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Libertarianism, Natural Rights and the Constitution: A Commentary on Recent Libertarian Literature

David Bergland

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LIBERTARIANISM, NATURAL RIGHTS AND THE CONSTITUTION: A COMMENTARY ON RECENT LIBERTARIAN LITERATURE

DAVID BERGLAND

Why Government Doesn't Work

What It Means To Be A Libertarian

Libertarianism: A Primer

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I. INTRODUCTION

During his 1996 presidential re-election campaign, Bill Clinton told us: "The era of big government is over." Consummate politician that he is, Mr. Clinton knew that was what the people wanted to hear. Of course, Mr. Clinton's specific policy proposals tend toward more government, not less. His "budget balancing" plan is for the federal government to continue growing for the next seven years. Programs to help the elderly, the poor, families, working parents, college students and others will expand, the War on Drugs will expand, regulation of the work place and cyberspace will expand, and big government will get bigger. The fact that the Republicans control both houses of Congress will not likely affect the trend. What's going on here? Why do voters nod their heads in agreement when reminded that government is too big, too expensive, too intrusive, and woefully inefficient and then support more of the same kinds of programs that have proven to be so ineffective and counter-productive before? More important, is it actually possible to reduce the size, cost and intrusiveness of the federal government and would that be a good thing?

Harry Browne, the Libertarian candidate for president in 1996, addresses these questions in Why Government Doesn't Work.2 (Browne, 64, is the author of numerous financial books, including three New York Times best sellers. His 1973 How I Found Freedom in an Unfree World3 is considered a libertarian classic.) As a libertarian, Mr. Browne does not hesitate to declare that a smaller government would bring substantial improvement to the lives of all of us. The tricky part is to understand why government programs never seem to achieve the stated ends of their supporters, actually making things worse in the process, and to come up with a plan to get the support of the majority for radical elimination of large parts of the government.

The modest market success of Harry Browne's book, and his presidential campaign, generate some questions about the libertarian segment of American politics in the late twentieth century. Who are these libertarians? What do they want? Where did they come from? Should we listen to them? Mr. Browne's book and two other recent additions help answer these questions.

Charles Murray's What It Means To Be A Libertarian is sub-titled "A Personal Interpretation." In this slim book (178 pages) Murray gives his personal response to the "who are the libertarians" question (he differs from other, more strictly rational, principled libertarians, in that he is "fond of tradition and the nonrational aspects of the human spirit.")4 He also tells us what he seeks to accomplish with a number of succinct policy prescriptions. (Murray is a respected social scientist associated with the American Enterprise Institute and

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4Charles A Murray, What It Means To Be A Libertarian: A Personal Interpretation (1997) [hereinafter What It Means].
an author well known for Losing Ground: American Social Policy 1950-1980,5 In Pursuit: Of Happiness and Good Government 6 and, with Richard J. Herrnstein, The Bell Curve: Intelligence and Class Structure in American Life.7 To Murray, the importance of seeking limited government is:

Not just because freedom is our birthright, but because limited government leaves people with the freedom and responsibility they need to mold satisfying lives both as individuals and as members of families and communities. To substitute the phrase that the Founders used so often and so respectfu, limited government enables people to pursue happiness.8

David Boaz, Executive Vice President of the CATO Institute, a prominent Washington libertarian think tank, tells us (among much else) from whence the libertarians, ancient and modern, have come. He takes us on a fascinating historical journey from ancient China (Lao-Tzu), the Bible (First Book of Samuel), through classical Greece (Sophocles' Antigone) and Rome (Cicero) and other important points of interest (Magna Carta) in the development of Western Culture (the Enlightenment, John Locke, Adam Smith, David Hume) to the founding of America (Thomas Paine, Thomas Jefferson) and on to the present day (Ayn Rand, Robert Nozick, Milton Friedman and many others). After reading Chapter 2, "The Roots of Libertarianism," and Chapter 3, "What Rights Do We Have," in his Libertarianism: A Primer,9 one has a considerable grasp of the development and venerable history of the libertarian political philosophy through the last 2,500 years. Libertarianism is no radical late comer to the American political scene. But Mr. Boaz covers much more than might be expected from a "primer." His 314 page book is a not untypical think tank product generously packed with hard data, study results, anecdotal evidence and explanations of economic and social philosophy to support the case he makes for radically trimming government. Like Browne and Murray, Boaz also addresses the current political issues and presents his own view of how to improve our world by listening to what the libertarians have to say.

Not surprisingly, the three libertarian authors agree, although not completely, about what government should do (much less than it is now doing) and do (most of what it currently attempts). They differ more in how they choose to communicate the case for liberty. Browne writes as a presidential candidate, limiting his discussion to federal government issues, delivered in a witty style designed to appeal to an interested general public. Murray speaks gracefully to social scientists and academics. He begins almost apologetically

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6CHARLES A. MURRAY, IN PURSUIT OF HAPPINESS AND GOOD GOVERNMENT (1988).
8MURRAY, supra note 4, at 35.
9DAVID BOAZ, LIBERTARIANISM: A PRIMER (1997) [hereinafter PRIMER].
by explaining why he uses the word "libertarian." One suspects that he fears his standing might suffer among those he deems important because he has chosen to apply the label to himself. Boaz, too, appears to aim higher than a general audience, buttressing every argument with loads of evidence and authority such as one might expect in an article in a learned journal.

