## TAKING THE CONSTITUTION SERIOUSLY

Walter Berns/Simon and Schuster/$19.95

Terry Eastland

Walter Berns writes in the preface to this book that he intends it to be "an explanation of sorts" of the Constitution. To his credit, he does not try to explain the Constitution by referring simply to what the Supreme Court has said about it in constitutional cases, as so often happens in law school classrooms. Nor does he attempt to explain it by looking only at the work of its framers. Instead, Berns offers an explanation that understands the Constitution in light of the Declaration of Independence. That document declares the rights with which each of us is equally endowed, and states that it is to secure those rights that governments are instituted. *Taking the Constitution Seriously* undertakes to show how our basic law protects rights.

Berns goes about this task with wit and style. He has a sure grip on the history of the founding period, and skillfully explicates the rights-securing principles of the framers' "new science of politics," which included representation, separation of powers, and an extended, commercial republic.

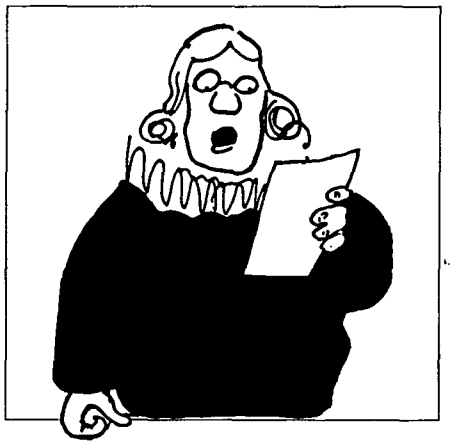
*Taking the Constitution Seriously* is thoughtful and informative, one of the best books written on our founding charter in a year understandably crowded with publications on the Constitution. My differences with the book concern its most interesting parts—those dealing with religion.

Berns sets forth the history of the "religious problem," as he calls it, and shows why securing rights required separating church and state. All of this Berns does well enough, as a historical matter. Yet his explanation of this aspect of our constitutional order leads to an odd and I think unnecessary conclusion. For Berns, it seems, a sincere religious believer must have a low regard for the Constitution and the kind of society it has helped establish.

Berns characterizes religious believers as "the most zealous of partisans" who aren't "satisfied with being represented" and want always to "rule." Such believers—and Berns seems to mean all believers, today as well as ages past—want to "shape the character" of their fellow citizens, cleansing them of sin. They think "every commonwealth . . . is properly a religious commonwealth." They get this idea from "revealed religion" (specifically from the New Testament) from which they learn that "souls belong to God and that . . . He has revealed how they should be cared for." In other words, they accept that God has "provided rule for mankind." Believing in this divine revelation, they must deny that liberty of conscience is a "natural right."

The problem with this argument is that Berns wrongly assumes religions and religious people are alike in the ways he indicates. True, there were religions in what Berns calls the "premodern age" (i.e., before Hobbes) that maintained every commonwealth must be a religious commonwealth. True as well, there are such religions today. There is the radical Islamic movement in Tehran, which Berns cites. There is in our own country the "dominion" theology associated with Pat Robertson, which seems to call for a kind of theocracy. But so far as most Protestant Christianity in the United States today is concerned, it rejects rule in the name of religion, in practice as well as doctrine. Most Protestants, and for that matter most Catholics and Jews, are quite satisfied "with being represented."

For me—a Protestant—the idea of a religious commonwealth is not only bad politics. It's bad theology. The only such commonwealth sanctioned in the Bible appears in the Old Testament—the state of Israel. The New Testament broke with that, and while it does recognize civil government as an institution under God, it does not spell out how government should be organized—it does not contain some theology of temporal rule. Further, while it does articulate principles of relevance to politics—concerning the importance and distinctiveness of each individual, for example—such principles are not unique to the New Testament and they enjoy support from non-religious sources. As I read the New Testament, it contains a letter to the Philippians but not one to the Politicians. It has Paul, but not Publius. Revealed religion—specifically the New Testament—does not say how men "should be cared for" by government. Someone like me, who believes in God but does not hang heretics, is free to use his reason in thinking about politics.



