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THE MAKING OF A LIBERTARIAN, CONTRARIAN, NONOBSERVANT, BUT SELF-IDENTIFIED JEW

Randy E. Barnett*

ABSTRACT: Many academics are unaware that I am Jewish, no doubt due, in part, to my last name as well as to my politics. Yet growing up as a Jew in Polish-Catholic Calumet City, Illinois and as a kid from Calumet City attending Temple in Hammond, Indiana made me quite conscious of the tyranny of the majority. This environment, together with the influence of my father, had a deep affect on my views of liberty, justice, individual rights, and the U.S. Constitution. In this brief essay, prepared for a symposium on “Judaism and Constitutional Law: People of the Book,” held at the DePaul University College of Law, I explain how being a contrarian Jew has affected my academic agenda, my scholarly commitments, and the future direction of my work. I also suggest implications of my latest work on Our Republican Constitution for Judaism itself.

For me, the influence of Judaism was extremely fundamental, but largely cultural. The most formative influence on what became my intellectual orientation came from my father, who was both an atheist Jew and vocally “conservative” in a proto-libertarian way. In the wake of the Holocaust, he believed that the liberty traditionally recognized in the United States and protected by the Constitution made it the “promised land” for Jews—who also needed to assume responsibility for protecting themselves from persecution, which includes keeping and bearing arms.

No doubt part of my thinking about the Constitution – and disappointment with Supreme Court decisions I read in law school – was inspired by the desire to preserve the form of government that made the US a haven for me and my family as Jews. The recent growth of antisemitism around the world has only deepened this commitment.

From my perspective as an American Jew, as the world is now shrinking for Jews, the U.S. remains an unprecedented refuge. This is not to be taken for granted. Originalism helps “lock in” the political and legal system that has served American Jewry very well indeed. I now think I have a better idea what it is about the American political system that is has been so good for the Jews, a thesis to which I return at the

*Carmack Waterhouse Professor of Legal Theory, Georgetown University Law Center; Director, Georgetown Center for the Constitution. This essay was prepared for the symposium on “Judaism and Constitutional Law: People of the Book,” sponsored by the Center for Jewish Law & Judaic Studies, at the DePaul University College of Law, and held on April 3, 2014. It was also influenced by my participation in a week-long Tikvah Advanced Institute on “In Defense of Nationalism,” held in Jerusalem in December 2014.

end of this essay and hope to develop further in other work.

Today, however, many if not most Jewish legal academics seem bent on replacing it with a majoritarian social democratic system, which I believe is big mistake. Not for the first time are Jewish intellectuals being short-sighted about what is good for the Jews. Perhaps my resistance to this Jewish group think is motivated by how my Judaism made me the “odd boy out” in public school.

I was one of four Jews in my high school class of four hundred in the Polish-Catholic, predominately Democratic blue collar town of Calumet City, Illinois. Antisemitism was common and often not at all concealed. For example, I got into a school yard fist-fight in the second grade with a classmate (and future felon) who called me a “dirty Jew.” Years later I occurred to me that he may well not have known I was Jewish. It was just an insult one hurled in a town where one didn’t even imagine meeting a Jew. But perhaps did know, and if a second grader was aware of this, you can imagine what this says about the pervasiveness of antisemitism in Calumet City.

Another somewhat more gratifying antisemitic slight I only became aware of when attending a high school reunion not so long ago. I was speaking with a woman with whom I was very friendly in high school. In high school she was really cute, was a pom pom girl, and eventually married one of the star running back on our football team to whom she is married still.

When I admitted that I had had a crush on her when we were classmates, she replied without any hesitation, as though this was on her mind when she saw me: “Oh I know,” she responded, “but my father would have rather I brought home a black than a Jew!” To me, this meant that I had not been rejected by her because I was a nerd, but because I was Jewish! So I must admit that I was elated by this antisemitic revelation.

I should hasten to add that my school days in Calumet City were happy ones, and I am grateful to have been raised there. I was a leader in my school, on the wrestling and debate teams, and was both the president of my high school’s student counsel and a member of the homecoming annual carnival court. And I only rarely had to fight. Antisemitism just lurked mostly silently in the background, affecting mainly social interactions with other guys – and apparently with girls too.