II. Who Are Libertarians?

To return to the first of the questions posed above: who are these folks who call themselves libertarians? To answer that question, most people will follow up with: are they right wing or left wing? Liberal or conservative? The answer is that there is no place on the traditional one-dimensional left/right spectrum for the libertarians. If you knew I was against censorship laws and wanted to decriminalize marijuana, you would probably think me a liberal, a lefty. If you knew I was against gun control laws and wanted to cut taxes by 75%, you would probably think me a conservative, a right-winger. But, if you knew I was against both censorship laws and gun control laws, wanted to decriminalize marijuana and also cut taxes by 75%, you could not place me on the left/right spectrum. After reading Browne, Murray and Boaz, you would recognize me as a libertarian. In an appendix entitled "Are You a Libertarian," Boaz provides an illuminating test, one that uses the reader's answers to questions about current political issues to place them on a two dimensional political map where the choices are Libertarian, Liberal, Conservative and Authoritarian.11

It is fairly easy to identify a libertarian. She will advocate a high degree of liberty, and little or no government control, on all political issues, whether they be issues that implicate personal liberty (censorship, conscription, sexual preference, drug use, gun ownership) or economic liberty (taxation, business regulation, free trade). How does that differ from the other choices? A liberal tends to value personal liberty but seeks government intervention into the economic areas of your life. A conservative tends to value economic liberty but seeks government intervention into the personal areas of your life. An authoritarian thinks liberty is dangerous and seeks government control in all areas of everyone's life. Most politicians tend to become more authoritarian the longer they remain in government. (A point emphasized by the proponents of term limits.)

Murray helps us understand libertarians by looking at the importance of political liberty to each individual person. "Mindful human beings require freedom and personal responsibility to live satisfying lives."12 It is our right to pursue happiness and that requires a context of liberty in which each individual may flourish. Boaz speaks more abstractly of libertarianism as a political philosophy, describing libertarians by their belief system.

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10 Id. at xii.

11 BOAZ, supra note 8, at 291-94.

12 MURRAY, supra note 4 at 18.
Libertarianism is the view that each person has the right to live his life in any way he chooses so long as he respects the equal rights of others. . . . In the libertarian view, all human relationships should be voluntary; the only actions that should be forbidden by law are those that involve the initiation of force against those who have not themselves used force—actions like murder, rape, robbery, kidnapping, and fraud.  \(^{13}\)

Central to libertarian thinking about government is that the people in it have no special exemption from the moral code that applies to the rest of us. In other words, the government (and every individual in it) should obey the law. Where the federal government is concerned, it should be bound by the Constitution in the sense that it cannot legitimately exercise its power in any way or sphere not expressly, and unequivocally, authorized by the language of the Constitution. Such a position will no doubt appear revolutionary to anyone familiar with constitutional jurisprudence since the 1930s. Today, the Courts recognize few constitutional limits to what the Congress and the President choose to do. But, the Americans who ratified the Constitution would have found the position of Messrs. Brown, Murray and Boaz substantially in accord with their own. All three authors refer us to the importance of the founding documents, the Declaration of Independence and the Constitution, in the creation of the (mostly) free society that once existed here, and could again. The Americans of 1789 would be amazed at the latter-day expansive interpretation given to the Constitution that allows the federal government to legislate regarding virtually all aspects of the lives of the citizens. How did it happen?

III. FALLODY OF LEGISLATIVE OMNICOMPETENCE

I believe it was Nobel prize winning economist Friedrich Hayek who coined the illuminating phrase: "the fallacy of legislative omnicompetence." During most of our lifetimes, the idea that government can be and ought to be the source of solutions to every problem in the economy and society has dominated. No matter what occurs, if someone is uncomfortable with it, the typical reaction is "there ought to be a law." The government should do something to make things better, at least from the point of view of the person making the observation. Legislators are never reluctant to respond. Passing laws is what they do. Why bother to seek election if you don't intend to exercise your power to legislate at every opportunity? Whether the subject involved is one that legislation can deal with effectively is a question seldom asked by legislators or their critics. Of even less concern is the question of whether the legislature should attempt to deal with the issue at all.

The fallacy of legislative omnicompetence has two elements. First, it holds that government, by legislative action, ought to deal with anything that anyone contends is a "problem." Second, it holds that government action will in fact bring about an improvement in the state of affairs it addresses. We might call

\(^{13}\)Boaz, supra note 8, at 2.
these the moral element and the pragmatic element, respectively. A reading of Browne, Murray and Boaz challenges us to consider both. Let us examine these two elements more closely.

A. Moral Element

The moral element of the fallacy of legislative omnicompetence raises this question: are there any aspects of the lives of the citizens that government must leave alone? It is quite obvious that many in our Congress, state legislatures and local governing boards, recognize no such limitations. Consider the various federal regulatory agencies and the Federal Register with its thousands of pages of regulations. Whether it is the Congress who passes the laws giving regulatory power to the agencies or the bureaucrats who staff them, no part of our national economic life escapes their scrutiny or propensity to adopt and enforce rules applicable to manufacturing, business, the work place, the retail store, restaurant, theater, your home or your most personal and private affairs. The fact that the Constitution grants certain limited powers to Congress, and no others, and that most of the substance of Congressional legislation is clearly beyond the scope of those limited powers, has been no impediment to their grasp on our economic throats. The Commerce Clause has been a primary conduit for the usurpation. Because the Commerce Clause allows the federal government to regulate commerce among the several states, and because everything in commerce is linked, even though only remotely and indirectly, with more than one state, the Congress can regulate everything in commerce. That is the argument, and the Supreme Court bought it decades ago.

