Confusing rights: a reply to Hocutt.

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On January 11, 1944, Fraklin Delano Roosevelt delivered one of the most influential speeches of the twentieth century. With victory in World War II on the horizon, he contended that "the one supreme objective for the future," the objective for all nations, was captured "in one word: Security." This term meant "not only physical security which provides safety from attacks by aggressors," but also "economic security, social security, moral security." Building on this claim, Roosevelt contended that the United States had come to accept "a second Bill of Rights under which a new basis of security and prosperity can be established for all--regardless of station, race, or creed." This Second Bill of Rights would include, among other things, the right to a good education; the right to freedom from unfair competition and domination by monopolies; the right to a decent home; the right to adequate medical care; the right to adequate protection from the fears associated with old age, sickness, accident, and unemployment; and the fight to a useful and remunerative job.

The influence of Roosevelt's speech can be seen in its impact on the Universal Declaration of Human Rights, which includes the rights he championed. The same influence appears in dozens of the world's constitutions, which borrow directly from Roosevelt's Second Bill of Rights. Even the interim Constitution of Iraq, written with a great deal of American influence, shows Roosevelt's influence, boldly proclaiming that "the individual has the right to security, education, health care, and social security."

In The Second Bill of Rights: FDR's Constitutional Vision and Why We Need It More Than Ever (New York: Basic, 2004), my first goal was to recover a lost part of U.S. history--to trace the origins of social and economic rights in American culture and to understand the historical background that led Roosevelt to propose his Second Bill. Too often, Americans (and Europeans) see the United States as committed to a form of individualism that is incompatible with rights of the sort that Roosevelt championed. Simply as a matter of history, this understanding is a blunder; one of America's greatest presidents sought those rights precisely in the name of individualism. Indeed, he saw those rights as a supplement to and compatible with what he described as the "sacred possessive rights" of property and freedom of contract, which preceded them.

In recovering Roosevelt's Second Bill, I had two other goals. I wanted to give a sympathetic account of the early-twentieth-century American attack on the distinction between negative and positive rights--an attack that found its way into the White House. Over a period of years, many people argued that the so-called negative rights, including the right to private property and the right to freedom of contract, depended for their existence on law, legal institutions, and aggressive government. Without government protection of property, people cannot enjoy property, in the way that a capitalist society requires. In this sense, property is itself a positive right, and so too is contractual liberty. It is all very well to say that people should be able to make contracts as they choose (subject to the limitations of the criminal law), but without a legal system to enforce contractual agreements, contractual liberty is often meaningless. Those who made these

arguments did not mean to attack capitalism, to which they were committed, but they thought that legal rights should be accepted, or not, after an inquiry into their functions in promoting human well-being. That inquiry should not be clouded by the effort, a conceptual disaster from the legal point of view, to distinguish negative rights from positive rights.

In my view, Roosevelt's Second Bill was made possible in part by claims of this kind. As early as 1932, Roosevelt proposed "an economic declaration of rights, an economic constitutional order," that would recognize that "every man has a right to live," which entailed "a right to make a comfortable living." In making this argument, Roosevelt stressed that even "[Thomas] Jefferson realized that the exercise of the property rights might so interfere with the rights of the individual that the government, without whose assistance the property rights could not exist, must intervene, not to destroy individualism but to protect it." The key point here is that "property rights could not exist" without government, which makes such rights real in the world. Note in this regard that government intervention--in Roosevelt's view--is necessary to protect individualism rather than to destroy it.

Roosevelt did not believe that the Constitution should be amended to include the Second Bill of Rights. He was generally skeptical about both constitutional change and federal courts. He thought that the Second Bill should be seen as akin to the Declaration of Independence--as a statement of basic commitments to which the citizenry and its representatives would look in deciding on its basic obligations.

I am grateful to Max Hocutt for his courteous and careful treatment of my argument. Before I get to the central point, let me offer a few clarifications. Hocutt is correct to say that people can have moral rights that lack legal backing. My friends have a right to be treated with respect, but that right is not legally enforceable. Hocutt is also correct to say that moral sanctions for rights violations can be at least as strong as legal ones. My argument is not meant to take a stand on the question of moral rights, so it is not entirely clear what Hocutt seeks to accomplish by his emphasis on the existence of legally unenforceable moral rights. Does he mean to say that people might have a moral right to, say, education and housing without also having a legal right to these goods? Does he mean to say that their moral rights should be satisfied by private charity and entrepreneurship rather than by government?

