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LIBERALISM AND THE CONSTITUTION

By Sotirios A. Barber

I. Introduction

The U.S. Constitution is widely regarded as the preeminent historical expression of philosophical liberalism, a conception of man and society that emerged in seventeenth-century England. If the fundamental assumptions and ultimate aims of liberalism were ever clear, they are no longer, for liberalism has reached a point of internal divisions at multiple levels. Some of today's self-styled liberals argue that reason can approximate objective moral truth, while others profess varieties of moral conventionalism and skepticism. Some liberals argue for a perfectionist state, a state actively concerned with the beliefs and attitudes of its people, while others insist that liberalism's essence is neutrality among conceptions of virtue and the good life. Some liberals worry about the "size" of government, while others worry about the competence of government.

One part of these debates about the nature of liberalism is the nature of rights in a liberal state—specifically whether a properly liberal understanding of government can admit a constitutional obligation to provide positive rights or, as I prefer, welfare rights, like rights to health care and education. I contend here that if the American Constitution qualifies as a liberal constitution, liberal governments can indeed be obligated to secure welfare rights. I support this contention here by reinforcing arguments I have made elsewhere for a welfarist view of the Constitution and by submitting additional arguments against limiting liberalism to protecting negative rights.

II. Welfare and the Constitution

I begin by sketching a positive view of the Constitution that fits the constitutional text and the leading argument for ratification. Here I consider questions of constitutional meaning from the perspective of citizens who accept the Constitution's authority. I assume what other writers have shown to be the metaphysical and epistemological beliefs of this perspective. I expect most readers of this essay will assume as I do here, and as I have argued elsewhere, that there are, or at least may be, better and worse understandings of what the Constitution means and what it requires in practice, as measured by something other than personal preferences

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and conventional beliefs.[1] I expect also that most readers will find that my principal moral conclusions, defended at length elsewhere,[2] require little more than deflation of textual and historical excuses for avoiding moral arguments altogether. The excuses I refer to are those favored in recent years by self-styled conservative jurists.[3] The Supreme Court has held twice over the past quarter-century, for example, that governments in America have no federal constitutional duty to provide police protection (logically, a welfare right)[4] against predictable violence.[5] In the most recent case, involving the murder of three children, the Rehnquist Court found no constitutional duty of municipal police to provide protection despite the order of a state court that made police action mandatory. Expose the fraud in the textual and historical arguments for such holdings, and you enlist the intuition that people generally would have little reason to value a constitution that failed to mandate the least of night-watchman services. Defenders of the Rehnquist Court will answer that free-world constitutions aim chiefly at limiting government, not empowering it. This answer, I trust, will conflict with the intuition that it would make no sense to establish a government for the chief purpose of limiting it. By showing (1) that the framers were more interested in empowering government than limiting it, and (2) that the constitutional text establishes an instrument of positive benefits—promising, *inter alia,* to "provide for the common Defense, promote the general Welfare, and secure the Blessings of Liberty"—I can reinforce the sense that the Supreme Court was wrong to declare no constitutional duty to protect helpless children from perfectly predictable violence. If my argument succeeds, a right to police protection could be the camel's nose that the Rehnquist majority feared. A constitutional duty to protect children from predictable violence could establish a presumptive constitutional duty to protect them from undeserved poverty, ignorance, and dependency.[6]

Arguments against this broader duty can take two general forms: a policy of taxing and spending to provide broader benefits is either (1) morally wrong or (2) counterproductive. The second kind of argument is compatible with welfarism, for it preserves the possibility of broader protection, and the authority to provide it, as prudence advises in changing circumstances. The first kind of argument cannot succeed; it is

[1] See Sotirios A. Barber, *The Constitution of Judicial Power* (Baltimore, MD: Johns Hopkins University Press, 1994), chaps. 6–7; and Barber, *Welfare and the Constitution* (Princeton, NJ: Princeton University Press, 2003), chaps. 4–5.

[2] Barber, *Welfare and the Constitution,* 8, 13–14, 25–26.

[3] For a review of these writers, see Barber, *The Constitution of Judicial Power,* chap. 4.

[4] Ibid., 12–15; Norman Barry, *Welfare* (Minneapolis: University of Minnesota Press, 1990), 79; Stephen Holmes and Cass Sunstein, *The Cost of Rights* (New York: Norton, 1999), 29–39.

[5] *DeShaney v. Winnebago,* 489 U.S. 189 (1989); *Castle Rock v. Gonzales,* 125 S.Ct. 2796 (2005).

[6] For an acknowledgment of this point by a supporter of the Court's position, see David P. Currie, "Positive and Negative Constitutional Rights," *University of Chicago Law Review* 53 (1986): 877–78.

either unpersuasive or a form of welfarism deficient in self-awareness. It is hardly persuasive that morality (expressed as justice, for example) requires government to protect the unearned opportunity of first possessors and the unearned (because inherited) wealth of their children at the expense of undeservedly disadvantaged children. When I say "at the expense of" the disadvantaged, I mean the tax on the disadvantaged imposed by the criminal law—that is, the criminal law's denial of the opportunities of the undeservedly poor (and their right in a state of nature) to help themselves to that part of the excess wealth of the affluent that they think they need for their survival. The classical rejoinder to this point is that protecting first possessors and their progeny creates a store of wealth and a net increase of opportunities that benefit everyone, including the poor. But this rejoinder is, of course, a welfarist claim. It contends that institutions that might initially seem unfair actually redound to the well-being of the poor.[7]

Let us assume, however, that we could prove that broader benefits would be morally wrong by some theory of what is right that is conceptually independent of a welfare claim. In that case, we could still ask why we should prefer the right thing instead of what benefits us, individually and/or collectively. A true conception of morality (separated, *ex hypothesi*, from well-being) might provide *some* justificatory reason for an act or a practice conforming to its requirements, but it would not constitute *sufficient reason* for such conduct. Because we can sensibly speak of reasons for acting unjustly, for example, justice alone seems an insufficient reason for acting.[8] Knowledge of what is good, in contrast, can constitute sufficient reason for action.[9] Thus, a *practical* argument invoking justice could not work if justice were disconnected from well-being. This leaves no way to avoid welfarist assumptions, and awareness of that fact should enable us to improve the welfarist assumptions we inevitably make.

III. The Constitutional Text

The surface welfarism of the constitutional text is clear. The preamble of the Constitution contains a list of ends or goods: a more perfect union, justice, domestic tranquility, the common defense, the general welfare,

[7] See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985). Epstein argues (pp. 11–18) that although state protection for first possessors means lost opportunities to late-comers, protecting first possessors yields more benefits for everyone. In *Welfare and the Constitution* (p. 149), I discuss the welfarist strain in Epstein's thought.

[8] See David O. Brink, *Moral Realism and the Foundation of Ethics* (New York: Cambridge University Press, 1989), 57–62, 240–45.

[9] Knowledge of what is right might constitute sufficient reason if Immanuel Kant is correct (in the first section of *The Groundwork of the Metaphysic of Morals*) that the only unqualified good is a will disposed to do what is right. I do not explore this possibility here because Kant's proposal seems to me a theory of the good.

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and the blessings of liberty. The preamble implies that the government whose establishment it announces is an instrument of these ends or goods—that they will be pursued through the actions of this government. This active instrumentalism calls for structuring and empowering governmental institutions, and that is what the Constitution is chiefly about. Article I establishes a legislature, structures it, and authorizes it to take specific kinds of actions. Section 8 lists most of these authorizations. Logically, this famous "enumeration of powers" indicates the kinds of purposes that the government is authorized to pursue and, indirectly, the kind of society it must cultivate if its ends are to be realized and its institutions are to survive.[10] Section 8 thus authorizes Congress to regulate commerce, coin money and regulate the value thereof, enact bankruptcy laws, and so forth. If we group these specified authorizations into associated kinds, construe them with the clause of Article VI that makes federal law supreme over state law, and reflect on what is conspicuously left out (i.e., the pursuit of religious truth and salvation), it appears that the paramount ends of this government and of the nation it represents are national security and prosperity.[11]

In keeping with the preamble's emphasis on substantive ends, Article I of the Constitution emphasizes institutions and powers: the two bodies of Congress and the kinds of things they are authorized to do. Yet Article I also mentions a handful of rights. Section 9 restricts Congress's power to suspend "[t]he privilege . . . of habeas corpus." It also prohibits bills of attainder, ex post facto laws, and titles of nobility. Section 10 imposes these last three restrictions on the states and adds a prohibition against impairing the obligation of contracts. These rights are clearly restrictions on power and, as such, they fit a negative view of the Constitution's principal function: to restrain government. However, Article I lists three additional rights that suggest a different logic. Section 6 extends qualified immunities from arrest to members of Congress during the legislative session and flatly prohibits questioning them "in any other place" (like a police station or a court of law) for "any speech or debate in either house" of Congress. These rights, while negative, are integral to something positive: the lawmaking function. Analogously, Section 8 empowers Congress (obligates Congress, a welfarist should say)[12] "to promote the progress of science and useful arts, by securing for limited times to authors and

[10] Sotirios A. Barber, *On What the Constitution Means* (Baltimore, MD: Johns Hopkins University Press, 1984), chap. 4, esp. 88–91, 97–104. For the theory of action on which I rely to connect powers (to act) with purposes (for acting), see Georg Henrik von Wright, *Norm and Action* (London: Routledge and Kegan Paul, 1963), 35–38.