1. The War on Ingestion

Likewise, the Congress and the Executive have no compunctions about intruding into our personal lives. The most glaring example is the War on Drugs. What could be a more "personal" decision than the choice of what to put into one’s body. Where in the Constitution does it say that Congress has the power to pass laws making it a crime for you to ingest marijuana, the products of the opium poppy, the products of the coca plant or the products of the chemical laboratory? For anyone with a basic grasp of the English language, it is clear that no such power is expressed in the Constitution. But no member of Congress or the Executive branch ever raises that issue or anything close to it. Perhaps they are willing to allow what they know is an improper use of federal power in the one instance because they want to use it in another that is more important—to them. Thus, each group’s willingness to expand federal power is supported, perhaps grudgingly, as an investment in a future expansion of that power for some other unconstitutional purpose. The result is a Congress in which no member ever challenges proposed legislation on the ground that the Constitution does not allow it. The attitude becomes: pass the law and let whoever doesn’t like it challenge it in the courts.

The War on Drugs is not the only example. Consider the Food and Drug Administration. Does it not derive its very existence from the same underlying premises? We are all weak, stupid, incompetent, dishonest and dangerous to ourselves and others. We cannot be trusted to act in our own best interests. People in business cannot be trusted to offer safe and effective products. If
government did not protect us from acting foolishly or being bamboozled by unscrupulous farmers, butchers, grocers, pharmacists and pharmaceutical manufacturers, millions would die, be injured or sickened. At the very least we would all be ripped off mercilessly by those obscene profiteers who sell us food, medicine, vitamins and other consumer products that we put in or on our bodies. Claptrap though they be, these views have supplied justification enough for a federal power grab in the name of protecting your health by putting important medical, health and hygiene decisions in the hands of FDA bureaucrats and commensurately taking those decisions away from you.

A current hot issue is tobacco, used in Europe and America for about 500 years and in other places for unknown centuries before that. Its health risks and addictive properties have been well known, to any observant person, for 100 years or more. The federal government has regulated tobacco advertising for a couple of decades. Currently, the effort is to eliminate all tobacco advertising. (Does the First Amendment not apply when government uses its power to prevent speech, even "commercial" speech?) Now the FDA categorizes tobacco as a "drug" and subjects it to FDA regulations so that it must pass the customary FDA test of being safe and effective. Ultimately, if the customary procedures are followed, a doctor’s prescription would be required to smoke or chew. Further, several state governments are suing the tobacco companies on the ground that, because many people suffer from tobacco related illnesses, and because many of those people receive medical treatment at government expense, cigarette manufacturers should compensate the government for those costs. What we have here is a series of back door steps that will eventually put tobacco into the same category as marijuana, cocaine and heroin so that you will be at risk of going to prison for lighting up? It is remarkable that Americans are not more offended at such underhanded attempts to deprive them of their personal autonomy.

Economist Walter Williams recently observed that when this country undertook to prevent alcohol consumption by law it was clear that a constitutional amendment was required. Everyone understood that the power to criminalize the production, sale and use of alcoholic beverages was not included within the powers granted by the people to Congress in the Constitution. No similar understanding applies today to the federal government’s War on Drugs and the attempt to expand it to include tobacco.

2. Enabling the Nanny State

There is no direct constitutional authority for Congress to make law respecting your health, medications or any substance you might choose to ingest. How does the Nanny State get away with it? One tactic is the use of the taxing power. Congress has the power to lay excise taxes on any product. How do you prevent people from using a product if you cannot simply declare it criminal contraband but you have the power to tax it. Simply tax it at a sky high rate, say 100 times the market price. The producers will market the product without paying the tax, the product becomes contraband, and everyone involved, including end users, becomes part of the criminal conspiracy to evade the tax laws.

Another tactic is, as we have mentioned, expansion of the scope of the Commerce Clause. The production and sale of nearly everything has some
connection, however remote, with more than one state. Consequently, according to the United States Supreme Court, anything that might have some effect on interstate commerce may be regulated by Congress. In essence, if commerce is involved, Congress has the power to legislate regarding the activity. Damn little will escape congressional scrutiny under this view. The Supreme Court did not arrive at this rather spectacular Constitutional conclusion until the 1930s and not until after Franklin Roosevelt had appointed new justices to the Court who agreed with him that the circumstances of the country after years of depression required extreme measures. After all, when the economy has been in the doldrums for five or six years, shouldn’t the Congress be allowed to do something to fix it? (Such a question conveniently overlooks the massive government interventions that were exacerbating the economic malaise.) Why let a century and a half of constitutional jurisprudence stand in the way?

The framers of the Constitution and the People who ratified it were exquisitely sensitive to the risks of creating a federal government. They knew that people in government inevitably seek to expand their powers and tax to the levels the citizens will bear without revolution. The proposed Constitution’s supporters argued that it would create a small and relatively weak government with limited powers that were expressly set forth in the Constitution. That was not good enough for the People. They demanded and got a Bill of Rights, stating specific things the federal government must not do, before they ratified the Constitution. In opposition, it was argued that a Bill of Rights was not required because the government had been granted no power to violate anyone’s rights. It had only those powers clearly stated in the Constitution. The opponents also argued that by listing certain rights that the government could not violate, a Bill of Rights would invite the interpretation that only those listed rights were protected. *Expressio unius est exclusio alterius.* In response to that prescient argument, James Madison propose the Ninth and Tenth Amendments, which were included in the Bill of Rights finally adopted.

