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BOOK REVIEW

Restoring the Lost Constitution: The Presumption of Liberty. By Randy E. Barnett. Princeton, New Jersey: Princeton University Press, 2004.

RANDY BARNETT IS AMONG the world's leading libertarian academics and lawyers, perhaps second only to Richard Epstein in influence. In fact, Mr. Barnett (1977, p. 15) has defended anarcho-capitalism in these very pages,[1] which makes his most recent book, *Restoring the Lost Constitution*, most curious. In it, he attempts to legitimate the United States government by arguing that, properly understood, the U.S. Constitution establishes libertarianism throughout the land by both limiting the federal government's powers and empowering the federal government to restrain the states.

Though well-intentioned, the book is fatally flawed. Mr. Barnett's arguments that a monopoly government can be legitimate are unpersuasive; his arguments that the federal government should limit its own power are futile; and his arguments that the federal government should impose libertarianism on the states are dangerous.

THE GOVERNED DO NOT CONSENT

The author begins soundly enough, with an admirable refutation of the arguments of others for the legitimacy of government, clearly inspired by Lysander Spooner's *The Constitution of No Authority*.[1] He rightly rejects the idea that the federal government was formed by "We the People" or with "the consent of the governed," and knocks down several putative claims for legitimacy based upon "consent."

[1]Mr. Barnett has made this and other Spooner works available at www.lysanderspooner.org.

He shows, for example, that voting rights do not create consent. A vote for a candidate does not necessarily indicate consent to anything the candidate may do in office—it may merely be (and almost always is) a vote in self-defense against an even worse candidate. Further, there is no way to choose not to "consent" through voting because under this theory, the nonvoter is assumed to have consented, too, by forgoing his opportunity to vote.

Mr. Barnett also refutes arguments that one consents to a nation's government simply by living within its borders. To argue that residency equals consent, one must assume "that lawmakers have the initial authority to demand your obedience or exit in the first place." The residency argument cannot support this assumption anymore than it could be said that a rape victim consents "simply by being there."

Mr. Barnett also effectively disposes of the arguments of those who say the country's founders consented on our behalf. First, the founders themselves did not unanimously consent to our government. Second, even if they had, they could not have consented on behalf of the rest of us, because we did not give them that authority. Consent, by definition, can only be given by the individual. If this were not the case, there would be no need for, say, trial by jury. Your representative in a state legislature or the U.S. Congress could simply waive your rights for you. After all, they are your "duly elected representatives."

Finally, he shows that acquiescence does not equal consent. True, there must be general acquiescence for a government to exist at all, but that cannot be the same thing as consent.[2] Otherwise, even the most oppressive regime would be legitimate.

A LEGITIMATE STATE?

Despite all this, Mr. Barnett is unwilling to give up on the idea of legitimate government. He notes that at some level, unanimous consent of the governed is possible—for example, in private condominium developments such as the one in which his parents live. But because state and federal governments control areas too large to have unanimous consent, he writes (p. 43), "If these lawmaking authorities are to command a duty of obedience, it must be on some grounds other than consent of the governed." He then searches for and finds other grounds which he believes legitimate the

[2]Compare Mises (2002, p. 46): "Only a group that can count on the consent of the governed can establish a lasting regime."

Constitution and overcome Spooner's *Constitution of No Authority* objections.

Why a self-described libertarian would feel a need to go down this road at all is unclear. He has just acknowledged that unanimous consent exists and works well in private communities. Is this not the libertarian ideal? Perhaps he believes we need larger political units encompassing nonconsenting parties for some compelling reason—maybe for the provision of so-called public goods, such as police protection or roads. But he does not present any such argument here, let alone refute the ample literature showing such larger political units' non-necessity. Instead, he rushes forth to make the case for the Constitution.

To do this, he avers that consent is not the only foundation upon which a legitimate government may rest. A government is also legitimate, he says, if it provides (p. 46) "procedural assurances that the rights of the nonconsenting persons upon whom [its laws] are imposed have been protected." Thus, a government that prohibits the initiation of acts of force and fraud against peaceful people is legitimate. He finds this consistent with Spooner's (1971, vol. 4, p. 143) statement, "Justice is evidently the only principle that *everybody* can be presumed to agree to, in the formation of government."

