

2001

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Randy E. Barnett

Douglas B. Rasmussen

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Recommended Citation

Randy E. Barnett and Douglas B. Rasmussen, *The Right to Liberty in a Good Society*, 69 Fordham L. Rev. 1603 (2001).

Available at: <https://ir.lawnet.fordham.edu/flr/vol69/iss5/4>

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THE RIGHT TO LIBERTY IN A GOOD SOCIETY

*Randy E. Barnett**
and
*Douglas B. Rasmussen***

INTRODUCTION

We have been asked to consider how a “Constitution of Civic Virtue” might contribute to a “good society.” To answer this question, we need to have some idea of what a good society might be, and we need to be able to articulate that idea. Certainly, we think we know a good movie when we see it, a good book when we read it, a good argument when we hear it, and a good idea when we have one, but we are not sure we have a handle on what a good society is. Even what we think we know about good books, movies, arguments, and ideas gives us pause. For we are not sure we can always explain why we think a particular movie is good or a book is bad. And even when we can explain it, we find that many people disagree with us about such matters. Indeed, we, at times, even disagree with each other.

By this we do not mean to suggest any skepticism about there being such a thing as a good book, a good film, a good wine, a good car, or even a good person. If there is one thing we think we know in this world, it is that there are good persons—quite amazingly good actually. Nor do we mean to deny that there may be such a thing as a good society, though we are not so confident about this. A lot depends on what is meant by those words. Having said this, we will set our skepticism aside and now offer a conception of a good society; but we no more expect everyone to agree with this conception than we expect them to agree with one of us that “The Tao of Steve” was a really good movie.

I. DISTINGUISHING SOCIETY FROM COMMUNITY

Let us begin by distinguishing a “society” from a “community.” A society, or what F. A. Hayek referred to as the Great Society, is a vast network of human interaction. The people within such a network know an infinitesimal fraction of their fellow network members. 99.999999% of them are strangers to each other, yet they are highly

* Austin B. Fletcher Professor, Boston University School of Law, rbarnett@bu.edu.

** Professor of Philosophy, St. John’s University, dbrlogos@earthlink.net.

dependent on each other for almost every necessity and luxury of life, from food and shelter to every imaginable consumer product. They are also dependent on the society to refrain from interfering with their pursuit of happiness or the good life.

The network that constitutes a society is so large and amorphous that it is impossible to speak of an individual's consent to be a member and live by the rules established by the government of any given society. The only way to refuse consent to being a member of a particular society is to leave. Such a choice is so costly in terms of what one gives up by leaving—one's family, friends, home, community, career, language, etc.—that a decision to remain cannot be construed as consent to live by whatever government happens to exist in that society. This is particularly so, because the option of living in *no society* at all is almost impossible to exercise.

For those that think otherwise about consenting to be a member of a particular society, ask yourself what you would think constitutes consent to waive tort liability, or even consent to lease a television set at a high interest rate. Then apply those standards to the decision to remain in the country of one's birth, and we suggest you would not infer from that decision consent to live by the rules of any particular regime.

In contrast, a "community" is a network of interaction in which each person has exercised his consent to live by the rules of that network—both the primary rules that govern behavior and the secondary rules that determine how the primary rules are to be made. While living in the same Great Society, we are all members of countless different communities. This includes such temporary communities as, for example, a conference on a constitution of the good society, as well as the more lasting communities of our home institutions, our churches or synagogues, our clubs, and for some the co-ops, condominiums, and residential developments in which they live. One might say that the precise composition of each of our community memberships is as unique as our other personal characteristics.

Each of the communities to which we belong is marked by a meaningful and very real, unanimous consent to live by the primary and secondary rules of that community—a consent that the Great Society cannot claim.¹ Typically, with genuine communities consent is

1. By viewing the Great Society as a network it is tempting to look to the Internet as an analogy or model. But there is one big difference. You do in fact choose to use the Internet. You can turn it off and walk away from it at reasonably low cost. But you cannot refuse to "use" the society of which you are a part—unless you go to very great extremes indeed and even the success of such efforts at complete detachment are open to question. If you cannot withdraw from society even if you want to, then unlike the Internet it cannot be said that you choose or consent to be a member of society (though you can at great cost leave and become a member of another). The Internet is actually more like the telephone network than either a

express, but on certain conditions which we shall not go into here, consent to the governance of a genuine community may be implied-in-fact.