The Ninth Amendment states, "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Tenth Amendment states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." The Ninth and Tenth Amendments make it clear that the federal government has only those powers expressly granted to it in the Constitution, that the people have many rights in addition to those mentioned in the first eight amendments and that all powers not expressly granted to the federal government are retained by the people or the States.

To anyone cognizant of that context, it makes no sense at all to read the Commerce Clause as a broad grant of power to the federal government to

14 U.S. CONST. amend. IX.
15 U.S. CONST. amend X.
control all human activity that might have some connection to commerce between people in more than one state. The same may be said regarding any other of the express and limited powers in the Constitution. The primary purpose of the Commerce Clause as it related to the several states (as opposed to foreign commerce and the indian tribes) was to create a nationwide free trade zone. The framers were aware of the negative consequences on the people resulting from protectionist trade barriers. They had the experience of European countries and the several years under the Articles of Confederation to teach them, as well as the theoretical foundation provided by Adam Smith's *Wealth of Nations*.\textsuperscript{16} Thus, a more appropriate interpretation of the power granted by the Commerce Clause over intra-U.S. commerce is that it gives Congress the power to prevent state legislatures or executives from interfering with commerce that crosses state lines, but no more. To accept the unlimited power view is to say that the Ninth and Tenth Amendments must be ignored. Such a view contradicts a basic principle of statutory interpretation, to wit: every part of the statute is to be given meaning, congruent with the entire statute, and no part ignored. That principle is even more important when interpreting a Constitution.

3. Natural Rights v. Legal Positivism

The trend in constitutional jurisprudence from the limited government paradigm at the beginning to the nearly unlimited Congressional power of today is a reflection of the increasing acceptance of the moral element of the fallacy of legislative omnicompetence. To challenge it, we must ask whether there is any sphere of human activity, of our lives, from which government should be barred? To put the question more fundamentally: what is the proper relation of the State to the individual?

These questions lead us to that eternal confrontation between the "natural rights" tradition and legal positivism. The influence of the natural rights tradition on the framers is apparent in the opening paragraphs of the Declaration of Independence, attributed to Thomas Jefferson, where it is stated:

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; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organ-

izing its powers in such form, as to them shall seem most likely to effect their safety and happiness.\textsuperscript{17}

It would be difficult to improve on this succinct statement of the natural rights views dominant at the time of the American Revolution and the adoption of the Constitution. It also describes the proper relationship of the individual to the State according to the natural rights paradigm.

Jefferson surely knew his stuff when operating within the natural rights philosophy. He and it were products of the Enlightenment. The words Jefferson selected for the Declaration make clear that the three rights mentioned are only some of many. So every individual has many rights, too many to list, and each individual is equal to each other where rights are concerned. The people and their rights exist before government. As to the purpose of government and its proper powers, the Declaration tells us that we humans create government to protect our rights and that we consent to grant it the power it needs to do that job, but not to trample the rights it was created to protect. Further, when government exceeds its just powers, those derived from the consent of the governed, we have the right and the duty to throw it off and create new forms of government that will serve us better.

The ideals, in the natural rights tradition, as stated in the Declaration, were not fully adhered to in the Constitution, the equality of women being ignored and the rights of blacks being sacrificed in the compromise to achieve its adoption. The point I make is not that the Constitution was perfect, but rather that the natural rights philosophy predominated in the thinking of the framers and the citizens who ratified it. Proper interpretation of the Constitution must take into account the basic precepts of the natural rights tradition.

Legal positivism has largely replaced the concept of natural rights in the jurisprudence of today. Positivists, notably Jeremy Bentham, rejected the idea that individuals have natural rights as "nonsense." Positivists contend that "rights" are created by the State. No one has the right to anything until the State acts by legislation to make it so. The positivist view tends to merge the concepts of rights and powers. It may be nice to discuss rights, but without the power to back up what you say, it is mere discussion and nothing more. The State must exercise its power to make any claim (right) meaningful. Individuals must join together to incorporate themselves into a State in order to escape the anarchy that would otherwise exist and to give themselves protection from the worst among them. Individuals must look to the State for a statement of their "rights" and protection and that can succeed only when individuals concede that the whole (the State) is superior and they are subordinate.

It is not difficult to understand that when the natural rights philosophy predominates, people will tend to want and expect a small government that intrudes very little into their lives. Judges will interpret governing documents with an eye to keeping government under constraint, resolving ambiguities in favor of the individual and against state power. The interpretive principle

\textsuperscript{17}The Declaration of Independence para. 1 (U.S. 1776).
would be: show me where the Constitution says the People have granted the government the power to act on the subject under examination.

On the other hand, where the positivist view predominates, people will understand and expect that they must look to government for what they value. Legislators will see themselves as the source of all things good that the people want and will dole it out generously, basking in the appreciation of the voters. The result of that will necessarily be larger and larger government with few limits on its power to control all activities of the citizens. Positivist judges and Supreme Court justices will look to the Constitution to see what rights have been granted to the people, placing limits on government power only when they find an express limitation on that power. If the Bill of Rights does not deny the power to the government, it has it. In this way, the risk of including a Bill of Rights in the Constitution has borne its bitter fruit. By setting forth a list of protected rights in the Bill of Rights, the People made it possible for the positivists to prevail with their argument that no rights are protected except those expressly stated. Not surprisingly, the gradual replacement of natural rights by positivism as the dominant jurisprudential philosophy in the United States corresponds with the expansion of federal power.