But Mr. Barnett does not address how a government may legitimately have a *monopoly* on the use of force and the provision of defense, law, and justice, as our federal and state governments do. Certainly he would agree that any justice system, state or private, will be imperfect and, despite the best "procedural assurances," an innocent person may be wrongly convicted of and punished for a crime. Can we not justify such a system only on the ground that the party being punished consented to participate? And besides, will a monopoly law-and-justice provider not be, like all socialist enterprises, inferior to private alternatives that would exist but for the monopolist?

Mr. Barnett seems to simply assume that a monopoly government with the right "procedural assurances" will be a perfect justice-dispensing machine, or at the very least, not inferior to private (consented-to) alternatives. Perhaps the greatest fault of his book is that it does not even attempt to support this unstated assumption.

Proceeding on this theory of legitimacy, Mr. Barnett argues that the U.S. Constitution, rightly understood, establishes a legitimate government, because it protects natural (libertarian) rights.

LIMITED FEDERAL GOVERNMENT

Despite the serious problems with his ideas about governmental legitimacy, Mr. Barnett does a fine job illustrating some of the founders' more-or-less libertarian intentions and how they are reflected in the Constitution. But as we shall see in a moment, good intentions count for nothing.

Mr. Barnett begins by arguing for an originalist interpretation of the Constitution—interpreting it as the general public would have at the time it was written, based upon the text. That is, he interprets the constitution according to its original *meaning*, rather than its authors' original *intent*. Here again, his inspiration is Lysander Spooner, who applied this method in his 1847 book, *The Unconstitutionality of Slavery*.[3]

If we must have a constitution, libertarians should find Spooner/Barnett originalism the most appealing way to interpret it. As Mr. Barnett persuasively argues, a government operating by a fixed set of rules seems preferable to one that can make up the rules as it goes along. Originalism may be all the more appealing because Mr. Barnett presents a strong argument that the originalist Constitution creates a federal government of extremely limited powers. For example, he shows that the "Necessary and Proper Clause" does not extend Congress's powers beyond the few enumerated in Article I of the Constitution; that the "lost" Ninth Amendment—which courts have always ignored and "conservatives" such as Robert Bork deny has any meaning at all—prevents Congress from infringing natural rights under most circumstances; and that the Commerce Clause has been greatly distorted to give Congress far more power than it was ever intended to have.[4]

Mr. Barnett's well-reasoned and well-supported arguments for a limited federal government make up a large portion of the book, but I make short shrift of them here because, despite their appeal, they are almost entirely useless. The Ninth Amendment and the Commerce Clause are not, as he says, "lost"—they have been in the Constitution all along. Courts have distorted these provisions not because judges have not had Randy Barnett to explain their true meaning. Courts have done so because they are part of the very

[3]See also Barnett (1977).

[4]Most of these arguments have been made before, by Mr. Barnett and others. See, e.g., Epstein (1987) and Barnett (1991, 1993). And for a compelling libertarian analysis that looks less favorably upon our founders' Constitution, see Royce (1997).

federal government Randy Barnett seeks to limit. In general, judges and those who appoint them have no reason to want to limit government.

Mr. Barnett naïvely sees judges as somehow more trustworthy than other government officials. He argues that courts should give less deference to Congress than they do now because, while we once "assumed that legislatures really do assess the necessity and propriety of laws before enacting them," we now know better. "In recent decades," he writes,

> we have remembered the problem of faction. . . . We now understand much better . . . than our post-New Deal predecessors . . . that both minorities and majorities can successfully assert their interests in the legislative process to gain enactments that serve their own interests rather than being necessary and proper. (p. 260)

But one must wonder how much Mr. Barnett has learned from twentieth-century history. Have not judges been responsible for some of the most outrageous expansions of government power? And, after all, are judges not a product of the same political system that gives us legislators and presidents? What president would appoint judges who would tell him he cannot do anything he wants? What Senators would confirm a judicial candidate who tells them that everything they have ever done in office is unconstitutional? The whole enterprise of libertarian constitutional theory ignores all we have learned from public choice economics about the incentives of government actors.

