the liberal tradition. In justifying this version of liberalism, he even returned to a Lockean or quasi-Lockean style of philosophy.

Rawls cast his theory in such a way as to reveal continuities with traditional liberal commitments, but the original American welfare liberals, the Progressives, were much less likely to emphasize continuities. Thus, we see one of the founding documents of Progressivism, Charles

[16] See, e.g., T. H. Green, *Lectures on the Principles of Political Obligation and Other Writings* (Cambridge: Cambridge University Press, 1986).

[17] See esp. Cass Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (New York: Basic Books, 2004).

[18] On the various types of liberals, see T. H. Marshall, *Class, Citizenship, and Social Development* (Chicago: University of Chicago Press, 1964).

[19] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

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Beard's *An Economic Interpretation of the Constitution* (1913), mounting a full frontal assault on the old-liberal American founders who established the Constitution.[20] The founders and their Constitution, Beard argued, were enemies of progress and of the kinds of legislation and other reforms the Progressives sought. The founders, Beard said, acted as a class (the wealthy and well-born) to produce a governing structure (the Constitution) that would operate to favor their own interests. The point was to move his countrymen away from their deep attachment to the Constitution, an attachment that was standing in the way of the substantial changes the Progressives believed were needed, changes such as the thorough democratization of the polity and the regulation of the economy.

Although the need to appeal to the American electorate led them to temper their public presentations, the Progressives, and later the New Deal liberals, shared the idea that truth and justice required a break with the American constitutional order and with much of the inherited American political culture.

The late twentieth century saw the emergence of a yet newer form of liberalism, which requires at least brief mention. Like welfare liberalism, it is group-oriented rather than individualist in character; but where the economy, class, and distribution issues characterize welfare liberalism, the newer liberalism is far more centered on issues of culture and identity. Thus the name: "identity liberalism" or "multiculturalism." Identity liberalism is not only associated with the political causes of different elements of the population from those that were at the center of the advocacy of welfare liberalism, but it has also become attached to quite new and different styles of political thinking. Welfare liberalism was associated with the political cause of the working and middle classes, but identity liberalism is connected to the causes of racial and cultural groups (e.g., African Americans, Native Americans) and gender related groups (e.g., women, gays). Identity liberalism makes a more radical break with the preceding liberal traditions in that it is accompanied in many quarters by a call for a break with Enlightenment thinking, that is, a turn away from the kind of rationalism that has, in one form or another, underpinned liberalism ever since Locke.

Identity liberalism is a still-powerful force, but it is also partly responsible for the political waning of liberalism in America today. Eschewing the universalism of earlier liberalisms, targeting itself to discrete and identifiable groups, it has cut itself off from an appeal to the broader electorate; the present weakness of the Democratic Party in the United States has to be traced to a large degree to the success of identity liberalism in influencing the party.

[20] Charles Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan and Co., 1913).

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That weakness underlies the appeal of the "new liberalism," with which we shall be most concerned here. This form of liberalism is a species of welfare liberalism. It returns to many of the earlier distributional themes. Thus, Cass Sunstein, one of its leading proponents, wrote a book aiming to revive Roosevelt's vision of a "Second Bill of Rights," centered on economic and welfare entitlements. This new version of welfare liberalism also retains some of the concerns of identity liberalism, such as gay rights, civil rights, and women's rights. From a purely political point of view, one might see this new welfare liberalism as an attempt to broaden the appeal of liberalism for the American public as a whole by committing to an agenda of benefits (e.g., health care) that will be attractive to the middle and working classes.

It differs from the original welfare liberalism in a number of ways. It has absorbed many of the lessons of the post–New Deal world, and thus is much friendlier to markets than the original welfare liberalism was. The twentieth-century worldwide experience of economies that opted for central planning and nonmarket allocations of resources has proved to the satisfaction of almost all reasonable observers that the hopes attached to nonmarket economies were greatly misplaced. The market is not perfect, but it is much more productive and more supportive of liberty than any alternatives. Despite its greater friendliness to markets, the new form of welfare liberalism remains focused on distributional outcomes, for it retains the view of the original welfare liberalism that markets tend not to spread the results of their productive power equitably or reasonably among the population.[21]

