Afterword: The Libertarian Middle Way

Randy E. Barnett

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Libertarians are often portrayed as radicals and, in a sense, this is accurate. The three senses of "radical" could each be said to characterize libertarianism: (1) "(especially of change or action) relating to or affecting the fundamental nature of something; far-reaching or thorough," (2) "characterized by departure from tradition; innovative or progressive," and (3) "of or relating to the root of something."[1] Libertarians do make claims about the fundamental nature of things, and strive to be thorough in the application of their principles. Libertarian policies often are a departure from tradition, though as we shall see, libertarianism is deeply rooted in the classical liberal western tradition associated with the Enlightenment (and its roots could easily be traced still farther back in time).[2] Libertarians do strive to go to the root of how society should be structured, and they claim that root to be liberty.[3]

But, although libertarians sometimes appear to place a primacy on liberty in the political sphere, to the exclusion of other ends, this appearance is deceptive and easily mischaracterized. As I will explain in this essay, while some libertarians may promote liberty as an end in itself, for most, liberty is a means to other ends. Liberty enables the individual who is living in society with others to pursue happiness, or the good life. The good life is an ultimate end consisting of a myriad of subordinate ends, from love to charity to excellence in one's intellectual and physical powers. While all humans share a nature in common with others—the nature that differentiates us from other creatures—no human's potential is exactly the same as any other. And our common nature requires that our virtues be developed from our own choices, not imposed from above. As my teacher Henry Veatch instructed, living a good life is a do-it-yourself affair.[4]

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1 *Radical Definition*, OXFORDDICTIONARIES.COM, http://oxforddictionaries.com/definition/american_english/radical (last visited Jan. 25, 2013).

2 *See* DAVID BOAZ, LIBERTARIANISM: A PRIMER 27–52 (1997) (exploring the early history of libertarianism); GEORGE H. SMITH, THE SYSTEM OF LIBERTY: THEMES IN THE HISTORY OF CLASSICAL LIBERALISM (2013) (describing the basic tenets of classical liberalism).

3 On the origins of modern libertarianism, see BOAZ, *supra* note 2, at 52–58; BRIAN DOHERTY, RADICALS FOR CAPITALISM: A FREEWHEELING HISTORY OF THE MODERN AMERICAN LIBERTARIAN MOVEMENT *passim* (2007).

4 *See, e.g.*, HENRY B. VEATCH, RATIONAL MAN: A MODERN INTERPRETATION OF ARISTOTELIAN ETHICS (Liberty Fund, Inc. 2003) (1962); *see also* HENRY B. VEATCH, FOR AN ONTOLOGY OF MORALS:

So most libertarians hold the "radical" views they do for the very same types of reasons that others hold theirs: they believe that people will be better off in the highest sense if their liberties are acknowledged and respected. Libertarians would not bother to hold and advocate their views if they did not care about the well-being of others; they would just go about their business. Instead, they expend their scarce energy and resources learning which social structures work best, and which worse, and then advance their answers against the contending alternatives.

In this sense, then, libertarians are no more "radical" than others who advocate societal reform by identifying goals towards which they think social structures should strive. They just have a different view of how society should be structured so as to make people better off. But the point I want to make in this essay is that libertarianism is the *opposite* of radical, if by radical, you mean *extreme*. Libertarianism today is actually a moderate middle ground between two contemporary extremes: the social justice crowd on the Left, and the legal moralists on the Right (though both positions have much in common, there is no logical reason why one cannot hold both at the same time, as some do, and what is considered "left" and "right" will vary over time).

THE SOCIAL JUSTICE AND LEGAL MORALIST EXTREMES[5]

The social justice crowd holds some version of the view that everyone is entitled to some quantum of stuff; and if they do not have whatever it is that a particular social justice theorist thinks they ought to have, we need a coercive government with the power to take from those who have this stuff and give it to those who do not. This sometimes also entails that no one should have any, or too much, more stuff than anyone else. Whether the standard be absolute or comparative, however, social justice consists of everyone having whatever they are supposed to have according to the advocate of social justice.

There are at least three fundamental problems associated with this position. The first is that there is no single and salient answer to what everyone is supposed to have. Almost everyone who advocates for social justice has either a different view of this or, more commonly in my experience, no firm view they are willing to articulate. For example, try asking someone who says that "the rich" are not paying their "fair share" of

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A CRITIQUE OF CONTEMPORARY ETHICAL THEORY (1971).

