

ing the hard cases and because they represent, after all, a controversial commitment: one way of looking at the world, but by no means the only possible way.

Greenawalt undoubtedly shares the Enlightenment values. In his restrained, judicious style, however, he shies away from saying why, and he does not bring these values explicitly to bear on his argument. His philosophical and legal close-order drill would be more interesting, and perhaps more persuasive, if he unbent a little and conveyed more fire about why free speech is important to him: why it matters for the sort of civilization he obviously believes in.

INDIVIDUALS AND THEIR RIGHTS. By Tibor Machan.¹ LaSalle, Ill.: Open Court Publishing Co. 1989. Pp. xviii, 250. \$32.95, cloth; \$16.95, paper.

*Michael Zuckert*²

"The owl of Minerva," said Hegel, "flies only at dusk," by which he meant that only after an historical order is well-established or even fading do the philosophers come to bring understanding of it. Whether Hegel's utterance has such universal bearing as he believed is a nice question, but regarding the issue of rights there is much to be said for his assertion. We have had our "rights revolution," and now we are getting philosophy's attempts to bring some wisdom about rights. Since the mid-seventies or so many talented writers have philosophized about rights. To mention but a few—Robert Nozick, Ronald Dworkin, and Alan Gewirth have presented sophisticated theories of rights, all purporting to make sense of this concept so central to our political life, and each (of course) presenting doctrines quite different from the others.

Tibor Machan is a frequent contributor to discussions about rights in the journals, and he published an earlier book on the subject in 1975. He has now drawn together his more recent work into another book. It could have been an important book, but its value is much diminished by various failings. To begin, it is not well-tailored. Machan has stitched the book together from previously published essays: the seams show; annoying repetitions occur regularly, and it would have benefitted from a much more thorough rewriting.

1. Professor of Philosophy, Auburn University.

2. Professor of Political Science, Carleton College.

The book also has a genre problem. Although Machan seems to aim at a general audience, he spends most of his time skirmishing with fellow philosophy professors. In these skirmishes he tends to deploy lighter artillery than seems appropriate for doing battle with his fellow generals of rigorous thought. Moreover, his engagements have something of the character of an old-fashioned cavalry charge—a tremendous amount of smoke and dust, horses wheeling every which way, a confusion of men running in all directions—after a while it is difficult to tell who is on which side and how the battle is going. This confusion stems, first, from the sheer number of alternative philosophic ideas he is contesting—not just ideas about rights, but about epistemology and the nature of science, about universals and particulars, about the moral character (or lack thereof) of egoism and the qualities of a good human life, about is and about ought, and about whether ought really does imply can. These battles usually occur without his clarifying sufficiently which ridge the opposition holds, how much fire power they have and what their fortifications are like. It is hard enough to ask lay readers to watch all the battles, but much worse not to explain what the argument is about.

Machan's book, in other words, is certain to annoy, frustrate, and lose many readers. This is unfortunate because he defends a libertarian point of view which stands outside the bounds of the liberal academic consensus. The standard response by the professoriate in such circumstances is to bury the offender by silence. To his own detriment, Machan has laced his book with enough obvious vices that those inclined to ignore it because of what it says will be able to do so because of how it says it.

Nonetheless, *Individuals and Their Rights* is worth the effort it requires, for Machan attempts to fill a slot in the on-going discussion of rights that needs filling. It would be more than tedious to review all the rights theories that have popped up in the past twenty years or so, but a schematic sketch can give an idea of some of the main alternatives and of how Machan's effort relates to them. We can identify four distinct types of rights theories. The differences among them derive from different combinations of answers theorists give to two questions within the broad realm of rights-thinking. The first question is the simplest and most obvious: What rights are there? The leading candidates are Lockean rights and welfare rights. Lockean rights are the familiar rights to life, liberty, and property, or in Thomas Jefferson's slightly revised formula, rights to life, liberty, and the pursuit of happiness. All of these Lockean

rights are “negative”: they protect us from certain kinds of interference.

The other kind of right is a positive right, or, as some put it, a claim right. An example of each will help clarify the distinction. A person has a positive right to the funds in his or her bank account; this means that the bank, the duty-bearer in this case, has a duty to supply the funds, the very thing to which the person has a right. The right to freedom of speech is quite different. Here the duty-bearers have no duty to supply the speaker with a speech, nor even to listen to him. They merely must forbear from interfering with valid exercises of the right.