Although it made its initial appearance earlier, in the 1960s, this new welfare liberalism is also, in its most current form, very visibly a reaction against the views that more or less triumphed in the Reagan Revolution of the 1980s. In many ways, Ronald Reagan's views and policies were very like libertarian liberalism, and it is not of interest here to explore the differences. It is merely worth noting that, in contemporary discourse, the welfare liberals have managed to capture and hold onto the venerable title "liberal," and with it the claim to be the legitimate heirs of the liberal tradition. The welfare liberals particularly object to the hostility to positive government that surfaced under Reagan. "Government is not the solution," said a famous Reagan slogan, "it is the problem." The welfare liberals would reverse that motto, and, more than that, they insist that the Reaganites did not really believe in or live up to their other motto: "Get government off our backs." The reality, they claim, was a selective use of government to favor the causes and interests dear to the Reaganites.[22] Opposition to government was reserved for opposition to programs and

[21] Sunstein, *Second Bill of Rights,* 203–4.

[22] Ibid., 17–34; Sotirios Barber, *Welfare and the Constitution* (Princeton, NJ: Princeton University Press, 2003), 8–12, 65–68.

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policies they disdained. The welfare liberals are thus committed to positive government, and a public philosophy that recognizes government's responsibility for the comprehensive welfare of the people.

What most strikingly distinguishes the current version of welfare liberalism from the older instantiation of that doctrine is the about-face it has made with respect to the inherited elements of the liberal and particularly the American tradition. Instead of presenting themselves, as Beard and the other Progressives did, as hostile to the Constitution, the current welfare liberals present themselves as grounded in the Constitution and in American political culture as it is, as it has been, and as it could be if it lived up to its own foundational commitments. Sotirios Barber, a University of Notre Dame constitutional theorist, and the most profound and thoughtful of the new welfare liberals, presents a theory that maintains that the original Constitution contains or implies the welfare liberalism he advocates.[23] Political theorist Stephen Holmes argues that the liberal tradition from Hobbes onward has had one driving commitment, the relief of insecurity. Over time, "the *sources* of insecurity changed . . . but the *value* of security itself remained the same."[24] The welfare state these liberals call for is thus said to be in direct continuity with and a fulfillment of the older liberal tradition as a means of relieving insecurity. In line with this emphasis on continuity, this new welfare liberalism is centered on the Constitution. Therefore, I propose to name it "constitutional welfare liberalism," or CWL.

The first glimmerings of what became CWL appeared in the late 1960s in the hey-day of the Warren Court, when some important legal scholars attempted to develop the idea that the Constitution contained or implied a right to welfare.[25] For a short while, it looked as though the welfare liberals might succeed in having the Supreme Court announce such a right to be in the Constitution.[26] The timing of that original emergence offers one clue to the impetus behind the shift to a Constitution-centered welfare liberalism: if this political program could be attached to the Constitution, there was a chance the courts would adopt it, and that certainly looked easier than running the gauntlet of the political process.

The revival and renewed attractiveness of CWL in the 1990s and beyond is no longer so clearly tied to the hopes that the courts will adopt and then impose this vision, for in the meantime the Supreme Court has become far more conservative and far less likely to adopt any such constitutional doctrine as this. Indeed, one of the *bêtes noires* of the welfare liberals is a

[23] Barber, *Welfare and the Constitution,* 63.

[24] Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995), 257–58; Barber, *Welfare and the Constitution,* 44.

[25] Charles A. Reich, "The New Property," *Yale Law Journal* 73 (1964): 733; Frank Michelman, "On Protecting the Poor through the Fourteenth Amendment," *Harvard Law Review* 83 (1969): 7.

[26] For an account of how that did not happen, see Sunstein, *Second Bill of Rights,* 149–75.

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fairly recent Supreme Court case, *DeShaney v. Winnebago County Department of Social Services* (1989), with a majority opinion authored by Chief Justice William H. Rehnquist.[27] In that case, the Court maintained that the states do not have a constitutional obligation to supply even much more ordinary kinds of protection to citizens, such as protections of children from abusive parents, much less the kinds of benefits CWL calls for. The welfare liberals now tend to distinguish levels and kinds of legal/constitutional obligation. The obligations they find in the Constitution are no longer presented as a part of the Constitution to be judicially enforced. The welfare duties are held to be duties in the Constitution, binding to be sure on public officials, but not in the ordinary case to be adjudicated. Thus, legal scholar Lawrence Sager develops a theory of "constitutional underenforcement";[28] Barber develops a strong distinction between judicially enforceable and nonenforceable duties;[29] and Sunstein develops a distinction between the agencies that are to apply the first Bill of Rights (the courts) and those that are to apply the second Bill of Rights (the political branches).[30]