We realize that not everyone uses these terms in this manner. Some look to what we are calling a Great Society and see it as a community. We think this is mistaken, but at the moment we are just trying to clarify the terminology so we can interpret the question before us. We take the reference to a “good society” in the title of this symposium to be a reference, not to the many communities to which we consent to belong, but to the Great Society—that is to say, to the vast network of human interaction that used to be identified primarily with nation-states, but the precise demarcation of which is becoming increasingly blurry now that technology is expanding the boundaries of human interaction.

II. WHAT MAKES A SOCIETY GOOD?: A NEO-ARISTOTELIAN ANSWER

What is it, then, that makes a Great Society, as distinguished from a community, a “good” society? Initially, we would say that a Great Society is good if it has a framework in which human beings can pursue happiness, peace, and prosperity while living in close proximity to each other. It provides a framework, not for isolated individuals, but for individuals who are actively and continuously interacting with each other by partaking in myriad forms of community that must somehow peacefully coexist if persons are to pursue happiness, peace, and prosperity.

In *The Structure of Liberty*,² it was explained how any society must solve the serious problems of knowledge, interest, and power, if the persons that comprise society are to pursue happiness. And the solution to these social problems lies, in part, in the legal recognition of the fundamental natural rights of property, freedom of contract, first possession, self-defense, and restitution.

In *The Structure of Liberty*, however, it was taken for granted that the pursuit of happiness (and peace and prosperity) were the goals of any society. Some have asked, “why should this be?” Others have wanted to know more about what exactly is meant by the pursuit of happiness. They want to assess more carefully the claim that these rights are fundamental to the pursuit of happiness. These are very complicated issues, but we believe that any answer to these questions must be based upon a conception of the human good—that is, on a conception of what it really is for human beings to flourish. We take a neo-Aristotelian approach.

society or a community.

2. See Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (1998) [hereinafter Barnett, *The Structure of Liberty*].

According to this approach, there are six fundamental features of the human good. The good for humans is (1) objective, (2) inclusive, (3) individualized, (4) agent-relative, (5) self-directed, and (6) social. We shall briefly describe each of these features. This description, however, will be *highly* truncated.³ We offer it only to give a flavor of the nuanced and complex character of this neo-Aristotelian account.

(1) Human flourishing is a way of living that consists of certain activities. Human flourishing is to be found in action. It is not something static. These activities both express and produce in human beings an actualization of their generic and individual potentialities. According to this approach, human goodness is a state of being, not a mere feeling or experience. Whether or not anyone is flourishing is a fact independent of their opinion about whether they are flourishing. It is an objective good.

(2) Human flourishing is an “inclusive” end. It comprises basic or “generic” goods and virtues—for example, such goods as knowledge, health, friendship, creative achievement, beauty, and pleasure; and such virtues as integrity, temperance, courage and justice. Just as buying golf clubs is a means to playing golf, while putting is part of what constitutes the activity of golf itself, the subordinate goods and virtues are valuable not as mere means to human flourishing but as partial realizations or expressions of it. Though human flourishing is constituted by many subordinate goods and virtues, there is not a preset weighting or evaluative pattern for the basic or generic goods and virtues that constitute it. Even if all the aforementioned goods and virtues are necessary to flourishing, an abstract analysis of human nature may not show us what their evaluative ranking should be. Such an analysis may not tell us how much time and effort should be spent in pursuit of one necessary good or virtue as opposed to another.

