

Understanding the Difference Between Positive and Negative Rights

Background

The discourse on the rights of man, which began as early as Platoⁱ and Ciceroⁱⁱ, continues today as United States politicians routinely discuss “certain unalienable Rights . . .”ⁱⁱⁱ which the Founding Fathers might not recognize.

The Declaration of Independence calls for the British government to end the “long train of abuses and usurpations” of “certain unalienable Rights,” specifically “Life, Liberty and the pursuit of Happiness.” The authors and signers of the Declaration did not desire for government to provide “Life, Liberty and the pursuit of Happiness”, but rather they expected government to protect their pre-existing rights which were “endowed by their Creator.”^{iv}

Similarly, the Bill of Rights to the Constitution of the United States restricts Congress from making laws against the right to any religion, the right to exercise religion, the right to practice free speech, the right to freedom of the press, and the right “to petition the Government for a redress of grievances.”^v The Bill of Rights also declares that “the right of the people to keep and bear Arms, shall not be infringed”^{vi} and the government shall not violate “[t]he right of the people to be secure in their persons, houses, papers, and effects . . .”^{vii}

The unalienable rights in the Declaration and many found among the first amendments to the Constitution are considered “negative rights.” A “negative right” restrains other persons or governments by limiting their actions toward or against the right holder. In other words, it enables the right holder to be left alone in certain areas. For example, the right to be secure in one’s home requires that others refrain from trespassing or entering without permission.

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On the other hand, many claims of rights emerging since America’s founding, such as rights to healthcare, housing, or standards of living, are considered “positive rights.” These positive rights essentially provide the right holder with a claim against another person or the state for some good, service, or treatment. Thus, a right to housing obligates someone – presumably the state – to provide the right holder with housing, typically via resources obtained from others.^{viii}

The words “negative” and “positive” reflect the nature of the rights rather than a judgment on the quality of the rights themselves.

Policy Consideration

When Supreme Court Justice Ruth Bader Ginsberg was asked what document emerging democracies should look to in drafting a constitution, she pointed to the 1997 constitution of South Africa, rather than the United States’

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Constitution.^{ix} In contrast to the U.S. Constitution, that document includes positive rights, for example, stipulating that citizens have the right to adequate housing.^x Similar to South Africa's constitution, the following international "covenants" and "declarations" similarly pose the enforcement of positive rights by nations.

- The International Covenant on Economic, Social, and Cultural Rights (signed but not yet ratified by the U.S.) proclaims the right of all people to "an equitable distribution of world food supplies;"^{xi} to "the enjoyment of the highest attainable standard of physical and mental health;"^{xii} to "take part in cultural life;"^{xiii} and "to enjoy the benefits of scientific progress and its applications."^{xiv}
- The 1948 United Nations Universal Declaration of Human Rights proclaims that all human beings have "the right to [work and to receive] just and favorable remuneration . . . [and] the right to rest and leisure."^{xv}

The New York Times also published a recent article proclaiming that the U.S. Constitution "is terse and old, and it guarantees relatively few rights." Continuing, the article lamented that "[t]he commitment of some members of the Supreme Court to interpreting the Constitution according to its original meaning in the 18th century may send the signal that it is of little current use to a new African nation."^{xvi}

Numerous "positive rights" in modern America link directly to many of the practical and budgetary concerns facing the nation. "Positive rights" often make for attractive political promises and catchy sound bites. After all, what American does not like the thought of free healthcare, housing, or income? Unfortunately, explanations are sparse on who will provide the funding

to deliver them. Even for long-standing entitlement programs like Social Security, serious questions exist about the government's capacity to fund them.

Conclusion

Of America's Constitutional government, James Madison said, "In Europe, charters of liberty have been granted by power. America has set the example . . . of charters of power granted by liberty." He called this a "revolution in the practice of the world," which introduced "the most triumphant epoch of its history."

Understanding the difference between "negative" and "positive" rights is integral to comprehending the federal government's deviation from the nature and bounds of the Constitution. In the modern setting, where individuals claim "rights" to just about every aspect of life, citizens have an obligation to understand the difference in the guarantees of the Constitution and the wishful promises of politicians who have limited abilities and resources to actually deliver the rights they aim to provide.

ⁱ V. Bradley Lewis, *Platonic Philosophy and Natural Law*, THE WITHERSPOON INSTITUTE (2012), available at <http://www.nlnrac.org/classical/plato>.

ⁱⁱ Walter Nicgorski, *CICERO and the NATURAL LAW*, THE WITHERSPOON INSTITUTE (2012), available at <http://www.nlnrac.org/classical/cicero>.

ⁱⁱⁱ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), available at http://www.archives.gov/exhibits/charters/declaration_transcript.html.

^{iv} *Id.*

^v U.S. CONST. amend. I, available at

http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html.

^{vi} *Id.* at amend. II.

^{vii} *Id.* at amend. IV.

^{viii} See generally Leif Wenar, "Rights", *The Stanford Encyclopedia of Philosophy*, (Edward N. Zalta ed.) (2011) available at <http://plato.stanford.edu/archives/fall2011/entries/rights/>.

^{ix} *to Egyptians: I wouldn't use U.S. Constitution as a model*, FOXNEWS.COM (Feb. 6, 2012), <http://www.foxnews.com/politics/2012/02/06/ginsburg-to-egyptians-wouldnt-use-us-constitution-as-model/>.

^x S. Afr CONST. §26, available at

<http://www.info.gov.za/documents/constitution/1996/96cons2.htm#26>.

^{xi} INT'L COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS art. 11, available at <http://www2.ohchr.org/english/law/cescr.htm>.

^{xii} *Id.* at art. 12.

^{xiii} *Id.* at art. 15.

^{xiv} *Id.*

^{xv} U.N. Declaration of Human Rights art. 24, available at

<http://www.un.org/en/documents/udhr/index.shtml>.

^{xvi} Adam Liptak, "We the People" Loses Appeal With People Around the World, N. Y. TIMES (February 6, 2012), <http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html>.