[11] Martin Diamond, "The Federalist," in Leo Strauss and Joseph Cropsey, eds., *History of Political Philosophy* (Chicago: Rand McNally, 1972), 648–50; Walter Berns, "Judicial Review and the Rights and Laws of Nature," in Philip Kurland, Gerhard Casper, and Dennis Hutchinson, eds., *1982 Supreme Court Review* (Chicago: University of Chicago Press, 1983), 58–61, 65.

[12] Barber, *On What the Constitution Means,* 182–85.

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inventors the exclusive right to their respective writings and discoveries." These two provisions are not enough to establish a welfarist view of the Constitution. They do illustrate, however, ways in which negative rights can fit within a generally positive, ends-oriented, or welfarist view of the Constitution—a welfarist view established by the preamble, the history of the American founding, and the common-sense proposition that it makes no sense to establish a government for the sake of limiting it in a purely negative way.

Rights do not appear again until the last three paragraphs of Article III. Article II structures and empowers the presidency, and Article III establishes the Supreme Court, defines some of its composition and jurisdiction, and empowers (obligates) Congress to determine the rest. The right to trial by jury is specified at the end of Article III, Section 2, and Section 3 lists restrictions on government's power to charge, try, and punish persons for treason. Two additional rights appear in the Constitution of 1789 (i.e., before the adoption of the first ten amendments in 1791). Article IV, Section 2 obligates states to grant citizens of other states the "privileges and immunities" they extend to their own citizens, and the last sentence of Article VI—the document's last substantive provision before it concludes with the ratification procedures of Article VII—promises that "no religious test shall ever be required as a qualification to any office of public trust under the United States."

Though these rights can be interpreted negatively, as restrictions on government, they can also admit a positive interpretation, as integral to the pursuit of governmental ends. Jury trials can enhance public support for the judicial process by bringing the sense of the community to bear on concrete questions of civil and criminal justice. Defining treason narrowly helps to safeguard criticism of the government's foreign policy. Rights to criticize the government can be interpreted as elements of government's power because, according to the wording of the preamble, that power is dedicated to the common defense, implicitly as a real good. *Real goods like this are the only things that the Constitution authorizes government to pursue.* A real good is captured by knowledge of that good, not by a mere conception of that good, which can always be wrong. Where actors are fallible, criticism can expose false conceptions. Because exposing false conceptions is a step in the pursuit of better conceptions, defined as conceptions closer to the truth, the right to expose false conceptions is an element of the power to pursue better conceptions.[13] For another example, consider freedom from religious tests for office. This freedom can contribute to domestic tranquility, an end listed in the preamble. It also contributes to the self-critical and secular reasonableness that is integral to the (true) well-being of fallible

[13] Compare Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995), 181, 185–86.

actors trying to cope with a natural world whose essential features are not of their making.[14]

Beyond freedom from religious tests and the narrow definition of treason, two additional parts of the original Constitution imply fallibility at all levels: the immunity of members of Congress from prosecution for anything they might say in congressional debate, and the amending provisions of Article V. These freedoms to criticize policy and effect constitutional change make sense only if fallibility is supposed at all levels, including that of the supreme authority—the people of the United States—whose most authoritative expression is declared by Article VI to be the supreme law of the land. By conceiving these original rights (involving patents and copyrights, jury trials, congressional immunity, treason trials, and religious tests) in a welfarist fashion, we can see how to do the same for the apparently negative rights of the Bill of Rights, ratified in 1791. First Amendment rights to publish, petition, and criticize the government are integral to power dedicated to the pursuit of real ends about which the community and its agent-government can always be wrong. Freedom from religious establishments enhances prospects of domestic tranquility and the general welfare, on the theory that well-being requires the freedom and capacity for independent thought about reality, moral and nonmoral. Rights of criminal defendants (to judicially-issued search warrants, representation by counsel, fair trials, etc.) enhance prospects of punishing only the truly guilty, as justice, one of the ends in the preamble, requires. Security for investors and private property on publicly reasonable terms (in clauses that prohibit warrantless seizures and deprivations of property without due process, takings of property for public use without just compensation, and impairments of contractual obligations) seems a good way under foreseeable circumstances to enhance the material well-being of everyone in the community.

Textual warrant for this kind of interpretation occurs in Article V, which terms all properly ratified amendments "part[s] of this Constitution." To render negative liberties "parts" of a positive or welfarist whole—a whole whose welfarist character is established by the preamble, the history of the founding, and common sense—one must conceive negative liberties as elements of the power to serve real goods. Seen as a list of purely negative liberties, the Bill of Rights would make the Constitution either incoherent or pointless. Incoherence would result from giving equal weight to a negative and a positive—the negative logic of the Bill of Rights and the positive or welfarist logic of the Constitution *sans* negative rights. Pointlessness would result from permitting the putatively negative logic of the Bill of Rights to overpower the Constitution's positive logic; for no one can make sense of a constitution's establishing a government solely or chiefly for the sake of limiting it.

[14] Barber, *Welfare and the Constitution*, 88–91.

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IV. *The Federalist*

Anti-welfarists can concede the instrumentalist language of the constitutional text while denying a constitutional obligation in government to work for everyone's well-being, including that of the least well-off. Anti-welfarists can claim that the Constitution's ends centrally involve security for negative liberties, like the paradigm right of private property. I have anticipated this objection by highlighting the public-regarding way Article I authorizes Congress to secure rights of intellectual property—patents and copyrights not (merely) for the sake of justice to inventors and authors but (also) for the sake of progress in the sciences and useful arts. Later in this essay, I will contend that although ends or goods can be the objects of negative rights, negative rights should not be conflated with their objects because negative rights as such cannot be ends; that is, the goodness or value of rights cannot consist in their negative aspect. First, however, I must complete my showing that the Constitution is a welfarist constitution. Because many anti-welfarists find constitutional meaning more in (their reading of) the framers' intentions than in the constitutional text, I will have to supplement my treatment of the latter with a defensible version of the former. I claim no more than a defensible version of the framers' intentions. I claim no knock-down version, for no such version exists.[15] And even if it did, its normative relevance could be established only through a moral argument whose very launching would imply the normative inadequacy of any mere historical fact of the framers' intentions. Assuming *The Federalist* is a defensible source of the framers' intentions, I show here that one does not have to strain to see continuity between the framers and the New Deal.[16]

[15] See Walter F. Murphy, "Constitutional Interpretation: The Art of the Magician, Historian, or Statesman?" *Yale Law Journal* 87 (1978): 1752–71.

[16] I speak here not of Alexander Hamilton, James Madison, and John Jay, but of "Publius." In adopting their chosen pen name, I assume the unity of *The Federalist* and the separability of an argument from the private motives of its authors—that is, motives not publicly stated or implicit in the argument itself. Assuming the unity of *The Federalist* is necessary for anyone who would treat that work as a source of normative guidance, for an internally contradictory message cannot function as a norm. A presumption against the undisclosed motives of an argument would be uncontroversial in most contexts. It is not uncontroversial here, however, because of the famous split between Hamilton and Madison in the 1790s. I give a Hamiltonian interpretation to *The Federalist* for two reasons. First, Madison was in fact a strong nationalist and an ally of Hamilton during the ratification period. Second, *The Federalist* is, on its face, more of a strong-government and nationalist argument than a weak-government and states'-rights argument. John Marshall and Joseph Story gave *The Federalist* a nationalist reading, and I know of no professional student of *The Federalist* who has hazarded a states'-rights reading of the work as a whole. Modern exponents of states' rights prefer either to take evidence of the framers' intentions from arguments in the state ratifying conventions or to ignore the main thrust of *The Federalist* in favor of its defensive responses to Antifederalist criticisms. The present treatment of *The Federalist* draws on Barber, *The Constitution of Judicial Power,* chap. 2. My understanding of *The Federalist* has been heavily influenced by Martin Diamond and Herbert Storing, two pre-Reagan conservatives widely recognized by two generations of political scientists as leading interpreters of the

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The leading complaint of Publius's Antifederalist critics was that the proposed constitution would require state governments to surrender too much power to the national government. This charge has several dimensions, and the complete answer to it must be collected from different parts of *The Federalist.* But the heart of Publius's response appears in the most emotional paragraph of all the Federalist papers, the second paragraph of *Federalist No. 45.* Here Publius urges, in welfarist fashion, that his critics should ask not how the transfer of power will affect the state governments, but "what degree of power" is essential to "the purposes of the federal government." These purposes include, he says, security against foreign danger, peace among the states, and security against "violent and oppressive factions which embitter the blessings of liberty." Union, he adds, "has been shown to be essential" to these purposes—"in a word . . . essential to the happiness of the people of America." This makes it "preposterous" to object to the new government from fear that it "may derogate from the importance of the governments of the individual States." Those who raise states'-rights objections revive in new form the "impious" old-world doctrine that "people were made for kings, not kings for people." They forget that "the public good, the real welfare of the great body of the people, is the supreme object to be pursued, and that no form of government whatever has any other value than as it may be fitted for the attainment of this object" (45:309).

The spirit of the forty-fifth paper dominates *The Federalist.* Its positive message governs the organization of the entire work. Toward the end of the first paper, Publius promises a series of papers that will show: (1) the utility of the union to the nation's "political prosperity"; (2) the insufficiency of the Confederation to preserve the union; (3) the necessity of a government "at least equally energetic with the one proposed"; (4) the conformity of the proposed constitution to republican principles; (5) the "analogy" of the proposed government to the state constitutions; and (6) the "additional security" the Constitution "will afford" to republicanism, "to liberty, and to property" (1:6–7; italics omitted). The first three themes are assertive in nature; they emphasize ends, powers, and the superiority of the new government. They fit within an overall positive view of the Constitution. The last three themes are defensive in nature; they would assure Publius's audience that the new government is not a threat to their personal and political liberties. In Publius's hands, the defensive themes are consonant with the positive themes. This is evident in what he eventually says about the "additional security" to liberty and property and in his argument against a bill of rights.