(3) Human flourishing is individualized and diverse. Abstractly considered, we can speak of human flourishing and of basic or generic goods and virtues that help to define it. Yet this does not make human flourishing in reality either abstract or universal. Concretely speaking, no two cases of human flourishing are the same, and they are not interchangeable. Just as Susan’s actualization of her potentialities is not the same as Fred’s actualization of his, Susan’s

3. This portion of our essay is based on material from the following: Douglas B. Rasmussen & Douglas J. Den Uyl, *Liberalism Defended: The Challenge of Post-Modernity* 23-39 (The Locke Inst., The Shaftesbury Papers No. 9, 1997) [hereinafter Rasmussen & Den Uyl, *Liberalism Defended*]; Douglas B. Rasmussen & Douglas J. Den Uyl, *Liberty and Nature: An Aristotelian Defense of Liberal Order* 58-75, 131-54 (1991) [hereinafter Rasmussen & Den Uyl, *Liberty and Nature*]; Douglas J. Den Uyl & Douglas B. Rasmussen, “Rights” as *MetaNormative Principles*, in *Liberty for the Twenty-First Century: Contemporary Libertarian Thought* 59 (Tibor R. Machan & Douglas B. Rasmussen eds., 1995) [hereinafter Den Uyl & Rasmussen, “Rights” as *Meta-Normative Principles*]; see also Douglas B. Rasmussen, *Human Flourishing and the Appeal of Human Nature*, 16 *Soc. Phil. & Pol’y* 1 (Winter 1999).

fulfillment is not the same as Fred's. Human fulfillment is always something unique.

(4) Human flourishing is agent-relative.⁴ The status of human flourishing *as the ultimate value* arises within and obtains only *in relationship* to some person's life. That is to say, its value is found in and exhausted by those activities of a person that constitute that person's flourishing. This view stands in contrast to those ethical theories that view values as "impersonal"⁵ such that they can be conceptually detached from particular persons, aggregated and then maximized across persons. Human flourishing is not something that can be exchanged or promoted regardless of whose flourishing it is.

(5) Human flourishing is self-directed activity. Human flourishing must be attained through a person's own efforts and cannot be the result of factors that are beyond one's control. Flourishing does not consist of the mere possession and use of needed goods. Rather, human flourishing consists in a person's taking charge of his own life so as to develop and maintain those virtues for which he alone is responsible and which in most cases will allow him to attain the good his life requires. Self-direction is not merely one of many necessary conditions of human flourishing. Rather, self-direction is necessary to the very character of human flourishing. Human flourishing would not be human flourishing if there was no self-direction involved. Moreover, *self-direction is the central necessary constituent or ingredient of human flourishing without which no other feature could be a constituent.* Regardless of the level of achievement or specificity, self-direction is a feature of all acts of human fulfillment. To flourish, each person must expend effort to discover the goods and virtues of human flourishing as well as to achieve and implement them.

(6) Human beings are naturally social animals. We are social in the sense that our maturation requires a life with others. We have potentialities that are other-oriented, and we cannot find fulfillment without their actualization. Human flourishing is not atomistic. Therefore, one who thinks that human beings can flourish independently and apart from others commits the fallacy of reification

4. Human flourishing, G, for a person, P, is agent-relative if and only if its distinctive presence in world W1 is a basis for P ranking W1 over W2, even though G may not be the basis for *any other* persons ranking W1 over W2. See Eric Mack, *Moral Individualism, Agent-Relativity and Deontic Restraints*, 7 Soc. Phil. & Pol'y 81 (Autumn 1989).

5. An ethical theory is impersonal when all ultimately morally salient values, reasons, and rankings are "agent-neutral," and they are agent-neutral when they do *not* involve as part of their description an essential reference to the person for whom the value or reason exists or the ranking is correct. "For any value, reason or ranking V, if a person P1 is justified in holding V, then so are P2-Pn under appropriately similar conditions. . . . On an agent-neutral conception it is impossible to weight more heavily or at all, V, simply because it is one's own value." Douglas J. Den Uyl, *The Virtue of Prudence* 27 (1991). Accordingly, in an impersonal ethical theory, when it comes to describing a value, reason, or ranking, it does not ethically matter whose value, reason, or ranking it is.

just as much as one who thinks that human nature or society can exist independently and apart from individuals. Being asocial is not a policy consistent with human flourishing, and individuals ought to be concerned with the nature of, and conditions for, social life.

Accordingly, it can be said that one person's moral well-being cannot be exchanged with another's. The good-for-me is not, and cannot be, the good-for-you, but this is not to say that any choice one makes is as good as the next. Rather, it is to say that the choice must be one's own and must involve considerations that are unique to oneself. The human good, then, is something objective, self-directed, socially achieved, and yet highly personal. It is not abstract, collectively determined, atomistic, or impersonal.