Thus, CWL is not advocating that judges command Congress to undo the 1996 Welfare Reform Act, which cut back substantially on the welfare commitments of the federal government and promised to "end welfare as we know it." Nor are the partisans of CWL pressing for the courts to take over welfare departments, prisons, schools, and other security- or welfare-providing institutions, as sometimes happened in the headiest days of judicial activism. Not only is CWL more sensitive to the judiciary's limited capacity to step outside the bounds of its normal activities, but CWL is sensitive also to concerns about judicial supremacy and the need to respect democracy and the political institutions of self-government. CWL, as we see it today, is in this respect chastened and far more moderate than the earliest versions of the doctrine.

As constitutional doctrine, CWL fights for a certain interpretation of the Constitution and sets itself firmly against another interpretation, which it tends to identify as the dominant or orthodox view. The constitutional welfare liberals oppose "the negative-liberties model" of the Constitution (to use Barber's terminology) and would replace that with a "benefits model." In brief, the negative-liberties model holds that the Constitution secures negative rights but not positive rights, that its aim is to protect against governmental oppression or tyranny, and that it operates chiefly to restrain the government through practices like judicial review, bills of rights, separation of powers, and federalism. By contrast, the benefits model maintains that the Constitution is not only or even primarily a

[27] *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189 (1989).

[28] Lawrence Sager, *Justice in Plain Clothes* (New Haven, CT: Yale University Press, 2004), 84–128.

[29] Barber, *Welfare and the Constitution,* 68–71, 82–86.

[30] Sunstein, *Second Bill of Rights,* 209–30.

negative or restraining instrument but has the actual provision of general welfare as its task, a provision which includes the elements of welfare that we normally think of as part of the "welfare state." In Sunstein's closely related idea, the Constitution is not only to be concerned with the Bill of Rights, a series of provisions to limit government, but also with the Second Bill of Rights, as proposed by FDR, which is concerned roughly with the same set of welfare-state entitlements that Barber identifies with the government's duty to the "general welfare."

IV. Constitutional Welfare Liberalism: A Critique

At the bottom of CWL are two pieces of complementary analysis, which together constitute the core of the CWL position. One is developed by Holmes and Sunstein, the other by Barber. The two arguments operate functionally very similarly, for they are meant to show that the negative-liberties model is inadequate, and at the same time, to ground the benefits model in the materials of traditional American constitutionalism and liberalism. I will address these arguments in turn.

A. CWL and negative rights

Holmes and Sunstein, in their book *The Cost of Rights* (1999), develop an argument of the following sort. The American constitutional/liberal tradition affirms rights, which are normally taken to be negative rights. But Holmes and Sunstein deny that the distinction between negative and positive rights makes sense; all rights, they maintain, are, in effect, positive rights, which is why they present their crucial analysis in a chapter called "All Rights Are Positive." Since all rights are positive, the American commitment to rights in fact amounts to a commitment to the benefits model.[31]

Central to their argument is their definition of the two sorts of rights. The distinction between negative and positive rights (as usually drawn) is "perceived to be the same" as the distinction "between liberties and subsidies." Alternatively, "negative rights ban and exclude government; positive ones invite and demand government." Thus, Holmes and Sunstein conclude that negative rights "require the hobbling of public officials"; these rights "typically protect liberty." In contrast, positive rights "require . . . the affirmative intervention" of public officials; these rights "typically promote equality." "Negative rights shelter us from the government, . . . positive rights grant us services by the government."[32]

[31] Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W. W. Norton, 1999), 35–48.
[32] Ibid., 39, 40.