4. Limiting Leviathan

So we find ourselves today in a situation where the great majority of Americans never ask whether Congress is within its constitutional authority when legislating, regardless of the subject matter, the people involved or the geography. Neither the Congress nor the Executive care, they just act, if it serves their political purpose, which invariably is getting reelected. The courts face the issue only when a lawsuit is brought by some naive soul who believes the Constitution grants only limited powers to the government. Almost never do the courts agree. The surprised reaction to the Supreme Court’s 1995, United States v. Lopez,18 decision proves the case. In Lopez, the Supreme Court held that the Commerce Clause did not justify federal legislation restricting the possession of a handgun in proximity to a public school.19 The Court, in a fit of reasonableness, could not see sufficient connection to interstate commerce, even though guns are obviously sold across state lines.20 Legal commentators typically viewed this as a significant departure from established Commerce Clause jurisprudence.

What limits, if any, should be put on what government can attempt to do? One answer is provided by the natural rights theory as expressed in the Declaration of Independence, an answer most congenial to modern libertarians as well. Government exists only for the limited purpose of protecting the rights of the citizens when they are under attack or in jeopardy. Each person has rights equal to each other person. No person, including those in government, has the

19Id.
20Id. at 1632.
right to trample the rights of another, no matter how much good he might think it would do. Government has no legitimate power to act as Nanny to protect us from ourselves or from making stupid decisions in what we buy, use or ingest or how we choose to live our lives. Or, as Jefferson put it in his First Inaugural Address: "[A] wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government. . . ."21

The opposite view (the first element of the fallacy of legislative omnicompetence, i.e., that there are no necessary moral limits on government action) is consistent with and supported by the positivist paradigm. Under positivism, there logically cannot be, should not be, and are, no limits on government because it is the source of rights and the power to protect those rights. Why do I call it a fallacy? For the reason that acceptance of this view deprives us of any effective defense of the ultimate political value: liberty for ourselves as individuals, while leaving the field open to all forms of dictatorship and slavery. Positivism leads to totalitarianism in practice because it recognizes no logical way to argue against any exercise of government power over the individual. It leads to draconian limits on freedom of speech, press or any kind of dissent, to mass murder of dissidents, and to economic and environmental disaster as demonstrated in Nazi Germany, the former Soviet Union and Eastern Europe. The post-World War II War Crimes trials in Nuremberg illuminate the issue. The Nazi defendants claimed they were merely enforcing the law of the State, just following orders issued from the legitimate heads of the German State. That should be a valid defense in a purely positivist regime, but not one where natural rights views predominate. Indeed, the convictions at Nuremberg could only be sustained on the basis that the individual victims had rights superior to what the Nazi government recognized and that those rights had been violated by the defendants while carrying out the State orders to exterminate them.

The consequences of consistently applied positivism in practice are anti-liberty, anti-rights, anti-human and anti-life. Anyone who values liberty and the flourishing of individual human beings in conditions of peace and abundance must begin by rejecting the view that it is morally appropriate for government to act in every situation that displeases us. Rather, our question should always be the one consistent with our natural rights tradition: where does it say the government has the power to do that? Did we the People give our consent to be governed in this way? Let us place the burden on the proponents of federal government power to point to the language in the Constitution that authorizes the legislation or regulation that they seek to impose on us.

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21 Thomas Jefferson, First Inaugural Address, quoted in Murray, supra note 4 at ix.
B. Pragmatic Element

The second element of the fallacy of legislative omniscience is the mistake of thinking that government action will actually accomplish what you want. The brilliant centerpiece of Harry Browne's *Why Government Doesn't Work* is his explanation of why the attempt to solve problems in people's lives by using government force is doomed to fail. It invariably fails to achieve the ends sought by the proponents and invariably leads to other consequences that no reasonable person would find desirable.

Government is all around us, federal, state and local. Like the fish who does not realize that he is wet, most of us move through our daily lives with little awareness of the millions of laws and regulations that touch on every aspect of what we do, say and think. Most of us have never given any thought to the essential characteristic of government, until we run afoul of it. "The distinctive feature of government is coercion—the use of force and the threat of force to win obedience." 22 As Browne explains, behind all government action is force or the threat of force to make people do things they might not choose to do voluntarily.

Suppose you offer a service to willing customers (e.g., cutting hair) that requires a license, but you decline to apply for one. You will be visited by government agents who will tell you to stop. 23 If you refuse to stop performing your service without permission (i.e., a license), you will be prosecuted and jailed. If you resist with equal force at any step in the process, you will be overwhelmed with superior, even lethal force. You want to grow the assiduous hemp plant? If you do you will be jailed. Should you try to stop the DEA agent from burning your crop, you will be shot. You think the government’s welfare programs or international military meddling are a travesty so you refuse to pay taxes to support them. The IRS will send its agents to seize your property to pay the tax it claims you owe. If you resist, you will be jailed; if your resistance is violent, you will be shot. Ultimately it becomes clear that every government action comes in the form of men with guns who will shoot you if you do not obey.

Most people, most of the time, comply with the law, or if they don’t, they do not resist when the men with guns show up so there is a facade of peacefulness about the process. But it is clear that anyone who resists the government’s power will be dealt with severely. The clearer the resistance, the more likely the citizen will wind up dead. Consider Waco and Ruby Ridge.

