

## Book Review: Judge Andrew Napolitano's "It Is Dangerous To Be Right When The Government Is Wrong"

By: John Tamny

When I began my employment at Washington, D.C.'s Cato Institute (editor's note: I remain affiliated with Cato in a professional, non-policy capacity) over eight years ago, one of the biggest eye openers was the Institute's reading of the Constitution. Used to a more conservative, Robert Bork style approach to our founding document, the view held inside Cato made infinitely more sense to me.

A frequent speaker at Cato events on constitutional issues then and now was Judge Andrew Napolitano (editor's note: I'm a frequent guest on Judge Napolitano's Fox Business News television show: *FreedomWatch*), and much like the scholars at Cato, the Judge's read of the Constitution was quite liberating, plus made what was once obscure far more understandable. Specifically, in his speeches the Judge made plain that the Constitution was written first to authorize the federal government, but after that the document exists to severely limit the federal government's role in our lives. Put more simply, the powers granted to the federal government in the document are just that, and if powers are not listed, *they don't exist*.

Most revealing to me, Judge Napolitano's take on the Constitution is that far from something which limits our rights, the Constitution grants our government the right to protect our infinite rights as human beings. Though legal scholars of Bork's ilk are said to view the 9th Amendment as an "inkblot", to libertarians like Napolitano the 9th in many ways animates the Constitution for putting down in plain English the basic truth that as humans we're free to do anything we want so long as our actions don't infringe on the freedoms of others.

In his essential new book, *It Is Dangerous To Be Right When The Government Is Wrong*, the Judge expertly explains the meaning of the Constitution, articulates beautifully how we as Americans have infinite natural rights that could never be listed, plus he lays out the myriad policy errors that continue to harm our personal and economic freedom as a result of Washington's casual disregard of constitutional limits. This book is not to be missed.

Beginning with the basics, Napolitano in the introduction lays out neatly the explanation of natural rights. Simply stated by the author, "our natural rights protect our ability to pursue our natural inclinations free from government interference." Those rights exist because we're human, or as Frederic Bastiat put it in 1850, "it was the fact that life, liberty and property existed beforehand that caused men to make laws in the first place." As humans we were born with these rights, and the government's *raison d'être* is to protect the natural rights we were born with.

Of course those rights are constantly under attack by legal positivists who wrongly believe that "all of our rights are granted to us by the government." Implicit in the positivist mindset is that the government can both grant us rights and rescind them, and this belief certainly describes the views held by both major political parties in the U.S. As Napolitano puts it, in the U.S. today "We have one Big Government Party. It has a Republican wing that prefers war, deficits, assaults on civil liberties, and corporate welfare; and a Democratic wing that prefers war, taxes, assaults on commercial liberties, and individual welfare. Neither wing is devoted to the Constitution."

Very importantly, Napolitano is clear that democracy itself should not be construed as freedom. In theory and in practice democracies can foster tyrannical majorities, thus making the understanding of natural rights so crucial. Here Napolitano quotes a 1992 *Los Angeles Times* editorial which stated that "Freedom comes from the recognition of certain rights which may not be taken, not even by a 99 percent vote." Comparing democracies to dictatorships, Napolitano entertainingly writes that "The only cogent distinction is that in a democracy, more of your neighbors desire to take your property than in a dictatorship." Here lies the battle those who prefer freedom now face: some, but not all voters believe positivist rights can be won at the ballot box; even rights which infringe on the personal freedoms of others.

Of note to those who assume natural rights ensure constant bliss, Napolitano reminds us that "there can be no natural right not to be offended." More to the point, if the person next to me in the movie chews their popcorn too loudly, or if the football fan next to me at the bar cheers too loudly for Texas A&M, I can in each instance move to another seat (or another theater/bar) if I'm offended.

After that, much as it's my right to associate with those whom I choose to, implicit there is my right to discriminate. Or as, Napolitano writes, "the government exists to protect this right to discriminate."