5 In this section, I offer some generalizations about the approaches I label as "social justice" and "legal moralism." These descriptions are based on my experience as an academic listening to such views being offered by my colleagues, and in more popular discourse, and I do not offer any specific iterations by particular advocates. Instead, I paint with a broad brush. The persuasiveness of this critique will turn on whether the descriptions I offer seem to match the reader's own exposure to these views. For example, if, unlike me, the reader is aware of specific structural proposals (apart from invocations of democracy) by advocates of these views to ensure that the correct conception of either social justice or legal moralism is initially adopted and maintained over time, then my claim that there are no such generally-accepted proposals will be undermined.

taxes, "OK, what *is* the "fair share?" You will either get a blank look or a single word answer: *"*more.*"* Whatever the "well-off" are now paying, they should be paying *more*. Whatever the less-well-off have, they should have *more*. How much more? Not saying. Just *more*.

This lack of specificity makes crafting actual policies extremely unstable. There is no core position around which any political consensus may be formed. There is no identifiable limit beyond which the policy of redistribution can be deemed unjust. Even if the existence of consensus is an unrealistic demand to make of social justice advocates, in its absence, whatever policy may actually be implemented will be politically unstable. Only the subgroup that favors the prevailing plan will be satisfied that social justice is being done. No matter how much redistribution of income or wealth is adopted, there will always be cries for more or different forms, which will greatly undermine the security of everyone's possessions, and the ability to plan. Then there are the many who will persist in objecting to using force to achieve social justice. This is not a recipe for a peaceful and contented society.

A second problem is that achieving *any* particular pattern of distribution will require enormously intrusive government administrative mechanisms. Some subset of a society will need to be given special powers to collect the information of everyone's wealth or income. This is not some accidental occurrence that can somehow be avoided; it is absolutely necessary to know from whom to take the wealth and to whom to give it according to the approved pattern of social justice. Collecting this information will necessarily be privacy invasive, and the existence of a database with such information can lead to the intimidation of dissidents.

Finally, a third problem was identified most prominently by Robert Nozick: whatever level of redistribution is adopted will require the continual use of force to achieve and maintain over time. The natural outcome of liberty will inevitably destroy whatever pattern of holdings is adopted as the socially "just" one.[6] In addition to collecting the relevant information to discover how actual holdings differ from this pattern, some subset of persons will need to be empowered to use force to continually adjust holdings so they conform.

These three fundamental problems lead to the following mega-problem with social justice policies: Any institution powerful enough to gather this information and enforce the pattern will be highly intrusive and enormously dangerous. Not only will it have the exceptional power to violate the background rights that libertarians advocate as the prerequisite for pursuing happiness in a social context, it will also have the power to deviate from the pattern favored by any particular social justice advocate. These institutions of coercion may adopt a different vision of social

6 *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 160–64 (1974) (describing how liberty upsets patterns).

justice—or other ends entirely, such as legal moralism—that will violate the conception of social justice favored by any given proponent. And when one acknowledges realistically that there is no uniquely salient pattern of distribution, the highly contested nature of social justice makes the potential for abuse even greater. Because one cannot prove one's conception is the right one, a perpetual struggle to control the institutions of coercion becomes inevitable, unless dissenters are somehow suppressed or eliminated, which historically is what happens to dissidents in societies committed to some conception of social justice.

It is not enough, therefore, for social justice advocates to identify a uniquely salient pattern of holdings as the socially just one, though this is essential. They must also identify the structural features of a legal system that can assure that the just pattern—and *only* the just pattern—will be adopted, and that the powers required to monitor and perpetuate the just pattern will not be captured and abused to the detriment of social justice. I am not even asking for an ironclad guarantee, but merely a reasonable assurance that some approximation of the right pattern of social justice will be adopted initially and maintained over time. In my experience, such assurances have not been forthcoming.

Legal moralists have a comparable set of problems. Indeed, we can simply port much of the above analysis of social justice over to legal moralism. Legal moralists focus their attention, not on how much stuff each person has, but on how each person ought to act when living his or her life. Each person should behave just the way legal moralists believe he or she ought to behave or be sanctioned by law. However, like social justice proponents, legal moralists disagree among themselves about the correct set of moral behaviors.

Of course, all legal moralists would maintain that acts like murder, rape, robbery, and theft, which violate the rights of others, should be banned—a belief they share in common with libertarians. For this reason, to preserve the distinction between libertarianism and legal moralism, it is important to distinguish between *justice*—which consists of prohibiting "wrongful" conduct that violates the rights of others—and *morality* or *ethics*, which evaluates the full gamut of human action to distinguish good from bad conduct.

All libertarians, and most everyone else, believe that force is justified to prohibit unjust or wrongful behavior; but legal moralists would extend the use of force to reach some or all immoral or unethical conduct as well. But while the consensus that murder, rape, robbery and theft are wrongful and may be legally forbidden is widespread—indeed universal—there is no comparable consensus about how all people ought to act, or which moral code should be imposed on a society.