A natural or human right can be given either a positive or a negative interpretation. For example, the right to life may mean, as a negative right, that all other persons are morally disbarred (under ordinary circumstances) from taking life; as a positive right it imposes a claim on others for the means to life. This is why it makes sense to call positive rights welfare rights, for they entail some sort of claims on others or on society as a whole to the means of welfare or well-being.

A right may even metamorphose from negative to positive. During our recent rights revolution, we had a good example in the right to counsel. It used to be a negative right; the state, the duty-bearer here, was obliged merely to allow the right-holder (a defendant) to employ an attorney if he or she desired and was able. After the Supreme Court's decision in *Gideon*, however, this right was transformed into a positive right: the right-holder now has a right to have counsel supplied by the state.

Among important rights theorists there have been champions of both types of rights. Locke and Jefferson supported negative rights; the best known of the recent theorists of negative rights probably is Nozick. Advocates of positive rights include Gewirth, the author of the most sophisticated of the recent theories, and Ronald Dworkin. Although he did not cast his theory in this form, John Rawls can also be seen as a positive rights theorist—at least his theory of justice has been recently restated in that way by Rex Martin. Another important and relatively well-known positive rights theorist is the English legal philosopher, John Finnis.

The second question which divides the rights-theorists into different camps concerns the nature of the foundation or grounding of rights. Here the answers roughly match those given in the field of moral philosophy as a whole. Rights theories grounded in naturalism, in utilitarianism, or in a loose Kantianism have all appeared. Each of these fundamental theories has a more or less distinguished

representative in the current array of writers—Finnis, for example, is a naturalist, David Lyons a utilitarian, and Gewirth a Kantian. Although Lyons and other utilitarians have made a good effort, utilitarianism is not a promising ground for a rights theory—to some degree the very impetus for the emergence of utilitarianism was the rejection of natural rights, and the theory retains a fundamental inhospitality to them. So let us set utilitarian theories aside.

The two remaining kinds of foundations and the two types of rights intersect to produce a four-fold typology of rights-theories: one finds both naturalist positive and negative rights theories as well as Kantian positive and negative rights theories. Thus Finnis is a naturalist-positive, Gewirth a Kantian-positive, and Nozick a Kantian-negative. Machan's importance becomes visible at this point, for he presents a serious version of a naturalist-negative rights theory, and thus completes the schema.

But it is not mere completeness that makes Machan's effort of such interest. Within the American political and legal system there is a special reason for interest in negative rights theories, for these were the sorts of natural rights proclaimed in the Declaration of Independence and the inspiration for the drafters of the original Constitution as well as the Reconstruction Amendments.

Another reason for welcoming Machan's effort is tied to the internal dialectic of the recent discussions. The most promising approach to the question of rights seemed at first to be one or another form of Kantianism. Rawls had set the tone with his theory of justice. Nozick retained Rawls's Kantian foundation—roughly the moral principle that human beings must be treated as ends and not merely as means—and showed that Rawls's own theory of justice, and by implication, positive rights theories in general, could not satisfy that Kantian grounding. The claims contained in positive rights, by imposing duties indiscriminately on others, in effect made the others into means for the satisfaction of the rights-holders.

Nozick's critique of Rawls, and by implication of Kantian positive-rights theories, was more successful than his own effort to build a negative rights theory on that same Kantian foundation. Nozick's work failed resoundingly in three different areas: first, he was unable to make good his own foundation; second, he was unable to generate a right to property (crucial for his theory) from his foundation, and finally, his Kantian foundation proved too potent to allow the development of a theory of legitimate political power. He could not in fact escape the anarchy (state of nature, state of

“no-rule”) which was the moral beginning point for his theory.³

II

Machan explicitly takes Nozick's failure to establish a foundation as his point of departure. He wants to remedy Nozick's failure by building on an altogether different kind of ground—a form of naturalism he calls “classical egoism,” which he says, “fills the gap left by Nozick in the moral foundations.” Machan's “classical egoism” is very different, however, from the more familiar egoism associated with the philosophy of Hobbes or Locke. He rejects Hobbesian theory as too reductionist, too atomistic, too selfish and over-committed to conflict as the natural human condition, too closed to genuinely ethical human qualities like “loyalty, generosity, good will, compassion,” and at bottom, too subjectivist. Hobbesian theory provides “a conception of individuality, selfhood or ego, which is not anchored in any firm and stable (human) nature.” In place of (human) nature, Hobbesian egoism “depends wholly on individual (or collectively agreed to) wants, desires, or preferences.”

