

## Essay

# THE PARSIMONY OF LIBERTARIANISM

*James E. Fleming\**

I want to begin by congratulating Randy Barnett on writing *The Structure of Liberty*,<sup>1</sup> one of the most radical and provocative works of political and legal theory that I have ever read. I consider myself to be a liberal who prizes liberty. Barnett claims to provide an account of the structure of liberty along with “[t]he liberal conception of justice” and the rule of law.<sup>2</sup> His is a radical libertarian account centrally concerned with protecting the fundamental natural rights of property, first possession, freedom of contract, and self-defense. In Barnett’s world, the fabled libertarian night-watchman state has been downsized and privatized: It is a world of private courts, private police, and private prisons where inmates work to earn enough money to pay restitution to their victims.

If this is liberalism, it is enough to make me an anti-liberal, at least of the civic republican, progressive, and radical feminist strains. Indeed, for years I have been defending liberalism against criticisms by such anti-liberals, charging that they were

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1. Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Clarendon Press, 1998).

2. *Id.* at 63-83.

attacking a caricature of liberalism. Well, Barnett's book embodies the caricature of liberalism that they attack. I mean this as a compliment: His book provides a caricature of liberalism by boldly exaggerating some of its characteristic features, in particular, its libertarianism and its fear of state power. Indeed, Barnett's *The Structure of Liberty* should join (if not replace) Robert Nozick's *Anarchy, State, and Utopia*<sup>3</sup> in the standard, obligatory footnote references to libertarian political and legal theory.

There is much to praise and much to criticize in Barnett's provocative book, and it deserves vigorous and thoroughgoing engagement. I shall focus on three points. The first relates to his account of "the" liberal conception of justice. The second concerns his natural law method of reasoning, in particular, his ambitious expansion of H.L.A. Hart's famous notion of the minimum content of natural law. The third relates to his account of the rule of law, in particular, his aggressive elaboration of Lon Fuller's well-known conception of the formal principles of legality to include a requirement of "compossibility" and the parsimony of rights. Thus, my essay is titled "The Parsimony of Libertarianism."

## I. "THE" LIBERAL CONCEPTION OF JUSTICE

John Rawls gave his classic work of political theory the modest title *A Theory of Justice*.<sup>4</sup> Barnett labors under no such modesty. He claims to develop "[t]he liberal conception of justice."<sup>5</sup> To be sure, he sometimes calls his conception that of "the classical liberal approach."<sup>6</sup> But he does not systematically distinguish, or articulate the connection, between his conception of liberalism and other, non-classical versions of it. If both Rawls and Barnett are liberals, we must ask, "How capacious is the tradition of liberalism?"<sup>7</sup>

As I stated previously, I have spent years defending liberalism against anti-liberal critics, including civic republicans, progressives, and radical feminists. My move is generally to argue that (a broadly Rawlsian) liberalism is more capacious than such

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3. Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974).

4. John Rawls, *A Theory of Justice* (Harvard U. Press, 1971).

5. Barnett, *The Structure of Liberty* at 63-83 (cited in note 1) (emphasis added).

6. Id. at 15.

7. I have benefited from discussing with Samuel Freeman the question of whether libertarianism is a liberal view at all. He thinks not.

anti-liberals have recognized and to argue that liberalism, properly conceived or reconstructed, can be synthesized with civic republicanism, progressivism, and feminism.<sup>8</sup> The resulting liberal republicanism or liberal feminism yields a conclusion that liberalism can sponsor a limited formative project. Under such a liberalism, government should secure the basic liberties that are preconditions for self-government in two senses: not only deliberative democracy but also deliberative autonomy. Securing these two sorts of preconditions, I argue, would afford everyone the common and guaranteed status of free and equal citizenship in our morally pluralistic constitutional democracy.