Assuming some uniquely salient moral code was identified, however, like social justice advocates, legal moralists require a powerful and

intrusive set of legal institutions to gather information on how everyone is behaving in public or private to detect whether they are behaving morally or not. Any institution that is powerful enough to accomplish this would be susceptible to enormous abuse. And this potential for abuse is even greater than it would be if a uniquely salient moral code were capable of being identified, which is a prerequisite for confining those who hold power to those identifiable limits.

IS DEMOCRACY THE ANSWER?

When confronted by these inherent and fundamental problems with their positions, both social justice advocates and legal moralists tend to offer the same response: democracy. We just let people vote on the correct pattern of distribution, the correct moral code, or both. But this is simply avoiding the issue by creating a "black box" solution. Although majority rule might arrive at *some* outcome, given the contested nature of both concepts, it is not likely to be a stable outcome as winners must continually fend off losers. And this solution assumes, of course, that democracy is maintained after the initial vote, which is not typically the case in countries pursuing either a social justice or legal moralist agenda.

More fundamentally, how exactly is majority rule supposed to arrive at policies of either social justice or morality that are *correct* according to the theories of social justice or morality advanced by any particular proponent? What sorts of arguments about the right outcome could political advocates even make? What would a legislative debate about the right distribution or correct morality look like beyond a mere assertion of one's conclusion in the form of one's vote? In short, what exactly makes the majority's vote (on any given day) the *right* outcome from the standpoint of either social justice or morality?

Yet, if there is no assurance that a majority of a group of individuals who are denominated "legislators" or "representatives," or a majority of the body politic voting in a referendum, will vote for the right outcome, then how exactly is democracy the solution to the problem of the radical indeterminacy of the social justice or legal moralist perspectives? Far from being a solution to the problem of arriving at the right conception of social justice or legal morality, the appeal to democracy either disguises or merely restates the problem and then sweeps it under the rug.

In the end, both social justice and legal moralism assume a "God's eye view" of either how all physical resources in a given society should be allocated or how all persons should behave in their personal and public lives. Indeed, one could easily conclude that social justice proponents and legal moralists are simply substituting a secular government for an interventionist God to create their own heaven on earth. But any such project is simply beyond the capacity of the actual human beings we must rely upon to devise and implement such a scheme. Hypothesizing about the demos does not solve, or even seriously address, this problem.

Moreover, because both social justice and legal moralist visions are *comprehensive* approaches to social arrangements, any preferred position necessarily implies the rejection of all competing positions. To adopt any one pattern of distribution is to reject all other contending patterns; to adopt any one moral code is to reject all alternative moral codes. Not only do the comprehensive natures of both approaches make them inherently unstable—as those who favor alternative conceptions continue to agitate for their view of "justice" or "morality"—but this very instability has historically engendered highly coercive and often brutal measures to suppress dissent from the prevailing position. Whether enforced brutally or not, however, every loser of this perpetual struggle must be forced to live their life in a regime that he or she takes to be unjust or immoral. The inevitable result of this dynamic is a Hobbesian war of all against all.

THE ROOTS OF CLASSICAL LIBERALISM IN RELIGIOUS TOLERATION

While I wish I could claim that any of the foregoing analysis is new or original, the recognition of these problems is as old as liberalism itself. Indeed, the origin of classical liberalism, which begat modern libertarianism, can be traced to the devastating consequences of religious wars during which comprehensive religious views fought violently against each other. And why should contending religions not take up arms against their rivals? If eternal salvation is at stake, and salvation requires living in a society in which others all believe accordingly, why should religion not be fought over to the death? Nor has this stance been eradicated from modernity. We see it today in the radical Islamist jihadist movement that is gaining steam in a large part of the world, both in its deadliest form and in its drive to adopt Sharia law in "democratic" societies that is then coercively imposed on believers and nonbelievers alike.

The classical liberal solution to the problem of religious wars was religious toleration: the view that matters of conscience were matters of individual choice.[7] Notwithstanding that one's eternal soul might be at stake, these proto-liberals contended that it was better for individuals to be free to choose their religions than to adopt a comprehensive one-religion-for-all policy that led to perpetual and deadly domestic and foreign strife.