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founding. See Diamond, "The Federalist"; and Herbert J. Storing, "The Problem of Big Government," in Robert A. Goldwin, ed., *A Nation of States* (Chicago: Rand McNally, 1961), 65–87, esp. 79–85. References to *The Federalist* are from the edition by Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961). In-text references appear in parentheses with the page number following the paper number and a colon; "*Federalist No. 1,* p. 3" will thus read "(1:3)."

In *Federalist No. 85,* the concluding paper, Publius recalls his sixth promise, namely, to elaborate additional securities to liberty, property, and republican principles. Instead of launching a new discussion, however, he claims to have redeemed this promise through all that he has previously shown about the need for a new government. The securities to liberty, property, and republicanism "consist chiefly in the restraints which the preservation of the Union will impose upon local factions . . . in the diminution of the opportunities for foreign intrigue, which the dissolution of the Confederation will invite and facilitate; in the prevention of extensive military establishments, which could not fail to grow out of wars between the States in a disunited situation; in the express guarantee of a republican form of government to each; in the absolute and universal exclusion of titles of nobility; and in the precautions against the repetition of those practices on the part of the State governments which have undermined the foundations of property and credit, have planted mutual distrust in the breasts of all classes of citizens, and have occasioned an almost universal prostration of morals" (85:588). In brief, and with the one exception regarding titles of nobility, the additional security to liberty, property, and republicanism consists in provisions of the new constitution that have augmented national power at the expense of the states. Power and liberty, it seems, are on the same side, or can be if the power is properly structured and the sphere of government sufficiently enlarged. The final paper thus recalls a leading if not the leading message of the first paper: "the vigor of government is essential to the security of liberty; . . . [and] in the contemplation of a sound and well-informed judgment, their interests can never be separated" (1:5–6).

Consonant with this message is Publius's well-known argument against a bill of rights. In *Federalist No. 84,* he says that in the proposed constitution a bill of rights would be unnecessary and dangerous; he says also that it would be "impracticable." A bill of rights is unnecessary because "it would contain various exceptions to powers not granted." Why guarantee a free press, for instance, "[w]hen no power is given by which restrictions [on the press] may be imposed?" Restraining power not given would be dangerous because it "would afford a colorable pretext to claim more [power] than were granted." Restrain a power not given and "men disposed to usurp" can claim "with a semblance of reason" that there is a power there to restrain—a power, say, "to provide proper regulations" of the press. Finally, the "aphorisms" typical of "our State bills of rights . . . would sound much better in a treatise of ethics than in a constitution of government." No one can give something like "liberty of the press . . . any definition which would not leave the utmost latitude for evasion." In the end, its security "must altogether depend on public opinion, and on the general spirit of the people and of the government" (84:579–80).

When Publius says that specifying a right to an act or activity is unnecessary where the Constitution grants no power to regulate that act or

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activity, he assumes that a right is violated only by acts whose governing purpose is violating the right. This suggests, for example, that if a government aims at victory in war, and restraining or punishing a given publication appears necessary for victory, then the government can restrain the publication without violating the right. From this it would follow that there is no right to freedom of the press, speech, religious exercise, and so forth, to the extent that abridging any of these freedoms appears necessary to some authorized end such as winning a war, creating a national market, or securing equal educational opportunity for oppressed racial and ethnic minorities.[17] This view of ostensibly "protected" rights all but makes them hostage to the perceptions of necessity and value of the political forces that control judicial appointments. Publius suggests as much when he says, in his third argument against a bill of rights, that the spirit of the people and the government will control what rights are taken to mean. Disturbing as this may be to the modern ear, how could it be otherwise in an imperfect world where, as Publius says in *Federalist No. 51,* men are not angels and angels do not govern men? (51:349). No one can make sense of a constitution that provides unqualified exemptions from the power to secure the ends for which it was adopted.[18] Fully defensible constitutional rights must therefore be seen as elements of power, not genuine exemptions from power. Examples would include intellectual property rights justified in terms of—and therefore limited by—"the progress of science and useful arts,"[19] and freedom of speech as a rational response to human fallibility in pursuit of real goods.[20]

Publius's third argument against a bill of rights deserves further comment here. His position is that the security of rights depends ultimately not on the words of the Constitution as applied by judges, but on the nation's political culture. The upshot of this proposition is that a commitment to rights necessitates a perfectionist state, a state that actively influences the beliefs and shapes the character of its people. Again, it could hardly be otherwise. You cannot expect racists to favor any but a racist view of Fourteenth Amendment rights, a view that favors results that belong to a racist view of the world. You cannot expect members of the religious right to respect religious diversity or a scientific outlook. You cannot expect doctrinaire free-marketeers to acknowledge their dependence on the redistributive state or to see their conception of

[17] Vestiges of Publius's assumption survive in present-day doctrines of American law like the "secular-regulation rule" in free exercise cases (which holds that incidental effects of generally applicable laws enacted for secular purposes do not offend the freedom of religious exercise) and the rule that government can abridge protected rights if there is "no less drastic means" to realizing "compelling governmental interests."

[18] Holmes and Sunstein, *The Cost of Rights,* 99–101.

[19] Ibid., 115–16; Barber, *Welfare and the Constitution,* 48–50; compare Aristotle's *Politics,* 1263a.

[20] Barber, *Welfare and the Constitution,* 55–56, 121–22; Holmes, *Passions and Constraint,* 185–86.

equal opportunity as fraudulently narrow. Commit yourself to equal protection, freedom of conscience, and equal opportunity, and you commit yourself to educational and economic strategies aimed at weakening racism, dogmatism, and greed. To generalize and to gloss *Federalist No. 1*'s view of liberty and government as on the same side: *people genuinely interested in negative rights will want big government to secure positive rights.* An oath to preserve and defend the Constitution (including the Bill of Rights) turns out to be an oath to promote certain attitudes, beliefs, and conditions—a belief in the soundness of a scientific worldview, for example, along with attitudes like racial inclusivity and religious toleration, and conditions like equal economic, political, and social opportunity.[21]

This active governmental concern for the beliefs and attitudes of the people—this liberal perfectionism—need not mean dogmatism and totalitarianism. If, as Publius says, no form of government whatever has any value other than as it may be fitted for attaining the general welfare, neither does liberalism. If all can err about the true meaning of the general welfare, so can liberals. If a defining feature of liberalism is an appreciation of human fallibility in a natural world of which humankind appears but one of many dependent parts, then liberalism is fallible too. Liberals generally should, and many do, appreciate that their essentially secular view of the good and its pursuit may ultimately be wrong. Liberals should therefore take pains to tolerate nonviolent forms of antiliberalism, from global philosophic skepticism and radical historicism to sectarian dogmatism and dogmatic secularism.[22]

Accordingly, Publius's view of rights is fully integrated into his larger view of government. *The Federalist* opens with a clear welfarist message: The nation needs a new constitution because the old one does not work; it is inadequate to "the existence of the UNION . . . [and] the safety and welfare of . . . [its] parts" (1:3). Publius also mentions "liberty" in addition to safety and welfare, but here he sees liberty as an end *of government*—that is, as a positive good secured through the agency of the coercive authority that government is.[23] He holds that a good constitution will establish a strong and efficient government, because such a government is essential to "the security of liberty." He urges skepticism toward politicians who would separate the interests of liberty and government, for "a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidden appearance of zeal for the firmness and efficiency of government" (1:5–6). The proposed constitution would establish the requisite government; it is the "safest course for your liberty, your dignity, and your happiness" (1:6).

[21] Barber, *On What the Constitution Means,* 72–77.
[22] See Barber, *Welfare and the Constitution,* 121–23.
[23] For Publius's view on coercion as essential to government and law, see *Federalist No. 15,* 95–96.

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The second paper then turns to the first question Publius promised to discuss: "The utility of the UNION to your political prosperity" (1:6; italics omitted.) *Federalist No. 2* introduces a series of seven papers on national security and the need to avoid war among disunited states by identifying the entity whose interests in security and peace are in question; that entity is the nation as a whole. "[T]he people of America," it seems, already exist as a cultural unity ("same ancestors, . . . same language, . . . same religion, . . . same principles of government, . . . [people] very similar in their manners and customs"). Having fought "side by side throughout a long and bloody war," this people has a history of its own. This same people also has a common inheritance "so proper and convenient for a band of brothers," a blessing from "Providence"—namely, "one connected, fertile . . . country, . . . blessed . . . with a variety of soils and productions, and watered with innumerable streams" that form "highways" for "easy communication" and "a chain around its borders, as if to bind it together" (2:8–10). As Publius poses it here and elsewhere (esp. 14:87–89), the question is not whether to unite a country that is already united; the question is whether to divide the country by rejecting the plan for a more perfect union. With the Constitution's defeat and (he assumes) the subsequent dissolution of the union, the question will be whether, on any occasion, any one of the several states will have sufficient reason to help another under attack by a foreign power. Should union be strengthened, an attack on a part will be an attack on the whole (4:22–23). And since Publius assumes an existing cultural union, he refers in these papers not to the shipping and other interests *in* America vis-à-vis the shipping and other interests of European powers, but to the shipping and other interests *of* the nation as a united whole. Notwithstanding the private ownership of the entities that make up the transportation sector, Publius addresses the electorate at large and refers to "our carrying trade," "our commerce," and "our own vessels." He argues that the military and other resources of one united nation can better protect and promote "our carrying trade" vis-à-vis that of other nations (4:19–20). Because he presents power to promote and protect "our carrying trade" as a reason for adopting the Constitution, Publius takes for granted that his readers share the identity he attributes to them.

