**Cornell Law Review**

Volume 90
Issue 3 *March 2005*

Article 6

# Book Review

# BOOK REVIEW

# LAMENTING *LOCHNER*'S LOSS: RANDY BARNETT'S CASE FOR A LIBERTARIAN CONSTITUTION

RESTORING THE LOST CONSTITUTION. By *Randy E. Barnett.* Princeton: Princeton University Press, 2004. Pp. 357. $32.50.

*Trevor W. Morrison*†

## INTRODUCTION

Contending positions in constitutional theory often work themselves out with reference to certain benchmark cases. This is especially so with the protection of individual freedoms not enumerated in the Constitution, an area commonly associated with the doctrine of "substantive due process." Mere mention of the doctrine evokes the Supreme Court's decision in *Roe v. Wade.*[1] To its supporters, the *Roe* line of cases confirms the critical proposition, recently reaffirmed by the Court, that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[2] To its critics, *Roe* cannot be justified as an act of constitutional interpretation, but instead represents the anti-democratic conversion into law of the Court's views on social policy.[3] In that vein, critics liken *Roe* to

† Assistant Professor of Law, Cornell Law School. I am grateful to Steve Shiffrin for helpful comments on an earlier draft, to Bob Hillman and Doug Kysar for useful pointers, and to Matthew Peller for excellent research assistance. I also thank Randy Barnett for generously agreeing to share with me an early draft of his reply to this Review. Where I have responded to Professor Barnett's reply, I have done so on the basis of that early draft. Finally, I thank Hayley Reynolds, Christopher Clark, and Dana Hill of the *Cornell Law Review* for their patient and thoughtful editing.

1 410 U.S. 113 (1973).

2 Lawrence v. Texas, 539 U.S. 558, 574 (2003); *see Roe*, 410 U.S. at 152–53 (citing cases providing constitutional protection for marriage, procreation, contraception, family relationships, child rearing, and education). I discuss *Lawrence* at greater length in Part IV of this Review.

3 *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 935–36 (1973) ("What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure." (footnote omitted)).

that *bête-noire* of modern constitutional scholarship, *Lochner v. New York*.[4]

*Lochner*, of course, is the best-known in a line of cases striking down Progressive-era legislation in the name of economic liberty—specifically the freedom of contract—even though such liberty is not expressly mentioned in the Constitution. Today, the *Lochner* Court's protection of economic liberty at the expense of social welfare legislation is deplored by constitutional scholars across the political spectrum.[5] Many conservatives charge that *Roe* and other cases in its line simply repeat the errors of the *Lochner* period: In both areas, critics argue, the Court's protection of freedoms not enumerated in the Constitution amounts to the fabrication of rights in order to advance the Court's own policy preferences.[6] On this view, *Roe* and *Lochner* are both paradigm cases of a countermajoritarian judicial activism that threatens to render irrelevant the actual text of the Constitution.

This charge typically places *Roe*'s defenders in the position of having to show why the Court was right to protect unenumerated rights relating to procreative autonomy, but wrong to protect those bearing on freedom of contract.[7] Distinctions can certainly be drawn. Many would agree with Laurence Tribe and Michael Dorf, for example, that the problem with *Lochner* is not that it involved the judicial enforcement of values not expressly written into the Constitution, but that "the Court chose the wrong values to enforce, wrong in the sense that complete laissez-faire capitalism was neither required by the historical understanding of 'liberty,' nor did it meaningfully enhance the freedom of the vast majority of Americans in the industrialized age."[8] On this view, judges will inevitably make somewhat subjective value choices when deciding how to apply a particular constitutional provision to a certain set of facts. But some choices are better than others, and *Roe* fits better with enduring constitutional values than does *Lochner*.

Recently, however, a new response has emerged to the charge that *Roe* is no better than *Lochner*. Rather than stressing distinctions in

---

4 198 U.S. 45 (1905).

5 The same is true of judges. As David Bernstein has observed, "today, Supreme Court Justices across the political spectrum use *Lochner* as a negative touchstone with which they verbally bludgeon their colleagues" while "Justices in the majority feel obligated to distinguish their opinions from *Lochner*." David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 1 n.2 (2003) (collecting cases to demonstrate the point).