For theological reasons, I also think a sincerely religious person can agree that religious liberty is at least a thing to be prized by society and protected by government, if not also a "natural right." This is possible because while it is true (from the perspective of religion) that God made every soul for Himself, He also made man free to choose God. In the absence of revelation that obliges government to dictate how souls "should be cared for," no one should be forced by the state to choose God. The matter of eternity is properly between God and man alone, and thus it is proper for law to secure religious liberty.

Berns correctly rejects the view that the idea of toleration rests on disbelief. Yet he goes on to argue that toleration probably does "depend on a way of life from which at least weakened belief follows as a consequence." This way of life is the one contemplated by a commercial republic: the framers believed that men would absorb themselves, as Berns puts it, in "material gratification or comfortable preservation," and that in consequence they would lose their interest in things above. Writes Berns: "Rather than being a whole way of life, religion, in the commercial republic, becomes merely a part of life . . . consigned or relegated to one day (or one morning) a week. Commerce . . . leads men, perhaps imperceptibly, away from the continuous concern with those issues characteristic of life in a preconstitutional age."

Here Berns makes a point of considerable force. The evidence is strong that major framers believed commercial pursuits would "tame" or "soften" the religious impulses of man, and "weaken" belief. And from Berns's perspective, it would seem that this has happened, at least in some degree: the way religious people conduct themselves in modern America is certainly different from how such people behaved during, say, the Crusades or the time of Charles I. Still, this isn't the whole of the matter. Berns's model for an authentic religious life seems to be that of a (to use his word) "preconstitutional" age: monk-like, constantly absorbed in reflecting on things above (and driving non-monks into war with their fellow men). But this model, even if a right one, isn't the only one, nor is there anything in Christianity or Judaism that forbids commercial life. An American might busy himself in commerce or the various pursuits it supports but also believe he is at the same time serving God. And certainly there are millions of Americans who believe they are doing so daily, not just on Sundays. Whether or not in fact they are, of course, and whether or not religious devotees in the "preconstitutional" age were in fact serving God, is not something mere mortals can determine.

So I differ with Berns on some aspects of his treatment of religion: it's not schizophrenic to believe in God and also to like our Constitution and our country. But lest there be any misunderstanding, I should point out that Berns is not a cultured despiser of religion. Indeed, Berns rejects that view of America which argues for the minimizing, if not the ultimate elimination, of all vestiges of the "pre-modern world," including religion, in pursuit of a society that is libertarian (except, of course, in matters of economics). Berns shares the view of the Founders that religion, while it must be consigned to the private sphere, is nonetheless vital to the political health of the nation. For Berns, as for the Founders, religion has positive attributes; it can help shape the character of citizens, making them honest, generous, and concerned about their neighbor. It is for this reason that care must be taken, as Berns says, "not to abolish it or neglect it to such an extent that it would languish and die."

In the final part of his book, which is no longer an "explanation" of the Constitution but an inquiry into its interpretations by judges, Berns discusses what he calls the "deconstructing" of America. Berns correctly relates the Founders' understanding that religion and other "conditions of republicanism" (such as family and education) were properly to be the concern of the states, not the national government. Yet as he points out, the ability of the states to deal effectively in this area has been seriously compromised. The Bill of Rights, whose provisions originally applied only to the federal government, has in substantial measure been applied to the states by the Supreme Court,

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through its interpretation of the Fourteenth Amendment, beginning in 1925. As a result, the Court has voided many state laws and practices dealing with the "conditions of republicanism." As Berns puts it, "old-fashioned" laws have been "weighed in the balance" with "new-fashioned" principles, and been found wanting—and thus America has been "deconstructed." In this process, Berns writes, the Court has become a political institution, causing "its critics to charge it with making law and its friends to praise it for the sort of law it made." Berns remarks at length on the illegitimate "rights creation" of the Supreme Court that made possible its new law—and the nullifying of state law—and criticizes the Court for abusing its independence.