The ninth paper introduces the best-known paper of the series, *Federalist No. 10.* In the first nine papers, little or nothing occurs that either resembles or supports the suggestion that the legislative function of constitutional government is one of aggregating partial or private interests. These early papers appeal to public-spiritedness in behalf of public purposes; they emphasize power and suggest little about exemptions from power. The emphasis remains positive even when liberty is discussed. Liberty is seen as an end of government, a positive good to be enjoyed under government's protection (1:5–6). Government is therefore a good thing, and the new constitution will make government better by strength-

ening it. This multilayered emphasis on the positive seems to change in *Federalist No. 10*, where the concern seems to be making government not more efficient, but less efficient, and the common-sense strategy of cultivating public-spiritedness gives way to one of coalition-building (interest aggregation?) among a large number of self-serving interests.

Yet Martin Diamond, whose analysis of *The Federalist* has influenced many political scientists for more than a generation, proved that there is more to *Federalist No. 10* than meets the eye. To appreciate the continuity of this tenth paper with the New Deal, we must attend to Diamond's analysis of the paper. Diamond pointed out that movement from a small to a large country would not guarantee the political pluralism needed for Publius's solution to the problem of majority faction. A large territory with a large population could as easily be polarized along several lines, such as wealth, religion, or, we could add, race.[24] Whether a nation's group structure is pluralist or polarized depends on how people see themselves politically. However, Publius is not entitled to assume that Americans will see themselves chiefly in terms of narrow economic interests and not as Catholics against Protestants, rich against poor, or, we could add, black against white. A related problem is Publius's view of modern government's "principal task," which he identifies as regulating economic conflict (10:59). Economic conflict arises from "the various and unequal distribution of property," which Publius calls "the most common and durable source of faction" (10:59). However, he also recognizes other sources of social division, such as "a zeal for different opinions concerning religion, concerning government, and many other points" (10:58–59). Why not regulate these other kinds of conflict? How can it be enough to leave noneconomic conflicts to the state governments after *Federalist No. 10* recognizes the possibility of sectarian faction and argues that the states are incompetent to control majority factions generally? If the states could control majority religious and ideological factions, why could they not deal with majority economic factions? These problems force us to ask whether Publius's theory is adequate to the full range of social problems that he himself identifies.

We therefore have a choice regarding *The Federalist*: we can either look elsewhere for guidance on constitutional meaning, or we can seek a way to save Publius from his difficulties. The latter effort begins by asking if there are any conditions under which Publius can reasonably assume (1) that the large republic will be pluralist and not polarized and (2) that regulating economic conflict at the national level will ameliorate the country's noneconomic divisions. If we find answers to these questions, we must also ask (3) how the nation will achieve and maintain those conditions. Diamond answered the first two questions, and Herbert Storing, Diamond's friend and colleague, answered the third. Both writers answered

[24] Diamond, "The Federalist," 648–49.

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from a Hamiltonian reading (that is, a nationalist and strong-government reading) of *The Federalist* and the founding generally. Diamond reflected Hamilton's commercialist view of society and government's mercantilist relationship to economy. Storing reflected Hamilton's emphasis on executive power.

Our first question relates to the conditions under which the large republic will be pluralist and not polarized. The system outlined in *Federalist No. 10* is one in which political interest groups form and reform changing electoral and legislative coalitions that exclude no stable minority for long. Diamond argued that the people who belong in this picture must live in an urban-industrial society (because an agrarian society lacks the large number of economic groups around which to form political interest groups). A people who see their political interests in terms of their economic interests will have to be a more-or-less materialistic people. This quality is the key to answering our second question, regarding how the promotion of a certain economy might ameliorate noneconomic divisions. Materialistic people want government to protect their physical security and promote their material well-being. Even if they care for the salvation of their souls as individuals, they will not insist that the government facilitate or compel the salvation of their neighbors' souls. This makes them appear religiously and ideologically tolerant. These people will also be a democratic people in several ways. They will support equal economic opportunity regardless of class or religion or (we could add) race or gender, lest the society divide along these lines. They will value equal political opportunity for the same reason.[25]

To avoid polarization and the politics of resentment, the typical citizen of this large commercial republic must have evidence that his or her achievements reflect more-or-less what he or she has been willing to work for. This evidence can only take the form of upward (or downward) mobility for people who start poor (or affluent) and a fair distribution of wealth and status across lines of religion and (we could add) race and gender. A poor man who is black must know many blacks who are not poor in order to believe that racism is not a major cause of his poverty. He must see poor people become rich and rich people become poor in order to feel that people generally have what they deserve. Such a society would also have to be a wealthy society, for much wealth would be needed to feed the economic ambition of everyone willing to work and to convince people that the system is basically fair in practice, not just theory. To this Diamond added with caution that perhaps the wealth of this society would have to increase more-or-less indefinitely—that the society had to be committed to ever-expanding personal and national wealth.[26]

[25] Martin Diamond, Winston Mills Fisk, and Herbert Garfinkel, *The Democratic Republic* (Chicago: Rand McNally, 1966), 77–80.

[26] Ibid., 80.

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Diamond hesitated about this last condition of the large commercial republic. A student of Nietzsche and Tocqueville, he may have been concerned with what a commitment to economic growth would do to autonomous individuality and public-spirited citizenship. A Marxist in his youth, he may have seen that economic growth would eventually mean a global oligarchy beyond the control of any government, as well as economic polarization at home (a growing "income gap") caused by capital flight to cheaper labor markets abroad. He might also have worried about the violent reaction of anti-Western cultures targeted as sources of raw materials and as markets for Western goods and ideas. Diamond might have found this last prospect especially threatening to a highly differentiated and interdependent society that is profoundly dependent on increasingly complex and vulnerable technologies.

In any case, I do not contend that the elements of the large commercial republic constitute the ends to which the preamble of the Constitution is dedicated. I think Diamond was right to hold that the features of the large commercial republic *are* necessary for the success of the system outlined in *Federalist No. 10*. And I have argued elsewhere that these features can constitute working conceptions of ends found in the preamble, such as justice and the general welfare. The conception of individual well-being favored by these ends focuses on the possession of the capacities (intellectual, moral, and material) and the opportunity to engage in the lawful pursuits of the large commercial republic to the end of securing for oneself, if one wants them, such goods as adequate nutrition and housing, health care, education for one's children, some leisure, and a secure retirement.[27] The general well-being would include, ideally, the well-being of each responsible member of the community. But these conceptions of the preamble's ends are *mere* conceptions; they may be false. It is hardly beyond contention, for example, that well-being must be conceived in terms of material goods and the faculties and opportunities for acquiring them, as typically American as these aspirations are. Have people been better off, and may they again be better off, in settings that define well-being largely in terms of spiritual goods? Would people be happier, as current research suggests, with less wealth and economic mobility and more leisure and stable families, friendships, and communities?[28] Assume the Constitution is what it says it is, an instrument of things like the people's welfare, and acknowledge the gap between any conception of well-being and the real thing, and you may conclude that a truly well-off people are well-off due to a certain capacity. I mean the intellectual, psychological, and material wherewithal to do what the founding generation did: assess their problems and fashion new institutions according-

[27] Barber, *Welfare and the Constitution*, 106–17.

[28] See Robert E. Lane, *The Loss of Happiness in Market Democracies* (New Haven, CT: Yale University Press, 2000), chaps. 5–6.

ly.[29] A constitution adequate to real ends will preserve the capacity for constructive social and governmental change. Whether Americans still have this capacity (or ever really did) is something we can debate. I have discussed this problem elsewhere, and I will not say more about it here.[30] I will say, however, that this element of national well-being—the capacity for constructive change—amends our understanding of the ends of government to include some freedoms of speech, press, political association, religious association, and academic inquiry, and all that accompanies these freedoms, including a politics of public reasonableness, the toleration of reasonable diversity, and private property held on reasonable terms. Seen in this light, property and the freedoms of speech, religion, and the rest are not mere limitations on our collective power as a people. They are elements of that power, for without them we cannot pursue *real* as opposed to merely *apparent* goods.

The American Constitution thus embodies an appreciation of *human fallibility* and a recognition of *higher authority* (either God or nature) which is common to both the Christian and pagan branches of the Western tradition. An element of that tradition at least since Homer's time has been pride in a people's ability to acknowledge and provide for the fact that its beliefs and practices may be wrong. The larger community typically becomes aware of that fact through the agency of some unpopular individual such as Socrates, to whom Publius alludes at one point (63:425). And when individuals or minorities brave "the perils of the community's displeasure" and change the public's mind, the community honors them as benefactors (71:482–83). Because Western thought from the beginning has valued truth over convention and has associated truth with the dissenting individual, the individual enjoys a presumptive dignity. American law reflects this presumption in places like the free speech and criminal-defendant provisions of the Bill of Rights and the guarantees of civil freedom, due process, and equal protection in the Civil War amendments.