What constitutes flourishing for a particular person is "objective" insofar as it is not merely a matter of that person's will or desire or opinion, or social convention. A person can be quite sure about how he or she may flourish and yet be entirely wrong. But what constitutes flourishing is also profoundly individual (or "subjective") and is thus always diverse (or pluralistic) insofar as each of the abstract "goods" and "virtues" will apply differently to each particular individual.

Moreover, this neo-Aristotelian account of the human good as flourishing is fundamentally egalitarian in the sense that it provides no impersonal reason to prefer one form of flourishing to another. As our mentor Henry B. Veatch once pointed out, each of us must pursue our own respective forms of self-perfection,⁶ and it must be in terms of self-perfection that we make sense of good society or, more precisely, the good political/legal order of the Great Society.

Considering that the list of abstract goods and virtues that is subordinate to the end of human flourishing is long, and that there are several billion people in the world, each of whom has a different package of such goods, it is impossible, we suggest, to specify any political or legal system that can ensure human flourishing for everyone. To put the matter baldly, it is impossible to imagine a law that could be enacted that would ensure the flourishing of even a single person, much less the 250 million persons that live in the area known as the United States.

Why is this? Partly it is because of the serious knowledge problem involved: if each person cannot be sure what it takes for him or her to flourish, it would be much more difficult for remote rulers to know what it would take for millions of persons unknown to them to flourish. Partly it is because of the serious problems of interest involved: assuming such knowledge of the requirements of flourishing for others truly existed, what assurances do we have that enacted laws will truly reflect those requirements.

6. Henry B. Veatch, *Human Rights: Fact or Fancy?* 84-85 (1985).

Yet, it is even more than this. Human flourishing can only be real, can only be something that is valuable, when it is the good *for* some person. For this to occur, it has to be more than an abstraction. It must obtain its particular form or character by being melded with the unique features of the person. In other words, the basic or generic goods must be given appropriate weight and proportion—we must act in accordance with our “means”—but this requires that we exercise the central intellectual virtue of practical wisdom. Yet, what has not always been recognized is that the virtue of practical wisdom can only occur through human agency or self-direction. Because human flourishing is and must be a self-directed activity, lawmakers can no more provide the basis for human flourishing than they can provide the basis for empathy and compassion, or even for physical fitness.

But this is not to say that a legal order is unimportant for human flourishing. Far from it. It is only to say that it is a mistake to think of a political or legal order as one that can ensure or guarantee that anyone, much less everyone, actually flourishes, for such guarantees are impossible given the nature of human beings and the world in which we live. Though a political or legal order cannot be the means by which human flourishing is achieved, the right kind of legal order can be viewed as a necessary precondition for the possibility that human flourishing can take place in a social context—which, given the nature of human sociality, is the only place where flourishing *can* occur. More importantly, the right kind of legal order is a precondition for the possibility that *everyone's* flourishing can take place.

The neo-Aristotelian account of flourishing primarily addresses the ethical problem of identifying the good for human beings. But it also exposes another quite distinct social problem. Human beings need others to flourish—atomistic individualism is not an option—but, at the same time, other people can intervene to prevent the self-direction that constitutes the essential core of human flourishing. Given the nature of human beings and the nature of human flourishing, how can society be structured to permit each and every individual to engage in the sorts of actions that constitute flourishing without favoring the flourishing of any one person over that of another?

This problem is not the same as the ethical problem of how persons should live their lives. It is a structural problem that is distinctly political/legal. Having identified it as a problem, and one that is distinct from the problems that are answered by ethical theory, we are now in a position to define a good society. A good society is one in which this social problem is handled well; in which there exists a political/legal structure that permits each and every individual to engage in the sorts of actions that constitute flourishing without favoring the flourishing of any one person over that of another. And the means by which this problem is solved, therefore, will provide the

specific characteristics that determine the extent to which any particular society is "good."