In making such moves, I sometimes explicitly and sometimes implicitly distance liberalism from classical liberalism or libertarianism.<sup>9</sup> Barnett's book prompts the question: Should liberalism be capacious enough to include libertarian theories like his? Or should it exclude such theories, notwithstanding Barnett's claim to develop "the" liberal conception of justice? In analyzing the development of the tradition of liberalism from classical liberalism to contemporary liberalism, Stephen Holmes has argued that it has been characterized by a shifting understanding of insecurity, ranging from fear of state power to fear of "private" power.<sup>10</sup> Barnett's liberalism reflects no such shift in the understanding of the sources of insecurity: The only ground of insecurity in his account is the fear of state power.<sup>11</sup> Or, with respect to other sources of insecurity that might seem to call for the intervention of state power, he argues that the medicine is "far more troublesome and dangerous than the disease."<sup>12</sup>

What is at stake here is whether liberalism, properly so called, can justify a limited formative project of government to secure the preconditions for self-government through legislation. Such a formative project would share (some) common ground with civic republicanism, progressivism, and radical feminism.

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8. See, e.g., James E. Fleming, *Securing Deliberative Autonomy*, 48 *Stan. L. Rev.* 1 (1995) ("Fleming, *Securing*"); James E. Fleming, *Constructing the Substantive Constitution*, 72 *Tex. L. Rev.* 211 (1993) ("Fleming, *Constructing*"); James E. Fleming and Linda C. McClain, *In Search of a Substantive Republic*, 76 *Tex. L. Rev.* 509 (1997) (book review); see also Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect*, 59 *Ohio St. L. J.* 19 (1998).

9. See, e.g., Fleming, *Securing* at 43-46 (cited in note 8).

10. Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* 257-60 (U. of Chicago Press, 1995).

11. Barnett, *The Structure of Liberty* at 238-50 (cited in note 1).

12. *Id.* at 302 (emphasis omitted) (citations omitted).

Barnett's version of liberalism radically questions the justice and the legitimacy of such legislation (and, for that matter, practically all legislation). Indeed, if there were a contest as to what work of libertarian theory runs the most pages before acknowledging the existence of legislatures and of legislation, Barnett's book might win: legislation is not mentioned until page 124. And even there, he does not acknowledge the legitimacy of legislation. Instead, in the course of waxing eloquent about the characteristics of common-law adjudication, he expresses doubts about the original idea that errors in the common law "were supposed to be corrected by occasional acts of legislation."<sup>13</sup> He goes on to complain: "Today, legislation is hardly extraordinary and is hardly confined to correcting doctrinal errors of courts."<sup>14</sup> He continues:

Indeed, for some time now the legislative process has tended to overshadow and even to supplant common-law processes as the principal engine of legal discovery and change. This has meant that legal evolution has sometimes been replaced by legal revolution—and the disruption and hubris that typically accompanies revolutions—as the dominant approach to legal change.<sup>15</sup>

Even more remarkably, in a section on "[l]aw and [l]egislation" in his fable imagining a polycentric constitutional order, he does not refer to legislation enacted by legislatures.<sup>16</sup> Instead, he states that "judicial opinions are commonly supplemented by reference to 'codes' or legislation written by authoritative outside institutions" such as the American Law Institute's Restatements of the Laws or the legal experts who write treatises.<sup>17</sup>

I am grateful to Barnett for sharpening and clarifying the differences between classical liberalism and the liberalism that I wish to develop and defend (by synthesizing it with civic republicanism, progressivism, and feminism). And I am grateful to him for providing me with a citation to use in deflecting anti-liberal critiques of liberalism. I no longer have to object that they attack a caricature of liberalism. Instead, I can employ a strategy of confession and avoidance: I can confess that their criticisms are well-taken against versions of liberalism like Barnett's, but I

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13. *Id.* at 124.

14. *Id.*

15. *Id.*

16. *Id.* at 284-97.

17. *Id.* at 289.

can avoid those criticisms by arguing that they do not apply to versions of liberalism like Rawls's (or for that matter, Ronald Dworkin's,<sup>18</sup> Bruce Ackerman's,<sup>19</sup> or my own).

Here we should ask Barnett, just how capacious is liberalism? Does he mean, by claiming to elaborate "the" liberal conception of justice, to write Rawls, Dworkin, and others out of the canon of liberalism? How would he conceive the core, and the boundaries, of liberalism? How does he conceive the differences, and the connections, between his conception of liberalism and those of Rawls, Dworkin, and others?