Those favoring toleration need not, and did not, deny that one religion was right and the rest were wrong; in other words, they need not adopt the stance of religious relativism. Instead, they needed only to recognize that the determination of which religion was the true one was sufficiently contestable, and inevitably contested, as to make the imposition of one religion on all a highly unstable and destructive approach to social ordering. Even from the point of view of religious truth, while the best outcome might be to have one's own true religion imposed on others, the

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7 *See, e.g.*, JOHN LOCKE, A LETTER CONCERNING TOLERATION 18 (Prentice-Hall, Inc. 1950) (1689) (advocating for religious toleration).

worst outcome would be to have another's false religion imposed on you. Everyone's second-best outcome is to be free to exercise his or her own religion without imposing on others, which makes this policy the most stable and conducive to social peace.

For this reason, rather than have one religion imposed coercively by a monarch, the liberal solution to religious strife was for each individual to be considered the King or sovereign of his own conscience. Each individual was to live side-by-side with other individual sovereigns of their own conscience, the way monarchs of countries under the Treaty of Westphalia were supposed to live in peace with their neighbors and to refrain from forcibly interfering with the internal affairs of other sovereign monarchs.

For Westphalian monarchical sovereignty to work, however, the geographical borders within which each monarch was free to determine internal domestic policies without outside interference must be identifiable and established. By the same token, the individual sovereignty entailed by religious toleration requires the identification and establishment of boundaries within which individuals have the jurisdiction to choose how to worship. While matters of conscience lie entirely within one's mind, the practice or free exercise of religion requires action, and action requires the use of physical resources.

What physical resources are properly within the boundaries of individual sovereigns? The liberal answer to this jurisdictional question was the concept of private property: property in one's own person, and also in external possessions. As Locke put it, the commonwealth is "a society of men constituted only for the procuring, preserving, and advancing their own civil interests."[8] These interests are "life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like."[9]

> It is the duty of the civil magistrate, by the impartial execution of equal laws, to secure unto all the people in general, and to every one of his subjects in particular, the just possession of these things belonging to this life. If anyone presume to violate the laws of public justice and equity, established for the preservation of those things, his presumption is to be checked by the fear of punishment consisting of the deprivation or diminution of those civil interests or goods which otherwise he might and ought to enjoy. But seeing no man does willingly suffer himself to be punished by the deprivation of any part of his goods, and much less of his liberty or life, therefore is the magistrate armed with the force and strength of all his subjects, in order to the punishment of those that violate any other man's rights.[10]

With this conception of the proper scope of civil government, Locke concluded that, because "the whole jurisdiction of the magistrate reaches

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8 *Id.* at 17.
9 *Id.*
10 *Id.*

only to these civil concernments . . . all civil power, right and dominion is bounded and confined to the only care of promoting these things" and "it neither can nor ought in any manner to be extended to the salvation of souls."[11]

Nor could the power to impose religious belief "be vested in the magistrate by the consent of the people."[12] This is because some rights are inalienable, meaning they cannot be surrendered to government even by consent.

> [N]o man can so far abandon the care of his own salvation as blindly to leave to the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace. For no man can, if he would, conform his faith to the dictates of another. All the life and power of true religion consist in the inward and full persuasion of the mind; and faith is not faith without believing.[13]

In this way, individual sovereignty with respect to matters of conscience took priority over any collective consent.

In sum, the liberal solution to the Hobbesian war of all-against-all created by comprehensive religious claims was not to posit a sovereign monarch or Leviathan to settle on the true religion for all—indeed that was the *source* of religious wars—but instead to shift the conception of sovereignty over religious belief and exercise from the monarch to the people, with "the people" referring to the plural of individual persons, each with his or her own conscience. As explained by Locke, "one man does not violate the right of another by his erroneous opinions and undue manner of worship, nor is his perdition any prejudice to another man's affairs, therefore, the care of each man's salvation belongs only to himself."[14]

Building upon this insight, the Lockean jurisdictional solution to the social strife created by comprehensive religious claims came gradually to be adopted to handle lesser conflicts over mere moral disagreements. Just as the jurisdictions of sovereign monarchs are limited to their respective geographical territories, the jurisdiction of sovereign individuals is limited to their bodies and their justly acquired physical possessions. As in international relations, force is justified to keep everyone within their boundaries but, so long as they are operating within their respective jurisdictions and not invading the rightful jurisdiction or domains of others, individuals should be free to make their own moral choices. Just like the King.

The more decisions that are viewed as matters of individual sovereignty, the more "libertarian" this approach becomes. Indeed, modern libertarianism can be viewed as the push to see how many types of decisions can feasibly be delegated to the realm of individual sovereignty.

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11 *Id.*
12 *Id.* at 18.
13 *Id.*
14 *Id.* at 46.

The debate between libertarians and others, and among libertarians themselves, is precisely about how far this process of delegation can be taken.