From *Federalist No. 10* our quick tour turns to *No. 15* and Publius's criticism of the Articles of Confederation. We know in a general way that the Articles were inadequate to the country's needs. If we could learn more of the specifics, we could better appreciate the structure of the proposed government, for we can assume that the latter was designed to avoid the defects of the former. *Federalist No. 15* discusses "the great and radical vice in the structure" of the Articles, which is that the Continental Congress passed laws that applied not directly to individual citizens, but to the several states (15:93). Under the Articles, Congress's laws took the form of requests or *requisitions* to the state legislatures, requisitions for things like their individual share of the money Congress needed to pay

[29] Barber, *Welfare and the Constitution,* 113–14, 153–54.

[30] Ibid., chap. 6; see also Jeffrey K. Tulis, "Constitution and Revolution," in Sotirios A. Barber and Robert P. George, eds., *Constitutional Politics: Essays in Constitution Making, Maintenance, and Change* (Princeton, NJ: Princeton University Press, 2001), 116–27.

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down the war debt, support ambassadors and embassies abroad, protect settlers on the western borders, and pay the salaries and expenses of legislative and administrative officials at home. Because these requisitions were not backed by credible threats of force in cases of noncompliance, the states failed to respond fully and in a timely fashion, and Congress's aims were frustrated. Behind this structural defect Publius identifies a philosophic mistake: faith that voluntary compliance with law is sufficiently attractive to dispense with effective and credible threats of force against the noncompliant (15:96). This pair of structural-philosophical mistakes deprived the Confederation of what Publius calls "the energy and efficiency of government."

Publius does not emphasize strong government in his most famous paper, *Federalist No. 10,* but the need for strong government is the dominant message of *The Federalist* as a whole. The very first sentence of *Federalist No. 1* calls for a new constitution to correct "the inefficacy of the subsisting Federal Government." Publius accompanies this call with the important claims that "the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well informed judgment, their interests can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people, than under the forbidden appearance of zeal for the firmness and efficiency of government" (1:5–6). *Federalist No. 15* reminds us of this opening theme and leaves us with two questions: What or who will supply energy in government, and to what ends will this energy be directed? Diamond's theory of *Federalist No. 10* answers the question of ends in terms of the social conditions for the success of the system described in that paper. These social conditions include a growing economy, a people that values equal economic and political opportunity, and a sense in the community that people have more-or-less what they have been willing to work for—in general, the social conditions of the large commercial republic when it is working as it should. We shall see that Herbert Storing answered the question of who will supply the needed energy: The Constitution institutes presidential government because Publius puts the president in the best position to exercise the initiatives of government.

The kind of energy discussed in *Federalist No. 15* and elaborated in the next several papers is a negative energy: energy to enforce the law against people who disobey. Energy of a different kind emerges as Publius turns to the specific *powers* granted to the new government, powers in the sense of authorizations to enact specific kinds of laws (such as regulations of commerce) or to take certain kinds of actions (such as declaring war). At the beginning of *Federalist No. 22,* Publius defends the commerce power of Article I, Section 8 in terms of the benefits to the nation of stable trade and financial dealings with foreign nations and among the states of the union. He goes on to justify "the power of raising armies" in terms of "a vigorous and economical system of [national] defense" (22:135–38). The logic

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of these references is made explicit in *Federalist No. 23*: *powers are granted for the sake of ends.* In this paper, Publius can barely restrain his impatience with critics who say that the new government will have too much power. He responds that critics must first decide what they want from the new government. If they want that government to provide national defense and facilitate a stable national market and favorable economic and political relations with other nations, then it follows "that that government ought to be clothed with all the powers requisite to the complete execution of its trust." This conclusion, he says, "rests upon axioms as simple as they are universal: The *means* ought to be proportional to the *end.* The persons, from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained" (23:147). He says that how much power may be needed is "*impossible to foresee*" because of "*the extent and variety of national exigencies, or the corresponding extent & variety of the means which may be necessary to satisfy them*" (23:146–47; his emphasis). He applies this proposition not only to national defense, where it would be more acceptable to more people, but also "to commerce, and to every other matter to which [the new government's] jurisdiction is permitted to extend" (23:149). So here we find a *positive energy:* energy for making laws and taking actions in pursuit of the desiderata for which the government was instituted.

Publius recognizes that power in government, while essential, is also risky, for power can be abused. His general approach to this problem is not to withhold power from the new government but to arrange the government's "internal structure" in ways that make abuses of power less likely and more easily detected and remedied. When Publius completes his lengthy discussion of "the general mass of power allotted" to the new government, he turns to that government's "internal structure" and the Constitution's "distribution of this mass of power among [the government's] constituent parts." *Federalist No. 47* begins this inquiry by acknowledging that the "accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny" (47:324). How to keep the several parts of the government in their prescribed places is now Publius's question. He goes on to reject several answers that depend on some form of citizen or official virtue. He will rely neither on the law-abidingness of elected officials (*Federalist No. 48*) nor on the public's devotion to constitutional boundaries (*Federalist No. 49* and *No. 50*). "[P]ower is of an encroaching nature," he says in *No. 48,* too strong to be restrained by mere "parchment barriers" (48:332). And in *Federalist No. 49,* he notes that although "it seems strictly consonant to the republican theory to recur to the same original authority [i.e., the people's] not only . . . to . . . new-model the powers of government; but also whenever any one of the departments [of government] may commit encroachments on the chartered authorities of

the others" (49:339), in the end the people's judgment "could never be expected to turn on the true merits" of a constitutional conflict among the branches of government. Appealing to the people insures that "the *passions* . . . not *the reason,* of the people would sit in judgment," for the people's judgment "would inevitably be connected with the spirit of pre-existing parties . . . springing out of the question itself" (49:342–43).

Publius's solution to the problem of "maintaining in practice the separation [of powers] delineated on paper" is announced in *Federalist No. 51*: "to divide and arrange the several offices [of government] in such a manner that each may be a check on the other." This system of mutual checks is not one in which virtue checks ambition; it is one in which ambition checks ambition. It "consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." In this way "the private interests of every individual, may be a sentinel over the public rights" (51:349).

This famous theory of checks and balances is widely assumed to express a negative view of government. Its focus is not on the good things facilitated by government, like national security and a stable national market; its concern is the abuse of governmental power and how to prevent it. Checks and balances are thus often linked with other sorts of restraints on national power, like the first nine amendments and the Tenth Amendment's promise that powers not granted to the national government are reserved to the states or to the people, a promise many construe as a grant of "states' rights" against the national government. Publius, however, offers checks and balances in lieu of devices for withholding power from the national government, devices like a bill of rights, a narrow specification of national powers, and explicit and categorical reservations of state powers. Publius's conception of checks and balances is part of a larger constitutional theory whose general thrust is clearly positive, for Publius connects checks and balances to the need for *energetic government.* As Storing observed, Publius has more in mind than "giv[ing] to each department an equal power of self defense." Looking back on the nation's experience with the state governments under the Articles of Confederation, Publius's great fear was the overbearing power of representative legislatures whose thoughtless response to public opinion too often defeated the public's true interests. "The legislative power," he says in *Federalist No. 48,* "is every where extending the sphere of its activity, and drawing all power into its impetuous vortex." Publius cites Jefferson's observation to similar effect and quotes Jefferson's famous remark: "'An *elective despotism,* was not the government we fought for'" (48: 133, 135; his emphasis). So when Publius turns in *Federalist No. 51* to the question of how to divide power among the branches, he says that it will not be sufficient "to give to each department an equal power of self defense . . . [because] . . . in republican government the legislative authority, necessarily pre-

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dominates." His "remedy for this inconvenience" is essentially to *divide and weaken Congress vis-à-vis the president and strengthen the president vis-à-vis Congress* (51:350). Storing pointed out that this strategy involves a president whose tenure and power, especially in times of crisis, are largely independent of Congress. This independent and unitary power turns out to be "the primary source of energy and direction for the government as a whole."[31] *Federalist No. 1* opens with a plea for strong or energetic government. Weakness is the essential flaw of the confederation that the Constitution is to replace. And when Publius turns his full attention to the question of what constitutes energy in government, he talks about the "ingredients which constitute energy in the executive" (70:472).

We need look no further into Publius's argument to establish that his purposes can be described in positive terms. He wanted goods like national security and national prosperity. When he referred to "liberty" in the abstract, he treated it not only as something to be secured by strong government against third parties (a negative liberty secured by state action against third-party threats), but also as a positive good, a general state of affairs to be achieved and enjoyed, a condition whose possession would mark a people as a free people, an affirmative end of government. His chief institutional concerns were consonant with this substantive orientation. His lengthy exposition and defense of generic *energy* or *power* and specific *grants* or *powers* consumed much more of his attention than the subject of negative rights. This is what you would expect of one concerned with substantive ends provided by or facilitated through government: power and the organization of power—power to pursue substantive goods efficiently and safely.

V. Publius and the Positive State

Architects of the New Deal shared Publius's view of national power as dedicated to, *and* as constitutionally adequate to, broad ends like national security and the economic well-being of the nation's people. Over the years, scholars of different ideologies have considered the New Deal and the "mixed economy" of the "welfare state" a moderate middle course between the theoretical extremes of pure socialism and laissez-faire and an extension in new circumstances of a Hamiltonian view of constitutional government.[32] Yet this position is often qualified or equivocal. Thus, Morton Frisch, a colleague of Storing and Dia-

[31] Storing, "The Problem of Big Government," 81.

