

Anarchism as Constitutionalism

Written by Roderick Long.

I was recently pointed to, or reminded of, Robert J. Bidinotto's article *The Contradiction in Anarchism*. The article is nearly a decade old, so I don't know whether Bidinotto still stands by everything in it; but his criticisms of Market Anarchism are nonetheless worth addressing.

Bidinotto contrasts Market Anarchism unfavourably with constitutionally limited government. Because 'conflicting philosophies will lead to conflicting interpretations of the *meaning* of such basic terms as 'aggression,' 'self-defense,' 'property,' 'rights,' 'justice,' and 'liberty,'" Bidinotto argues, it follows that while Market Anarchists may 'believe that they are merely advocating *'competition' in the protection of rights,*' their system would in practice involve *'competition' in defining what 'rights' are.*' Under limited government, the acts of private agents 'are limited by the government,' while 'government agents themselves are limited *by the Constitution.*' By contrast, under Market Anarchism, 'no private company would deliberately handcuff itself, with separations and divisions of powers, and checks and balances.' Given consumer sovereignty, the rulers of society under Market Anarchism would be the 'same guys who rule it now,' brought to power 'by the same popular constituency that now elects them'; but under Market Anarchism, by contrast with limited government, 'there'd be *no institutional limits on their behavior.*'

I agree with Bidinotto that the use of force needs to be governed by constitutional restraints. But I suspect he's being misled by a metaphysically illusive picture of what constitutional restraints are and how they work.

First of all, when we speak of constitutional restraints we are presumably not talking merely of restrictions written into a legal document. Such paper prohibitions are neither necessary (look at Britain) nor sufficient (look at Soviet Russia) for actually operative restraints. What matters is a nation's 'constitution' in the original sense of the actual institutions, practices, and incentive structures that are in place.

But a constitution in that sense has no existence independent of the actual behaviour and interactions of actual human beings. The metaphysical illusion I referred to is the habit of thinking of 'separations and divisions of powers, and checks and balances,' as though these structures existed *in their own right*, as external limitations on society as a whole. But in fact those structures exist only insofar as they are continually *maintained* in existence by human agents acting in certain systematic ways. A constitution is not some impersonal, miraculously self-enforcing robot. It's an ongoing pattern of behaviour, and it persists only so long as human agents continue to conform to that pattern in their actions.

Since human beings have free will, no social pattern of behaviour can be *automatically* self-perpetuating; nothing whose survival depends on the choices of free agents can be *guaranteed* to survive. (Hence Bidinotto's dismissal of the Icelandic experience with a competitive legal system on the grounds that it 'didn't last' and so must have lacked 'viability' is off the mark ' to say nothing of the fact that Iceland's stateless period lasted successfully for *over three centuries*, which is a lot longer than the United States has lasted so far.) But such social patterns can be more or less *likely* to survive. A way of interacting that tends, by and large, to give most of the people participating in it an *incentive* to keep interacting in that way is more likely to survive than one that does not.

The constitution of a free society, then, needs to be a pattern of interaction in which people act ' and in so doing give themselves and/or one another an incentive to keep acting ' in ways that tend to maintain freedom. Market Anarchists and proponents of limited government *both* claim to be offering such a pattern. The choice between government and anarchy, then, is not a choice between having a constitution and not having one; it is a choice between two different constitutions. Far from eschewing 'separations and divisions of powers, and checks and balances,' Market Anarchists take *market competition*, with its associated incentives, to *instantiate* a checks-and-balances system, and to do so far more reliably than could a governmental system. As I've written elsewhere, despite the best intentions of those who framed the U.S. Constitution's checks-and-balances system 'there has been sufficient convergence of interests among the three branches that, despite occasional squabbles over details, each branch has been complicit with the others in expanding the power of the central government. Separation of powers, like federalism and elective democracy, merely *simulates* market competition, within a fundamentally monopolistic context.'

Anarchy thus represents the *extension*, not the negation, of constitutionalism. As Gustave de Molinari, the founder of Market Anarchism, wrote in his 1884 work *Political Evolution and Revolution*: 'The future will bring neither the absorption of society by the state, as the communists and collectivists believe, nor the suppression of the state which is the dream of the [non-market] anarchists and nihilists. It will bring the diffusion of the state within society.' (This quotation incidentally shows how to answer Chris Sciabarra's charge that Market Anarchism posits an untenable 'dualism' between society and government. Rather a Hegelian synthesis!)

Bidinotto thinks that legal services cannot be supplied on the market because a functioning market *presupposes* a functioning legal order; hence government is a 'a *precondition* of the market.' Now it is true that a functioning market requires a functioning legal order; but it is equally true that a functioning legal order requires a functioning market. This is obviously true if the legal order is Market Anarchism; but *it is no less true when the legal order is a government*. As Anthony de Jasay has recently pointed out, states can arise only in

societies wealthy and orderly enough to maintain them. Hence a state cannot exist unless there is a functioning economy of some sort. (Anarchists take this to show that the state is a *parasite* on productive activity; the most the minarchist can claim is that it is a *luxury good*.) In any case, a functioning market and a functioning legal order arise *together*; it's not as though one shows up on the scene first and then paves the way for the other. To think otherwise is to fall once more into the metaphysical illusion that economic activity takes place against the background of a legal framework whose existence is somehow *independent* of the activity it constrains.

