

NO DUTY TO OBEY THE STATE: REPLY TO BARNETT

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I APPRECIATE PROFESSOR BARNETT'S comments on my review of his book, *Restoring the Lost Constitution*. My analysis of his book, however, remains the same: in the long run, his constitutional system would threaten, rather than advance, liberty.

I also reject his idea that one can have a duty to obey the state, and do not share his approval of the imposition of the United States Constitution around the world.

NO DUTY TO THE STATE

In his reply, Mr. Barnett claims "modern libertarian theory offers no criteria by which to distinguish better from worse governmental legal systems." But of course that is not so. I am aware of no libertarian unwilling to say that, *ceteris paribus*, an institutional arrangement that results in more liberty is preferable to one that results in less.

Anticipating that response, Mr. Barnett argues it will not suffice because "it misses a crucial issue to which libertarians have paid inadequate attention: the duty to obey the law."

But libertarianism *never* recognizes a duty to obey state-imposed law simply because it is the law.¹ Libertarianism imposes only a "duty" to act justly—that is, to refrain from aggressive acts against peaceful people, and to live according to rules one has consented to obey. Prudence may, of course, demand obedience to some non-libertarian laws just as one might prudently obey any criminal who has you looking at the business end of his gun, demanding your money or your life. But why should I ever consider myself to have a "duty" to obey rules imposed by a criminal gang simply because it calls itself a government? Mr. Barnett bears the burden of explaining why

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¹In his review of the same book, David Gordon (2004) provides a fine elaboration of this point.

libertarians should acknowledge such a thing, and he does not carry it in his reply, his book, or his 2003 law-review article.

Contrary to Mr. Barnett's suggestion, libertarianism's refusal to recognize a "duty to obey the law" does not hinder at all its ability to distinguish between more and less preferable regimes. For example, one can see all governments as wholly illegitimate and still prefer a world of small states to a world of large federal governments, on the ground that competition and low escape costs in the small-state world will tend to minimize rights violations and prevent a dangerous accumulation of power in one entity's hands, regardless of the legal regimes in any of these small states. Indeed, even city-states ruled by absolute monarchs who offer *no* procedural assurances of legal "legitimacy," but face other incentives to minimize rights violations, may be preferable to a federal government enforcing the "lost Constitution."² Whether that is actually true or not, the preferability of one arrangement over the other does not depend at all on the "legitimacy" for which Mr. Barnett expresses so much concern.

LIBERTARIAN EMPIRE?

Mr. Barnett apparently embraces my suggestion that his ideas legitimate the United States government's overthrow of foreign governments, so long as the newly installed regimes adopt the U.S. Constitution. He asks,

Would [I] deny that *if* the U.S. Constitution, properly interpreted, did reliably enforce individual rights when followed (a contestable claim), then the existence of such a legal system anywhere in the world would be good thing on libertarian grounds, however it came about?

Of course I deny that. Above all, I take issue with the final four words of the question. One can imagine many atrocious ways such a regime could come about that would in no way be "a good thing," including, for example, extermination of a large percentage of the population supposedly protected by it.³ Imposing the Constitution upon nonconsenting foreigners will almost certainly entail killing innocents, including but not limited to people who understandably do not want a foreign system, libertarian or otherwise, imposed on them, and who exercise their right to resist invaders.

²On the advantages of decentralization generally, see Healy; on the advantages of monarchy, see Hoppe (2002).

³I am grateful to Walter Block for pointing out this implication of Mr. Barnett's view.

Further, even if we assume the Constitution could be imposed without harming innocent people, there is no reason to believe the Constitution would actually be “followed” by a country that never asked for it, especially in light of the fact that it has never been followed in the way Mr. Barnett desires in the United States.

And we must recognize that not all the world is ready for imposition of the whole libertarian program. Successful relatively libertarian societies are likely to be the product of secession and spontaneous order—not conquests or revolutions that wrest control of a centralized government. This is so even where the new regime is imposed by locals, let alone foreigners.

CONCLUSION

As a resident of the real world, I am not at all opposed to consideration of second-best alternatives to anarcho-capitalism, so I give Professor Barnett credit for searching for realistic means to advance liberty. Unfortunately, because of its support for the centralized state, Mr. Barnett’s system would not give us “second best,” but rather “even worse,” so I must continue to reject it, along with any notion of a duty to obey the state.

REFERENCES

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