It is inaccurate to characterize this argument for delegation as premised on some "atomistic individualism" that assumes that each man is an island independent of others in society, any more than did Westphalian monarchical sovereignty assume atomistic nation states. To the contrary, what is sought are the prerequisites of peaceful social coexistence in a world in which each person's actions are very likely to affect others. As with conflicts between contending nation states that are resolved by recognizing political sovereignty, the problems of social conflict and interdependence are solved, rather than denied, by the recognition of individual sovereignty.

True, historically, in the United States as elsewhere, whole categories of persons were denied the individual sovereignty that this approach favors. African slaves were under the jurisdiction of their masters, as were white indentured servants from Europe. Daughters were deemed to be under the jurisdiction of their fathers and wives of their husbands, with legally independent single adult women considered anomalies. This did not entail that the individual sovereignty approach was wrong, but merely that the delegation of jurisdiction was incomplete. Having devolved from the paternal King to the slaveholder or to the father of the family, it needed to go still farther to recognize the sovereignty of each adult, regardless of the irrelevant characteristics of race or sex.

As we know, the partial delegation that existed at the time of the Founding of the United States was merely a way station to the completely egalitarian devolution of jurisdiction to the individual. Indeed, the liberal case for the "natural rights" of private property and freedom of contract provided a potent argument against both slavery and legal paternalism.[15]

This is not to say that no person today remains under the jurisdiction of others. Children are under the jurisdiction of their guardians, and the mentally incompetent can be the wards of others as well. But these exceptions are fully consistent with the fundamental premise that all *competent* persons *sui juris* are the proper rulers of themselves. Indeed, any scheme by which the properly defined jurisdiction of fully competent persons is overridden by the will of others treats sovereign individuals as though they were children or mentally infirm (or women under coverture or slaves). And any scheme that denies or disparages individual sovereignty also presupposes that whoever is given the authority to rule individual adults—whether a monarch or some faction of society—is superior in some manner to the individual *sui juris*, a claim that begins to replicate the

15 *See* Randy E. Barnett, *Whence Comes Section One?: The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165 (2011) (discussing abolitionist constitutionalism).

dynamic that led to the religious wars, and was used to justify slavery and the subordination of women.

THE MODESTY OF MODERN LIBERTARIANISM

It should now be clear that modern libertarianism merely takes individual sovereignty seriously, and tries to push this concept as far as it can feasibly go. For libertarians, as for Locke, "private property" is the concept that defines the proper jurisdiction of each sovereign person who is *sui juris* or competent to manage his or her own affairs. And freedom of contract governs the transfers of these property rights from one person to another. The proposition that one should not have one's justly acquired property taken by others without one's consent is inimical to schemes of social justice.

"Liberty" for a libertarian, then, is not the Hobbesian freedom to do whatever you will. Instead, it is the Lockean freedom to do whatever you will *with what is yours*. There is simply no libertarianism without jurisdictional limits on freedom of action; the concept of property defines these limits and is what differentiates liberty from license. Libertarianism is distinctive in its attempt to limit coercion to the protection of these jurisdictional boundaries to the greatest practicable extent. Forcible interference by some with the liberty that is within the sovereign jurisdiction of others is as offensive to libertarianism as the unprovoked forcible interference of one national sovereign within the boundaries of another is offensive to the prevailing view of international relations.

However "radical" this might sound in the abstract, it is actually a far more modest approach than either social justice or legal moralism. Although the line between "mine and thine" must be drawn, doing so is far more practical than specifying the morality of the entirety of human action. Although rules and principles governing the just acquisition, use, and transfer of property must be identified, this is a far more manageable and less divisive and dangerous a task than continually readjusting the distribution of holdings, suppressing the acquisition of property altogether, or identifying a stable principle of "fair share."

Moreover, because proponents of social justice and legal moralism typically propose superimposing their schemes onto existing structures of private property and freedom of contract, rather than supplanting them altogether, these stances are necessarily more ambitious than simply limiting legal coercion to the libertarian core that must still be ascertained and enforced. Put another way, no matter how challenging the task of properly defining the proper jurisdictions of individual sovereigns may be, *adding* considerations of social justice, legal moralism, or both, to this task is that much more challenging. In this sense, libertarianism is necessarily more modest than either social justice or legal moralism.

In contrast with the tyrannies we have witnessed in the social justice of the U.S.S.R. and the legal moralism of the Muslim world, the most objectionable version of a libertarian political system we have experienced, in which the sovereignty of a portion of the citizenry was denied, evolved in a more, rather than less, egalitarian direction. The recognition of individual sovereignty creates a virtuous circle that tends to eliminate whatever irrelevant legal discrimination was inherited from a more ancient and illiberal legal tradition.