Yet, at the same time, my proto-libertarian politics—combined with the fact that Calumet City was literally the wrong side of the tracks—made me the “odd boy out” among the liberal Jewish kids from the Hammond-Munster, Indiana community where I attended Temple. Again, this is not to say that my childhood in the Jewish community was either unhappy or unsuccessful. I had Jewish friends and was president of my AZA chapter at Temple Beth-El. But my Jewish friends would never

drive to Calumet City to pick me up. I always had to go to them.

Growing up not quite wholly fitting in with either community nurtured in me an independent, critical, and even contrarian perspective towards whoever or whatever is the majority establishment—including the Jewish establishment. This skepticism was, no doubt, reinforced by the “almost-everything-is-optional” philosophy of the very reformed Temple where I attended Sunday and Hebrew schools and was Bar Mitzvah’d. My being Bar Mitzvah’d was my own choice. It was an open question whether my dad would even attend. In the end, he did. So, at Temple Beth-El, Judaism itself was rather *laissez-faire*.

As a kid I was highly dubious of Zionism. Back then, I thought that it was a really bad idea to get all the Jews in one place where they could be more easily exterminated. I was also turned off by the mixture of church and state in Israel as well as what I was told was the socialism that animated its founding. (Since then, I have changed my views towards Zionism, in part, because I have learned about its nonreligious, nationalist character, and discovered that some of its most prominent early proponents were individualists and strong opponents of socialism.¹)

To round out this picture, I must add that, in addition to such libertarian influences as Murray Rothbard and, to a much lesser extent, Ayn Rand – both atheists of Jewish descent – in college I was also deeply influenced by my mentor Professor Henry Veatch. Veatch was a renowned Aristotelian-Thomist natural law philosopher, who was an observant Anglican, from whom I took courses in both ethics and the philosophy of religion.¹ In addition to his course on ethics, I also took his philosophy of religion course. I was intrigued, but ultimately unconvinced, by the various proofs for the existence of god that he taught us.

After college, my commitment to libertarian political principles only grew, though it put me in the minority at Harvard Law School. This was just before the Federalist Society for Law and Public Policy was founded in which one might identify fellow travelers among one’s classmates. As a result, during my law school days, I spent a lot of time in New York where I became a board member of the Center for Libertarian Studies, and very active in its scholarly programs.

On the recommendation of Murray Rothbard, I received a fellowship from the libertarian Institute for Humane Studies to spend the summer between my first and

¹See BENZION NETANYAHU, *THE FOUNDING FATHERS OF ZIONISM* 11-104 (2012) (describing the views of Leo Pinsker and Theodore Herzl).

¹See, e.g., HENRY B. VEATCH, *RATIONAL MAN: A MODERN INTERPRETATION OF ARISTOTELIAN ETHICS* (1962); see also HENRY B. VEATCH, *FOR AN ONTOLOGY OF MORALS: A CRITIQUE OF CONTEMPORARY ETHICAL THEORY* (1971).

second of law school year researching and writing a paper on “Restitution: A New Paradigm of Criminal Justice.” But when I asked my criminal law professor to be my faculty advisor for the paper, so it would satisfy my third-year writing requirement, he made me sign an affidavit saying that IHS did not make its funding contingent on my reaching any particular conclusion.

My paper was published in my third year by the peer-reviewed philosophy journal, *Ethics*,² largely as I had written it – and has over the years been reprinted in various teaching texts and anthologies a dozen times. But it only merited a B+ from this same professor. So being a Jew in Calumet City prepared me for being a libertarian at Harvard.

It was at Harvard that I lost interest in the Constitution as a feasible protector of liberty after taking constitutional law, taught by Laurence Tribe. What bothered me was not Tribe’s approach; he was a brilliant teacher. What bothered me was reading how, in case after case, the Supreme Court had rendered most of the power-constraining parts meaningless or unenforceable. Consequently, after practicing criminal law as a prosecutor in Chicago, upon entering academia, I chose to teach and write about contract law rather than constitutional law, which I eschewed.

Gradually, however, and against my original intentions – pun intended – my contrariness induced me to turn my attention to the original meaning of the then-intellectually disreputable Ninth Amendment, before moving on to the then-also-disreputable Second Amendment. I was not yet an originalist, but the dissonance created by my interest in the original meaning of these parts of the “lost Constitution” led me to a different kind of originalism.³ What is now called the New Originalism⁴ differed not only from the majority of law professors’ approach to constitutional interpretation, but from the then-prevailing approach of originalists themselves (though I was not the first to make this move).

Above all, what ties together my intellectual pursuits is my commitment to justice, which I was taught lay at the core of Judaism. Not “social justice,” which

²See Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977).