## II. THE NATURAL LAW METHOD OF ANALYSIS

### A

Barnett opens his book with a perspicacious account of what he calls "The Natural Law Method of Analysis."<sup>20</sup> He rightly points out that the idea of natural law, despite its long and distinguished pedigree, is mysterious to many today.<sup>21</sup> And he proudly and expertly contributes to the revival or reconstruction of natural law and natural rights that is currently underway. He seeks to demystify the idea of natural law reasoning, describing it as a "hypothetical imperative"<sup>22</sup> method of reasoning with the following structure: "Given that the nature of human beings and the world in which they live is *X*, if we want to achieve *Y*, then we ought to do *Z*."<sup>23</sup>

Barnett imaginatively interprets H.L.A. Hart's well-known notion of "the minimum content of natural law"<sup>24</sup> in terms of that structure or method of reasoning.<sup>25</sup> According to Barnett, "Hart takes as 'given' five contingent facts about 'human nature and the world in which men live': (a) human vulnerability, (b) approximate equality, (c) limited altruism, (d) limited resources and (e) limited understanding and strength of will."<sup>26</sup> Barnett

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18. See, e.g., Ronald Dworkin, *Taking Rights Seriously* (Harvard U. Press, 1977).

19. See, e.g., Bruce A. Ackerman, *Social Justice in the Liberal State* (Yale U. Press, 1980).

20. Barnett, *The Structure of Liberty* at 4-12 (cited in note 1).

21. *Id.* at 4.

22. *Id.* at 7.

23. *Id.* at 8 (emphasis in original).

24. See H.L.A. Hart, *The Concept of Law* 189-95 (Clarendon Press, 1961).

25. Barnett, *The Structure of Liberty* at 10-12 (cited in note 1).

26. *Id.* at 11.

continues: "He then assumes, on the basis of observation, the additional contingent fact that most people desire to survive . . . ." <sup>27</sup> Finally, "Hart concludes that, *given* these five factual conditions, *if* persons desire to survive, *then* their legal systems ought to have [certain] features" <sup>28</sup> or rules such as those which make up what Hart calls "the minimum content of natural law." <sup>29</sup>

So far so good. Barnett then proceeds to a more ambitious elaboration of Hart's "core of good sense" yielded by this type of natural law reasoning. <sup>30</sup> Here is where the troubles begin. First, Barnett expands the *given*. To Hart's five contingent facts about human nature and the world in which humans live, he adds three pervasive social problems that confront every society: the problems of knowledge, interest, and power. <sup>31</sup> Second, he expands the *if*. In addition to Hart's objective of survival, he posits three other objectives: the pursuit of happiness, peace, and prosperity. <sup>32</sup> Finally, Barnett expands the *then*: from Hart's minimum content of natural law to a full-blown libertarian account of "the liberal conception of justice—as defined by natural rights—and the rule of law." <sup>33</sup>

I said here is where the troubles begin for the following basic reason: the appeal or "core of good sense" <sup>34</sup> in Hart's notion of the "minimum content of natural law" <sup>35</sup> lies in its very minimalism. Hart was trying to find common ground between the traditions of natural law and legal positivism, both by pruning the natural law tradition of its grandiose claims about human nature and the necessary connection between law and morality, and by pruning the legal positivist tradition of its radical relativist claims that there was no necessary content to the laws of a legitimate legal system. <sup>36</sup> Hart was trying to distill an extremely uncontroversial "core of good sense" that all reasonable persons could agree upon concerning, in Barnett's terms, the *given* (the picture of human nature and the nature of the world in which

27. *Id.*

28. *Id.* (emphasis in original).

29. *Id.* (quoting Hart, *Concept of Law* at 189-95 (cited in note 24)) (emphasis omitted).

30. *Id.* at 12 (quoting Hart, *Concept of Law* at 194 (cited in note 24)).

31. *Id.* at 17.

32. *Id.* at 16.