Emotional readers may well reply to the above that Napolitano and libertarians more broadly seek a return to the segregation of the past. Far from it. Instead, it's our natural right as human beings to hire the individuals we want, invite those we like over to where we live, and enter into marriage whether the union be heterosexual or homosexual. None of that which has been just described infringes on the freedoms of others, so we should be left alone to do as we wish.

Taking this further, "Freedom entails the right to make bad decisions." Those include the decision of a white business owner to only hire white people, and for that matter, a black business owner to only transact with people of color. In each case the business owner would potentially be harming the commercial entity's profit potential, but as the owner, the right exists and is natural.

The emotional may well once again assume a resumption of widespread discrimination if such freedoms were protected, but the profit motive says this worry is overdone. Furthermore, it wasn't businesses that chose to discriminate in the Jim Crow south, rather Napolitano reminds readers that "Jim Crow laws were written, implemented, and enforced by the government." He adds that "Jim Crow is a clear demonstration that we simply cannot trust the government to decide what discrimination is acceptable and what discrimination is deplorable."

Regarding the right to privacy, conservatives have in modern times used the fact that the word is not mentioned in the Constitution as evidence that the Founders didn't pay this most basic of natural rights much mind. Napolitano thinks otherwise. He speculates that as the 18th century meaning of "privacy" connoted "bathroom" or "outhouse", that the Founders use of the word "security" took its place.

To Napolitano, privacy is so interweaved in the concept of natural rights as to not even be questioned. He writes that privacy "relates to the right or the ability of individuals to determine how much and what information about themselves is to be revealed to others. Additionally, privacy relates to the idea of autonomy, the freedom of individuals to perform or not perform certain acts, or subject themselves to certain experiences."

Some of us may not like male/female cohabitation before marriage, or for that matter marriage between two consenting males, but neither act brings harm to those who disapprove. As for prostitution, Napolitano draws up an interesting situation involving a young male taking a pretty female out to dinner with sex on his mind for later, versus an older male paying a good looking woman to have dinner with him with full knowledge that the act of sex will occur later. The only difference between the two is that the paying male is certain of a happy ending, but either way, the individuals involved are doing what they wish; their actions hurting no one else.

Considering illegal drug use, assuming what the government deems "illegal" is really as bad as the alleged experts say, as humans we once again have the right to make bad decisions. Of course as Napolitano points out, much of the heated fear of "illegal drugs" is terribly overdone. He lays out statistics showing that while 8.5 million people have tried crack, "only 359,000 are regular users." Of the 3.8 million who've tried heroin, "only 213,000 are regular users." Napolitano asks "If these drugs are so addictive, why is there not a greater retention rate?" To the conservatives who support the drug laws, this reviewer feels compelled to ask why — if you're so skeptical of the government's ability to do so much of anything effectively — you believe this same government has the expert knowledge to regulate what we should and should not put in our bodies?

Hands off of my freedom or, as the majority of the Supreme Court wrote in the case of *Griswold v. Connecticut* (1965), "We deal with a right to privacy older than the Bill of Rights [and] older than our political parties..." About that sentence, Napolitano notes that it "alone acknowledges privacy as a natural, or if you prefer the secular term, fundamental, right, which cannot be taken away without due process of the law." Live and let live as they say.

On immigration, we can only wish that politicians possessed the clarity and wisdom of Napolitano. For the cultural xenophobes who fear the undoing of America thanks to the influx of the huddled, dirty masses, the author makes the uplifting point that "America is not a geographical border, but rather an ideal." So true. When individuals migrate to the land of the free they're explicitly embracing our ways, and we should be flattered.

As for the ridiculous talk about erecting a southern border to keep the "undesirables" out, Napolitano notes that it's these vain attempts to close our borders that exacerbate the alleged problem. As he puts it, "immigrants in America are less likely to leave for fear of inability to return." Further on he cites a statistic to back this up: "thirty years ago, nearly half of all undocumented arrivals departed within a year. Today, only one in 14 does." After that, humans are capital. The more we have, the greater the economic growth.