³See Randy E. Barnett, *An Originalism for Nonoriginalists*, 5 LOY. L. REV. 611, 620 (1999).

⁴See Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004).

concerns itself with whether everyone has the right amount of stuff,⁵ but justice as identified by the individual natural rights of each person. Justice in this world, and not the next. My commitment to justice led me at the age of 10 to want to be a criminal lawyer – after watching *The Defenders* on TV) – to become a philosophy major with an interest in natural law ethics and natural rights political theory, to become a criminal prosecutor in Chicago where one can seek justice on a case-by-case basis, and eventually to being a law professor where I could explore justice on a more systemic and theoretical level.

Justice informs the theory of constitutional legitimacy that I offered in defense of originalism as a method of constitutional interpretation in *Restoring the Lost Constitution*.⁶ And justice informs the “presumption of liberty”—the subtitle of the book—that I propose as a principle of constitutional construction. Justice as it truly is—as best I can understand it—not merely as it may happen to be recognized by the majority of the public, or a majority of legal academics.

In this way, my Jewishness has made me acutely aware of, and led me to question and resist, the “tyranny of the majority”—including at times the political convictions held by the majority of most American Jews. It led me to develop the conception of individual rights I present in *The Structure of Liberty: Justice and the Rule of Law*.⁷ It has led me to an individualist conception of popular sovereignty that is based on “We the People,” each and every one.⁸ And it led me to advocate a legal framework that can lock protections for the rights of these individuals, even against the majority.

Now I find that my most recent project has potentially significant implications for Jewry in the United States, in Europe, and in Israel. In a forthcoming book, tentatively titled *Our Republican Constitution: Securing the Sovereignty of the People*, I develop the distinction between a Democratic Constitution and a Republican Constitution, each of which is based on a different conception of We the

⁵See RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 342-51 (2d. ed. 2014) (comparing “the social justice and legal moralism extremes” with the “radical modesty of libertarianism”).

⁶RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2d ed. 2014).

⁷BARNETT, *supra* note 5.

⁸See BARNETT, *supra* note 6, at 361-69 (discussing individual popular sovereignty and presumed consent); and Randy E. Barnett, *We the People: Each and Every One*, 123 YALE L.J. 2576 (2014).

People and popular sovereignty.

The Democratic conception of a constitution is based on a Rousseauian *collective* conception of popular sovereignty that envisions government as expressing the “will of the people,” which in practice means the majority of the electorate. The Republican conception of the Constitution is based on a Lockean *individual* conception of popular sovereignty in which the government is envisioned as a subset of the people who are the servants of the people whose “just powers” are limited to the equal protection of the pre-existing rights of the people as individuals.

In a future essay, “Is Democracy Good for the Jews?” I plan to explain why (a) the reason Jews have thrived in the US is because it was fundamentally a republic that puts a primacy on individual rights rather than a democracy that unduly privileges the will of the majority; (b) to the extent that Europe is more democratic than the US, Jewry is threatened there; and (c) although most people envision Israel to be good for the Jews because it is a democracy in which Jews constitute the majority, it would be better if Israel was conceived as a republic in which the personal rights of every person – Jew and non-Jew alike – are equally protected by the government, but in which political rights may vary depending on what it takes to protect effectively the individual rights of the Jews.

For all these reasons, I believe my political commitments and legal views have been deeply affected by my upbringing as an American of Jewish descent, though not so much by the tenets or practices of the Jewish religion, but by the concept of the Jews as a people with an identity and often tragic history. It is my identity as a member of the Jewish people, rather than my religion, that has influenced my thinking and my work.⁹ And I now think I may have some insights to offer about the future survival of Jewry itself as a nationality.

In sum, I forthrightly identify myself, not only as an Aristotelian proponent of natural law, a Lockean proponent of natural rights, a libertarian and an originalist, but as an American and a Jew.

⁹On the importance of identity in general for the individual, and Jewish identity in particular, see NATAN SHARANSKY, *DEFENDING IDENTITY: ITS INDISPENSABLE ROLE IN PROTECTING DEMOCRACY* (2008). What Sharansky ardently defends as “liberal democracy,” I think can best be reconceived as a Lockean republic:

Conceptually, liberal democracy is fundamentally about the individual. Each person is an individual endowed with natural rights who agrees to join with others in a social contract for the benefit of all. The purpose of government, then, is to safeguard those individual rights.

Id. at 6.