6 *See* Ely, *supra* note 3, at 939 ("The Court continues to disavow the philosophy of *Lochner*. Yet . . . it is impossible candidly to regard *Roe* as the product of anything else." (footnotes omitted)).

7 *See* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 65–67 (1991).

8 *Id.* at 66.

an effort to save the former while interring the latter, libertarian scholars have argued for "a more sympathetic reconsideration of *Lochner*."[9] *Lochner*, on this view, did not protect an isolated "freedom of contract" derived from "Mr. Herbert Spencer's Social Statics."[10] Rather, it protected individual liberty more broadly—the same basic liberty at stake in *Roe* and other modern substantive due process cases. Advocates of this view sometimes speak of a "Constitution in exile."[11] The phrase evokes the classical liberal Constitution of the *Lochner* era, a Constitution displaced during and after the New Deal by a judicial reluctance to protect economic liberty, a willingness to accord most legislation a presumption of constitutionality, and a more expansive vision of federal regulatory authority.[12] As a proponent of the *Lochner*-era Constitution explains, its exile might be complete were it not for "a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty."[13]

Randy Barnett is one of those scholars. Professor Barnett's new book, *Restoring the Lost Constitution: The Presumption of Liberty*,[14] is perhaps the most detailed, robust, and cogent argument yet provided for a libertarian reading of the Constitution. The book seeks to expose and remedy entrenched patterns of judicial misinterpretation and underenforcement of key constitutional checks on government power. According to Professor Barnett:

> The way the Constitution has been interpreted over the past seventy years has meant that, with some exceptions, the Necessary and Proper Clause has no justiciable meaning, the Privileges or Immunities Clause [of the Fourteenth Amendment] has no justiciable meaning, the Ninth Amendment has no justiciable meaning, the Tenth Amendment has no justiciable meaning, the Commerce Clause has no justiciable meaning, and the unenumerated police power of the states has no limit.[15]

---

9 Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2002–2003 CATO SUP. CT. REV. 21, 31 [hereinafter Barnett, *Libertarian Revolution*]. For a collection of this literature, see Bernstein, *supra* note 5, at 6 nn.16 & 18.

10 *See Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (criticizing the majority's reasoning in part on the ground that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics").

11 *See generally* William W. Van Alstyne, Foreword, *The Constitution in Exile: Is It Time to Bring It in from the Cold?*, 51 DUKE L.J. 1, 1–7 (2001) (describing the idea and attributing the term to a review written by Judge Douglas H. Ginsburg, see *infra* note 12).

12 *See* Douglas H. Ginsburg, Book Review, *Delegation Running Riot*, 1 REGULATION 83, 83–84 (1995) (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)).

13 *Id.* at 84.

14 RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) [hereinafter BARNETT, RESTORING].

15 *Id.* at 354 (footnote omitted).

In contrast, "[t]he original meaning of the entire Constitution, as amended, is much more libertarian than the one selectively enforced by the Supreme Court."[16] Professor Barnett seeks a return to that liberty-enhancing original meaning, in part by converting the conventional "presumption of constitutionality" into a "Presumption of Liberty" that "places the burden on the government to establish the necessity and propriety of any infringement on individual freedom."[17]

By mounting an argument that not only rehabilitates *Lochner* but also defends such recent decisions as *Lawrence v. Texas*,[18] Professor Barnett may provoke a certain degree of incredulity in his readers.[19] But incredulity should not lead to summary dismissal. Powerfully and imaginatively argued, *Restoring the Lost Constitution* deserves to be read by anyone interested in American constitutional law.

Like any engaging piece of scholarship, however, *Restoring the Lost Constitution* creates room for disagreement. In the spirit of critical engagement, and without purporting to be exhaustive, I will discuss four points on which Professor Barnett's argument gives me pause. First, the book proceeds from an extratextual political theory that is difficult to square with the actual framing of the Constitution, a dilemma that is particularly acute for Professor Barnett since he later defends a form of originalism as the appropriate mode of constitutional interpretation. Second, Professor Barnett's defense of an "original meaning" approach to constitutional interpretation features a rather strained attempt to analogize constitutions to contracts, and, in the process, slights competing methods of constitutional interpretation. Third, especially in his discussion of the state police power, Professor Barnett operationalizes his "presumption of liberty" by injecting into the Constitution a number of remarkably unstable conceptual distinc-

---

16 *Id.* at 356.