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Holmes and Sunstein summarize the distinction as the one usually drawn by the labels "immunities" and "entitlements" respectively, but they consider the alleged distinction between these sorts of rights to be a "story book distinction."[33] The distinction is "palpably inadequate." That insight, they believe, is particularly important, for most persons from all positions on the political spectrum generally accept the distinction as meaningful, even if persons at different points on the spectrum value the different kinds of rights differently. "The negative/positive polarity . . . furnishes a common language within which welfare-state liberals and libertarian conservatives can understand each other and trade abuse."[34] Although Holmes and Sunstein are defenders of a welfare liberal position, they are following a different strategy from their fellow liberals: not to value positive rights more highly, but to demonstrate that "upon inspection, the contrast between the two fundamental sorts of rights is more elusive than we might have expected. . . ."[35] More than that, the alleged distinction, they say, "turns out to be based on fundamental confusions, both theoretical and empirical."[36]

The core of their critique of this common distinction is the claim that "[a]ll rights are claims to an affirmative governmental response. All rights, descriptively speaking, amount to entitlements defined and safeguarded by law."[37] This claim, in turn, is supported by the idea that all legal rights involve redress by government (and Holmes and Sunstein treat all rights as legal rights). Rights are "hollow to the extent they are unenforced," and the call for enforcement, even of a right that appears to be negative, is a call for governmental action, that is, a call of the positive-rights sort. "[A]lmost every right implies a correlative duty, and duties are taken seriously only when dereliction is punished by the public power drawing on the public purse. There are no legally enforceable rights in the absence of legally enforceable duties, which is why law can be permissive only by being simultaneously obligatory."[38]

In contrast to the Holmes and Sunstein view, I will present an argument that will ultimately establish three conclusions: (1) that there is a perfectly lucid and valid distinction between negative and positive rights; (2) that Holmes and Sunstein do not understand that distinction correctly; and (3) that their denial of the distinction is based on a fundamental confusion on their part about the logic of rights and rights enforcement.

Let us begin with two closely related features of their analysis. Holmes and Sunstein take for granted that all rights (both putatively negative and

[33] Ibid., 40.
[34] Ibid., 42.
[35] Ibid., 43.
[36] Ibid.
[37] Ibid., 44.
[38] Ibid., 43–44.

putatively positive rights) are rights against government.[39] Relatedly, they maintain that the only rights of interest are legal rights. They dismiss (merely) moral rights—that is, rights not recognized and enforceable by positive law—as "hollow," and therefore, apparently, unworthy of consideration. However, it is not true that all rights are rights against government. If we take the famous Lockean triad of natural rights—life, liberty, and property—these are held to pertain to individuals prior to or in the absence of government. These are rights held against agents other than the government; indeed, these are rights against all comers—in the first instance, against other (private) individuals.

Moreover, it is quite misleading to dismiss moral rights so quickly as hollow and unimportant. Consider the claims of nineteenth-century abolitionists. They insisted that the slaves on whose behalf they agitated had the right to be free even though no government recognized or enforced that right. Admittedly, it would be a more valuable right if it were enforced, but it makes no sense to dismiss this rights claim as meaningless. Indeed, it appears central to the logic or function of rights that we can and do raise such claims, for the function of rights claims is precisely to attempt to gain recognition and protection of rights that are not being recognized and protected. To agree with Holmes and Sunstein that there is a tendency for rights claimants to attempt to transform moral rights into legal rights does not imply that one can ignore the reality of moral rights. Indeed, it is clear that moral rights are (often) logically prior to legal rights, for they are the preexisting bases for claims to legal rights.

Holmes and Sunstein limit their analysis to legal rights, but this is simply question-begging. Legal rights are, by definition, rights for the vindication of which one can appeal to government for action of some sort. The limitation of their analysis to legal rights thus produces automatically the conclusion they draw that all rights are positive, that is, that all rights are claims on government.

Clarity on the meaningfulness of speaking of nonlegal moral rights is a prerequisite to getting to the core of the issue: Do Holmes and Sunstein understand the difference between negative and positive rights correctly? I do not believe they do. The true difference between these two kinds of rights is not what Holmes and Sunstein tentatively identify as the commonly held distinction, namely, that negative rights "ban and exclude government," while positive rights "require affirmative intervention" of public officials. The true difference comes out more clearly if one starts where Holmes and Sunstein refuse to, with moral rights, and move from there to legal rights.

It is useful to make a larger distinction within the realms of right and rights. I refer to the distinction between objective and subjective right. The former is captured in a statement such as the following: "It is right

[39] Ibid., 40.

