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Book Review: Taking the Constitution Seriously. by Walter Berns.

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ment. That aspiration contains many difficult tensions, to be sure, and it exacts a price, but fidelity to the aspirations of the tradition means fidelity to those tensions, and willingness to pay that price.

For all his talk about the American political tradition and its aspirations, Perry is remarkably untouched by contact with any of its wellsprings. In my opinion, he would do better to read a little less of contemporary philosophy (even here less can be more) and devote more time instead to the materials of the tradition. He might begin with *The Federalist* and read carefully what the authors have to say about republicanism and about the unacceptability of governance by "a will independent of society." He then might try Abraham Lincoln, who shared Perry's concern for the moral groundings and aspirations of the American polity, but who yet understood far better what these required for a "government of the people, by the people, and for the people." And finally, he might reread Alexander Bickel, whom he quotes from time to time, but always in a self-serving way. He might consider how Bickel came to write a book called *The Morality of Consent*.

It is easy to sympathize with Perry's desire for a moral community, but even easier to be repelled by his desire to further the rule of willfulness over the rule of law. But willfulness, no matter how dressed up in the latest philosophic theories and the most high-minded rhetoric remains—willfulness.

TAKING THE CONSTITUTION SERIOUSLY. By Walter Berns.¹ New York: Simon & Schuster. 1987. Pp. 288. \$19.95.

*Daniel D. Polsby*²

Constitutions are things whose substance is language; and natural languages are alive with wormholes and pitfalls, so plastic in the hands of an interpreter that the true study of a political constitution lies not in the intentions of those who drafted the text, but of those who have interpreted it. It is people, not words, that possess meaning. Such, at any rate, is the modern fashion, against which the old convention, the Constitution as a framework of constraints and fences and walls, stands in stark contrast.

Professor Walter Berns seems entirely unaffected by the mod-

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ern fashion. For him, the Constitution is a thing of ideas. Indeed, he sees not one Constitution but a nest of constitutions. First of all, there is the constitution of those who may constitute the government: Professor Berns places the Declaration of Independence at the center of constitutional theory. Then the Constitution proper, which constituted the government. Finally the Bill of Rights, which constituted the means by which the government undertook to be governed itself.

Berns's distinction between "fundamental rights" and "created rights" (or "interests") is central to his argument about the Constitution and how courts should deal with it. "Fundamental rights," like the right to own and dispose of property, are the sorts of things that political constitutions can be founded upon: "created rights," rooted merely in a court's *ipse dixit*, are not. Privacy and all its entailments is an example of a created right. By going forward with the privacy *oeuvre*, the courts deprive the public of the right to debate this question; the power of the unelected judges to make fundamental law is broadened at the expense of the political process.

But of course rights are like that, wherever they come from. Berns, a non-lawyer, would surely profit from a few weeks in a law school Torts or Property class. As Justice Holmes pointed out, "rights"—never mind what kind—tend to declare themselves absolute to their logical extremes. However fundamental a right may be, it eventually bumps into another right: my right of free speech versus your right to quiet; my right to grow tomatillos versus your right to cast a shadow.

Courts must resolve these conflicts according to law. The pattern of their resolution, indeed, is the most important datum we possess concerning what the "law" is. The nice metaphysical question, a variant of the problem that Socrates posed to Euthyphro, whether the judges make law or follow it, will probably always be an important issue in political theory. But to lawyers it is no longer of practical interest. There was, no doubt, a time when legal realists could induce *frissons* in law students by proclaiming, "it's law because we say it is." But that was fifty and more years ago.

The process of judging within a set of never-repeating facts will necessarily produce at least the illusion of amoebic locomotion in the law. It is not obvious why constitutional law and common law should differ much in this particular. To do their job, judges have to do things that look like lawmaking. Berns seems to think it is otherwise. He claims, for instance, that "read literally," the fourteenth amendment's due process clause is addressed to state courts and their procedures, and does not entitle judges to address them-

selves to the substance of what the process protects. But a court cannot possibly understand "due process" until it understands what things "due process" attaches to. The Supreme Court's long agonies over *what* process is due and *when* have almost always involved the non-obvious question of what is "property" (or "liberty") and what is not. These cases have seemed difficult for the simple reason that they *are* difficult. Unavoidably, they summon the court to formulate and characterize the "substance"—horrors!—of an underlying claim. If my job is "property," then the state may not take it from me without "due process." If it isn't "property," then it may.

Moreover, it is evident that a "created right," like that of "privacy," might, at least as an original matter, be considered just as fundamental, and just as foundational, as the right to own property, *pace* Berns, who does not see how a constitutional order could be based on the various acts that "privacy" is supposed to immunize. A pretty persuasive case could be made, for example, that property and privacy are merely different phases of one larger concept: the old-fashioned liberal notion that human happiness requires social institutions to respect a separation between the collective and the individual will. In any case, however, the argument that several explicit provisions of the Constitution may imply an (unexplicit) right of privacy is hardly frivolous, any more than it is frivolous to assert, for example, that the government sometimes "takes" private property by regulating it too severely.