1. Justifiable Uses of Force

Is it not necessary and proper to use government force in some instances? Certainly, if I have the right of self defense (even the positivists would probably

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23 Perhaps, as Browne describes in his witty illustration of the force behind all government action, the agents will be from the "state Board of Tonsorial Cutters of Hair (BOTCH)." Browne, *supra* note 2, at 11.
agree that I do), then for the government to use its force to assist me in the
defense of my person, rights and property would be proper. If we agree that
such activities as murder, rape, robbery, battery, kidnapping, assault, larceny,
embezzlement, burglary, arson, trespass, pollution (a form of trespass), fraud,
breach of contract and negligent infliction of injury violate the rights of victims,
then the use of government force to penalize and recover restitution from the
wrongdoer would be proper in those cases. Even so, to have the government
participate still carries costs and risks. There is no perfect solution or foolproof
way to locate the lines that must inevitably be drawn to protect citizens and
their rights from criminals or tortfeasors.

The "government doesn't work" paradigm can be seen most clearly when
the legislature passes laws for purposes that go beyond the defense of the
persons, rights and property of the citizens. There are several reasons why this
is so.

The power available to those in government to force others to do their will
is seductive. Many will seek government positions in order to wield that power,
all for the good of mankind, of course. It is so nice not to have to persuade
anyone to do what you think they should do, but merely to persuade your
companion legislators to pass your law that will force them to do so. In
exchange, you will probably support other legislators' pet projects, even
though you might not think they are all that great. So, this mutual support
among legislators tends inexorably to increase the number of laws and
programs emanating from government.

2. The Dictator Syndrome

What happens to these programs that inevitably begin with someone's good
intentions? Harry Browne discusses what he calls "The Dictator Syndrome," the
practice of calling on government to use its coercive powers to cure some
real or imagined ill, such as finding a cure for cancer, bringing peace to Bosnia,
or preventing air pollution. At first blush, it seems so clear that having the
government coercively mobilize the people and resources to solve such
problems is a good thing. But, you cannot get your program adopted without
political allies and they will invariably modify it to suit themselves and their
supporters. When it is written into law, you do not get to write the law your
way. It will be written by others and they will incorporate even more
compromises into it.

If the law passes, you won't administer it, "faceless bureaucrats" will, and to
suit their end, not yours. Finally, disputes will arise that result in lawsuits where
judges will interpret the law in ways you never imagined. The end result is
government exercising more power in ways you will probably find offensive,
not providing the beneficial results you initially envisioned when you set out
to do good.

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24 *Id.* at 20-21.
The problems that were to be solved by government action don't get solved and new problems arise. The people in government are motivated to expand their power to solve the new problems. This is understandable. As the Public Choice school of economics has taught us, people in government are much like the rest of us. They will predictably seek to increase their wealth and stature. Working within the governmental system, the way to do that is to increase the size of one's bureaucracy, its budget and its manpower, while expanding the scope of its control. There is absolutely no inclination by those on the inside to evaluate a government program as a failure and end it. During the last 30 years, the federal government has spent over $5 trillion fighting poverty, which is no less a problem now than before the federal government became involved. Charles Murray, using his social science approach, demonstrates that in program after program, when the government steps in to solve a perceived "problem," nothing much changes, except things are made worse.

The People, who read their increasing tax bills and speak wistfully about less government, also contribute to its expansion. Frederic Bastiat, a 19th Century French economist, aptly described government as "that great fictitious entity by which everyone tries to live at the expense of everyone else." Where government regulates everything, and has numerous programs with benefits for a wide variety of groups, a rational citizen will understandably seek to receive the maximum amount of goodies while passing on the costs to others. Everyone expects the system to go on with minimal change, so it appears best to sign up for every subsidy or handout, search out the loopholes, and ask for heavier regulations to drive your competitors out of business. Legislators are typically happy to oblige because it increases their power and stature.

3. Destroying Market Signals

As government grows in size, cost and intrusiveness, the relatively smooth operation of the market pricing and resource allocation mechanisms are disrupted and the entire system becomes less efficient and less productive with fewer opportunities. The Soviet Union collapsed after 70 years of a doomed effort to substitute central command for a market economy. Austrian economist Ludwig Von Mises explained the process first in 1922 in his book, Socialism, where he predicted the logical progression to full collapse that occurred in all the centrally planned socialist economies. Without a free market that provides information through prices, those making economic decisions have no way to

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26MURRAY, supra note 4, at 47-56. Conversely, Bill Clinton prefers: "Mend it, don't end it."
27Frederick Bastiat, The State, in SELECTED ESSAYS ON POLITICAL ECONOMY, 144 (1968).
determine where to allocate resources in order to satisfy the most urgent demands of consumers. Socialist planners, by definition, do not allow workers and producers to move to where they can get the highest price for their wares or services. Indeed, when the market is not allowed to work, no worker or producer can know how best to use the resources he controls. The result is continual waste, inefficiency, shortages and no way to know what to do about it. The people in such circumstances will survive by resorting to a somewhat freer underground (criminal) economy. In the official economy, it will be as the old Soviet joke describes it: "We pretend to work and they pretend to pay us."

It should not be surprising that the most socialistic aspects of American society are the locus of the most obvious inefficiencies and problems. The public schools cost considerable sums of money, waste much of it, do a poor job of educating children and are frequently unsafe for kids and teachers. Compulsory payment by taxes and compulsory attendance laws have created a protected socialist monopoly for public schools that gives predictable results. The public schools have not improved since Jimmy Carter established the federal Department of Education for the benefit of the teachers' unions. The Postal Service, also a protected monopoly in first class mail, is everyone's model of bureaucratic inefficiency. The Pentagon's wasteful defense contracting is notorious. The insane War on Drugs is a colossal failure that has increased violent crime in our cities, overfilled the prisons, ruined the lives of thousands of young people who are no threat to anyone, and corrupted our police and courts. Meanwhile, the government cannot keep drugs out of its own prisons.