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that Ellen speak up about matters of public concern." The latter kind of right is captured in the apparently similar proposition: "Ellen has a right to speak up about matters of public concern." These statements sound very similar, but they are saying quite different things. In the case of the first, the objective right, the right expresses a duty for Ellen to speak up. If she fails to do so, she is violating right, that is, the right state of affairs. In the case of the second, the subjective right, Ellen is not violating right if she fails to speak up. She has a right to speak (i.e., a moral permission), but she does not have a duty to do so. Such rights inhere in a subject (the rights-holder) in such a way that the subject has a range of discretion regarding the exercise of the right. A subjective right is a permission to act or not, as the rights-holder chooses. Subjective rights are thus sometimes called "choice rights."

The debate about rights in which Holmes, Sunstein, Barber, and other welfare liberals are engaged is a debate about subjective rights, for it is these rights that are subdivided into negative and positive rights. The welfare liberals have not put their fingers on the real distinction between positive and negative rights, however, and this failure to grasp the distinction correctly is responsible for their strongly worded conclusions that there is no difference at all. It is as though one were saying that the difference between humans and other animals is that humans are two-footed and other animals four-footed, and then, observing that there are plenty of other two-footed animals (e.g., birds), concluding that there is no difference between humans and other animals.

Holmes and Sunstein first go astray in dismissing moral rights and limiting their horizon of discourse to legal rights. They then miss the defining feature of the positive-negative divide. The difference between positive and negative depends on the duty that stands correlative to the right in question. All rights-in-the-proper-sense imply a duty in some other or others as their correlate. But the nature of the duty can vary a good deal. In some cases, a right implies a duty in others only to forbear from interfering with the right the rights-holder possesses or asserts. In other cases, the duty extends farther and encompasses the objects to which the rights-holder's right extends. Simple examples can illustrate the difference. Consider the right to free speech. The rights-holder asserts a claim to be free to speak as he or she chooses. Duty-holders are obliged only not to interfere with the rights-holder's exercise of the right. No one has a duty to provide the rights-holder with a speech to deliver, with a forum in which to deliver it, or even to listen to the speaker. By contrast, the right to the money in your savings account is different. Here the duty-bearer, the bank, has the duty to supply the very thing to which the rights-holder lays claim, namely, the money in the account, when properly applied for, and so on. Contrary to what Holmes, Sunstein, Barber, and others say, this distinction is perfectly intelligible, perfectly lucid, and stable. There is no reason whatever to conclude that "all rights are positive."

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Now, of course, the identification of a stable line of classification between types of rights does not yet settle the politically most important question: What kinds of rights do we in fact have? Do we have rights like a right to health care (a positive right), which point to a welfare state, or those like the right to free speech, which do not necessarily do so? Holmes and Sunstein attempt to sidestep that issue by (falsely) declaring it a nonissue on the basis of denying the distinction between types of rights. Their denial is based not only on a failure to grasp the real dividing line between the two kinds of rights, but also on their confusedly throwing into the analysis a quite separate right, which makes the fundamental character of rights and their relation to government and law obscure. So far, I have spoken of rights as moral and not legal rights. In the perspective of the old liberalism, we have a basic right in addition to our other rights: we have a right to protection of our rights by government. This is what the idea of the social contract means to say. Originally, we have rights that are merely moral in character. Human beings being human, the possession of merely moral rights by no means guarantees that one will be able securely to exercise or enjoy one's rights. We need an agency to enforce or secure our rights. That is, in a Lockean framework, the point and purpose of government, and government therefore has a duty to its citizens to supply protection of their rights. A strong echo of this additional right is visible in the Fourteenth Amendment, where a right to (equal) protection of the laws is affirmed.

The right to governmental protection of rights is the positive dimension of rights that Holmes and Sunstein see when they look at rights. Since they limit their survey of the rights universe to legal rights, this additional right, of course, shows up as part of every right they see. Nonetheless, a better way to see this additional right would be as a shadow of the primary rights rather than as an actual component of the primary rights. The example of the right to property can help make all this clear. The right to property as it exists in a civil society is, in itself, a negative right. It is the right to inherit, purchase, lease, sell, hold, and convey real and personal property.[40] The immediate correlative duty involved is that all others must forbear from interfering with the congery of liberties, powers, and objects that go into the property right. Duty-bearers include both private individuals and entities like governments. Thus, the U.S. Constitution contains provisions that say the government may not deprive persons of property without due process of law. That is to say, the government is obliged to recognize persons as property-rights holders and to respect their property. The government may interfere with property only in recognizably valid ways and for recognizably valid purposes. These are

[40] This list comes from Section 1 of the Civil Rights Act of 1866 as reprinted in Henry Steele Commager, ed., *Documents of American History,* 7th ed. (New York: Appleton-Century-Crofts, 1963), 464.