Much of what Berns says in criticism of the Court is on the mark. Many of its decisions involving the "conditions of republicanism" betray ignorance of the subtleties of the Founders' political science. Where they took it for granted "that states would use the law to support the institution of the family," says Berns, such a sentiment does not appear in modern family cases. Nor does there appear in modern religion cases the kind of appreciation for the importance of religion to our polity that the Founders shared.

Berns concludes his criticism of the modern Court with a plea that it take the Constitution seriously. This means construing it in its original sense, that is, in the way in which its provisions were understood by those who framed and ratified its various parts, not according to extra-constitutional ideals of the public good, however compelling they might be. Berns plainly is an "interpretivist" or "originalist"; he would keep the times in tune with the Constitution, as he says more than once, not the other way round.

I agree with Berns, although he does leave some important matters of detail unaddressed. It seems, for Berns, that taking the Constitution seriously would mean returning many issues to the states (that is, it would undo much of the application of provisions of the Bill of Rights to the states). Whether this procedural change is advisable is debatable (and any High Court nominee who advocated it would fail to be confirmed). More urgently needed is the development of better substantive doctrine, so that when the Court construes provisions of the Bill of Rights it does so in ways more faithful to the original Constitution. Change in this respect would enhance the ability of states to foster the "conditions of republicanism."

Walter Berns has devoted his distinguished academic career to thinking about American politics and government, particularly in relation to the founding period. For more than three decades his scholarly and popular work has concerned the relationship between liberty and virtue, between those "new-fashioned principles" and "old-fashioned laws." *Taking the Constitution Seriously* represents a continuation and indeed a culmination of this effort. Its depth and gravity promise that it will have a life long after the Constitution's bicentennial celebration has ended. □

PLANT CLOSINGS: WORKER RIGHTS, MANAGEMENT RIGHTS, AND THE LAW
Francis A. O'Connell/Transaction Books/$19.95; $12.95 paper

Howard Dickman

The Democratic party is once again in control of both houses of Congress, and once again our legislators are on the verge of committing many serious mistakes, including one whose ramifications may hinder our economy for years to come. A union-sponsored measure championed by Senator Howard Metzenbaum would compel firms in many instances to give months of notice about plant closings and even layoffs to employees. The announced purpose is to give workers and communities time to cope with dislocation: a reasonable sounding goal, although surveys show that many businesses, both unionized and not, already do notify workers of impending layoffs or shutdowns, at least when they can do so without jeopardizing their survival by scaring off creditors and customers. Yet the measure before Congress now is merely a cat's-paw for more radical legislation introduced earlier in 1987, which would hinder or prevent firms from laying off workers or shutting down altogether. This bill would force many American businesses to meet and confer with unions, local and state governments, and federal bureaucrats for the purpose of agreeing to an alternative to curtailing their operations.

Economists who have analyzed organized labor's crusade for plant closing legislation over the past fifteen-odd years generally agree that, in the words of Richard McKenzie of Clemson, it is a "bad idea whose time may have come." Frank O'Connell informs us that it already has. His well-researched, timely study recounts the evolution and current status of workers' legal rights in shutdowns and contracting-out situations, as these rights have been discovered by the National Labor Relations Board (NLRB) and the federal courts in the National Labor Relations Act (NLRA).

Some unions have successfully negotiated for the right to be consulted by employers over the decision to shut down, and a few even have "work preservation" clauses which guarantee employees the right to perform certain kinds of work for the life of the agreement. But as union pay hikes have provoked unemployment and plant relocations to areas where labor is cheaper and not bound by restrictive work rules, the unions' need for job security provisions has grown significantly faster than their ability to get them at the bargaining table. So they have tried to get the government into the act.

O'Connell explains that two "unfair labor practice" provisions in the NLRA provided, and, if there is a change in the political winds, may still provide, unions, the NLRB, and the federal courts with the power they need to further interfere unjustifiably with property rights. It is illegal for employers to terminate or otherwise "discriminate" against employees if the motive is to discourage union membership or activity. It is also an unfair labor practice for employers to refuse to bargain "in good faith" with unions over wages, hours, "and other terms and conditions of employment."

The duty to bargain is not a duty to agree, to be sure. But an employer can-

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