IV. THE AUTHORS' PROPOSALS FOR CHANGE

So government doesn't work, or at least not very well, in just about everything we see it trying to do. Yet, how do these libertarian authors propose to make things better? One goal is to reduce the federal government to those functions specifically authorized by the Constitution, just as the Framers envisioned. Instead of a $1.5 trillion annual budget, we could get by on $100 billion per year. That's easy enough to say, and many might agree that it is a laudable goal, but the political obstacles are formidable. Certainly those in government would not want to see their power and stature so diminished. More problematic, would the People want to give up all those benefits, those "entitlements," to which they have become accustomed?

A. Social Security

Each of the authors addresses several of the high visibility federal government programs and shows how they can be eliminated beneficially. Each deals with the so called (untouchable) "third rail of politics," Social Security. Young people, especially, know that Social Security is a fraudulent

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29 Browne, supra note 2, at 170-86.

30 Id. at 159-69; Boaz, supra note 8, at 219-33; Murray, What It Means, supra note 4,
and bankrupt program that is taxing them mercilessly today and will give them nothing when they retire. But with millions of elderly voters hanging on to it, how can it possibly be changed? Browne begins with the fact that the federal government owns trillions of dollars worth of assets that are not constitutionally authorized, such as its ownership of one-third of all American soil. He would sell off portions of these assets and use the proceeds to purchase private insurance annuity contracts for retirees to replace their Social Security benefits. Then the system would be ended. This would make retirees more secure than they are under the government system, which Congress can change at will, and would eliminate the 15 percent payroll tax that employees and employers must pay for the current program. That tax relief would boost the economy tremendously and give young workers bigger paychecks and the opportunity to make their own investment decisions with their own money.

Mr. Boaz recommends privatization of the Social Security system such as has already been accomplished in Chile, New Zealand and Singapore, citing greatly increased investment and economic growth that has resulted from those reforms. Charles Murray recommends the radical surgery of simply ending the program, along with all other social service programs and all income transfers in cash or kind. His well documented reason: these programs have done far more harm than good, in particular the harm of depriving individuals of a context in which they can take responsibility for their own lives and the lives of others in their families and communities.

B. Health Care

Similarly with health care, the authors lay out the serious problems and exploding costs that have been caused since the federal government decided everyone had a "right" to health care in the 1960s. Harry Browne's solution is to get the federal government out of health care by: (1) abolishing the FDA so people can take responsibility for their own treatment; (2) privatizing Medicare by turning it over to private insurance companies; (3) abolishing Medicaid (the federal program that sends tax dollars to the States for medical care for the poor); (4) making medical expenses, including insurance, tax deductible (so long as the income tax exists); and (5) ending State mandates on medical insurance coverage.

Charles Murray would also end Medicare and Medicaid and deregulate the health care industry at all levels of government. He does propose treating the value of employee medical benefits as taxable income for income tax purposes, which apparently assumes the continuation of the federal income tax in perpetuity, an assumption Browne probably would not find agreeable. David Boaz proposes the adoption of the medical savings account (MSA), in essence, an IRA for medical purposes, along with the elimination of federal

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at 124-38, 152-43.

31 MURRAY, supra note 4, at 90-101.
government medical programs and medical industry deregulation.\textsuperscript{32} As with Murray, the MSA proposal assumes that the federal income tax will continue to exist.

\textbf{C. Education}

The three authors’ approach to federal government involvement in education is similar. They show how, since the federal government exceeded its constitutional bounds and charged into this area, the costs to taxpayers have skyrocketed, the practical results have been negative and the liberties of Americans have suffered. Harry Browne’s solution is to terminate federal intervention in education because there is no constitutional authority for it to do so. When the tax burden associated with it is removed, the People will be much better equipped to handle the problems of education in their own communities.\textsuperscript{33} David Boaz provides additional evidence of the reverse effects of federal intervention in education. He highlights the benefits of private education and school choice but advocates federal government funded vouchers to subsidize students’ education and choice.\textsuperscript{34} Charles Murray concurs in the need to get government out of education but proposes a $3,000 annual education voucher per child to replace all existing federal education programs.\textsuperscript{35} Although Messrs. Boaz and Murray discuss at length in their respective books the problems created by government intervention into areas better left to individuals and communities, agreeing in essence with Harry Browne’s analysis of why government doesn’t work, it appears that in the education area, they are willing to give it one more chance to do good with their voucher proposal. No doubt Mr. Browne would predict that neither of them will get the good results they seek and that the legislators and bureaucrats will deliver something neither of them really desires.

\textbf{D. Foreign Policy and National Defense}

\textit{Why Government Doesn’t Work} also provides us with Browne’s libertarian approach to foreign policy and national defense, topics that a reader would expect a presidential candidate to address. Neither Murray or Boaz deal with this area, although the implications of their libertarian principles logically lead to the conclusion that governments should not interfere with free and honest trade across international borders. Here, Browne is content that the Constitution authorizes the federal government to act. Libertarians have always been advocates of free trade and Browne is no exception. Free trade is simply the result of recognizing that individuals have the right to interact peacefully and honestly regardless of where they live. Governments do not

\textsuperscript{32}BOAZ, \textit{supra} note 8, at 223-28.
\textsuperscript{33}BROWNE, \textit{supra} note 2, at 112-17.
\textsuperscript{34}BOAZ, \textit{supra} note 8, at 242-46.
\textsuperscript{35}MURRAY, \textit{supra} note 4, at 90-97.
engage in trade, people do. The prospects for peace are enhanced when government does not interfere with trade across international borders and the quality of life for people of all countries is enhanced when opportunities for trade increase. After all, no one will voluntarily enter an economic transaction unless he expects to be better off as a result.