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public purposes, which citizens can be conceived to have rationally authorized the government to pursue. Thus, the negative right to property by no means immunizes property owners from all governmental involvement or interference with property, but it does demand that government recognize property rights and be able to satisfy certain justificatory conditions when it interferes with those rights.[41]

John's property right, then, implies a duty in government, no less than in Ringo, Paul, and George, not to take from John what is his. John's right to property does not contain the correlate that government must supply him with property. That is a sure sign that this is a negative right, not a positive one. In addition to the negative property right, however, John has the "shadow-right" to the protection of his property by government. I call this a "shadow-right" not because it is in any way insubstantial, but because it shadows, that is, follows from and is in a sense a derivative of the primary right, in this case, the negative right to property. This shadow-right is a right John holds vis-à-vis government, which in this case has a duty to supply that to which John has a right. So if John's property is interfered with or threatened by others, government has a duty to protect it. If his Rolls-Royce is stolen, he can appeal to the authorities to (try to) recover it for him. John's shadow-right to the protection of the laws is thus a positive right. It accompanies but is not the same as the primary rights.

The implication for the Holmes-Sunstein doctrine should be clear: they find the line between positive and negative rights to be blurry or worse, because they fail to distinguish the primary rights from the shadow-rights involved. Perhaps, they might say in reply, the analysis could be drawn more sharply than they have drawn it, but the point remains the same: our negative rights do contain or imply or have as an accompaniment a positive-rights claim, for all negative rights imply positive rights (at least if they are legal rights). This is a far more defensible claim than the one Holmes and Sunstein make.

Even so, the distinction between positive and negative rights does not collapse, because the duties government has continue to differ according to whether the government's duty relates to a positive or a negative right. The right to protection of a negative right is quite different from what is involved in securing a positive right. In both cases, John has a right to call on government, and government has a duty to act. But what government is duty-bound to do is quite different.

If John has a right to, say, his Social Security check, then government has a duty to supply it. If Ringo has a right to free speech, government remains without a duty to supply a speech or to procure for him an

[41] Admittedly, the recent Supreme Court case *Kelo v. New London*, 545 U.S. (2005), throws some of this into question as valid constitutional law by supplying a very loose notion of "public purpose." The analysis nonetheless remains cogent within the framework of Lockean liberalism.

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audience for his speech. Its duty is not to interfere with or prevent Ringo from speaking, and to act, by supplying the protection of the laws, to prevent others from interfering with his right to speak (recognizing, of course, all the qualifications that must be made as to "time, manner, place," etc.). In both cases, government must (ought to) do something, but they are quite different somethings. It is just not possible to leap from, say, John's negative right to property (together with his positive right to protection of his property) to a welfare state. Holmes and Sunstein sought a short-cut to their destination, a Northwest Passage of political philosophy. Like the quest for most such short-cuts, theirs does not succeed.

Holmes and Sunstein have another argument on rights that is more far-reaching yet. Not only are all rights positive in the sense that they are not negative, but also, they say, all rights are positive in the sense that they are non-natural. "Rights," they say, "are interests on which we as a community have bestowed special protection, usually because they touch upon 'the public interest'—that is, because they involve either the interests of the collectivity as a whole or the fair treatment of various members of the community. By recognizing, protecting, and financing rights, the collectivity fosters what are widely construed to be the deeper interests of its members."[42] Rights, Holmes and Sunstein are saying, are not natural, inherent possessions of individual human beings but are endowed by "the collectivity," that is, by society. All men are endowed—by their society—with certain alienable rights. Thus they would rewrite the Declaration of Independence.