Machan, therefore, does not mean merely to reassert an older view of natural rights. The best known doctrines of natural rights, those of Hobbes and Locke, were naturalist, egoist-negative, but were not *classical* egoist. Like Nozick, Machan seeks to defend Lockean rights, but on an un-Lockean foundation.

Unlike Nozick, he turns to Aristotle instead of Kant. Although “it has a classical pedigree,” Machan's theory is nonetheless “not in full accord with Aristotle's philosophy.” Probably the most obvious deviation from Aristotle is this: Aristotle was not a philosopher of natural rights, and surely not of negative natural rights. He defended not a libertarian minimal state, but a robust notion of the comprehensive moral purpose of politics. In other words, Aristotle was not even a liberal, much less a libertarian like Machan.

To Machan, Aristotle stands for the general principle of “metaphysical naturalism”: things, human beings included, possess natures which are graspable by the human intellect. Machan also understands moral matters more or less in the manner of Aristotle: life itself sets criteria for successful living or “flourishing.” By nature, humans strive for this condition of flourishing, called happiness by both Aristotle and Machan. This idea supplies “the core of the concept of good: being in a position to complete the nature of what something is makes that something a good one of its kind. The human good, at its most complete, would be the most fully,

3. See Zuckert, *Liberalism and Nihilism*, 2 CONST. COMM. 389 (1985).

consistently realized manifestation of *human nature*." The emphasis on flourishing or happiness means Machan takes roughly the same naturalistic tack as several other recent legal philosophers—for instance, Finnis and Michael Perry.

He differs from them (and from Aristotle) in that his naturalism is clearly egoistic. "The classical egoist holds that the primary ethical task for each person is the fullest development of himself or herself as a living human being *and* as the individual that he or she is." Human good has a unique character compared to other kinds of natural goods. Human beings are like all beings in that the same general principle of excellence holds: "We would have an excellent human being if we found one who most fully and consistently realized human nature." But "human nature" needs to be specified: "Every human being is a rational animal." To be rational means, preeminently, to be "capable of self-motivation or initiation of its own functions," i.e., to be a "self-responsible" being which is for that reason an ethical egoist. The "specifically human good," which is "ethics or morality," is "that aspect of human good subject to determination by the person, or open to choice." The human good, morality, thus differs from purely naturalistic goods of other beings in that it requires the exercise of the rational faculty or the exercise of choice. As Machan summarizes his point, "to be morally meritorious, the right course of conduct must be *chosen*." The individual, therefore, is an egoist not for the amoral Hobbesian reason that he or she is a passion-driven, self-seeking hedonist, but for a fully moral reason: the obligation to live in a fully ethical or responsible way the only "particular human life over which [a] person has direct responsibility, namely, oneself." And so, Machan concludes, "ethical egoism . . . is not an ethics of greed, position, or power, but one of self-development."

He thinks it but a short step from ethical egoism as the standard of moral good to natural rights as the standard of political good. Egoism implies that "each of us should choose to attain our happiness and among others this can be realized only if each has a sphere of sovereignty, his or her moral space in society." This "sphere of sovereignty" or "moral space" is precisely what rights delimit. "Rights specify the sole personal authority of someone to judge and the jurisdiction to act." Machan's egoism posits as the primary dimension of morality the claim of moral autonomy for the self; but, he insists, the self is required also to recognize the rights of others. "If one chooses to be part of human community life, one is implicitly consenting to the necessary conditions for such association, namely, respect for other people's sovereignty over their own

lives and the reasonable securing of those conditions, that is to say, enforceable basic rights." Recognition of the rights of others is a rationally discernible condition for social life, and all "moral agents . . . have implicitly agreed to be so bound." But what they are bound to is recognition of the sphere of autonomy of others, i.e., recognition of purely negative rights.

Such is Machan's argument grounding natural rights. What is of interest in it compared to that of his fellow negative rights theorist, Nozick, is not only the greater richness of detail in Machan, but the way in which he extracts a wholly negative conception of rights from a positive moral argument. What is of interest in Machan's arguments compared to that of fellow ethical naturalists like Finnis and Perry is the way he brings out an often hidden egoist bias in the ethics of "flourishing." Machan brings out, as Perry never does, the problematic character of deriving positive moral obligations (or positive rights) from ethical naturalism.