17 *Id.* at 259–60. Professor Barnett capitalizes the "Presumption of Liberty" for which he argues, and my quotations of him repeat that convention. When not quoting material, however, I will refer to this proposed "presumption of liberty" without capitalization, in keeping with the typical rendering of the more familiar "presumption of constitutionality."

18 539 U.S. 558 (2003) (striking down a Texas statute criminalizing homosexual sodomy on substantive due process grounds).

19 Indeed, at least two conservative critics of the Court's *Lawrence* decision have already rejected Professor Barnett's attempt to cast the decision as a manifestation of a presumption of liberty. *See* Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1590–97 (2004). On the other hand, Professor Barnett is not alone in the view that economic and personal liberty ought to be viewed as versions of the same basic constitutional freedom. For example, Walter Dellinger, while evidently not inclined to extend the argument to the point of defending *Lochner*, has contended recently that "[t]he disparagement by some liberal scholars and jurists of the constitutional protection of economic rights weakens the constitutional foundations of personal liberty. *And conversely*: The disparagement by some conservative jurists and scholars of unenumerated personal liberties weakens the constitutional foundation for rights of property, contract, and occupational freedom." Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2003–2004 CATO SUP. CT. REV. 9, 9–10.

tions. Fourth and finally, Professor Barnett's argument for a generalized jurisprudence of liberty neglects the extent to which particular articulations of liberty in our constitutional system may be linked to another core constitutional value: equality. Greater attention to a liberty-equality link might yield a significantly different understanding of the appropriate constitutional balance between government power and individual freedom.

## I
## CONSTITUTIONAL LEGITIMACY

The first part of *Restoring the Lost Constitution* focuses not on the Constitution itself, nor on the views of those who framed or ratified the Constitution, nor even on the work of the judges who have implemented it over the last two centuries. Rather, Professor Barnett begins by constructing a political theory of the conditions under which any legal system may be "binding in conscience."[20] According to him, a constitution is legitimate if it creates a lawmaking system that in turn is capable of producing commands that citizens have a moral duty to obey.[21] In this respect, the mere fact that a law is enacted according to constitutional procedures does not make it morally binding.[22] Rather, we must ask whether the procedures are themselves legitimate and just.

In developing his discussion of legitimacy, Professor Barnett does not purport to survey all theories of legal legitimacy in general,[23] nor does he consider all possible accounts of constitutional legitimacy more specifically. Instead, he discusses and critiques the most familiar version of American constitutional legitimacy, and then offers his own theory in its place.

The standard account of American constitutional legitimacy is one of "popular sovereignty"—the idea that "We the People" collec-

---

20 BARNETT, RESTORING, *supra* note 14, at 44; *see id.* at 24 ("The problem of legitimacy considered here is whether the commands of an existing legal system bind the citizenry in conscience.").

21 *See id.* at 12 ("A lawmaking system is legitimate . . . if it creates commands that citizens have a duty to obey. A constitution is legitimate if it creates this type of legal system.").

22 *Id.*

23 He does not, for example, devote any sustained consideration to theories of legal "authority" (which here effectively means legitimate authority) as articulated by the likes of Joseph Raz or Jeremy Waldron. *See generally* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986); JEREMY WALDRON, LAW AND DISAGREEMENT (1999). For a brief overview of Raz's and Waldron's arguments, see W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 376–81 (2004). I do not mean this observation as a criticism. Rather, I mean simply to make clear that Professor Barnett does not set out in this book to survey all possible accounts of legitimacy. He elsewhere offers a more detailed discussion of his own theory of legitimacy. *See* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 63–83 (1998).

tively established the Constitution and bound ourselves and our progeny to it until it is changed.[24] Professor Barnett rejects this argument:

> I challenge the idea, sometimes referred to as "popular sovereignty," that the Constitution of the United States was or is legitimate because it was established by "We the People" or the "consent of the governed." I deny that the conditions needed to make this claim valid existed at the time the Constitution was adopted or ever could exist. Though "the People" can surely be bound by their consent, this consent must be real, not fictional—unanimous, not majoritarian. Anything less than unanimous consent simply cannot bind nonconsenting persons.[25]

Absent the literally unanimous consent of everyone in the Founding generation and in all subsequent generations, Professor Barnett contends that consent cannot legitimize the Constitution. And because such unanimous consent is impossible as a practical matter, he asserts that we must look elsewhere for a source of constitutional legitimacy.