33. *Id.* at 22, see also *id.* at 17.

34. Hart, *Concept of Law* at 194 (cited in note 24).

35. *Id.* at 189-95.

36. *Id.* at 181-89.

humans live); the *if* (the objectives that humans are to pursue); and the *then* (the content of the laws that humans should enact). And so, any expansion of the *given*, the *if*, or the *then* in Hart's idea of the minimum content of natural law is very likely to lose the appeal or the core of good sense in his notion.

This proves to be the case with Barnett's ambitious elaboration of Hart's idea. His expansions of the *given*, the *if*, and the *then* all are extremely controversial, and are at once too much and too little in ways that I shall explain. First, consider Barnett's expansion of the *given* to include the problems of knowledge, interest, and power. This is too much in the sense that the *given* is now far more controversial and problematic than it was in Hart's formulation. It is too little in the sense that, once we open the door to include the three problems identified by Barnett, numerous other problems will vie for inclusion. To name a few: the problem of need, the problem of envy, the problem of diversity (or of reasonable moral pluralism), the problem of equal concern and respect, the problem of self-respect, the problem of care (and of dependency and interdependency), the problem of security (and of vulnerability), the problem of realizing our capacities, and the like.<sup>37</sup>

Barnett may be right in identifying the problems of knowledge, interest, and power as fundamental. Indeed, if they were the only or even the primary problems in the world in which we live, his proposed resolution of them might make a significant and lasting contribution to political and legal theory. He certainly makes an imaginative and rigorous argument for a libertarian conception of justice and the rule of law from the premise that these are the fundamental problems of the human condition. And we should commend him for being so clear about this premise. For his doing so makes clear the glaring omissions in his theory. To paraphrase Hart on Holmes, Barnett has the virtue that when he is clearly wrong, he is wrong clearly.<sup>38</sup>

But Barnett does not provide a persuasive argument that the three problems of knowledge, interest, and power are so fundamental that they trump, override, or rule out of bounds other problems (or that they exhaust the problems that a conception of justice and the rule of law should address). To be

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37. I understand that Larry Sager advanced this sort of criticism of Barnett in the Quinipiac conference.

38. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, in *Essays in Jurisprudence and Philosophy* 49, 49 (Clarendon Press, 1983).

sure, he alludes to the “other problems” objection in the final chapter of the book.<sup>39</sup> But that is simply too short a dismissal of this criticism. Furthermore, it becomes highly doubtful whether Barnett, once he adds the problems of knowledge, interest, and power to the *given*, is merely reasoning from facts about human nature and the human condition, as he seems to claim,<sup>40</sup> rather than engaging in moral reasoning or normative political theory.<sup>41</sup>

Second, consider Barnett’s expansion of the *if* to include the pursuit of happiness, peace, and prosperity. Again, this is both too much and too little. Too much in that, once we move beyond the objective of survival, we are dealing with objectives that are far more controversial and problematic. Too little in that, once we open the door to objectives beyond survival, other objectives will compete with the pursuit of happiness, peace, and prosperity as candidates for inclusion. For example, to take a famous trilogy, what about the ends of equality and fraternity in addition to liberty? And what about the ends of human excellence or virtue? Dignity and autonomy? Community? Again, Barnett does not adequately defend his decision to focus on the pursuit of happiness, peace, and prosperity to the exclusion or neglect of such other objectives.

Third and finally, I could also make the too much, too little objection to Barnett’s expansion of the *then*. It is too much in that once we move beyond the minimum content of natural law, the content becomes far more controversial and problematic. It is too little in that Barnett’s libertarian conception of justice seems merely to be a conception of liberty. It is not a full conception of justice at all, not even after he goes through eight refinements or formulations of it.<sup>42</sup> Rather, it is a conception of liberty that acknowledges constraints on liberty, but only for the sake of liberty, not also for the sake of other principles, rights, or values.<sup>43</sup>

The point of my criticisms concerning the natural law method of reasoning is not that it is inappropriate for Barnett ambitiously to build upon Hart’s analysis, or to engage in the natural law method of reasoning. And I certainly do not wish to

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39. Barnett, *The Structure of Liberty* at 325-26 (cited in note 1).

