Review of Limited Government and the Bill of Rights, by Patrick M. Garry

LIMITED GOVERNMENT AND THE BILL OF RIGHTS, by Patrick M. Garry. Missouri: University of Missouri Press, 2012. 197pp. Cloth $45.00. ISBN: 978-0-8262-1971-8.

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Limited Government and the Bill of Rights sets forth a line of constitutional interpretation and analysis that purports to reconcile previous inconsistent outcomes in jurisprudence that have formed over time, due to differing values of the Supreme Court justices, and to some extent, the socio-economic backdrop against which a particular case was decided. *Limited Government* advances the notion that the Bill of Rights was created, not as a mechanism by which to enumerate certain explicit areas of individual rights, but rather to set boundaries around areas not to be infringed upon by government action. Patrick M. Garry is a law professor and an expert in constitutional analysis, especially in the area of First Amendment jurisprudence.

Garry spends some time discussing the language of the Bill of Rights Amendments, and to a lesser extent, that of the Articles of the Constitution—a structural interpretation, if you will. Garry explains the way the negative and positive intentions are outlined. The negative language of the Bill of Rights Amendments was intentionally written by the Anti-Federalists as a way to limit government interference in certain areas reserved to both the people and the States, whereas the positive language outlines the bounds of governmental power, as seen in the Articles. The contemporary existence of positive liberties was judicially created. These same liberties would still be protected, just not explicitly enumerated, had the Court chosen to limit government interference rather than to define the scope of those certain individual rights. Attempting to define the scope of each individual right that should entertain no government interference is a more cumbersome task than to simply limit the government action that might cause that intrusion.

Garry further explains that limited government is dictated by the public's ability to limit and control government thereby preserving state's rights, and more importantly, individual rights. Merely allowing for a democratic process (the fact that citizens vote every year) is not sufficient to limit and control government; in order to limit and control government, citizens must not only be informed, but must understand both the information and their own rights so that they can understand the differences between what was intended by the founding fathers, and what has transpired in the Court's history. This book is a good first step toward a nation of people aware that their rights would not need to be outlined so long as they continue to control and limit government action, interference, and regulation.

Unfortunately, this book is not for the faint of heart. It brought me back to some of the most intense (albeit enjoyable) moments from my Constitutional Law class in law school. I found this book to be a somewhat pleasant intellectual exercise in that

sense, but that notion led me to believe that this book has a limited target audience: strictly, legal professionals and knowledgeable enthusiasts.

I would have appreciated more incorporation of the political, social, and economic backdrop for the cases discussed to provide context that might further explain why some cases were decided in certain ways. The author provided some context as explanation for cases that applied the Individual Rights model where, he argues, the decision was bad, or where the court may have reached the same conclusion had it applied the Limited-Government model.

Garry could have taken the time to address some socio-economic changes that the Founding Fathers could not have anticipated, like the rate of information dissemination—as opposed to the actual information itself, which, too, has changed because of a diluted, over-populated, and less shameful society—as a possible factor that may have influenced the Court's view of individual rights. This would further support his view that cases that may have considered the possibility that such minutia is better left to be interpreted within the Limited-Government model; whereas addressing every facet of change falls in line with the Individual Rights interpretation model, the Limited-Government model would simply apply the "Can the government act in this area?" question of constitutionality.

The author pulls in ideas from other scholars in this area of analysis, showing agreement or disagreement in a manner very similar to a journal article. He uses those references to reinforce his own thesis on limited government repeatedly. That is not to say that the author's ideas are not well-expressed, but they could have been more fully honed with simple explanations, and in some cases more analysis, especially when it comes to the cases selected that illustrate the ideas of both individual rights and limited government.

The sheer volume of case law that has been reconciled using a limited government approach is slightly more impressive than the author's brazen convictions that the court was simply wrong with respect to certain opinions. The cases analyzed were well chosen, but were addressed in ways that may not make this book accessible to the lay person. In the acknowledgements, the author thanks some law journals for publishing articles that were used as the foundation for this book. This book was a further fleshing out of those "initial ideas," but falls short of being anything other than a very long scholarly article.

Many times, the author notes that the line of jurisprudence which had previously interpreted the Bill of Rights to limit government began to change as the federal Government acted in response to the economic decline that Americans were experiencing after the great depression (i.e. The New Deal era). During this time, the federal government was given great leeway to go beyond the prescribed bounds of its power, ultimately intruding in areas historically protected by states, including individual rights. Moreover, the way that the Bill of Rights was interpreted changed under the Warren Court. This Court explicitly advanced individual rights as a way to

limit government interference of those rights, rather than using those provisions to limit government that would have, in turn, secured those individual rights. The author provided one statistical point of information to put this in perspective for his audience; Garry cited a study by Arthur Hellman that found that in the six Supreme Court terms between 1971 and 1976, the court decided 383 decisions on issues addressing individual rights and only eight on issues concerning federalism, in contrast to a mere century ago, when Federalism was a more prominent concern.

The last few chapters addressed how the Limited-Government model would apply to the clauses of the First Amendment, specifically free speech and separation of church and state. The best part of this analysis was the discussion about the Fourteenth Amendment.

> *…section 5 of the Fourteenth Amendment does not give Congress the ability to affirmatively legislate in areas prohibited by the Bill of Rights; instead, it leaves to Congress, rather than exclusively to the courts, the duty of enforcing limitations on state government* (p.68).

This analysis reaffirmed my belief that this book was not written for the lay audience. The reconciliation of the substantive due process cases that could have reached similar results on equal protection grounds, to me, is a directive to attorneys and judges alike that less complicated legal arguments can achieve similar societal goals while also providing a more sturdy foundation of precedent. This foundation can remain mostly unchanged as the judges on the Court, and their own personal values, change.

In the final chapter, I was looking forward to an expansion of some of the ideas that had been discussed. Instead, Garry introduces new case law as support for his thesis. I was slightly dismayed by this because there did not seem to be any cohesive conclusion to the analysis set forth by the preceding 8 chapters. In that way, the book never really concluded, but gave me the impression that I should pay attention for the next installment.