# BOOK REVIEWS

**The Structure of Liberty**
Randy E. Barnett
New York: Oxford University Press, 1998, 347 pp.

Classical-liberal scholars today are engaged in the battle for liberty on two fronts. In the academy generally, they are fighting for liberty as a primary value, against scholars ("liberal" and conservative alike) who are willing to sacrifice liberty for the sake of other values and who thus champion the continued growth of governmental power. Hence, most modern classical-liberal scholarship aims at advocating a lessened role for government in civil society. But modern classical liberals are also engaged in a second scholarly struggle, among themselves: the debate between the "minarchist" and anarchist camps of modern libertarianism, a debate over the legitimacy of government itself.

Randy Barnett's important book, *The Structure of Liberty*, provides sophisticated new ammunition for both fronts of that battle. Although its most provocative part attempts to make the case for the anarchist vision of a "polycentric" system of justice, the strongest—and most valuable—part of the book consists of the first ten chapters, which make a compelling case for reconciling liberty and the rule of law, two values that many people (libertarians and non-libertarians alike) erroneously assume are antithetical. By explaining how liberty should be "structured" by certain rights and procedures associated with the classical liberal conceptions of justice and the rule of law, Barnett makes a compelling case for minimizing government—a case that anarchists and minarchists alike can embrace.

A real strength of Barnett's analysis is that, unlike other libertarian theorists who posit the importance of liberty and associated values as a given, Barnett grounds these fundamental rights in human nature itself. Under his "natural law" reasoning, rights derive from a "given-if-then" formulation: "*Given* that the nature of human beings and the world in which they live is X, *if* we want them to achieve Y, *then* we ought to do Z" (p. 8). Such reasoning will not persuade everyone; it will not sway those who reject the fundamental premises about human nature or reality depicted by X, nor those for whom "happiness, peace, and prosperity" are less important social goals than, say, following the presumed will

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of God, or order, or economic equality. Few "liberals" today, however, are willing to openly reject classical liberal premises (which in part explains why some of the leading critics of post-modernism are leftist liberals—see, for example, Daniel A. Farber and Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* (Oxford University Press, 1997). Barnett's defense of the classical liberal formulation of rights calls the bluff of those modern "liberal" scholars who claim to defend, say, the goal of individual achievement according to merit but who reject the full economic freedom necessary to achieve that goal.

In the second part of *The Structure of Liberty*, consisting of Chapters 11–14 and parts of Chapter 15, Barnett argues against what he calls "the Single Power Principle," that only one institution in society—i.e., government—should have a monopoly on the legitimate use of force. Here Barnett challenges classical liberal orthodoxy, from John Locke's *Second Treatise on Government* (1690) to such modern works as Ayn Rand's essay on "The Nature of Government" (1963), which holds that government (defined by Rand as "an institution that holds the exclusive power to enforce certain rules of social conduct in a given geographical area") is indeed a necessary institution in society.

Barnett's argument essentially is that constitutional devices to restrain government have failed to prevent what he calls "enforcement abuse," the use of power for inappropriate, or improper, purposes (p. 244). Although he deals, one by one, with the three institutional devices for checking governmental power he identifies (elections, "checks and balances," and free emigration), showing how each has "largely failed in keeping a coercive monopoly of power within the constraints defined by the liberal conception of justice and the rule of law" (p. 256), Barnett's ultimate objection to government is not utilitarian but conceptual. The Single Power Principle inherently violates rights, he argues, because "[a] coercive grant of monopoly power always infringes the right of freedom to contract of those who would do business but are coercively prohibited from doing so by the privileged monopoly." In other words, by enforcing its monopoly on the use of force, government violates the rights of those who wish to "opt out" of civil society, by contracting for the private use of force to enforce justice and the rule of law. Here Barnett echoes the argument of Lysander Spooner, the great 19th-century individualist anarchist, whose famous essay "No Treason No. IV: The Constitution of No Authority" (1870) maintained that only those individuals who actually consented to government under the Constitution can be bound by it.

Historically, the classical liberal response to arguments like Spooner's has been to invoke tacit consent, a principle that is admittedly problematic. Even James Madison, while defending the principle in a 1790 letter to Thomas Jefferson, conceded that it seemed incompatible with natural rights to compel an individual to submit to "the bonds of civil society" (to borrow Locke's term) without his own, actual consent. But Madison

recognized too the practical difficulty of the impossibility of obtaining unanimous consent by all individuals in a given society; hence, like Jefferson and the other Founders, he accepted the principle of majority rule.