DO SOCIAL DEMOCRACIES PROVIDE A BETTER MIDDLE WAY?

What about the social democracies of Western Europe or, to a lesser but increasing extent, the now-expanding social welfare state in the United States? Do not these political systems combine the individual sovereignty of private property with the redistribution of social justice, as well as some degree of legal moralism? Do these not represent the true "middle ground"—or what was once called the Third Way—between an unconstrained system of either social justice or legal moralism on the one hand and the unconstrained liberty of libertarianism on the other? If these types of political arrangements are feasible, does this not undermine the libertarian objection to social justice, legal moralism, or both?

In some ways, the answer to this last question is "yes." Superimposing a degree of wealth or income redistribution, or morals legislation, on a robust base of private property is infinitely preferable to the radical, single-minded pursuit of either social justice or legal moralism. But this response to the case for libertarianism is really a concession, rather than a genuine objection. For it concedes that libertarian principles of property provide a necessary baseline upon which some less-than-total scheme of redistribution or moral regulation can be superimposed, notwithstanding that the existence of this baseline is often contested by intellectuals on the Left.

Moreover, the challenge posed to libertarianism by social democracy assumes its feasibility. But what if such an approach is infeasible? What if superimposing social justice or legal moralism on the individual sovereignty defined by private property and freedom of contract is ultimately unstable? Why might this be?

Perhaps institutions with sufficient power to effectuate social justice or to impose morality will inevitably be captured by the more powerful forces in society and put to other ends. Perhaps they will inevitably be used for a purpose that does not conform to the proper conception of social justice or morality. After all, as noted above, what realistic assurances have we ever been offered that such power can be limited to whatever theory is being advanced to justify its creation?

What happens in a social democracy when 51% of the voters discover it can vote to "redistribute" the wealth of—or impose their moral vision

upon—the other 49%? Or more likely, what happens when political entrepreneurs inspire, say, 80% of the electorate to confiscate the income or wealth of the 20%? When this happens, how will social democracy preserve the individual sovereignty that the Third Way approach concedes is needed as a baseline? What realistic mechanisms are proposed by advocates of the Third Way superimposition of social justice or legal moralism on the libertarian rights of property and contract to ensure against this outcome?

I have been teaching law and writing about liberty for over thirty years now, and I have yet to hear any such proposal from any of my colleagues. It would be genuinely enlightening to hear how advocates of supplanting or overriding the libertarian rights that define individual sovereignty propose to limit the coercive powers they seek to the particular vision of social justice or morality that they offer to justify this claim of power. It would be equally enlightening to hear proponents of social democracy tell us how it will not eventually devour the individual rights that provide the foundation for their additional schemes of redistribution or morals regulation. Is this not a reasonable request?

LIBERTARIAN APPROACHES TO LIMITING GOVERNMENTAL POWER

In contrast, libertarians do offer a solution or two to the problem of limiting government power to the protection of individual sovereignty. Like their classical liberal ancestors, most modern libertarians favor constitutionally-limited government, in which power is structurally divided among different branches of a federal or national government, and between the limited powers of the national government and the broader police powers of states and municipalities.

These libertarians also typically favor the enforcement of these limits by what Madison called, "independent tribunals of justice." In particular, they believe that, although state legislatures have a general police power to prohibit the actions of some individuals that violate the sovereignty of others, when legislatures wish instead to "regulate" the otherwise rightful exercise of liberty by sovereign individuals, these regulations must be justified as reasonably necessary to protect the rights, health, and safety of other sovereign individuals. When disputes about whether such regulations are reasonably necessary to protect the right of others arise between the individuals who comprise a "legislature" and the sovereign individuals whose actions are the subject of these regulations—that is between the agents and their principals—the benefit of the doubt ought to go to the principals rather than those who are supposed to be their agents.

In short, these libertarians favor something very much like, if not identical to, the original meaning of the Constitution of the United States—the *whole* Constitution, including those parts that protect the unenumerated rights retained by the people and the privileges or immunities of citizens of the United States. In this, however, they are today opposed to their left by

"progressives" who wish to achieve their vision of social justice at the national level by "interpreting" federal power broadly enough to address any problem they deem to be "national" in scope—which is to say every problem.

To their right, libertarians are also opposed by social conservatives some of whom maintain that majorities in state legislatures have the right to enact their moral preferences into law, unconstrained by any judicially-enforced limits on their ability to restrict the liberty of the sovereign individual citizen.[16] These conservatives deny that judges have the power to protect the liberty of the individual by ensuring that legislatures are truly exercising a proper conception of their textually unenumerated police power. Since the Constitution contains few express limitations on the legislative power of states—and what limits it does provide have largely been interpreted out of existence—these conservatives contend that states have a virtually unlimited power to legislate morality.