40. *Id.* at 4-12.

41. I understand that Arthur Ripstein developed a version of this type of criticism at the Quinipiac conference. Sandy Levinson also did so at the AALS panel.

42. Barnett, *The Structure of Liberty* at 83, 102, 104, 159, 181, 190, 205, 214 (cited in note 1).

43. *Id.* at 63-83.



imply that any political theory or legal theory, to be acceptable, must be uncontroversial or must command the assent of all reasonable persons. Far from it. My point rather is that Barnett, by expanding Hart's idea of the minimum content of natural law, loses the appeal or the core of good sense in his notion. Again, the key to Hart's success is the very minimalism of his idea of the minimum content of natural law.

## B

Barnett does not develop a full-blown constitutional theory in *The Structure of Liberty*, nor does he advance a natural law method of constitutional interpretation.<sup>44</sup> But the book's implications for constitutional theory are clear enough. Barnett suggests that the principles he identifies as part of the liberal conception of justice and the rule of law inform the meaning of the "rights 'retained by the people' that the Ninth Amendment says shall not be 'denied or disparaged' or of the 'privileges or immunities of citizens' protected from state infringement by the Fourteenth Amendment," as well as the meaning of "due process of law" mentioned in the Fifth and Fourteenth Amendments.<sup>45</sup> He also makes clear that he would interpret the Takings Clause,<sup>46</sup> the Necessary and Proper Clause,<sup>47</sup> the Second Amendment right to bear arms,<sup>48</sup> and the Thirteenth Amendment prohibition of involuntary servitude<sup>49</sup> in light of his conception of justice and the rule of law. Furthermore, in another work he has called for getting normative in constitutional theory by engaging in natural rights reasoning in constitutional interpretation.<sup>50</sup> And so it seems appropriate to raise some doubts about interpreting the Constitution along the lines he suggests.

One objection, paraphrasing Holmes's dissent in *Lochner*, might be that the Constitution does not enact Mr. Randy Barnett's *The Structure of Liberty*, any more than it enacts Mr. Herbert Spencer's *Social Statics*.<sup>51</sup> I usually am skeptical about such

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44. Barnett is developing a full-blown constitutional theory in a book in progress, *The Presumption of Liberty*.

45. *Id.* at 25 & n.79.

46. *Id.* at 25.

47. *Id.*

48. *Id.* at 238-39.

49. *Id.* at 248-49.

50. See Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 *Const. Comm.* 93 (1995).

51. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*").

paraphrases of Holmes's dissent, with all their smugness and their purported dispositive, conversation-stopping force.<sup>52</sup> But here I think that such an invocation of Holmes's dissent is particularly apt, given the family resemblance between Barnett's libertarianism and Spencer's (even if Barnett does not obviously subscribe to a social Darwinism of the sort attributed to Spencer).<sup>53</sup>

Another objection might be that Barnett's liberal conception of justice does not comport with the original understanding of the Constitution. One version of this criticism would be that the founding generation did not believe in natural rights or did not accept the natural rights method of analysis.<sup>54</sup> Another version would be that even if they did, they did not believe that natural rights were a source of legal claims to be made in a court.<sup>55</sup> Yet another, more specific, version would be that the founding generation did not accept libertarian views of the Takings Clause of the sort Barnett would advance<sup>56</sup> and that a fortiori they would not have accepted his full liberal conception of justice and the rule of law.

I do not intend to make any of these objections. Instead, I want to make two different objections: one, that it is not persuasive to ground a liberal constitutional conception of justice on the prepolitical conception of human nature that Barnett deploys; and two, that Barnett's liberal conception of justice, applied to interpreting our Constitution, would not adequately fit or justify our constitutional document and practice.