Interestingly, Professor Barnett begins to construct a nonconsent theory of legitimacy by asserting that "consent matters—that people have a right to consent and, by necessary implication, they also have a right to withhold their consent."[26] In order for consent to matter, people must first have something they can give up. That is, it must be true that " 'first come rights, and then comes law' or 'first come rights, then comes government.' "[27] This yields a critical proposition in Professor Barnett's argument: that, setting consent aside, "a law is *just*, and therefore binding in conscience, if its restrictions are (1) *necessary* to protect the rights of others and (2) *proper* insofar as they do not violate the preexisting rights of the persons on whom they are imposed."[28] Laws that are just in this respect are binding in conscience without regard to issues of consent. In short, "[a] legal system that provides assurances that it does not violate the background rights retained by the people . . . is legitimate despite the fact that it did not originate in consent."[29] In this way, Professor Barnett builds into his account of constitutional legitimacy the beginnings of a presumption of liberty.

Though elegant in its internal logic, Professor Barnett's critique of consent-based constitutional legitimacy and his suggestion of a nonconsent alternative has very little to do with the Framers' actual views of constitutional formation. Professor Barnett acknowledges as much; he notes that the Framers shared a "universal belief in popular sover-

---

24 *See* BARNETT, RESTORING, *supra* note 14, at 11–31 (discussing this standard account).
25 *Id.* at 11.
26 *Id.* at 44.
27 *Id.*
28 *Id.*
29 *Id.* at 77.

eignty [and] the consent of the governed."[30] He maintains, however, that such a belief is illegitimate unless we can "explain exactly how and when 'We the People'—you and me and everyone else—consented to obey the laws of the land."[31] Yet there is no indication that any of the Founding-era adherents to popular sovereignty thought they had to shoulder such a burden.

When the Framers spoke of the consent of the governed, they had in mind something quite unlike Professor Barnett's aggressively individualistic, unanimity-requiring conception of consent. Consider James Madison's description of constitutional foundation:

> [T]he Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; . . . this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong.[32]

Madison was here referring principally to the federal, as opposed to purely national, process of constitutional formation. But the passage also makes clear that Madison's understanding of popular sovereignty depended on the consent of "the people" as a collective unit, not on the literal consent of every individual in the new Union. Even more telling is a later passage where Madison discussed the process by which the people would express their collective will: "Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority, in the same manner as the majority in each State must bind the minority."[33] In short, Madison and the other Founders thought of the consent of the governed in majoritarian (more precisely, supermajoritarian, given the requirements for constitutional ratification[34]), not unanimous, terms. It was a special form of majoritarian consent, to be sure—involving specially assembled constitutional conventions and the like—but it was majoritarian consent just the same. This view was coherent and tolerable to the Framers because they viewed constitutional legitimacy as issuing from the people as a collec-

---

30 *Id.* at 76; *see id.* at 36.

31 *Id.* at 14.

32 THE FEDERALIST No. 39, at 243 (James Madison) (Clinton Rossiter ed., 1961).

33 *Id.* at 244.

34 *See generally* John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEXAS L. REV. 703 (2002) (arguing that "governance through supermajority rules" is "central both to an accurate description of the Constitution and to the proper understanding of the normative reasons why the Constitution binds us," *id.* at 705).

tive entity, subsisting over time even as individual members came and went.[35]

This places Professor Barnett in a rather awkward position. He begins a book aimed at restoring lost constitutional meaning by rejecting as illegitimate the Framers' views on the nature of constitutional formation. As suggested above, Professor Barnett handles this point by stressing that even if the Founders were wrong about the legitimacy of popular sovereignty, the Constitution they devised may nevertheless be legitimate to the extent it creates a lawmaking system capable of producing just laws. The key here is the Founding generation's belief in natural rights.[36]