It should be noted, however, that although consent is a necessary condition for legitimate government under classical liberal theory, consent alone is insufficient. What really makes government legitimate is its function, or end, in protecting individual rights. As Locke argued, "the great and chief end . . . of men's uniting into commonwealths and putting themselves under government, is the preservation of their property," by which he meant their lives, liberties, and estates. Because (according to Locke's argument) property is not secure in the state of nature, government is necessary for the protection of individual rights. That necessity makes government legitimate, and reconciles it with natural rights theory. But what if government ceases to meet its legitimate ends?

Barnett's principal argument against the "Single Power Principle" is backed up by a secondary argument: that government (at least as it has evolved in American history) has expanded its coercive monopoly of power to include various powers—such as the collection of taxes to fund its activities, the conscription of labor for military and jury duty, "legal tender" laws, and occupational licensing laws—each of which would be a violation of rights if exercised by anyone other than the government (pp. 248–49). In other words, Barnett observes that government has failed to fulfill its legitimate function of protecting individual rights and has become itself the greatest violator of rights in modern society. As Barnett notes, this further problem arises, ironically, from the premises on which the Single Power Principle is based: the attributes of human nature which make the Lockean state of nature so "inconvenient." "It is precisely because human beings *are* corruptible, that some *will* try to take unfair advantage over others, and that they should not be trusted to be the judge in their own cases, that a coercive monopoly of power is so dangerous" (p. 244).

Barnett's solution is to propose what he calls a "polycentric constitutional order," in which multiple private agencies compete in two separate functions, the power to adjudicate disputes and the power to enforce the laws, with each law-enforcement agency choosing the body of law that it will enforce. Agencies in both those areas—both the competing courts and the competing law-enforcement agencies—would be required to adhere to two baseline, or "constitutional," principles: (1) They cannot confiscate their income by force but must contract with the persons they serve ("The Nonconfiscation Principle"); and (2) They cannot put their competitors out of business by force ("The Competition Principle") (p. 258). In response to the anticipated objection that such a system seems hopelessly utopian, Barnett presents in Chapter 14 a short "fable," which imaginatively describes how such a polycentric constitutional order would work.

Interestingly, Barnett does not reject the Lockean argument about the "inconveniences" of the state of nature; indeed, as suggested above, much of his challenge to the monopoly principle is based on his recognition of the same attributes in human nature that Locke recognized as causing those problems, particularly the problem of individuals being partial to their own interests (or perceived interests). Thus, for example, he concedes the need for objective law; but as an alternative to a single entity with the monopoly power to create law binding on both courts and law-enforcement agencies (i.e., the legislature), he posits the creation of a core set of "common law" principles shared by nearly all legal systems, much as in the U.S. legal system today the American Law Institute, a private organization of a select group of lawyers, judges, and law professors, has promulgated "Restatements of the Law" in various fields.

It is highly questionable whether a real consensus on legal rules would emerge in a polycentric system. Historically, where multiple legal systems existed in societies, they each applied a different body of substantive law; and because fairly clear jurisdictional lines were drawn to mark the parameters of each system, the multiple systems were seldom in genuine competition with one another. For example, in medieval England, only the King's (or royal) courts applied "common law"; local courts applied customary law, while church courts applied canon law. The examples cited by Barnett as evidence that polycentrism works tend generally to fall into the "mistake of proportion" cited by Richard Epstein in his review of the book ("The Libertarian Quartet," *Reason*, January 1999). That "mistake," as Epstein notes, results from Barnett's failure to appreciate the full context of our existing legal system, a system in which government's monopoly on force plays a critical part. Hence, Epstein observes, "much of the success of private [law] enforcement depends on its ability to rely on a public enforcement backup" (*Reason*, p. 65). Similarly, the persuasiveness of the various Restatements of the Law as legal authority depends ultimately upon their application by courts that do have the ultimate sanction of government's monopoly on the use of force.

The problem of obtaining objective law under a polycentric system is further compounded by the nature of legal rules themselves. The rules needed to resolve disputes among people are not only substantive rules (defining, for example, property in all its forms, both tangible and intangible, as well as those types of harms to persons or property which are legally cognizable), but also procedural rules, which include rules for fair adjudication, such as evidenciary rules and safeguards for persons unjustly accused. In the definition of all such rules, both substantive and procedural, there is plenty of room for disagreement; very few of those rules are self-evident, as any first-year law student quickly learns. In our present legal system, we are able to achieve a consensus—and thus to satisfy the need Locke identified for an "established, settled, known Law"—because those conflicts are resolved by legislatures when they pass legislation, and that legislation binds everyone as, literally, "the law

of the land." Barnett's polycentric system, with its competing law enforcement entities and courts, each free to adopt its own body of rules, fails to provide a viable alternative to legislation in solving Locke's first problem.