Thus, nothing short of a libertarian revolution would be necessary for courts to begin doing what Mr. Barnett wants them to. How could such a revolution come about? Not by educating people about the Constitution, but by educating them about liberty. And any good libertarian education reveals that "limited government" is impossible.

Of course, if Mr. Barnett and likeminded libertarians can persuade the federal government that it lacks the power to do certain things, that is to be applauded.[5] But such efforts are not only futile in the long run, they also perpetuate the myth that "limited government" is possible if only we put the right ideas in front of the right

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[5]Barnett himself recently argued before the Supreme Court that the Commerce Clause does not allow Congress to prohibit medical marijuana use, in *Ashcroft v. Raich*, No. 03-1454. As of this writing, the decision is pending, and court-watchers doubt the justices will side against the feds. See Greenhouse (2004, p. A-20).

government officials. This seems an unfortunate waste of talent for a powerful mind such as Randy Barnett's.

FEDERAL POWER OVER THE STATES

Mr. Barnett gets even more far out in his discussion of the Fourteenth Amendment and federal power over the states. The Fourteenth Amendment provides, among other things, that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Mr. Barnett believes that with these few words the Constitution requires federal courts to impose almost the whole libertarian program upon the states.

An honest originalist, libertarian or not, finds several problems with the author's view. First, it ignores arguments that the Fourteenth Amendment was passed in violation of the original Constitution and is therefore void (McDonald 2000, pp. 212–13). Second, it is simply inconceivable that legislators and the public of the 1860s not only envisioned the likes of *Lawrence v. Texas*,[6] but were so comfortable with this implication of their Amendment that they did not discuss it at all. Granted, discerning original meaning can be a rather tricky business—indeed, when talking about terms such as "privileges and immunities" that are not in the average layman's vocabulary, it may be difficult to distinguish "original meaning" from "original intent," as Mr. Barnett's originalism attempts to do. But whatever the Fourteenth Amendment meant to its authors or nineteenth-century Americans, it must have been something less than sanctioned sodomy across the fruited plain.

Even if the Fourteenth Amendment's authors did intend to "enact Mr. Herbert Spencer's *Social Statics*," and give judges the power to enforce it, libertarians should find this undesirable. Political decentralization was responsible for liberty flourishing in the West in the first place. Slavery and Jim Crow laws were evil, of course, but Mr. Barnett and some other well-meaning libertarians seem to have allowed it to distort their perspective. Further, a powerful federal court consisting of libertarian judges may achieve short-term good,[7] but what will be done with that power once it is

[6]In this 2003 decision, the U.S. Supreme Court held that the Fourteenth Amendment bars states from prohibiting sodomy. 539 U.S. 558.

[7]It certainly seems justifiable, from a libertarian perspective, for a litigant to use the federal government against his local government, if necessary to exercise his natural rights. But we can still object to the institutional arrangement.

inevitably back in the hands of the statists?[8] We have seen in the twentieth century just the sort of damage judges empowered by the Fourteenth Amendment can do. Any alleged good intentions behind the Amendment's passage did not prevent them from doing this.

And what if we follow this libertarian centralism to its logical conclusion? If it is proper for the federal government to impose liberty upon the states, then it must be appropriate—indeed, even better—for a world government to impose liberty upon everyone. Such a view also justifies U.S. military intervention as it "liberates" other countries. If a legitimate government needs only certain "procedural assurances," then there may be nothing illegitimate about any government the U.S. empire installs anywhere in the world—just give them the right constitution (perhaps the Cato pocket edition), and *voilà*.

CONCLUSION

Restoring the Lost Constitution has a laudable goal, but advises inappropriate means for achieving desirable ends. Randy Barnett's obvious intelligence and appreciation for liberty make it all the more disappointing to see him squander his talents trying to rescue a document that has shown itself so incapable of protecting liberty, and so capable of justifying offenses against it.

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[8]On this, and the Fourteenth Amendment generally, see Healy's outstanding critique of "libertarian centralism," including the ideas of Randy Barnett, Roger Pilon, and Clint Bolick.

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