III. THE GOOD SOCIETY AND THE RIGHT TO LIBERTY

How then can we solve the problem of flourishing in a social context? Human flourishing or actualization is an activity that needs to be performed by each person for him or herself. The precondition for this activity that everyone shares is the recognition of a jurisdiction or space within which each person is free to make her own decisions and exercise her own choices in pursuit of happiness, or the actualization of her potential. This jurisdiction or space is recognized to some degree in any society that is functioning at all. The good society is one that identifies and protects the widest range of self-direction for each person that is consistent with the same range of self-direction for all others.

Some will ask why self-direction plays so central a role in providing a good structure for the Great Society. This is an important question, and though we do not have the time or space to develop it here, there are basic answers to this question. Suffice it to say for now that, of all the generic goods and virtues, self-direction is the only feature of human flourishing that is common to all acts of human flourishing and peculiar to each, and yet at the same time does not imply any particular form of flourishing. It expresses the core of human flourishing. Its protection is something that everyone in principle can fulfill regardless of his or her material circumstances, and it is not only common to, but required by, all forms of human flourishing. Self-direction, therefore, is that feature of human flourishing that can be used to solve the political/legal structural problem that we noted earlier.

The principles that define the moral space or jurisdiction within which people may exercise self-direction in pursuit of their self-actualization are correctly referred to as natural rights. And given that these rights secure the *liberty* to pursue happiness, they can more particularly be characterized as "liberty rights." These liberty rights consist of the right of property, freedom of contract, first possession, self-defense, and restitution.⁷ Together they can be taken as defining the specific contours of a right to liberty. A good society is, in short, one in which the right to liberty is effectively protected. For the protection of liberty, so defined, is the precondition for each and every person to flourish without preferring the flourishing of any one person to any other.

7. The claim that the protection of these particular rights is essential for people to pursue happiness, peace, and prosperity while living in society with others is the principal thesis of Barnett, *The Structure of Liberty*, *supra* note 2, at 63-83, 176, 184, and is defended at length there.

IV. THE ROLE OF A WRITTEN CONSTITUTION IN A GOOD SOCIETY

Though a good society requires a legal order that effectively protects the particular rights that define a general right to liberty, we do not assume that such a legal order must be provided by what we think of as government.⁸ A polycentric legal order can contain multiple legal systems without a hierarchical government to oversee the interaction of these legal systems.⁹ Though such a legal order would have a “constitution” in the English sense of being constituted by a structure and basic principles, it would make little sense for a polycentric legal order comprised of multiple legal systems to have a written “constitution”—in the American sense.

If a written constitution is desirable at all, it is only when people in a particular “civil society” rely upon government to provide protection of their natural or “civil” rights. In such a context, how does a written constitution contribute to a good society, so defined? By enabling government to perform its functions, which include most importantly the enforcement of laws aimed at protecting the rights of individuals from their fellow citizens, while at the same time making it more difficult for government itself to intrude upon these rightful jurisdictions that are the prerequisite for human flourishing.

Let us assume one has discovered a form of government that can provide a legal system which protects the rights that are preconditions of human flourishing from violation by both private persons and by the government itself. In this event, a written constitution, interpreted according to its original meaning, can serve to “lock in” that particular form of government.¹⁰ A written constitution, so interpreted, can help resist deviations from this form of government, deviations that would endanger the rights that are the preconditions for the achievement of human flourishing.

Of course, according to the neo-Aristotelian conception of the good, to flourish, human beings need far more than the protection of their rights. This does not mean, however, that it is constitutional government that must, or even can, provide these other things. Man is a social animal in a variety of ways, and sociality can even be seen as one of the basic virtues in anyone’s basket of primary goods. But what we require of others can best be, and therefore should be,

8. The terms “government” and “state” are usually considered synonymous. If, however, the term “government” properly refers to any established legal order, then there can be “government” without a “state” that claims monopoly on the legitimate enforcement of law. See Bruce L. Benson, *The Enterprise of Law: Justice Without the State* 291-308 (1990). Nevertheless, in what follows we shall continue to use the term “government” in the more limited sense of being equivalent to a “state.”

9. See Barnett, *The Structure of Liberty*, *supra* note 2, at 238-97.

10. See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *Loy. L. Rev.* 611, 629-43 (1999).

supplied by family, friends and the many genuine communities that are as diverse as the needs of individuals who seek them out.