While conceding that there was no universal agreement among the Framers as to the precise content of *all* natural rights,[37] Professor Barnett maintains that there was widespread agreement about some of them, including "the rights of several property, freedom of contract, first possession, self-defense, and restitution."[38] He further argues that it was the Framers' recognition of these and other natural rights, coupled with their awareness that it would be futile to attempt to enumerate each and every right, that produced the Ninth Amendment and, later, the Privileges or Immunities Clause of the Fourteenth Amendment.[39] Both provisions, in Professor Barnett's view, were intended to preserve natural rights not otherwise specified in the Constitution. It is the inclusion of those provisions that creates the possibility of constitutional legitimacy not based on consent: "In the end, if their commitment to natural rights led them to devise and enact a scheme of lawmaking that would impart legitimacy on validly enacted laws, it does not matter that the founding generation and those who enacted the Fourteenth Amendment may have been wrong about popular sovereignty."[40]

This is an ingenious move: Although the Founders were wrong in their views about the legitimacy of the Constitution they were framing, they drafted such a superlative document that it achieves legitimacy by other means. The Constitution is legitimate, but not quite by design.

There are limits, however, on how far this theory of fortuitous legitimacy can go. Later in the book, Professor Barnett articulates some rather finely calibrated views about what rights should be

---

35 In this sense, the concept is akin to what Jed Rubenfeld calls "commitmentarian democracy," which "holds that a people, understood as an agent existing over time, across generations, is the proper subject of democratic self-government." JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 145 (2001).

36 *See* BARNETT, RESTORING, *supra* note 14, at 54–55.

37 *Id.* at 54.

38 *Id.* at 82.

39 *Id.* at 55, 61.

40 *Id.* at 78.

deemed retained by the people, and what powers should be deemed delegated to the government through the formation of the Constitution. Those views bear on his nonconsent theory of constitutional legitimacy. If a legal system's legitimacy turns on its "assurances that it does not violate the background rights retained by the people,"[41] then assessing the legitimacy of any particular system requires knowing not just that it incorporates some generalized concept of natural rights retained by the people, but that it protects the *correct* rights to the correct extent. Yet how can we know whether the Framers created a constitutional order that protected the same rights that Professor Barnett today argues are retained by the people? Professor Barnett concedes that the Framers disagreed about the precise content of natural rights[42] and that they "spoke of surrendering one's natural rights" as a condition of forming a government.[43] If the Framers believed that a form of majoritarian consent sufficed to legitimize a constitutional order, might they not also have thought the formation of government entailed surrendering more, or different, natural rights than Professor Barnett would allow?

I do not mean to suggest that every contemporary theory of individual liberty must necessarily cohere with the Founders' views about natural rights. A theory of constitutional interpretation that is less concerned with discerning the "original meaning" of the Constitution, for example, would necessarily face less of a burden on this score, at least on its own terms. As I will discuss below, however, Professor Barnett is an originalist; he argues that the Constitution must be interpreted according to its original meaning. His account of the nature of the liberty retained by the people, therefore, purports to reflect the prevailing understanding of that liberty at the time of the Founding (and during the later ratification of the Fourteenth Amendment). Accordingly, the possibility that Professor Barnett's account of the people's retained liberty differs from the views of the Framers is a potentially serious problem for his theory.

In his thoughtful reply to this Review, for which I thank him, Professor Barnett suggests that by responding to his "normative argument" about constitutional legitimacy with an "historical claim" that his argument cannot be squared with the views of the Founders, I have made "a simple category mistake."[44] I don't think so. To be sure, one could elect to challenge Professor Barnett's account of constitutional legitimacy by arguing that he does not take sufficient account of other

---

41 *Id.* at 77.

42 *Id.* at 54.

43 *Id.* at 68–69.

44 Randy E. Barnett, *Why You Should Read My Book Anyhow: A Reply to Trevor Morrison*, 90 CORNELL L. REV. 873, 878 (2005) [hereinafter Barnett, *Reply*].

present-day theories of legitimacy, or that his own theory is incomplete or otherwise unpersuasive. But I mean to question Professor Barnett's approach on different grounds. Specifically, I want to suggest that a claim to restore original constitutional meaning needs to be attentive to original understandings about the nature and content of the constitutional document, and that the Framers' understanding of the Constitution itself was surely connected to their views about its legitimacy. Rejecting the Framers' ideas about constitutional legitimacy means rejecting the intellectual context within which the Constitution took its original meaning. Again, if original meaning is not the touchstone of the analysis, then this rejection is of no necessary consequence. But for an originalist like Professor Barnett, it is significant indeed. In this respect, if a "category mistake" exists here, I think it lies in Professor Barnett's claim to be "Restoring the Lost Constitution" by propounding a theory that dispenses with the Framers' own views about the nature and legitimacy of the constitutional system they were creating.