First, Barnett purports to ground his liberal conception of justice on a prepolitical conception of human nature (indeed, on an account of the facts of human nature).<sup>57</sup> I sympathize with the idea of grounding our basic liberties on a conception of the person. But, following Rawls, I have attempted to ground our basic liberties on a rather different conception of the person: a conception of the person as free and equal citizen, and as having two

52. See, e.g., Fleming, *Securing* at 43-44 (cited in note 8); Fleming, *Constructing* at 301-04 (cited in note 8).

53. See Barnett, *The Structure of Liberty* at 73, 76 (cited in note 1).

54. See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 39 (Harvard U. Press, 1980).

55. See, e.g., Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 Yale L.J. 907, 932-33 (1993).

56. See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 819-25 (1995).

57. See Barnett, *The Structure of Liberty* at 4-12 (cited in note 1).

moral powers, the capacity for a sense of justice and the capacity for a conception of the good.<sup>58</sup> Applying this idea, I worked up a constitutional theory with two fundamental themes corresponding to these two moral powers: securing the basic liberties that are necessary for *deliberative democracy* and securing the basic liberties that are necessary for *deliberative autonomy*. Together, these two themes afford everyone the common and guaranteed status of free and equal citizenship in our morally pluralistic constitutional democracy.<sup>59</sup>

Note that this conception of the person does not purport to be a prepolitical conception of the person, or to stem from the facts of human nature. Rather, it is a political conception of the person, and it is a construct that is posited in order to account for, and provide a basis for justifying, the basic liberties that comprise an ongoing practice and tradition of constitutional democracy. The claim is that these basic liberties are expressed in or presupposed by our constitutional document and underlying constitutional order.<sup>60</sup>

Here I would like to play upon the title of an article by Barnett, *Getting Normative*.<sup>61</sup> If he gets normative by getting naturalist, I get normative by getting constructivist.<sup>62</sup> We need not and should not get normative by getting naturalist. My constructivist conception is not foundationalist or moral realist. It recognizes the independence of constitutional theory from deep, controversial metaphysical questions of philosophy. Most importantly, it recognizes the irrelevance, for the content of rights, of their status as natural rights. It is decidedly, and designedly, less deep, if you will, than foundationalist or moral realist accounts. For this very reason, I submit, it is more appropriate as a method of constitutional interpretation than is Barnett's natural rights method. Constructivism also has the virtue of charting a third way between natural law and legal positivism.

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58. See John Rawls, *Political Liberalism* 19, 302, 332 (Columbia U. Press, 1993).

59. See Fleming, *Securing* at 19-20 (cited in note 8); Fleming, *Constructing* at 287-898 (cited in note 8).

60. See Rawls, *Political Liberalism* at 29-35, 299-304 (cited in note 58).

61. Barnett, 12 Const. Comm. at 93 (cited in note 50).

62. In other works, I have outlined and developed a constitutional constructivism by analogy to Rawls's political constructivism, a theory developed in his book *Political Liberalism*. See Fleming, *Securing* at 2, 17-23 (cited in note 8); Fleming, *Constructing* at 217, 281-97 (cited in note 8).

The second reason that we should reject Barnett's liberal conception of justice in interpreting the Constitution is because—using the terms of Dworkin's two dimensions of best interpretation, fit and justification—it does not adequately fit or justify our constitutional document and practice.<sup>63</sup> Barnett's radical libertarian conception would entail that much, if not most, of our practice is unconstitutional; that many, if not most, of our precedents are wrongly decided; and that much, if not most, of our federal and state legislation is unconstitutional. I certainly do not mean to imply that the best constitutional theory may not be critical of some of our practices, precedents, and legislation. Still, to be eligible as a constitutional theory, it must fit most while criticizing some. I do not wish to seem to take a dim view of political theory that is radical, in the sense of making recourse to first principles and being willing to criticize much of extant practice as unjust. But I do mean to say that Barnett's book, precisely to the extent that it is eye-opening and laudable as a work of radical political theory, is problematic in its implications for constitutional theory. Again, I daresay that it (extrapolated to constitutional theory) would fail both the test of fit and justification. In sum, his political theory is so radical that, as a matter of constitutional interpretation, it is out of bounds.