[32] See Diamond, Fisk, and Garfinkel, *The Democratic Republic,* 490–95; Morton J. Frisch, "Franklin Delano Roosevelt," in Morton J. Frisch and Richard G. Stevens, eds., *American Political Thought: The Philosophic Dimensions of American Statesmanship* (New York: Charles Scribner's Sons, 1971), 225–35; Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism* (Cambridge, MA: Harvard University Press, 1993), 3–8, 15–21; and Cass R. Sunstein,

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mond, holds that the New Deal "was essentially restorative or conservative, rather than constitutive," that it found its "basis in the Madisonian system," and that Franklin D. Roosevelt correctly held that government was obligated "to satisfy those urgent human purposes, which, in essence, gave it its beginning and provide its present justification."[33] Frisch also holds, however, that the New Deal "constituted a profound modification of the traditional American Democracy . . . arrived at through a break with the earlier liberalism." The older liberalism, says Frisch, alluding to the Declaration of Independence without argument and citing neither the Constitution nor *The Federalist*, saw society and economy as more-or-less self-regulatory and government's role as that of securing not the people's welfare or happiness, but the "conditions" for the private pursuit of happiness. Measures like the Social Security Act, the Fair Labor Standards Act, and the Full Employment Act signaled a shift of emphasis from the mere conditions of happiness to the "enjoyment or possession of happiness" as a governmental responsibility to be discharged through "rearranging [the] economy, if necessary, and redistributing its benefits."[34]

James Ceaser, a political scientist influenced by Storing, displays the same ambivalence. In a recent essay, Ceaser cautions his fellow conservatives that their opposition to strong government weakens institutions they need to realize their own vision for the country.[35] Ceaser finds that the Constitution, properly understood, sanctions *unlimited discretion* in the national government in pursuit of essentially three ends: national security, national prosperity, and racial harmony.[36] From the Hamiltonian perspective that he explicitly adopts, Ceaser approves the New Deal's "expansion of federal power to handle some of the new problems posed by the conditions of the twentieth century." "New Deal program[s]," he writes, "were enacted during the most severe economic crisis in American history," and "[p]revious discretionary policy thinking [i.e., Hamiltonian thinking] would surely have provided in this situation for using national powers to their fullest—and perhaps even asking for more." Yet, writes Ceaser, by enacting programs "to ensure welfare and security," the New Deal parted with the tradition. When Roosevelt called for a second bill of rights that included jobs, medical care, retirement security, and education,

The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever (New York: Basic Books, 2004), 44, 57–59, 73.

[33] Frisch, "Franklin Delano Roosevelt," 221, 227, 230.

[34] Ibid., 228–31. Frisch ignores the statement in *Federalist No. 10* that regulating economic conflict is the "principal task of modern Legislation" (10:59). He also misses a matter regarding the Declaration of Independence on which I comment below: Jefferson treats the natural rights of life and liberty as "Ends" to be secured by government, effectively rendering them *positive* rights.

[35] James W. Ceaser, "What Kind of Government Do We Have to Fear?" in Arthur M. Melzer, Jerry Weinberger, and M. Richard Zinman, eds., *Politics at the Turn of the Century* (Lanham, MD: Rowman and Littlefield, 2001), 76–101.

[36] Ibid., 77–83.

writes Ceaser, he "turned the [negative rights] language of limited government on its head."[37]

One might resolve the tension in Ceaser's view of the New Deal by construing him as approving the regulatory policies of the New Deal and the Great Society, but not their redistributive policies: pursuing fair labor standards is constitutional, but Social Security is not; banning discrimination in employment is constitutionally authorized, but affirmative action is not. Interpretive repair of Ceaser's position will not take us far, however. He starts with a clear and, in my view, correct understanding of the logic of power as conceived at the founding, an instrumentalist logic that places few restrictions on government's pursuit of nationally authorized ends. He holds, for example, that a government limited only to the end of national defense "can become quite extensive," requiring "high taxes, a national mobilization of manpower, and extensive government economic planning," presumably of the kind the nation saw carried out by the War Industries Board of World War I and the War Production Board of World War II. Ceaser also has a generous view of constitutional ends. Far from limiting national power over the economy to regulating the flow of interstate commerce, Ceaser talks of "*promoting* the flow of commerce *and* economic development, and protecting the security of rights (especially economic rights from the effects of inflationary policies)."[38] He approves Hamilton's protectionist and mercantilist policies as serving "a direct constitutional purpose." He approves national support for scientific research and the nineteenth-century subsidies for western homesteading, land-grant colleges, and railroad expansion. He also believes the Supreme Court erred in the Civil Rights Cases (1883) by crippling Congress's power over the nation's race relations.[39] Add congressional power over the nation's race relations to the broad economic, military, and foreign-affairs powers of which Ceaser approves, and you have the potential for "very extensive" power indeed.

Yet Ceaser draws the line at "affirmative action," which he defines as government's guarantee not of opportunity but of "certain results for designated minority groups." According to Ceaser, to cross this line is to confound two kinds of rights: rights as expressive of (1) "what the 'demanding' individual want[s]" and (2) what one individual owes another "by way of restraint or duty." Rights of the second kind enhance "traditional" guarantees like freedom of speech, private property, and freedom from racial discrimination. The first kind includes "programmatic benefits" from education to "medical care, day care, . . . and so forth"—all at taxpayers' expense. Ceaser thus joins the American right's professed opposition to positive rights. Nonetheless, he urges his fellow conservatives

[37] Ibid., 84, 88.
[38] Ibid., 78; my emphasis.
[39] Ibid., 80–81, 90, commenting on the Civil Rights Cases, 109 U.S 3 (1883).

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not to overreact by turning against rights generally. Conservatives should not "compromise the protection of . . . real rights" like speech, property, and nondiscrimination; nor should they forget the "underpinning [of real rights] in Nature and the Constitution."[40]

One can excuse Ceaser for neglecting to defend the distinction between positive and negative rights, for the distinction is familiar and enjoys surface plausibility. However, Ceaser needs an argument for his suggestion that only negative rights are real, natural, and constitutional. He must argue for this conclusion if it is to be more than a way of identifying where he stands in the current debate over the role of government. Yet Ceaser offers no argument for his statement about real rights; he merely asserts it. And since this undefended proposition is crucial to his denial that the New Deal was faithful to the principles of the founding, that denial is also undefended. The need for argument on Ceaser's part is easy to see if we think for a moment not about "rights" but about the positive benefits that, on Ceaser's own account, the American government was established to pursue, either by provision or by facilitation. If, as Ceaser himself believes, a Hamiltonian view of constitutional responsibilities is best, and if, as Ceaser also believes, tax-supported benefits to American businesses from bond speculators to railroad developers have contributed to constitutional ends, then it is far from obvious why constitutional ends cannot be served by tax-supported police protection, housing, and education for all of the nation's children. Because (as far as I am aware) Ceaser has no answer to this objection, I turn to my colleague Michael Zuckert, a writer who does have arguments for the anti-welfarist position he shares with Ceaser.

VI. On the Origin and Nature of Rights

Zuckert views the debate about the size of government in America as including a debate over what kinds of rights the American system was designed to secure.[41] Those who argue for positive rights, like the right to health care (Zuckert's leading example), support big government because it takes big government to secure those rights. Those who favor only negative rights support government that while possibly extensive will also be in some sense "limited" and not as big as big government.[42] Zuckert's argument for limited government and negative rights takes the form of a contrast between John Rawls and John Locke, the former a philosopher of positive rights and big government, and the latter the philosopher of limited government and negative rights. Though Zuckert

[40] Ibid., 90, 92.

[41] Michael P. Zuckert, *Launching Liberalism: On Lockean Political Philosophy* (Lawrence: University Press of Kansas, 2002), 313.

[42] Ibid., 315, 326.

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adopts Locke's position as his own, he does not just assume Locke's authority; he offers arguments in Locke's behalf. This enables me to concentrate not on Zuckert's reading of other thinkers, but on Zuckert's view of the subject at hand: rights and the American Constitution. I contend here that whether Zuckert is right or wrong about Locke and Rawls, he must amend his views about rights and the Constitution.

Problems with Zuckert's position appear even before he begins his argument about the origins and the nature of rights and their relationship to constitutional government. Ultimately, he relies on what he believes is the greater intuitive appeal of negative rights over positive rights.[43] This reliance on intuition makes it a matter of some significance when he says at the outset that "most of us are committed" exclusively neither to positive rights nor to negative rights, but "to some mix" of positive and negative rights.[44] Because the distinction between positive and negative rights seems central to Zuckert's view of liberalism, his ambivalence invites speculation. Might he sense that at some level there is no meaningful distinction between negative and positive rights?[45] If common sense commits us to *a* mix of positive and negative rights, what particular mix does it commit us to? Why one mix rather than another? Can the best mix be something other than the one that best serves the general welfare and the common defense? These questions sit unanswered in the background of Zuckert's arguments against a welfarist view of the Constitution. Zuckert offers three such arguments: (1) that property precedes justice in a way that makes justice "rights preservative"; (2) that property in the self is the origin of (external) property and the origin of the priority of property to justice; and (3) that securing negative rights is the purpose or end of liberal government.