If so, Roosevelt's only objection (and mine) is intensely pragmatic: private steps are most unlikely to do what needs to be done. In U.S. history, and in other nations' histories, private actions have never come close to providing people with decent opportunities and minimal security. In Roosevelt's words, "Government has a final responsibility for the well-being of its citizenship. If private co-operative endeavor fails to provide work for willing hands and relief for the unfortunate, those suffering hardship from no fault of their own have a right to call upon the Government for aid; and a government worthy of its name must make fitting response." In my view, Roosevelt was right.

Of course, this point is not meant as a criticism of voluntary private efforts to help or of government efforts to enlist moral suasion and economic incentives in the interest of relieving human suffering. Those who believe in the Second Bill of Rights should be entirely content if private efforts greatly reduce the need for governmental help. (Incidentally, Hocutt is wrong to say that I admire European social democracies; I don't.) For the future, it would be best to emphasize Roosevelt's goals, but also to seek less-rigid, more market-friendly and incentive-based methods for achieving those goals. Consider, for example, the earned income tax credit, which is far better than the minimum wage as a method for responding to the problems that the working poor face. A great deal of creativity--on the left, right, and center--has already been devoted to market-friendly methods of assisting those in need; we need many more such efforts.

Hocutt's principal objection, however, lies elsewhere. He believes that positive rights do indeed differ from negative rights in the sense that the former impose "weightier and more irksome

duties." This "difference in weight," in his view, imposes a heavy burden of justification on "all who advocate adding positive economic rights to our constitutionally protected list of negative political rights." Hocutt emphasizes here what he sees as Locke's view that rights to life, liberty, and property reflect a purely negative duty, to the effect that other people must refrain from interfering with them. Hence, "Locke's was a scheme of purely negative rights," as is "the scheme of rights set out in the U.S. Constitution."

In this view, "people are called on not to do things, but rather to refrain from doing things, and the government's most important job is to see that they behave accordingly." Also according to Hocutt, Locke was a social-contract theorist who saw a central truth, which is "that positive rights differ from negative rights in that (1) they impose more burdensome and onerous duties, and (2) their protection is less essential to the maintenance of public order." Thus, it is "more irksome" to be asked to feed another man's children than to be told not to take food out of their mouths; it is similarly more irksome to share my house with you than to be told to refrain from taking your house. Hocutt concludes that the real trouble with positive rights is that they legitimate "a system of government coercion to expropriate the earnings of the talented, the hard-working, and the fortunate for redistribution to the untalented, the indigent, the irresponsible, and the unlucky."

This argument seems to me deeply puzzling. To see why, let us begin with the U.S. Constitution. It is simply not correct to say that our founding document creates "purely negative rights" in the sense of a duty of noninterference. The Sixth and Seventh Amendments create a right to a jury trial, which transparently requires government to create and taxpayers to fund an expensive (and sometimes irksome) apparatus, affirmatively requiring citizens and taxpayers to act, not simply to refrain from acting. Article I, section 10, forbids any state from enacting a "Law impairing the Obligation of Contracts." This provision does not require the government or ordinary citizens to refrain from acting. It requires governments to ensure the availability of a court system that is ready and able to enforce contractual agreements. It also requires ordinary citizens to comply with their contractual obligations. (We can define that duty as an obligation to "refrain" from violating other people's rights, but is it really helpful to adopt that definition?) Or consider the Fifth Amendment's prohibition on the "taking" of private property except for "public use" and with just compensation. If the government abolished the trespass laws, in whole or in part, it would be violating the Fifth Amendment, which requires government to protect property rights, not to refrain from acting.

Hocutt asserts that "freedom of speech is a right not to be prevented from saying what one thinks," but he offers an incomplete account of constitutional law. Freedom of speech also entails a right to the existence and flee availability of public parks and streets, which must be open for expressive activity at taxpayer expense (subject to restrictions of reasonable time, place, and manner). In numerous places, the government is under an affirmative duty to safeguard rights.