### III. THE RULE OF LAW: COMPOSSIBILITY AND THE PARSIMONY OF LIBERTARIANISM

If my second criticism focused on Barnett's ambitious expansion of a feature of H.L.A. Hart's legal theory, it is perhaps appropriate that my third criticism focuses on Barnett's expansion of a feature of Lon Fuller's legal theory (given the prominence in a prior generation of the Hart-Fuller debate on the relationship between law and morality). In elaborating upon rule of law principles, Barnett draws upon Fuller's well-known account of the formal principles of legality (or the eight ways Rex can fail to make law).<sup>64</sup> Fuller's fifth principle—proscribing the enactment of contradictory rules<sup>65</sup>—seems innocuous and unproblematic enough in itself. But Barnett reads “[t]he

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63. For Dworkin's formulations of the two dimensions of best interpretation, fit and justification, see, e.g., Ronald Dworkin, *Law's Empire* 239 (Harvard U. Press, 1986); Ronald Dworkin, *A Matter of Principle* 143-45 (Harvard U. Press, 1985); Dworkin, *Taking Rights Seriously* at 107 (cited in note 18).

64. Barnett, *The Structure of Liberty* at 89-99 (cited in note 1) (drawing upon Lon L. Fuller, *The Morality of Law* 38-39 (Yale U. Press, 2d ed. 1969)).

65. Fuller, *Morality of Law* at 39 (cited in note 64).

[r]equirement of [c]ompossibility" into it.<sup>66</sup> That requirement forbids conflict among rights, or proscribes recognizing any rights that conflict with other rights.<sup>67</sup>

Barnett takes issue with the common view that valid rights may conflict with each other.<sup>68</sup> In particular, he criticizes Jeremy Waldron's treatment of rights in conflict. According to Barnett:

Waldron . . . argues that with theories of rights based on interests, conflicts of rights are nearly inevitable and require "trade-offs" among rights. Waldron would make some of these trade-offs by "establish[ing] the relative importance of the interests at stake . . ." and by "try[ing] to maximize our promotion of what we take to be important." In other cases, he would establish an "internal relation between moral considerations" to handle conflicting claims of rights.<sup>69</sup>

Barnett rejects this view. He argues that it results in part from an inflation of mere claims into rights and in part from ignoring the informational role played by a compossible set of rights, that is, a set of rights that do not conflict.<sup>70</sup> He argues instead that rights must be compossible: "In a perfectly compossible set of rights, every right could be exercised according to its terms without any right in the set conflicting with any other."<sup>71</sup> He contends: "The compossibility of rights is functionally necessary to achieving an order of actions, because people need the information that rights provide as to how they may act to pursue happiness while avoiding conflicts with the actions of others."<sup>72</sup>

Furthermore, Barnett argues that "Fuller's fifth requirement of legality argues for a parsimony of rights."<sup>73</sup> Therefore, he argues: "However attractive a particular claim of right may be, if it conflicts with other rights that are essential to solving the knowledge problem—such as the rights to several property or to freedom of contract—it violates the requirement of compossibility and its validity is highly suspect."<sup>74</sup> This is a remarkable

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66. Barnett, *The Structure of Liberty* at 90-94 (cited in note 1).

67. *Id.*

68. *Id.* at 91.

69. *Id.* at 93 (quoting Jeremy Waldron, *Rights in Conflict*, in *Liberal Rights: Collected Papers 1981-1991* at 203, 223-24 (Cambridge U. Press, 1993)) (alterations in original).

70. *Id.* at 91, 93.

71. *Id.* at 92.

72. *Id.*

73. *Id.* at 91.

74. *Id.* at 92.

case of form—the concern for compossibility and parsimony—placing important constraints on substance, as Barnett acknowledges.<sup>75</sup> It is remarkable to presume that Barnett’s favored rights trump all other rights simply because of the requirement of compossibility and a tidy concern to avoid, in advance, the possibility of conflicts among rights. Waldron is certainly right to observe that “the price for this tidiness is a severe limitation on the types of moral concerns that can be articulated [as rights].”<sup>76</sup> We should ask whether such tidiness is worth the price. I think not.