Bidinotto complains, as we've seen, that competing providers of legal services in an anarchic order will have conflicting interpretations of justice. No doubt they will. But how is this different from the system he favours? The whole point of having a checks-and-balances system presupposes that the agents who administer the system will have conflicting interpretations of justice. There'd be no point in having distinct branches of government limiting each other, or having the people limit the government through the franchise, if unanimity on questions of justice could be expected. In *both* Market Anarchism and limited government, then, the working of the system will involve different parties trying to enact their several conceptions of justice. The best system is not one that eliminates such conflict 'no system can eliminate it' but one that does the best job of providing its constituent agents with an incentive to resolve their disputes a) peacefully, and b) in a manner favourable to individual liberty. The question is: which does a better job of this 'markets or governments?

In response to the Market Anarchist claim that private agencies would be led by market incentives to resolve disputes peacefully rather than violently, Bidinotto counters: 'What about a reputation for *customer satisfaction* ' and the profits that go with getting results?' But of course the incentive to violate rights in order to please one's customers/constituents is going to be present *both* for the private protection entrepreneur in an anarchic system *and* for the elected politician in a governmental system. The difference, Bidinotto thinks, is that the elected politician is restrained by 'checks and balances' while the private entrepreneur is not. But Bidinotto does not explain why market incentives cannot function as 'checks and balances.'

Bidinotto hopes to discredit Market Anarchism by portraying 'Bosnia, Somalia, Beirut, Northern Ireland, South Africa and . . . American inner cities' as real-life examples of societies with 'competing protection agencies.' The examples seem ill-chosen, however, since in all the cases he mentions the social chaos is the result of *government policies*. (With regard to Somalia, for example, the civil war broke out primarily in those parts of the country that had been under the central government before its collapse; the rival gangs were fighting over which of them was to be the new government. Meanwhile, the parts of the country that had never fallen under government control, but had been living under an

anarchist legal order since time immemorial, remained relatively peaceful.)

In any case, trying to refute anarchism by pointing to undesirable *instances* of anarchy is about as bad an argument as trying to refute Bidinotto's advocacy of government by pointing to the Soviet Union or Nazi Germany. Whether a state is horrendous or decent depends in large part on its constitutional structure; whether an anarchic society is horrendous or decent *likewise depends on its constitutional structure*. Because he apparently does not see that an anarchic society can *have* a constitutional structure, Bidinotto does not realise that anarchies can *differ* in constitutional structure just as states can. But the historical record clearly shows that anarchies can come in peaceful and productive forms, not just violent ones.

What guarantees that private entrepreneurs under Market Anarchism will not behave in tyrannical and abusive ways? The answer, of course, is that *nothing* 'guarantees' it, just as nothing 'guarantees' that governmental politicians will not behave likewise. But under which system is such behaviour most *likely* to be restrained? The superiority of anarchy over government here lies in the fact that under government the tie between the *decision* to commit aggression and the *cost* of that aggression is far weaker than under Market Anarchism. Under a governmental system, the cost of state policies leading to war is borne by taxpayers and conscripts, not by the politicians who crafted those policies. Under Market Anarchism, by contrast, agencies who resolve disputes through violence rather than arbitration will have to charge higher premiums and will thus lose customers. A government *can't* lose 'customers' (taxpayers) unless they take the drastic step of moving to a new country; by contrast, switching protection agencies would be as easy as switching long distance service. The proper response to Bidinotto's challenge 'If the 'demand' for peace is paramount, please explain the bloody history of the world' is: the bloody history of the world is the result of governments buying war at *less* than the market price by shifting the costs to their subjects.

Similar reasoning applies to Bidinotto's worries about each special interest group hiring its own protection agency. Under the governmental system, special interest groups don't have to pay the full costs of their policies; they get politicians to fund their schemes out of the general tax base. It's relatively costless for special interests to demand that government impose their particular values on society. But suppose that, under Market Anarchism, when you get your monthly bill from Acme Security Company, you see that you're paying \$X for 'basic service' (protection against force and fraud) and \$Y for 'premium service' (snooping on your neighbours to make sure that they're not taking drugs or having abortions or playing violent video games). The number of bigots who would be willing to *pay* to have their own values forcibly imposed is bound to be smaller than the number of bigots who merely *advocate* such imposition. Talk is cheap. And the few fanatics who *are* willing to put their money where their mouth is would be easier to deal with under anarchy; you can't

arrest people who *lobby* for government-imposed aggression, but you can arrest people who aggress.