I will address each of these arguments in turn. First, however, I must note Zuckert's definitions of different kinds of rights. A negative right, says Zuckert, implies a duty "not to interfere" with some effort or action of some individual or group. A negative right, like a right to property or the freedom of speech, involves a duty to forbear. A positive right, Zuckert says, involves a "duty to supply" something, like health care; positive rights are welfare rights. And a right, says Zuckert, is a claim on someone else either to forbear or to supply something. But rights cannot be just any claims, he says; they must be "justified claims."[46] These definitions occur early in Zuckert's discussion, and I underscore an obvious implication of the third definition. If rights are not just claims but *justified* claims, *there*

[43] Ibid., 317, 327–28.
[44] Ibid., 315.
[45] Zuckert holds that rights to life, liberty, and property are natural rights and, by their logic, negative. He recognizes that the right to their protection by the state is a positive right, but he says this positive right is a civil right, not a natural right. Yet he also says that "it is a part of natural justice that one's legal rights be honored" (ibid., 315–16).
[46] Ibid., 314–15.

can be no recognized right without some prior sense of what makes for a "justified claim." This implication alone defeats Zuckert's contention (in his first argument) that justice derives from property—i.e., that there is no justice without property, that we start with property (not justice) in a state of nature, that property makes justice possible because justice is giving everyone his due, and that justice is therefore preservative of property rights (*pace* the progressive concept of "social justice").[47] Zuckert attributes this position to Locke and contrasts it with Rawls's view that justice precedes property and that property may therefore be distributed as justice (as fairness) requires.[48] Whatever position Locke holds, however, Zuckert cannot define rights as justified claims, conflate property with property rights, and say that justice is preservative of antecedent property rights. For if rights are *justified* claims and property entails property rights (duties of forbearance by others), then justice precedes property and property is limited to what can be justified in terms other than preserving property.

I turn now to Zuckert's second argument against a welfarist view of the Constitution. Zuckert's view that justice is rights preservative (i.e., property preservative) incorporates a second position he finds in Locke: that "human beings are self-owners." "On the rock of self-ownership," says Zuckert, "Locke builds his doctrines of natural rights, justice, and limited government." Zuckert treats this "rock of self-ownership" as a nonmoral or scientific fact. His initial description of the "rock" makes it is easy to accept as a scientific fact, apparently a psychological fact. This fact is "a fact witnessed in our most elementary locutions. . . . The center of the self is the 'I,' the pure abstract and empty ego, possessor of its own data of consciousness (*my* feelings, *my* ideas, *my* experiences), yet never lost in them." But Zuckert moves immediately from the self as possessing the data of one's consciousness to the self as possessing one's body as an "instrument of its [the self's] intentional actions." This self-ownership of body and action is "of the nature of a property right." As such, it implies "exclusivity vis-à-vis others," and "logic (although not the practical conditions of existence) requires that each self raising such a claim [to exclusive direction of one's body] recognize that every other self raises ipso facto the very same claim on the very same ground."[49]

When Zuckert acknowledges that the "practical conditions of existence" may defeat what "logic" requires, he defeats any claim that self-ownership of the body and its actions is a fact on a par with self-ownership of the data of one's consciousness. Putting aside possibilities like hypnosis and mind-altering substances that render a person temporarily "not himself," self-ownership of one's experiences (data of consciousness) plausibly holds even for persons held in slavery. The historical

[47] See ibid., 312, 317, 326.
[48] Ibid., 317.
[49] Ibid., 324–26.

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fact of slavery proves, however, that self-ownership of body and actions is at best a contingent fact, even of persons whose consciousness is unimpaired. One held as a slave (plausibly) "has his own experiences" as a matter of psychological fact, but the slave does not enjoy his body "as an instrument of [his] intentional actions in relation to [his] broader purposes in life." Stated as a scientific fact, the proposition that all persons own their bodies and their actions is therefore false. If it is a fact, it must be a *moral fact,* not a scientific fact. An unqualified statement of the moral fact would be that *denying self-ownership is wrong.* Adjusted to accommodate uncontroversial treatment of children, impaired adults, and convicted felons, the moral fact would support the prescription that *each socially responsible adult ought to be treated as having property in his or her body, insofar as he or she remains socially responsible.*

What principle, then, might establish a universal right of self-ownership? The traditional answer is some principle of *equality.* The Declaration of Independence proposes that all persons are created equal and equally endowed by their creator with inalienable rights, and thus no person rightly governs another without the other's consent. Zuckert makes a different argument, however, and in view of his anti-welfarism, well he might. For if a principle of equality helps to justify the property of each person in his or her body and actions, and if this self-ownership is the basis of all subsequent property, then we can argue that there can be no just claim to property—and therefore no property—in other persons. We can argue further that there can be no just use of property to reduce persons to a state of virtual property, such as peonage. We can argue with Diamond that when Publius says that "the first object of government is the protection of different and unequal faculties for acquiring property," he means protecting the faculties both of "the little . . . and the much propertied" in ways that make the former "sanguine about their chances" for improving their condition.[50] Depending, as it seems to depend, on a principle of equality, the principle of self-ownership seems compatible with efforts of the welfare state to help the little propertied overcome those of their disadvantages (vis-à-vis the much propertied) that may be undeserved.[51]

Do we need a premise of equality to establish a general principle of self-ownership? When Zuckert argues for universal self-ownership, he starts with the self-ownership of one person—"my" self-ownership, "your" self-ownership, not yet the self-ownership of all. He establishes this self-ownership of one person through introspection and reflection on ordinary locutions such as "my body," "my experiences," etc. Then, as we have seen, he announces that *logic* does the rest: logic requires that each

[50] Diamond, "The Federalist," 650.

[51] My application of Diamond's argument depends, of course, on the existence of undeserved disadvantages. However, I take it as uncontroversial that children of poor households have not earned their disadvantages.

self that raises a claim of self-ownership recognize the same claim of all other selves. Logic is not enough, however. "I own my body and actions" simply does not entail "everyone claiming to own his body and actions owns his body and actions." For I may see, and there may be, stark and important differences between me and others. To connect the first proposition and the second, at least one additional premise is needed, and a likely prospect would be the traditional one. I would then say that everyone owns himself just as I do *because we (I and the others of the "we" referred to) are all sufficiently alike in relevant respects.* Self-ownership alone does not imply forbearance; for self-ownership is consistent with liberty in a state of nature, where each has the right to do whatever he might think necessary for his preservation. To justify property as a social institution, self-ownership must be allied with principles of equality and community, and these principles, in turn, structure what the community can recognize and protect as property.

Zuckert's third argument against a welfarist view of the Constitution is that the purpose of liberal government is securing negative rights, not positive rights. Again, Zuckert purports to make Locke's view his own, and, again, I will comment not on Zuckert's understanding of Locke, but on Zuckert's own view of our subject. According to Zuckert, then, individuals leave a state of nature and enter civil society for the sake of securing their natural rights. The liberal state is thus "rights-securing," says Zuckert, and the rights secured are negative rights.[52] I think this position needs refinement and that a more precise account would start with individuals leaving a state of nature to protect not rights but *goods*—goods like speaking your mind, moving about as you please, or enjoying what you have worked for—the goods that make up the *substantive content* of rights. The liberal state does secure rights, but unless *rights* are conflated with *goods* or *ends* (as often happens), "rights-securing" falls short of the state's central function.

The state that is (negative) rights-securing secures more than rights because rights secure more than rights. I do not deny that a right can be negative or, better, that a right can have a negative aspect. If someone possesses or anticipates a good and seeks its enjoyment without interference from other persons, she can sensibly want others to leave her alone. But restraining or excluding others as such is not a good, and only a psychopath would seek pointless restraints on others. The point served by the negative aspect of a right is the right's *object,* the thing one wishes to enjoy without interference, and the object of a right must be a *good.* Life is a good. Liberty is also a good, as is the liberty to pursue responsible conceptions of happiness. The Declaration of Independence says that government is established to secure these things, and from the particulars of its indictment of George III (charged at one point with "abdicat[ing]

[52] Zuckert, *Launching Liberalism,* 314.

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Government here") the Declaration clearly supposes that these things are to be secured *through governmental power,* not through governmental inaction. The second paragraph of the Declaration does refer to these things as "unalienable rights." However, it also refers to them as "Ends" and as elements of the people's "Safety and Happiness." In doing so, the Declaration conflates rights and ends.

Conflating rights and ends is unobjectionable if the rights referred to are *positive* rights. Positive rights can be conceived as ends of government. Negative rights cannot be ends of government. Consider two kinds of negative rights. Constitutional rights conceived solely as negative rights against government cannot be ends of government because no sane person would establish a government for the sake of limiting it. Negative rights against third parties cannot be ends of government because restraining others is good only when it is instrumental to the preservation of good things like life and liberty. In contrast with negative rights, positive rights conflated with ends can be ends of government because ends are goods and it makes sense to establish a government to secure good things.

The pursuit and enjoyment of these goods, moreover, would ultimately be justified in terms of *public goods.* The private enjoyment of goods would be involved; but because, as Zuckert says, private rights are *justified claims* (i.e., *publicly* justified claims), their active protection by government must ultimately be seen as a strategy for pursuing public goods.[53] Actors who are fully aware of what they are doing would thus leave the state of nature in pursuit of more than their private interests. These actors would abandon self-help and position themselves to draw on the resources of a newly created public authority, an authority whose charter (if, like the Constitution, it is the expression of some "we") and character (as maker of impersonal and generally applicable laws) permit action only for public purposes. The resources of this authority are far from abundant. Using these resources to protect private rights requires sacrifices, sometimes great sacrifices. The private pursuits thus protected therefore must be functional to the common good.[54] Lincoln called these protected pursuits "laudable pursuits," and, as laudable, they are more than merely private.[55] Publius spoke aptly, therefore, when he began his argument for ratification with an appeal to the "patriotism" and "philanthropy" of his readers (1:3) and when he described checks and balances as a "policy of supplying

[53] Holmes and Sunstein, *The Cost of Rights,* 61–62, 115–17.