Machan's second main task, after attempting to ground rights in general, is to derive a specific right to property. This right is at once central to his libertarian project and problematical beyond the other rights. It is central to his project because much of the governmental intrusion into the lives of individuals to which he objects involves alleged violations of property rights. It is problematical because, unlike rights to life and liberty which more clearly involve claims for sovereignty or control by the individual over what is his or her own life, body and actions, the right to property involves exclusive claims to the external world. How such claims over what is not one's own can arise is a question which has long tried the ingenuity of philosophers.

Machan rejects the Lockean answer that one makes some part of the external world one's own by mixing with it something that is clearly one's own, one's labor. He also rejects the typical pragmatic or utilitarian answer of the economists that private property increases productivity, because, while that may be true, it does not establish a moral right to property. Instead, "the right to private property is a moral prerequisite for the realization of the task of self-development within a social context," because "borders between individuals are needed to make self-governance possible." Property is the individual's "determinate sphere of authority" which is the necessary environment in which "the moral life of individuals can flourish." Property, as Machan conceives it, is rights made flesh. Since moral life is a life of individual choice, "collective planning is not only inefficient, . . . but morally reprehensible."

Like Nozick, Machan has such a strong theory of rights that

he is driven to take seriously the question posed by moral anarchism: "whether it is possible to acquire and possess legitimate political authority at all." He parts company from many of his fellow libertarians in holding that "political authority, once it is properly understood, is justified within an individualist moral framework." Although not exactly following the classical natural rights thinkers, he is much closer to them on this issue than on the others. The beginning point is the right to self-defense, the right to use force to protect oneself and one's rights. Via consent, this rightful power can be transferred to agents specially constituted to exercise it. While this process legitimates government, it legitimates only a strictly limited or minimal state, one limited to securing rights. That must be so, for individuals have no other rightful power over others than to protect themselves and their rights, and therefore they can never authorize governments to do more.

III

Such, in outline, is the argument of Machan's book. Does his naturalist classical egoism deliver a more successful theory of rights than Nozick's Kantianism? Of the three chief issues—the grounding of rights in general, the derivation of a right to property, and the legitimation of political authority—the chief interest of Machan's argument lies in the first two, for his treatment of the third is fairly ordinary and, unlike Nozick's, not in obvious contradiction with the foundations of his own argument.

Machan's argument on the right to property cannot be judged successful, at least not for generating a right of the sort he claims. The problem is simple. If the ground for a right to property is the contribution property makes to the moral task of "self-governance" through providing "borders between individuals" and a "sphere of authority" for each, then what appears to follow is some modicum of property for each and every rights-holder, that is, for all human beings. Machan's argument bears up well, or well enough, against the challenge of collectivism, but it does not rebut, indeed it is an argument for, *redistribution* of private property. A Machan libertarian might sponsor land-reform, for example, and steep inheritance taxes. Machan's argument, in other words, comes closer to establishing a positive right to property than the negative right he believes he has established.

If Machan replies that moral self-determination means that one lives with the consequences of one's actions, including gaining or losing property, the problem still remains of those who are born into the world with natural rights, but no property. They do not

lack this essential feature of their existence as rights-holders because of the choices they have made, but because they never had property to lose. At the very least, then, Machan's argument would establish a right to a "stake" for all. To put the point more broadly, Machan needs to consider how the limitation on property acquisition that Locke described—that enough and as good be left for others—bears on his own theory. Locke dealt with that problem through an argument about the productive power of labor and the need for private property to unleash labor; Machan has closed off this line of argument and pursues no other.

The failure of Machan's negative property right deals a fatal blow to his theory as part of his libertarian political project, but the most interesting theoretical question nevertheless remains: can he generate a theory of negative natural rights from his foundation in "Aristotelian" egoism?

At one point Machan supplies a formula that provides a good place to begin the consideration of this most important question: "to be morally meritorious, the right course of action must be *chosen*." As should be clear from the previous discussion, this statement is not a mere truism. Rather he is setting out a double criterion that must be met for moral merit to inhere in an action: it must be the "right course of conduct," and it must be "chosen." The right action externally imposed lacks moral merit; the wrong course freely chosen also lacks merit. A failure to satisfy either of these two requirements produces a moral failure, but Machan treats them in an interestingly non-parallel manner. One of the conditions imposes an absolute moral demand on all action, while the other imposes hardly any demand. The requirement of free choice must be satisfied under all conditions, whether the exercise of choice leads to the right course of conduct or not. Never does the "right course of conduct" impose on the role of choice. But if they are both equally necessary conditions for a morally correct action, and jointly the necessary and sufficient condition for such, then it does not follow that the "choice" requisite should be privileged in the way it is by Machan.