In so saying, Holmes and Sunstein indicate that they are breaking more with the liberal tradition than they normally present themselves as doing. They bring out the nonliberal character of this aspect of their argument when they gloss it out of Aristotle. Property is best understood as a social institution—the social granting of specific rights and powers to individuals—for the sake of achieving desirable "social purposes," for example, the improvement of "a nation's real estate and capital stock."[43] This more or less reverses the classic liberal understanding and, among other things, stands in significant tension with Holmes and Sunstein's own construal of the liberal tradition and their way of relating CWL to it. If the entire tradition is aimed at alleviating insecurity, or providing security for individuals, it seems that Holmes and Sunstein are committed to some prior notion of an individual claim or right that precedes social allocations of rights and powers and provides a standard for those allocations. Since they do not develop their argument extensively or very deeply, it is difficult to judge how they reconcile the different elements of their own argument, just as it is difficult to assess the merits of their explicit denial of natural rights. As it stands in their text, this denial is

[42] Holmes and Sunstein, *Cost of Rights,* 115–16.
[43] Ibid., citing Aristotle.

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merely an assertion and thus provides no occasion for assessing whether they can, in fact, self-consistently jettison the very notion of natural rights. I therefore leave this more radical and antiliberal argument aside, for it is not really an argument at all.

B. CWL and benefits

Sotirios Barber is another Henry Hudson, searching for his own Northwest Passage. In his book *Welfare and the Constitution,* Barber endorses the Holmes-Sunstein analysis of rights, but moves on to develop his own parallel argument in favor of the benefits model of the U.S. Constitution.[44] Where Holmes and Sunstein present their central argument in a chapter titled "All Rights Are Positive," Barber develops his in a chapter called "Every State a Welfare State." He outdoes Holmes and Sunstein in his lack of respect for his opponents' position. "The negative-liberties model," Barber tells us, is "indefensible, if not fraudulent."[45] The negative-liberties model is "pointless"; it "makes no sense."[46]

Holmes and Sunstein take as their point of departure the Constitution as a document of rights affirmations, and they go on to reason from these affirmations. Barber insists that that is far too narrow a way to view the Constitution. The Constitution provides a set of structures, processes, practices, and powers to accomplish things. As he rightly emphasizes, it just makes no sense to conceive of a constitution as having no point other than to prevent governmental action. Why have a government then? The limitation of governmental powers cannot be the sole or even the first thing. The first thing must be the existence and empowerment of government to act in some way; the reservations of powers and restrictions of action in the name of rights and individual liberties make sense only against a background of active, instrumental government.

Contrary to what the negative-liberties partisans and Holmes and Sunstein say, Barber points out that the very text of the American Constitution supports the alternative idea that government exists to do something. It grants powers (e.g., to spend money for the general welfare), and it states the ends of action in its preamble: to form a more perfect union, to provide for the common defense, to promote the general welfare, and so on. These positive empowerments, and, even more decisively, the ends to be achieved through them, must be given first place in thinking about what the Constitution is.

Barber thinks that the founders themselves are in agreement with his insistence on placing higher priority on the ends of action than on the means of action, to say nothing of limitations on the means of action.[47]

[44] Barber, *Welfare and the Constitution,* 15, 19, 49, 52.
[45] Ibid., 6.
[46] Ibid., 44, 51, 57.
[47] Ibid., 92–96.

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The preamble lists the ends, which are stated as a set of general concepts ("more perfect union," "general welfare") and not in terms of specific conceptions of these goods. The language of the preamble is very vague and general in order to convey the idea that the Constitution is dedicated to these general goals, which in varying circumstances must be interpreted so as to require us to draw on our best moral theories of matters like human well-being, and to reach a wide equilibrium, a maximal "fit" among moral insight, cultural potentialities of this (or any) society, and legal text.

Barber defends his position with much acumen and more than a little ingenuity, but at bottom it rests on the same confusion that underlies the Holmes-Sunstein analysis. We must begin by conceding, even emphasizing, Barber's first big point: constitutions and governments exist to do something. But Barber is quite mistaken to think that this fact refutes the negative-liberties model, for the negative-liberties model affirms that very thing—that governments are established "to secure these [negative] rights."

Barber is also quite mistaken to think that there is no logical line between affirming power to secure negative rights and affirming power to secure positive rights. Surely there is: it is just the logical line that distinguishes negative from positive rights. Barber needs to show that human beings possess positive (natural) rights, but like Holmes and Sunstein he is seeking a short-cut around that difficult task.