Perhaps Hocutt will respond that many (not all) of these examples merely require government to ensure that some people do not interfere with other people--that government is merely protecting our rights to immunity from interference by others. If he makes that response, we should notice right away that he is acknowledging one of my central points, which is that government is under a positive duty to protect certain rights. He should not be embarrassed by that acknowledgment. But there is a much deeper problem. What exactly are the (prelegal) rights that government must affirmatively protect from private interference? Hocutt's major answer seems to be that those rights, which he calls negative, do not impose "weightier and more irksome duties." But this answer is more puzzling still. How do we know whether a duty is weighty and irksome? Is this matter an empirical question? If it is, Hocutt's judgment is difficult to defend. If you are wealthy, it is not very irksome to be told that you must give twenty dollars each month to the relief of poverty or to feed someone else's child. If you are homeless, it is extremely irksome to be told that you cannot use someone else's house. Hocutt wants to accept the more conventional civil and political rights and to reject a right to decent opportunity and minimal security (which Roosevelt favored), but the ideas of "irksomeness" and "weight" do not come close to justifying Hocutt's

preferences.

Hocutt does have another argument. He thinks that protection of the Second Bill of Rights "is less essential to the maintenance of public order." This also appears to be an empirical claim, and Hocutt does not say enough to defend it. Is the right to a jury trial more essential to the maintenance of public order than the right to education? Is the right to medical care less essential to the maintenance of public order than the "public-use" requirement of the Fifth Amendment? What definition of "public order" will enable us to answer these questions? Still, grant Hocutt his premise and suppose, for example, that the right to freedom from unreasonable searches and seizures does in fact contribute more to the maintenance of public order than the right to a decent home. So what? It would be perfectly plausible to say that government should protect the latter right as best it can, even though public order is less jeopardized by violation of this right than by violations of other rights.

I suspect that Hocutt's position has nothing to do with irksomeness or with maintenance of public order. Nor is it at all helpful to say that he is concerned with protecting rights of noninterference. What counts as "noninterference" depends on our antecedent theory of entitlement. If people have a right to food and housing, then the failure to provide food and housing is "interference." If people have a right to property, then takings of land count as "interference." What is Hocutt's theory of entitlement? Clearly he thinks that the conventional rights are real and that Roosevelt's are not--that Roosevelt was actually proposing to violate fights, properly understood, by calling for expropriation and by "surrender[ing] to government the right to seize the property, restrict the liberty, and diminish the lives of some people in order to promise economic security to others." This issue, I think, is the heart of the matter. Here, however, Hocutt is left with an assertion, not an argument. If government protects the fights to an education and to freedom from monopoly and unfair competition, whose property is being unacceptably "seized"? If government takes steps to ensure that everyone has adequate medical care or decent food and clothing, why must those steps involve an unacceptable seizure of property or restriction of liberty? Hocutt must believe that people have some kind of moral or prepolitical right to the holdings that they currently have, but he has said nothing to establish the existence of such a right.

These claims should not be misunderstood. Roosevelt rejected socialism, and he was no social democrat. He was firmly committed to capitalist institutions; moreover, he was committed to experimentation. He knew that those who seek economic equality will end up with neither equality, nor prosperity. His plea for a Second Bill of Rights was a commitment to ends, not means. Market-friendly approaches, relying heavily on the private sphere, are to be welcomed if they work. Like Roosevelt, I do not favor judicial enforcement of the Second Bill of Rights, certainly not for the United States. To defend any set of policy initiatives, it is necessary to examine their consequences, including their incentive effects. When I argue that all rights are positive, I mean only to say that in order for rights to be realized, government's presence, not its abstinence, is required. Those who purport to reject "government interference" depend on it every day of every year.

These claims are not incompatible with the view that the rights to private property and freedom of contract are extremely important or that they have some special moral status. We can accept the Second Bill of Rights on various grounds without questioning a wide range of reasonable views about the foundations of moral and political rights. But we must reject the suggestion that people have some kind of moral entitlement to whatever holdings they have now. Roosevelt was right to find that view preposterous. The sooner we are rid of it, the better.

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