The difference between Aristotle and Machan derives from just this privileging of choice by the latter. For Aristotle, the question of ethics is substantially more complex, for he refuses to ignore the substantive issue of the right course of conduct. Indeed, politics fulfills for Aristotle the crucial moral role of helping to educate the citizenry toward "the right course of conduct," for, while that course is presumably the natural end or leads to the flourishing of the individual, there are nonetheless many natural barriers to it.

Virtue is relatively rare and must be worked at. Aristotle, therefore, almost reverses Machan's priorities: training towards virtue stands as the most legitimate task of the polity. The well-trained person then chooses the right course of conduct. Aristotle would consider it foolish or worse to elevate choice over virtuous conduct. For Aristotle, the moral-political problem requires a complex adjustment of habituation and choice, such that no formulation in terms of negative rights can begin to do justice to it.

Machan not only misses the way Aristotelian politics serves a moral function by contributing centrally to the production of virtue (habitually right course of conduct), but also the way in which it is the sphere in which choice is exercised. In political participation, in the process of ruling and being ruled, and in sharing in deliberation regarding the just and the unjust, the beneficial and the harmful, human beings are not only seeking the right course of conduct and setting out on paths toward it, but also doing so in a human, rational and free way. Machan continually denies that his system makes extreme assumptions about human asociality like those of Hobbes, but his differences from Aristotle bring out just how individualistic he remains. In sum: Aristotle cannot be drafted for service as a natural rights theorist, nor does Machan's version of naturalism seem superior to his.

That in itself, of course, does not settle any issue except whether Machan can succeed at his project of a natural rights theory on an Aristotelian naturalist foundation. On closer examination, it seems to me, Machan has not developed a naturalistic ethic at all. At bottom his is a theory of agency, very like, but less self-aware than that of Gewirth, who argued that rights are the necessarily recognized conditions for human agency. For Machan, rights derive exclusively from the choice dimension and thus too are requisites for effectuating human agency. In Gewirth, this line of reasoning produces a theory of positive rights, and it is not evident that Machan's argument for negative rights is a more valid inference from the premises.

Machan has not established his most interesting claim—that a moral foundation of a roughly Aristotelian type can produce a theory of negative rights. He fails here because he lets go of Aristotelian naturalism to a far greater extent than he acknowledges. On the other hand, he also does not establish his negative rights as the result of a theory of agency. Nor does he establish the approach via agency as superior to the naturalism he explicitly defends.

For all that, Machan's is a respectable, indeed an admirable effort, even if at bottom it is no more successful than Nozick's.

Does his failure imply that negative rights theories, i.e., theories of the sorts of rights affirmed in the American founding, are simply untenable? Some would say so. I would say instead that the current efforts at establishing negative rights have one very odd feature. There is a strenuous effort to defend Lockean rights, but just as strenuous an effort to avoid Lockean grounds for doing so. We have had Nozick's Kantian theory and now Machan's half-Aristotelian argument, but not a Lockean theory. There are difficulties with Locke's own version of rights theory, I admit, but there was a tradition, much of it in America, which worked at Lockean rights in a Lockean way. I will close with the suggestion that what we need from our rights theorists now is a strenuous effort to think Lockean rights through in a Lockean manner.

THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM. By Bernard Grofman¹ and Donald Wittman,² eds. New York: Agathon Press. 1989. Pp. 296. \$42.00 cloth, \$18.00 paper.

*Daniel A. Farber*³

For most readers of this journal, the first question about *The Federalist Papers and the New Institutionalism* is probably, "What on earth is 'The New Institutionalism'?" This is a simple question, which unfortunately has no equally simple answer. The "New Institutionalism" is one of several names for a new school of scholarship about government, which is also known as "rational choice," "social choice," or—most commonly—"public choice." Both the proper name for the school and the exact boundaries of its subject matter are still hotly contested, and already sub-schools have arisen. This is a field very much in flux, and therefore difficult to define.

Still, at least a tentative definition is necessary in order to proceed. One of the editors of the book defines the field as including "analyses using tools derived from microeconomics, game theory, and social choice to the effect of decision-making rules and institutional structure on outcomes." More simply, James Buchanan (who won the Nobel prize in economics for his work in the area) defines public choice as "the application of the theoretical method and techniques of modern economics to the study of political

-
1. Professor of Political Science, University of California, Irvine.
 2. Professor of Economics, University of California, Santa Cruz.
 3. Henry J. Fletcher Professor of Law, University of Minnesota.