V. MUST A CONSTITUTION FOR A GOOD SOCIETY ALSO ENFORCE WELFARE RIGHTS

At this point, someone is bound to object that the conception of a constitution for the good society that we have described neglects the vital function of government in providing for the basic material well-being of its people. Or, to speak more plainly, given the fact that government itself does not produce wealth, it is ultimately a government's responsibility to take resources from some of its people so that others may have at least the possibility of flourishing. There is, of course, much more to be said for and against such a claim than we can possibly explore now, so let us just identify a few problems with this claim for welfare rights that are revealed by our account of human flourishing and the good society.

We can begin with the serious problems of knowledge and interest that attach to the granting of any such power. The knowledge, for example, of who does not need as much as some other person, the resources they have produced, earned or received (without violating the liberty rights of anyone else) to flourish, as well as what constitutes "need." There is then the problem of interest that is created once the legitimacy of a power to take from A and give to B is recognized. This is the problem of people scrambling to define themselves out of the category of A's into the category of B's and the incentives of government officials to manipulate these categories to best preserve their own power and perquisites. And if the individual and communal jurisdictions that government ought to protect are themselves needed to solve pervasive problems of knowledge, interest, and power, then interfering with these jurisdictions to secure some other ostensibly good end may well be self-defeating.¹¹

Moreover, if flourishing is the good for human beings—and this good is agent-relative, not impersonal—then on this account there is no reason to prefer one person's flourishing to that of another. The only thing a legal order can provide, without running afoul of this conception of human good, is the social precondition for the possibility of everyone's flourishing. The "equal protection" of flourishing for everyone requires that, whatever government does to protect the jurisdictional spheres of decision making upon which flourishing depends, it may not favor some or sacrifice others. That is, it would require a persuasive argument that the government of a good society is justified in preferring one person's flourishing to another's, or the power to sacrifice the life of one for either the many or the few.

11. See Barnett, *The Structure of Liberty*, *supra* note 2, at 301-28 (discussing problems with theories of retributive and distributive justice).

And this argument can find no support in the neo-Aristotelian conception of the good based on human flourishing that we have described here.

But does not the protection of the sorts of rights we have discussed “prefer” one form of flourishing or one group of persons to another? We do not think so, but this is a complicated issue.¹² What a legal system that enforces just rules of law provides—namely, the liberty that protects the possibility of self-direction—is but one of the necessary conditions that everyone requires to flourish. Such a system provides the space within which people can be free to make the choices that only they can make as to how to actualize their unique potential. It does not, however, provide the *sufficient* conditions for flourishing. And this goes as much for those who might require great material wealth to flourish as it does for those who require very little. Were it possible for a government to provide the *sufficient* conditions for *everyone* to flourish, then perhaps it would be warranted in doing so, but we deny that this is ever possible for human beings in our world or in any conceivable world.

Yet, on second thought, even to consider this utopian supposition seems to go too far. Human flourishing is, in its essence, an activity for which the individual alone is responsible, not some condition others can provide. Moreover, this entire way of approaching politics and law—namely, thinking of the political/legal order as having as its aim the achievement of human flourishing—begs some serious questions. Most importantly, it assumes that the political/legal order is merely ethics writ large. This ought not to be done. Such an assumption forgets that human flourishing is highly pluralistic as well as profoundly social. Furthermore, it ignores the distinctly political/legal structural problem we spoke of earlier—namely, how do we create a political/legal order that will, as a matter of principle, *not* require that some form of human flourishing be sacrificed to some other form.

Knowing either that X-ing is good and ought to be done or that X-ing is bad and ought not to be done, does not, by itself, respectively show either that X-ing should be legally required or legally prohibited. Indeed, as Aquinas noted,¹³ there is a difference between demands of justice that are morally binding and demands of justice that are morally *and* legally binding. What is it, then, if anything, that justifies

12. Murder, theft, rape, extortion, and fraud are legally banned by a political/legal order based on natural rights. Though there might be some individuals who regard these activities as forms of human flourishing, they are not. These activities are incompatible with many of the features of human flourishing, but especially the generic good of sociality. Furthermore, to the extent that such activities become a part of “normal” social and cultural practices, then to that extent such societies and cultures are inimical to the social and pluralistic character of human flourishing.