Put more positively, libertarians side with progressives against the legal moralism of the social conservatives, and with the conservatives against the social justice agenda of progressives. In this regard, they can be viewed as an independent or "swing" vote between the left and right. Indeed, many progressives would prefer living in a libertarian world to having the moral code of social conservatives imposed upon them. And many social conservatives would prefer the libertarian world in which they are left alone to practice their religion than to have the progressive's vision of social justice (or secular morality) imposed upon them. Like religious toleration, for many who favor a comprehensive social system, the libertarian vision is their second-best option, with the first best being their own comprehensive vision of social justice or morality being imposed on everyone, and their last best being their opponent's comprehensive vision imposed upon them.

But libertarians have not one but two responses to how the coercive power needed for individual sovereignty can be confined to its only proper function of protecting individual sovereignty. Having observed the continued decline of respect for the limits on state and federal power contained in the U.S. Constitution, some libertarians favor a more radical alternative. They would see law enforcement and adjudication be handled competitively rather than by monopolistic government agencies.[17] They favor consumer choice and competition as the best check on the abuse of the powers of law enforcement.[18] While this alternative is highly controversial, even among libertarians, it should at least be mentioned in a

16 *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 124 (1990) ("Moral outrage is a sufficient ground for prohibitory legislation.").

17 *See, e.g.*, MURRAY N. ROTHBARD, FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO 215–41 (rev. ed. 1996) (discussing police protection and judicial services provided by free market).

18 *See, e.g.*, RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 257–83 (1998) (discussing feasibility of a polycentric legal order).

discussion of institutional mechanisms favored by libertarians to keep the use of power within the boundaries that libertarians, along with most others, take to be just.

In contrast with advocates of social justice or legal moralism, then, libertarians and their classical liberal forbearers have paid considerable attention to how government power can be limited to the protection of the rights defining individual sovereignty that libertarians favor. However persuasive their responses to this problem may be, they cannot be accused of ignoring it or treating it with less than the seriousness this problem deserves.

LIBERTARIANISM AND LAW

With all this as background, we are in a better position to understand the contribution that libertarianism can make to law. The first contribution is to identify the proper boundaries of individual sovereignty. Historically, this has been done by the private law subjects of property, contract, and torts. At the risk of oversimplification, the law of property governs the acquisition of land and possessions, the law of contract governs the consensual transfer of entitlements from one person to another, and the law of torts defines the proper use of property. For better or worse, these common-law subjects have historically provided the positive law that identifies the scope of individual sovereignty. Although the existing law of these subjects may not be perfectly libertarian, they have nevertheless been libertarian to a remarkable degree.

Libertarianism is an abstract theory, in the sense that the principles of private property and freedom of contract that define liberty are derived from an abstract description of human beings and the social context in which they exist. By this I mean that libertarianism is essentially egalitarian insofar as it is based on those abstract qualities that all humans share in common with each other, rather than on the particularities that differentiate one person from another. Because these principles are derived from an abstracted understanding of human beings, however, libertarian principles are themselves highly abstract—often too abstract to handle anything but the most basic social conflicts. Murder, rape, robbery, theft and the like are unjust and to be legally prohibited. But one learns quickly in law school and in practice that the particularities of human social interaction are often far too complex to be regulated by these abstract principles of justice alone.

For this reason, we not only need an abstract and often underdeterminate conception of justice, but also a rule of *law*. We need largely conventional rules and principles to apply to the particularities of the actual conflicts that arise in complex societies. While these legal rules and principles are constrained by the abstract principles of justice, they cannot be logically derived from them.[19]

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19 *See id.* at 108–14 (discussing the underdeterminacy of abstract principles of justice).

Libertarian legal theorists therefore operate within the private law pretty much the same way other legal theorists do. Their distinctive perspective is the stress they place on the overriding social importance of defining the individual's sovereignty by means of property, contract, and tort, preserving the discretion of individual choice within the boundaries that these concepts provide, and resisting the effort to override these concepts with claims based on social justice or legal moralism.

So, for example, my contracts scholarship has stressed the role of the consent of the parties, as opposed to using contract law to effectuate other social ends.[20] As someone who has participated in the debate over the proper basis of contractual obligation for several decades, I can testify that the libertarian position is a meaningful alternative to those that would have consent discounted, or disregarded altogether, in favor of other objectives, be they social justice, morality, or efficiency.