On national defense, Browne is a non-interventionist who believes that the U.S. government should not play the international cop nor force American taxpayers to finance other governments or their wars. He advocates the development of an effective American shield against nuclear missiles with an innovative financing angle. His proposition is that the federal government take bids on a working missile shield system that would be paid for upon delivery and proof that it works.

E. Persuasion v. Force

On issue after issue (crime, the War on Drugs, agriculture, education, the family, energy, economic regulation, etc.) Browne, Murray and Boaz point in the same direction. The basic distinction in real life is between using cooperation to achieve goals or using force to compel others to support your goals. Force is the basic tool of government; it is what underlies political decisionmaking and the implementation of government programs. People don’t react well, or as anticipated, to being forced into action decreed by legislators and bureaucrats. So the effect of government action is typically a state of affairs less desirable than before. The alternative to society dominated by government guidance through coercion is what Boaz terms "Civil Society."36 This is the part of life in which we interact cooperatively with others to pursue our own goals while they are doing the same. The most obvious example is the marketplace, where all of us act every day, without coercion, working, producing, buying and selling, all cooperatively with others.

Another aspect of civil society are the thousands of private charitable, educational and social welfare organizations doing beneficial work without resorting to coercion. Before the federal government began its massive interventions in the 1930s, there were thousands more such associations and groups working for the mutual benefit of members and the needy in neighborhoods and communities. One of the saddest consequences of government welfare programs, including Social Security, is that they have killed off much private charity, undermining the opportunities for people to take responsibility for members of their families and communities by the double whammy of relocating that responsibility to Washington and adding the crushing tax burden that finances the welfare state. The essence of the libertarian response to this state of affairs is to recognize the harm that dependence on government coercion has done and undo it by eliminating government intervention, reducing the tax burden, and thereby allowing

36 Boaz, supra note 8, at 127-47.
Americans to solve their own problems in any peaceful, honest and responsible manner they choose.

F. Implementation

The obvious question raised in the three authors’ discussions of the many policy issues they address is: do you think you could do a better job of deciding what to do with the money you earn than someone in Washington who does not know a thing about you? They surely believe you will answer that one affirmatively.

Many Americans approve of a good deal of the libertarian program. Standing in the way of its adoption is something akin to the prisoner’s dilemma. No one wants to give up the government benefits coming his way if that is the only change likely to occur. If others are not required to give up their benefits as well, each individual feels he’d be a fool to give up his own. We know how powerful a political obstacle this can be. Whenever a seemingly obsolete and inconsequential federal program is scheduled for abolition, the beneficiaries and their Congresspersons mount a furious defense, usually successfully.

The solution is to adopt a method similar to that used to select military bases for closure. Everyone in Congress acknowledged that many military bases were obsolete or surplus and should be closed, but they also recognized that it would be impossible to shut bases down one at a time because each one would be defended so vigorously. A commission was established to study the bases for closure and propose a lengthy list of them to Congress. Then, Congress could only vote for or against closing the entire list. The plan worked. Congress voted to close all the bases on the list.

Using a similar methodology, Harry Browne proposes what he refers to as "The Great Offer." He asks: would you give up your favorite federal programs if you never had to pay income tax again?

No matter what federal program you think is worthwhile, or particularly good for you (Student loans? Corporation for Public Broadcasting? Farm subsidies? Food stamps? Family Leave?), it is most likely that you will be better off in total without the programs you like and free of the income tax burden for the rest of your life. Most working Americans are losing between 10 and 30 percent of their earnings to the income tax collectors. Think of what you could do with the money you earn if you could keep that much more to spend, invest or give away according to your values. No matter how you spent or invested it, the rest of your fellow Americans would additionally benefit because of the new businesses and jobs created to meet increased market demand resulting from new private spending and investment. Each of us would have more earnings to improve our housing, our health, our minds, to educate our children, take care of our elderly relatives or the poor, or send it abroad to improve the conditions of people in third world countries.

V. Conclusion

Harry Browne's *Why Government Doesn't Work*, Charles Murray's *What It Means To Be a Libertarian*, and David Boaz' *Libertarianism: A Primer* critique of federal government programs and specific policy proposals raise several questions that are fundamental to the American experiment with human liberty within the constitutional framework bequeathed to us by Jefferson, Madison, Hamilton, the other founders, and the People who ratified the Constitution:

Is the natural rights paradigm, on which the Declaration of Independence and the Constitution were grounded, a timeless and universal set of principles applicable to today's people and their circumstances?

Is the natural rights paradigm a necessary foundation for the protection of human liberty and the flourishing of individuals in a free and productive society?

Should our constitutional jurisprudence acknowledge the power and applicability of the natural rights origins of the Constitution and interpret the Constitution accordingly, that is, as a grant of extremely limited powers to the federal government with all other powers and rights being retained by the People and the States?

Finally, does the Constitution limit the federal government to only those powers expressly and unequivocally stated in its text so that the vast majority of its current activities should be terminated or radically reduced?

There is little doubt that Harry Browne would answer each of these questions emphatically in the affirmative and that Charles Murray and David Boaz would be nearly as emphatic. All would clearly agree that adopting this "natural rights" approach to constitutional jurisprudence would lead America out of its current malaise and a long way toward its original promise of harmony, abundance and opportunity for all. It is interesting to contemplate how many Americans would answer the same way.