Barnett also concedes, implicitly, the second and third "inconveniences" Locke identified in the state of nature: the want of an impartial judge and the want of a sufficient power to execute law and judgments. Thus, like Locke, he would deny to individuals the power to take the "executive power" into their own hands: that power is ceded, not to a single entity legitimatized through the consent of the majority of persons in society (as Locke posited), but to the competing court systems and law-enforcement agencies in Barnett's polycentric system. As Barnett's "fable" in Chapter 14 makes clear, those entities use force in various ways. For example, most judges guarantee enforcement of their judgments by affiliating with specified law-enforcement agencies, which have the power to seize a defendant's assets and sell them to satisfy judgments as well as the power to incarcerate defendants in "restitution centers." These centers seem indistinguishable from prisons—or from forced-labor camps; indeed, Barnett tells us, "[t]hose convicts who refuse to work are incarcerated indefinitely" (p. 291).

Barnett rationalizes those entities' use of force by resorting to a fiction that, ultimately, is even more troublesome than the theory of tacit consent. He poses the question: "Suppose an individual refuses to contract with a reputable legal system having agreements with other legal systems. In the absence of such consent, would a competitive legal system be powerless to enforce its judgments?" He answers, "No," arguing that "[t]he justice of using force against such a person is based on the fact that he or she violated the rights of the victim, not that he or she consented to the jurisdiction of a court." The obvious response to Barnett's argument is the question: By what standard do we know the person did indeed "violate" someone else's rights? What if the person is unjustly accused? Barnett's rationalization is quite unpersuasive. Pointing by analogy to the right to be represented by an attorney in our present legal system, he argues that "fairness is accomplished if all persons have the *right to choose* a reputable legal system to protect them and a *right to participate* freely in any legal proceedings brought against them, not by the fact that they exercise these rights wisely in every instance. . . . [F]airness is not undermined when a person refuses to exercise his or her rights to choose and participate" (p. 279). By that measure of fairness, subjecting someone to the power of government under the Single Power Principle seems just as "fair," for under the principle of tacit consent, everyone in a democratic society has at least the right to participate, through voting. If a modern-day Lysander Spooner challenges the legitimacy of, say, a local property tax, arguing that it is unjust for his county government to take a portion of his wealth by force without his consent, one could similarly argue that because he had the "right to participate" freely

in the election in which the voters in his county approved the millage, he had no right to object.

Although undoubtedly there is merit in privatizing most services provided by government today at all levels—from the U.S. Postal Service down to local trash collection—certain functions of government ought not to be performed by the private sector: namely, those that involve the use of force, such as prisons. The virtue of keeping such functions in the hand of government would be to resurrect and reaffirm in Americans' minds the fundamental distinction between government and society that Thomas Paine made in *Common Sense*—a distinction well-known to Americans at the time of the Revolution but that, sadly, has fallen out of the "common sense" of most people (at least most non-libertarians) today. Arguably, Barnett's book does a tremendous disservice to the cause of liberty today by contributing to the blurring of that distinction. To Paine, as to America's Founders, government was necessary because, in order to fully protect individual rights in a legal system, force needed to be used; but government was also "evil," in a sense, because force, or power, is inherently a threat to the very rights it was designed to protect. If we abolish government's monopoly on the legitimate use of power in society, we also make it harder to identify evil—the abuse of power—and to remedy it.

Ultimately, Barnett concedes that a polycentric constitutional order is "no panacea" for the problems of enforcement abuse. It is interesting that he concludes his "fable" in Chapter14 with a "worst-case scenario," involving the merger of one of the largest law-enforcement agencies with one of the largest court systems into an organized crime syndicate, which meets its downfall when the other law-enforcement agencies and court systems agree to cease doing business with it, publicly declaring it an "outlaw." From this hypothetical episode, Barnett concludes that even under a polycentric system, "diligence" is required, "to prevent injustice and tyranny from recurring" (p. 296). That observation underscores the essential flaw of a polycentric system: that it depends upon a consensus about people's rights and, further, upon popular vigilance in support of those rights. The same flaw, it should be noted, exists in our system of limited, constitutional government. If government today has become destructive of its legitimate ends—and I agree with Barnett, that it has—we have only ourselves to blame, for it was done with our consent (something which many libertarians fail to acknowledge when they demonize "government" as the problem). If Americans today so blithely accept the genuine violations of rights that occur, under sanction of law, in the modern welfare/regulatory state, how can we possibly expect them to be diligent enough to defend their rights under any other system?

In a famous passage in *Federalist* No. 51, Madison called government "the greatest of all reflections on human nature," and explained: "If men were angels, no government would be necessary." Men, of course, are not angels: even in a utopia, disputes will arise among them. And as Locke

showed so persuasively over 300 years ago, there is a legitimate need for objective law, impartially applied, and effectively executed, to resolve those disputes. Sadly, it is equally a reality of human nature that physical force also needs to be used in order to effectuate a workable legal system. That's why, like it or not, we need government.

David N. Mayer
Capital University Law School