Berns's argument is unsatisfying in another way as well. A good deal of what he says is just the familiar, Frankfurterian plea for the passive virtues. But the ideal of deference to the elected branches needs more justification than Berns gives it. The argument that needs to be made cannot rely solely on the ineptness of the judiciary, even if that is granted. All us readers of the *Wall Street Journal's* editorial page know about ham-handed judges; but we also know more than we learned in Civics class about politicians as well. Furthermore, Professor Arrow's impossibility theorem is by now pretty well diffused in literate society; even the most unabashed democrat will appreciate how precarious is the claim that *vox populi* should direct public policy. It needs to be defended (not merely asserted) that the judicial function should in principle be incapable of enlargement through practice. Taking judicial review seriously, as Berns purports to do, would seemingly imply a judicial function exactly as flexible as the legislative disposition to circumvent the fundamental law.

Berns readily concedes that judicial review is a defensible inference from the structure of the Constitution. His argument is less

than entirely clear concerning how he thinks the courts ought to operate, and why he views most equal protection jurisprudence, including *Brown v. Board of Education*, as questionable. Eventually, re-reading and translating Berns's points into my own jargon, I discerned what I take to be an interesting argument.

According to Berns—this is para-translation now, not quotation—the legalistic and institutional machinery founded by the Constitution embodies a theory of the good life, of human happiness. The Constitution implies at least a rudimentary theory of social cause and effect, as well—a prediction of how people in society will behave under the influence of certain incentives. How the Constitution structures civil government, including the rights that it acknowledges (immunities from certain kinds of collective authority rather than promises of fair distributions), necessarily implies a hypothesis about human social nature: indeed, to adopt the current idiom, it is a theory of how and why civil government fails, and what can be done to keep it from failing.

When Berns argues that the result in *Brown v. Board of Education* wasn't actually "authorized" by anything in the Constitution, I guess he means to say more than that society suffers an incremental harm from a marginal instance of *ultra vires* action by certain judges. The harm inflicted by the assertion of topiary freedom in interpreting the Constitution is the introduction of what might be called democratic (as opposed to republican) virtues and institutions into fundamental law. These two visions of society are different from one another, and they do not fulfill one another. Just the opposite: they are downright incompatible. Republican institutions (such as property) and its associated virtues (such as thrift, foresight, industry, prudence) cannot for long co-exist with a reformed Constitution that requires assets to be re-deployed in the interest of politically defined desiderata such as justice or fairness.

But of course if that is Berns's complaint, his quarrel is not with expansive judicial interpretation as such—which might be entirely consistent with republican virtues—but rather with the particular decisions reached. And this criticism is fair enough: if the rules of the game are going to prefer fair shares or some similar redistributive tenet, then everything under the jurisdiction of the government is in principle subject to appropriation; one need only show that this is "just" in order to be entitled. Thus the material world becomes a common pool. In such a world, the game is stacked in favor of those who live by the rule of grabbing the most, soonest. Republican institutions and virtues cannot compete in

such an atmosphere and thus become the first victim of the Tragedy of the Commons.

The *novus ordo seclorum* that the founders founded was new precisely in that it expected people to behave self-interestedly. Unlike older political systems that had aimed at the perfection of human nature ("laws make men better"), the American system was designed to frustrate zealotry through what we should call sublimation. Commerce, not Christianity, was to be the established all-American religion. In Europe, the dominant fact of political life for hundreds of years had been sectarian conflict—poor, nasty, brutish, and long. Our Constitution would turn loose this fertile source of libidinal energy on a nobler objective than the honor of God or the salvation of the soul, namely, getting rich.

Whether or not historians of the Federalist period will be persuaded by this interpretation of events, the worthiness of Berns's vision cannot be denied. A world in which commercial competition replaces religious strife has everything to be said for it. Wise governors will, if they have the wits, create a civic environment in which people may behave "naturally"—as human beings, not angels—and yet at the same time constructively. This is the great consequentialist argument for property rights.

A review can seldom do justice to a serious book, and I fear having judged Berns's very serious book too harshly. Much of my criticism probably boils down to the different perspectives that lawyers and political theorists have of the subject. Unlike most lawyers, Berns is concerned less with the problem of interpretation than with understanding larger questions of democracy. It is refreshing to get these crosslights on a Constitution that is equally the property of all serious people and, to our good fortune, our fundamental law as well.

RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW. By Mark Tushnet.¹ Cambridge: Harvard University Press. 1988. Pp. x, 318. \$35.00.

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