[54] Ibid., 44–48.

[55] Abraham Lincoln, "Message to Congress in Special Session: July 4, 1861," in Roy P. Basler, ed., *Abraham Lincoln: His Speeches and Writings* (New York: Grosset and Dunlap, 1946), 607. Here Lincoln said that "the leading object" of the national government was "to elevate the condition of men; to lift artificial weight from all shoulders; to clear the paths of laudable pursuit for all; to afford all an unfettered start and a fair chance in the race of life."

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by opposite and rival interests, the defects of better motives" (51:349)—motives he claimed to share with the generation to whose patriotism and philanthropy he appealed (49:341).[56]

VII. Constitutional Rights

Conceived as rights against government, constitutional rights cannot be ends of government. Constitutional rights do not have to be conceived solely in negative terms, however. They can be understood in terms of virtues and civic institutions or practices. Take the freedom of speech. As a restraint on government and nothing more, it could hardly be an end for which government was established. But human fallibility makes the practice of free speech instrumental to the pursuit of goods (well-being, security, etc.) conceived as real goods, that is, goods about whose constituents and conditions the government and indeed the entire community can be wrong. A commitment to these goods is a commitment to a culture of free speech and its constituent institutions, attitudes, and conditions. For it is through diverse opinions in dialectical progression that we can hope to get closer to the truth about real goods and how to pursue them. A commitment to this culture, however, requires power to cultivate it and secure it against the forces that threaten it, including the conformity, softness, and moral skepticism that (through inadvertence?) have accompanied the progress of liberal modernity or, if you prefer, the "large commercial republic." Promoting free speech as an end of government necessitates an active concern for the education of the nation's people. It might well mean tax-and-spend programs like the National Endowment for the Arts and the Corporation for Public Broadcasting. Promoting free speech as an end of a liberal government should also require withholding public support (like voucher-eligibility and tax exemptions) from private schools that teach religious intolerance, cultivate racism, condemn secular reasonableness, and train children to substitute clerical authority and "Biblical truth" for self-critical and autonomous thought.[57] Free speech as an end of government thus means a lot more than free speech against government. But neither implies small government or negative government. The former requires big government, and the latter makes sense only in a positive context.

[56] Actors who might see their interests as wholly private would still seek more than wholly private interests if they reflected on the fact that they might be wrong about what their interests are. The truth about one's interests is approximated only in communities of reasonably diverse other persons who represent, in speech and conduct, alternative hypotheses of the good life in dialectical progression. The true interests of self-serving actors would thus be practically inseparable from the interests of such a community. See Barber, *Welfare and the Constitution*, 109–14.

[57] See ibid., 143–46.

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VIII. Conclusion

A welfarist view of the U.S. Constitution finds support in the text of the Constitution, the argument of *The Federalist,* and the testimony of common sense, or so I have contended here. But arguments against a welfarist view stretch from the metaphysical to the visceral. I have tried to confront these arguments in other works, to which I have referred the reader. Here I have addressed additional arguments to those who say a welfarist view is inconsistent with the liberal view of constitutional rights and rights in general. I close with brief comments about a problem Americans associate with the subject of rights: the threat welfare constitutionalism may pose to democracy.

When one contends, as I do, that the Constitution obligates our federal and state governments to provide things like police protection and public education, one risks unelected federal judges adding new rights to the Constitution and ordering elected legislators to tax and spend for things the voting public does not want (like abortion funding) or thinks it cannot afford (like universal health care).[58] This is the worry of many anti-welfarists, and my response here can only report conclusions that I have defended elsewhere.[59] This response is meant not to persuade but to inform readers that persuasive arguments may exist.

Anti-welfarists worried about threats to democracy should first consider whether arguments from democracy against judicial activism actually depreciate democracy. These arguments often assume that there are no objectively better or worse understandings of (values like) the general welfare. They leave us to wonder how there can be better or worse understandings of (values like) democracy, or why we should value democracy in the first place. Sometimes these arguments imply that the *demos* is incapable of aspiring to improve its performance regarding ends like justice and the general welfare. I say this because a people more concerned with self-improvement than with self-assertion would institutionalize that concern and because honest and competent judges who think for themselves about constitutional meaning would be part of that institution.[60] So if democracy is incompatible with or cannot produce good judges, then democracy cannot institutionalize a concern for real ends like justice and the general welfare. How, in that event, could anyone justify democracy?

Anti-welfarists worried about welfarism's threat to democracy can accept welfarism as an esoteric teaching and still oppose it both as a public philosophy and as a guide for academic inquiry. They can say that even if welfarism is faithful to the Constitution and the founding, things will

[58] See Robert H. Bork, "The Impossibility of Finding Welfare Rights in the Constitution," *Washington University Law Quarterly* (1979): 699–701.

[59] See Barber, *The Constitution of Judicial Power,* chaps. 4–5.

[60] Ibid., chap. 2, esp. 27–40.

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go better for Americans if everyone professes negative constitutionalism. This seems to be the position of Harvey Mansfield, a widely influential and spirited critic of welfare constitutionalism.[61] He appears to favor negative constitutionalism as a kind of noble lie.[62] Though Mansfield's position is easy to ridicule, he may be right. His strategy reflects Publius's decision to pursue the common good (a welfarist aim) through a system of private incentives, a system that (inadvertently?) weakens public purposefulness and fosters a normative standard of negative rights.[63] The implicit perfectionism of welfare constitutionalism does clash with Publius's belief in *Federalist No. 51* that instead of trying to correct for "the defect of better motives," the nation should pursue a strategy of checking and balancing "opposite and rival interests" (51:349). If Mansfield's crypto-welfarism is right, however, he still has to understand the Constitution from the welfarist perspective of Publius's "better motives"; this means that welfarism remains a correct (albeit now esoteric) teaching, democracy is degraded (the *demos* blind to the public purposefulness of its better self and incapable of genuine reform), and, its public stature notwithstanding, negative constitutionalism is no more than a welfarist strategy. As an account of the Constitution and the founding, negative constitutionalism is *still false.*

Finally, no metaphysical, semantic, or logical necessity connects welfare constitutionalism with enhanced judicial power. FDR did not ask the courts to enact his "Second Bill of Rights"; he wanted Congress to do it. Nor did he think constitutional amendments necessary, for he held, with the Hamiltonian tradition, that Article I already gives Congress power to tax and spend for the general welfare, broadly conceived.[64] Ironically, to complain that welfare constitutionalism means more power for the courts is to affirm the grandest claim of judicial imperialism: that the Constitution speaks solely through the courts. FDR denied this claim, as did Lincoln, and so do most present-day academic exponents of welfare rights.[65]

Academics who have urged recognition of welfare rights over the years do not constitute a unified tradition. They share no common conception of welfare rights or common ground from which to derive and defend

[61] See Harvey Mansfield, "The Formal Constitution: A Comment on Sotirios A. Barber," *The American Journal of Jurisprudence* 42 (1997): 188–89.

[62] See Sotirios A. Barber, "Reply to Professor Mansfield," *The American Journal of Jurisprudence* 42 (1997): 191–94.

[63] See Benjamin R. Barber, "The Compromised Republic: Public Purposelessness in America," in Robert H. Horwitz, ed., *The Moral Foundations of the American Republic* (Charlottesville: University Press of Virginia, 1986), 47–53.

[64] Sunstein, *The Second Bill of Rights,* 44, 55, 61, 64, 69–70, 143–44. On the general welfare clause, see Barber, *Welfare and the Constitution,* 137–42.

[65] See Barber, *Welfare and the Constitution,* 19, 152; see also Frank I. Michelman, "Welfare Rights in a Constitutional Democracy," *Washington University Law Quarterly* 3 (1979) 684–85; Lawrence G. Sager, *Justice in Plain Clothes* (New Haven, CT: Yale University Press, 2004), 86–92; and Sunstein, *The Second Bill of Rights,* 144–47.

such rights.[66] Welfarists may rationally choose the enlargement of judicial power, when contingencies recommend that course. But this possibility cannot tell against welfarism, for anti-welfarists have also sought and continue to seek enlargements of judicial power when it suits their purposes. As I understand welfare constitutionalism as an academic position, it has four or five ambitions. These ambitions reflect the connection, sketched in Section IV above, between true well-being and a constitution-making capacity.[67] None of these ambitions depends uniquely on judicial power. First, academic welfarism should encourage debate over the true normative properties of the Constitution as a whole. Second, it should encourage constitutional theorists to take up the question of what constitutes well-being and what a constitutional regime can do to facilitate its pursuit. Third, academic welfarism should assess the Constitution's adequacy to its ends. And, fourth, it should formulate substantive standards for evaluating public policies, as in my criticism of vouchers for anti-liberal schools (at the end of the previous section). Welfarists so inclined may also promote a true understanding of the Constitution among the nation's political leaders and encourage them to act on that understanding. These ambitions are either mainly theoretical or, in the case of the last mentioned, cultural in scope. They fall short of court-centered concerns in some respects; they exceed court-centered concerns in other respects. If welfarists with these ambitions threaten American democracy, it must be because American democracy cannot handle the truth about the constitution it purports to revere.

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[66] See Barber, *Welfare and the Constitution*, 6–8.
[67] Ibid., 113–14, 153–54.

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