I conclude this despite the fact that to some extent I share Barnett’s concern for parsimony or, as I would put it, elegance in the construction of a theory, and despite the fact that I too believe that we should take rights seriously, as trumps rather than as mere interests to be traded off or balanced against each other or against governmental interests. There is a serious problem concerning the criterion for determining priority in resolving or avoiding conflicts that Barnett does not adequately face up to. Even if we accept the requirement of compossibility for the sake of argument, what entitles the rights to several property and freedom of contract to priority over other asserted rights when we apply that requirement to resolve or avoid conflicts between rights? Barnett seems simply to assume that his rights have priority because they are, on his account, necessary to solve the problems of knowledge, interest, and power. He seems implicitly to take a “first in time, first in right” approach here: Because he has already elaborated these rights, and thus they already are on hand, they have priority over any other rights than anyone else might wish to assert.

Later in the book, Barnett again argues for a parsimony of rights, arriving at what he calls “a natural rights version of Ockham’s razor.”<sup>77</sup> There he argues that “rights are a necessary evil” rather than an unmitigated good.<sup>78</sup> Ironically, rights are a necessary evil because, although we think of them as protecting us against governmental power, they “legitimate the use of [governmental] force or violence to secure compliance.”<sup>79</sup> Therefore, he worries, “[t]he more rights we recognize the more violence

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75. Id.

76. Waldron, *Liberal Rights* at 204 (cited in note 69).

77. Barnett, *The Structure of Liberty* at 200 (cited in note 1).

78. Id.

79. Id.

we legitimate.”<sup>80</sup> He continues: “Because each right legitimates violence, the fewer we can manage with the better.”<sup>81</sup> He concludes: “Thus we arrive at a natural rights version of Ockham’s razor: To reduce the legitimated use of power in society that enforceable rights engender, any social problems, no matter how serious, that can be handled adequately by other means should be.”<sup>82</sup>

In my own writing in constitutional theory, I have pressed a theme concerning “the importance of being elegant” (though not too reductive) in constructing a constitutional theory.<sup>83</sup> My concern for elegance has affinity to Barnett’s concern for parsimony. I have used the criterion of elegance in arguing for the superiority of my constitutional theory over other theories, for example, that of Bruce Ackerman.<sup>84</sup> I argued that a constitutional theory of the sort I have developed, with the two fundamental themes of deliberative democracy and deliberative autonomy, can more elegantly, straightforwardly, and plausibly account for our dualist constitutional scheme and the basic liberties that it secures than can Ackerman’s unwieldy theory.<sup>85</sup>

I use the criterion of elegance in choosing among competing accounts of our basic liberties and scheme of government, all of which claim to fit and justify our constitutional document and practice. Barnett, by contrast, does not use elegance, parsimony, or Ockham’s razor to choose among competing accounts of a given phenomenon. For example, he does not argue that his account more parsimoniously accounts for a given set of rights than do other, less elegant, theories. Instead, he uses parsimony and Ockham’s razor to shave off claims of rights that conflict with the rights favored by his libertarian conception of justice. (Actually, he uses them more like an ax to clear the field of claims of rights that conflict with the rights he favors.) And so, I prefer to speak of “the parsimony of libertarianism” or “Randy’s razor.” Or, deploying a negative connotation of parsimony, to

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80. Id.

81. Id.

82. Id. (citations omitted).

83. See Fleming, *Securing* at 29 (cited in note 8).

84. James E. Fleming, *We the Unconventional American People*, 65 U. Chi. L. Rev. 1513, 1535-36 (1998). Ackerman’s theory, with its complex apparatus of three republics and of amendment and transformation of the Constitution outside the formal procedures of Article V, is inelegant. “By his own self-deprecating characterization, it may appear to be an ‘unworkable Rube Goldberg contraption.’” Id. at 1535 (citing Bruce Ackerman, *We the People: Foundations* 61 (Harvard U. Press, 1991)).

85. Id. at 1536.

speaking of “the poverty of libertarianism.” In conclusion, I would argue for the importance of being elegant in constructing a constitutional theory but also for the importance of not being too parsimonious or stingy in the recognition of rights.