13. See St. Thomas Aquinas, *Summa Theologiae* II-II, 23, 3, ad 1 and II-II, 80, ad 1.

moving from the ethical order to the political/legal order? This is, *de jure*, the fundamental *datum explanandum* of political and legal philosophy, and it is incumbent on any political and legal philosopher to show what justifies moving from one order to the next.

Collapsing the distinction between the ethical and political/legal orders only avoids addressing this problem. This is a nonstarter. We have, however, already addressed this issue by identifying natural rights as the key to solving a distinctly political/legal structural problem.¹⁴ Natural rights do not show us how to flourish, but they do provide a way for establishing and maintaining a political/legal order that will protect the possibility that everyone *might* flourish in society. A political/legal order based on the natural right to liberty protects the possibility of self-direction in a social context. This in turn helps secure the *possibility* that individual human beings might flourish in diverse ways in various cultures and communities without requiring that the flourishing of any other individual or group be sacrificed. In other words, it offers the best alternative known to date of reconciling the highly individual and profoundly social character of human flourishing.

But still, what about the claim that some minimum amount of physical resources are also necessary, though not sufficient, for human flourishing and that the constitution for the good society we are describing is objectionable because it does not provide for such resource distribution? In addition to the problems of knowledge and interest we describe above (which apply to the problem of determining what this minimum amount of resources might be for each person and, once legitimating the transfer, keeping it within the boundary defined by this justification), there is an additional problem.

If taking resources from A to give to B is justified on the grounds that it is necessary to provide the minimum of resources that are necessary for B to flourish, how do we know that doing so will not prevent A from flourishing because it deprives her of those resources that *she* needs to flourish? In other words, on what grounds is any government in a good society warranted in thwarting the flourishing of some by depriving them of resources they have acquired rightfully as part of their personal projects, to provide what is arguably the necessary, but not even sufficient, resources for someone else to flourish? Our position is that the government of a good society should protect persons and their property from being used without their consent. This is the *only* condition for the possibility of

14. Rasmussen and Den Uyl refer to this as "liberalism's problem." Douglas J. Den Uyl, *Liberalism and Virtue*, in *Public Morality, Civic Virtue, and the Problem of Modern Liberalism* 82 (T. William Boxx & Gary M. Quinlivan eds., 2000); Douglas B. Rasmussen, *Community versus Liberty?*, in *Liberty for the Twenty-First Century: Contemporary Libertarian Thought* 271 (Tibor R. Machan & Douglas B. Rasmussen eds., 1995).

flourishing that it may justifiably provide without preferring the flourishing of one person over that of another.

It is not enough to respond that we can take from some to give to others without depriving those from whom resources are taken of the conditions sufficient for their flourishing. This begs, as already noted, numerous questions. Further, unless the claim is that such takings do not deprive *anyone* of the conditions sufficient to flourish, then one is consciously sacrificing the flourishing of one to provide conditions necessary but not sufficient for the flourishing of another. This would not be a “good society” from the standpoint of human flourishing.

Therefore, so long as we agree that no government can, by taking from A to give to B, provide the conditions that are *sufficient* for *everyone* to flourish, and so long as there is no guarantee that taking from A to give to B will not deprive A of the resources that are necessary for *her* flourishing, then our choice is between a government that favors the flourishing of one person over another or one that stays out of the way of both and limits itself to providing that which *all forms of flourishing* require: the protection of a right to liberty comprised of each person’s liberty rights to acquire, use, and dispose of resources in the world without violating the like rights of others.

CONCLUSION

In justifying his veto of the extension of the charter of the Second National Bank on the grounds that the measure exceeded the constitutional powers of Congress, President Andrew Jackson observed that: “[d]istinctions in society will always exist under every just government. Equality of talents, of education, or of wealth can not be produced by human institutions.”¹⁵ Yet at the same time Jackson also insisted that, “[i]n the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law.”¹⁶ A constitution that provides for this equal protection of the rights retained by the people is, we think, a proper constitution for a good society.

15. 2 Messages and Papers of the Presidents 590 (James D. Richardson ed., 1896).

16. *Id.*

Notes & Observations