Libertarian legal theorists typically conceive the protection of these, the basic private law rights of individual sovereignty, as the ultimate justification for the public law. Conceptually they advance the proposition that "first comes rights, and then comes government"—or as the Declaration of Independence affirmed, all men are equally endowed "with certain unalienable Rights" and that "to secure these rights, Governments are instituted among Men."[21]

As discussed above, they view a written constitution as one means, among others, of confining the coercive power of government to its proper function of protecting the individual's private law rights. To this end, some libertarians defend the importance of a written constitution that is enforced by an independent judiciary.[22] They evaluate the legitimacy of any constitution, including the Constitution of the United States, by this criterion: how well does it protect the private rights of all persons in the jurisdiction in which it governs?[23] Many, if not most, libertarians believe that if the original meaning of the U.S. Constitution—as amended to extend the equal protection of the laws to women and those who had previously been enslaved—was actually followed, it would largely keep government within its proper powers.

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20 *See, e.g.*, Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) (discussing consent theory of contract). For a later and more developed summary, see RANDY E. BARNETT, THE OXFORD INTRODUCTIONS TO U.S. LAW: CONTRACTS (2010).

21 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Of course, the full quote reads as follows:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .

22 *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 100–12 (2004) (discussing the importance of a written constitution).

23 *See, e.g., id.* at 32–52 (discussing constitutional legitimacy without consent).

THE LIBERTARIAN FOCUS ON MEANS RATHER THAN ENDS

In the end, there emerges a fundamental contrast between social justice and legal moralism on the one hand and libertarianism on the other: Advocates of social justice and legal moralism are concerned with "ends" to the exclusion of any serious consideration of means. *All* persons should have *X* amount of stuff. *All* persons should act, or refrain from acting, in certain ways. In addition to the failure to reach anything close to consensus—even among themselves—on what these ends should be, what is principally lacking is any serious attention to (a) the means by which one's favored end will be achieved, and (b) how the coercive institutions will be limited to just these correct ends without being perverted to pursue other ends that are deemed by any particular social justice or legal moralist to be unjust and immoral.

In contrast, libertarianism is concerned almost exclusively with means rather than with ends. Even the fundamental rights of private property and freedom of contract that principally define liberty are conceived by libertarians as means to the pursuit of happiness while living in society with others, rather than as ends in themselves. To be sure, the protection of these rights is treated as the end *of government*, but only because government itself is perceived by many libertarians as a regrettably necessary means of protecting property and contract.

Of course, libertarians are seriously concerned with one end: the pursuit of the good life, or what the Declaration referred to as "the pursuit of happiness." It is this end that motivates their commitment to such means as private rights and constitutionally-limited government. But, as was described above, most libertarians believe that liberty is necessary precisely because the end of happiness will vary with the uniquely varying circumstances, goals and aspirations of particular individuals, and because living the good life is a do-it-yourself affair. Therefore, just as something like the private law concepts of property, contract and torts are an inescapable means to the pursuit of happiness in a social context, the search for effective means of limiting the exercise of governmental power to the protection of just these private law rights is the proper subject of the public law.

Imprecations to the contrary notwithstanding, libertarians are far more concerned with the actual real-world practicalities of using legal coercion than those who only focus on the ends of social justice or legal moralism. Real world experience, libertarians maintain, has demonstrated that governmental implementation of either social justice or legal moralism has led to dystopias almost beyond our ability to imagine. In contrast, even an imperfect commitment to private individual rights and limited constitutional government has led to the greatest prosperity in human history.

Of course, none of this is easy to prove. If it were, libertarianism would have either vanquished its intellectual foes or been defeated by them. But consider what may be the ultimate empirical proof of the superiority of even imperfectly adhering to libertarian principles: Which way do the refugees run? Which countries need to restrict the exit of their citizens? Were people clamoring to get into or out of the U.S.S.R.? Are they lined up to enter the Mullocracy of Iran? To the extent they can, people vote with their feet for the increased prosperity and choice made possible by the more robust protection of property as compared with other governmental systems. Persons who are capable of relocating tend to leave societies preoccupied by the pursuit of social justice or legal morality, and beat a path to the door of societies who pursue some semblance of the libertarian middle way. As empirical proofs go, this one is probably as good as any other.

Given that there is no truly libertarian society, this is a comparative matter. Which societies better protect the rights of property and contract than others? But, in the end, this too is why libertarianism is modest. Libertarians formulate and advance their models of complete liberty as a means of incrementally inching existing societies in a more libertarian direction. Libertarians believe that good things will happen as this progress is made, and if we ever reach a point where the protection of property rights is having a counterproductive effect, we can stop there. In the meantime, we have a long way to go before we reach that point. Or so says the libertarian middle way.