It's true that people living under anarchy might disagree about the definition of aggression. But if two security agencies disagree about how exactly to define property rights in some particular case, they can fight it out ' thus sending their costs through the roof and their customers to the nearest competitor ' or they can resolve their dispute through peaceful arbitration, thus keeping their costs low and their customers happy. (Governments resort to force far more often, since they don't have to worry so much about losing customers. Though it's worth noting that even governments interact peacefully most of the time, even though they face an artificially low cost of war. Private security agencies, which would have to buy at the market price, would choose war even less often.)

So disputes are likely to be resolved *peacefully*. But how likely are they to be resolved *correctly*? Admittedly nothing guarantees this. But a) a competitive court system is more likely to be information-generating than a top-down legislative system, for familiar Hayekian reasons; and b) since aggression is costlier than non-aggression, the dispute-resolution will tend to favour laws with a broadly libertarian content.

Bidinotto advises us to recall 'what Adam Smith had to say about businessmen.' What Smith had to say, of course, was that 'people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public.' Smith's meaning was that businessmen are constantly running to government for favours, trying to get subsidies or protectionist legislation. And as Smith looked around him, he saw that generally they succeeded. Though he campaigned tirelessly for free trade, he did not expect to succeed; 'to expect,' he wrote, 'that the freedom of trade should ever be entirely restored in Great Britain, is as absurd as to expect that an Oceana or Utopia should ever be established in it.' Smith rightly saw government as the malign *tool* of wealthy private interests rather than a fence against them.

That is not to say that there is no reason to worry about the power of the wealthy in a Market Anarchist society; I've written at length about the dangers, and possible solutions to them, in my article 'Toward a Libertarian Theory of Class' (*Social Philosophy & Policy* 15, no. 2 (Summer 1998)). But the notion that the danger of plutocracy is *less* under government is hard to believe. As I've written elsewhere:

Indeed, government *magnifies* the power of the rich. Suppose I'm an evil billionaire, and I want to achieve some goal X that costs one million dollars. Under a free-market system, I have to cough up one million of my own dollars in order to achieve this goal. But when there's a powerful government in charge, I can (directly or indirectly) bribe some politicians with a few *thousands* in order to achieve my million-dollar goal X. Since the politicians are paying for X with tax money rather than out of their own pocket, they lose nothing by this

deal.

Market Anarchists have often pointed out that market incentives would tend to favour a harmonisation of legal standards across society. But for Bidinotto this simply amounts to a re-emergence of the monopoly state: if 'a group of agencies decides to impose a mutually-agreed-upon framework on everyone,' then 'no one would be allowed to ignore or secede from the verdict imposed by *the majority of agencies*,' and so the legal system is no longer a competitive one. This seems false. First, the common framework need not be imposed by *force*; it may come about simply because agencies whose policies are incompatible with the majority system will lose customers, going the way of Betamax. Second, even if the common framework *is* imposed by force, what's required is a set of *standards*, not a set of institutions. If there are no barriers to entry 'if a new security agency can start up any time' how is the system not competitive? (Those interested in the question of how a cooperative network of security agencies differs from a state should consult Bryan Caplan's article on this topic.)

When one person uses force against another, Bidinotto observes, 'it's rarely self-evident who is the victim, and who the victimizer'; but since 'maintaining a functioning society requires that the rest of us determine who is at fault, so that our rights will be protected and justice maintained,' it follows that 'it is no 'violation of rights' to *require* individuals to submit to an objective process to justify, publicly, their uses of force.'

Bidinotto's point here is well-taken. *But what does it have to do with arguing against Market Anarchism?* Why couldn't an anarchic legal order likewise require that individuals 'submit to an objective process to justify, publicly, their uses of force'? The voluminous historical evidence (which Bidinotto inexplicably dismisses) indicates that anarchic legal systems have traditionally done precisely this. (If the worry is that only a monopolistic system could be 'objective,' see my previous argument to the contrary.)

While Bidinotto acknowledges a 'right to respond forcefully in *immediate* defense of one's life and values against aggression,' he insists that 'after-the-fact forceful responses are illegitimate, and must be left to an objective, impartial agency.' I think he has a good point here. But again, it's unclear why he thinks this point tells against Market Anarchism 'unless he's erroneously inferring from 'Each person must delegate retaliation to an impartial third party' to 'There must be an impartial third party to whom each person delegates retaliation.' (That would be an example of the **fallacy of composition**, wherein one infers from, e.g., 'Everyone likes at least one TV show' to 'There's at least one TV show that everyone likes.')

Let me end with a note of protest against Bidinotto's claim that Lysander Spooner's argument that we never signed the Constitution is irrelevant, because the Constitution is a limitation on the federal government, not on us. Bidinotto's critique drops the historical

context: a war had just been waged to prevent the South from seceding, so obviously the Constitution was being *interpreted* as a constraint on parties other than the federal government.

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For an expanded analysis on this topic, see [this essay](#).