He believes that the Constitution affirms positive rights. For example, he says at the beginning of his book: "The American Constitution makes sense (and originally made sense) only in light of general substantive ends like national security, freedom of conscience, domestic tranquility, and the people's economic well-being."[48] All of these do indeed set tasks for government, but all but the last are clearly negative rights or manifestations of the shadow-right of which I have already spoken. National security requires great governmental exertion, but it is in service of the fundamental quartet of negative rights, life, liberty, property, and the pursuit of happiness. The right of conscience is itself a negative right. Domestic tranquility is exactly parallel to national security. Finally, it is not exactly clear what kind of right "economic well-being" is or whether it is a right at all. I do not recall noticing this as a power of government or even as an end in the preamble.

To Barber's list one might add "establishing justice," an end that *is* listed in the preamble. The affirmation that one of the ends of the Constitution is to establish justice is sometimes taken to mean that the American founders went beyond Lockean liberal commitments to premodern conceptions of politics such as we might find in Plato or Aristotle. This, I believe, is a misreading, for the founders understood the natural rights philosophy to specify what justice is and requires. The natural rights

[48] Ibid., 1.

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philosophy specifies justice in the sense that it expresses what is due or owed to each, or what is the "own" which each possesses by nature. It thereby provides a specification for the general formula for justice—to each what he is due, or to each his own. What is due, or what is most our own, are our rights and the objects of our rights. To establish justice, therefore, is, in the language of the Declaration of Independence, "to secure these rights." The preamble of the Constitution does not, then, commit the national government to anything that goes beyond the negative-liberties model, if properly understood.

In other words, neither Barber's correct observations about empowerments nor his claims about positive preambular rights get him where he wishes to go. There is a perfectly clear account of governmental empowerment and constitutional duty to act that is consistent with, and indeed demanded by, the negative-liberties model; there is a clear line of division that allows us to affirm the negative-liberties model without going on to affirm any and every positive right one might dream up.

I might add that even if constitutional welfare liberals were correct in their views about rights and powers, it would remain true that they pay very insufficient attention to the fact that the Constitution of the United States was established to accomplish only certain limited ends, ends that were not coextensive with the liberal goals set forth in, for example, the Declaration of Independence. The entire political system, state plus federal governments, was to "secure these rights," but the great bulk of rights-securing was to be accomplished by the states. This fact in itself casts grave doubt upon Barber's heavy reliance on the preamble to the Constitution. The large ends of the preamble must be read in such a way as to be consistent with the relegation of most rights-securing to the states. Admittedly, the Fourteenth Amendment made a difference in the federal system, but not such a difference as to transfer the task of securing basic rights to the federal government of the United States.[49]

V. Conclusion

Let me conclude by attempting to clarify what I think I have accomplished in this essay and what I have not. I have attempted to locate constitutional welfare liberalism as a "new liberalism" within the broad context of the "thousand liberalisms" we have seen emerge since Locke. I have approached this "new liberalism" from the perspective of the

[49] On the original federalism, see Michael P. Zuckert, "Federalism and the Founding: Toward a Reinterpretation of the Constitutional Convention," *Review of Politics* 48 (1986): 166–210. On the change in federalism effected by the Fourteenth Amendment, see Michael P. Zuckert, "Completing the Constitution: The Fourteenth Amendment and Constitutional Rights," *Publius* 22 (1992) 69–91; and Michael P. Zuckert, "Congressional Power under the Fourteenth Amendment—the Original Understanding of Section Five," *Constitutional Commentary* 3 (1986): 123.

original "old liberalism" and have concluded that the new liberalism's attempt to imply that the welfare state, as a matter of right, is the only logical or plausible rendition of a constitutional republic grounded in rights is quite false. The most significant insight I have brought to the analysis is the identification of the shadow-right, a right to the protection of one's primary rights by government. This shadow-right is indeed a positive right, but it does not obliterate the distinction between positive and negative rights as the constitutional welfare liberals argue; nor does it, as a positive right, in itself imply the existence of a plethora of (or of any) other positive rights.

I do not mean to imply that the failure of constitutional welfare liberalism entails the triumph of what Barber calls the negative-liberties model of government, however. I believe that the old-liberal rights theory, fully developed, does imply something beyond the negative-liberties model as depicted in constitutional welfare liberalism. The result of such a full development, I hasten to add, is not so far-reaching as the Barber benefit model, nor so far-reaching as FDR's "Second Bill of Rights." To work out the full implications of rights theory, however, is a large enterprise in itself, and thus cannot be undertaken here as an addendum to a focused analysis of the claims of one version of new liberalism, constitutional welfare liberalism.

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