Regarding the act of war, far from anti-military, Napolitano is instead properly skeptical of the frequency with which presidents take us into war. He points out that while the Constitution states that the "President shall be Commander in Chief of the Army and Navy of the United States", that "nowhere does the Constitution state the President may willfully and intentionally fool the people into war..." The Founders were pretty clear about leaving the power to declare war with Congress as a necessary restraint on the instincts of fallible presidents, yet in modern times Congress hasn't often enough utilized its constitutional role when it comes to military adventurism.

Worse, war by definition empowers the federal government in ways that necessarily infringe on our liberties. Considering World Wars I and II, Napolitano writes that the feds "nationalized the railroad, telephone, domestic telegraph, and international telegraphic industries," and thus asserted control "over prices, people, and corporations." As for the horrifyingly absurd suggestion that war is an economic stimulant, Napolitano quotes von Mises, who noted that "war prosperity is like the prosperity than an earthquake or plague brings."

About taxation, Napolitano writes that it "violates natural property rights." So true, as government is ultimately about force, and while we hand over a lot of what we earn to the government, many of us don't do so because we want to. Worse, as evidenced by the federal government's ability to raise and lower our taxes, Napolitano sees within this a governmental presumption that it has the right to take as much of our income as it wishes. Scary stuff, and a reminder of how much better a simple national sales tax would be for the latter allowing Americans to choose through their consumption how much of their income they'd like to share with the feds.

As it stands now, Napolitano writes that "The government decides what it will take from you and what you may keep from it." The Founders cannot have envisioned this over 200 years ago. Indeed, it seems we have it backwards now whereby we pay the vast majority of our taxes to the federal government, and less to the local governments under whose laws we should mostly live. Justice Brandeis' view of states as "laboratories" of ideas has been perverted in the worst of ways.

Regarding monetary policy, Napolitano correctly sees monetary debasement as another violation of our natural rights, and to fix this, seeks a return to gold-defined money. There this reviewer is in total agreement. Inflation, an act whereby the government devalues the money we earn, is arguably the cruelest taking of all.

Still, there's a parting of the ways when it comes to Napolitano's modern Austrian School assertion that inflation "is caused by an increase in the money supply." The latter certainly is the broadly held view among modern Austrians, but as von Mises explained in *The Theory of Money and Credit*, inflation is "an increase in the quantity of money that is not offset by a corresponding increase in the need for money." Put more simply, growing economies need more "money" to facilitate the myriad transactions and investments that spike during periods of prosperity. More realistically, we can't possibly know what the supply of money should be; instead we should let the market price of gold signal whether or not monetary authorities have over or under-issued dollars.

As for banking, Napolitano calls for an end to fractional reserve banking, and a return to a 100 percent reserve system. This doesn't seem realistic. Banks should exist for profit, and should be able to lend out the monies collected from consenting individuals eager to get a return on deposits. Rather than end fractional reserve banking, banks should be free to keep as much or as little cash on hand as possible; interest paid on deposits higher or lower depending on how conservative each bank decides to be. After that, what needs to be abolished is the Fed's role as lender of last resort. In this case, banks would leave small amounts of cash in the vaults at their peril. If a run on deposits occurs, they would face borrowing from private sources of funds at penalty rates of interest that would reflect current market realities.

One other area of disagreement concerned public housing. Napolitano makes the hard to argue with point that as public housing "imposes a maximum limit on the earnings of individuals who wish to benefit from the use of the program", that there's a disincentive among its alleged beneficiaries to ever escape poverty else they're forced out of public housing. Really? It strikes this reviewer that the horrid nature of public housing calls into question those who would access it, and if fear of losing it from higher income acts as a disincentive, that these individuals have problems well beyond those foisted on them by governments that can't seem to get anything right.

Of course the disagreements listed are very minor quibbles. Judge Napolitano has a triumph of a book on his hands, and one that those who care about economic growth, personal freedom and constitutional governance should snap up with great speed.

Napolitano says about natural rights that under them, "liberty is the rule and not the exception." At the moment we've moving in the reverse. It's time to return to what once prevailed, and Napolitano provides the intellectual sustenance that should underlie such a movement.