## II
## CONSTITUTIONAL METHOD

Having articulated a libertarian theory of constitutional legitimacy, Professor Barnett then asks what method of constitutional interpretation is most consistent with that theory. He defends a theory of originalism that attempts to discern not the *original intent* of the Framers, but the *original public meaning* of the constitutional text. According to Professor Barnett, this form of originalism follows from "the commitment to a written text."[45] It also typically proceeds from the precise consent-based theory of legitimacy that Professor Barnett rejects in the opening chapters of his book.[46] But he justifies his originalism on a different ground. In keeping with his nonconsent theory of legitimacy, he asserts that "constitutional legitimacy based on natural rights, rather than popular sovereignty or consent, can ground a commitment to [this form of] originalism."[47] Thus, Profes-

45 BARNETT, RESTORING, *supra* note 14, at 100.

46 As Michael Dorf has explained:

> According to the strict form of originalism, the Constitution derives its authority from its ratification during particular periods in American history. Under this view, any departure from the understandings of those discrete periods robs constitutional interpretation of its claim to legitimacy. The political theory underlying strict originalism is a form of social contract theory: unelected judges may displace legislative decisions in the name of the Constitution, but *only* because the Constitution is a social contract to which consent was validly given through ratification.

Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1766 (1997) (footnote omitted).

47 BARNETT, RESTORING, *supra* note 14, at 117.

sor Barnett argues that if we can determine that the Constitution contains the kinds of provisions needed to achieve legitimacy, then adhering to the original meaning of the constitutional text ensures the continuing legitimacy of the constitutional order.

Scholars and judges have criticized originalism on a number of grounds over the past two decades, and have adopted a variety of other methods instead. Professor Barnett does not survey all of that literature, and I do not propose to do so here. Instead, I will make three points about Professor Barnett's account of originalism.

First, Professor Barnett's defense of "original meaning" originalism relies in large part on lessons he draws from the law of contracts. Though quick to disavow any claim that the Constitution is itself a contract in any literal sense,[48] he suggests that the "writtenness" of both kinds of documents means that rules of contractual interpretation can be useful for interpreting the Constitution.[49] At bottom, Professor Barnett deploys the contract analogy to bolster his contention that "[o]riginal meaning follows naturally, though perhaps not inevitably, from the commitment to a written text."[50]

The mere writtenness of both contracts and constitutions does not, however, justify applying rules for interpreting the former to the latter.[51] There is much that is written in our world, but this common feature tells us little about the writings themselves. That poetry is written, for example, does not mean that constitutional interpretation should employ the literary analysis needed to unpack the work of William Blake.[52] Moreover, even within the realm of positive law, recent work by Kevin Stack challenges the widespread, but largely unexamined, belief in "interpretive convergence"—the idea that similarities between the Constitution and statutes make the same interpretive approach applicable to both constitutional and statutory interpretation.[53] Contrary to that widespread belief, the justifications for a particular interpretive methodology in the statutory domain are not necessarily sufficient to justify that methodology in the constitutional

48 *Id.* at 100.

49 *Id.*

50 *Id.*

51 *See* Michael C. Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation, and Normative Theory*, 85 GEO. L.J. 1857, 1858–59 (1997) (critiquing Gary Lawson's defense of originalist constitutional interpretation through an example involving the reading of a fried chicken recipe).

52 I do not mean to suggest that literary analysis is necessarily *irrelevant* to constitutional interpretation. To the contrary, the interpretive and analytical methods of other disciplines may well have much to teach the constitutional theorist. *See* TRIBE & DORF, *supra* note 7, at 81–96. My point here is that the mere fact of writtenness is not enough, by itself, to render the insights of one domain relevant to another.

53 *See* Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 2–3 (2004).

domain, and vice versa. As to originalism in particular, the conventional democracy-reinforcing justifications for originalism in statutory interpretation fail in the constitutional context, and the supermajoritarian justifications for originalism in constitutional interpretation cannot justify reading statutes that way.[54] The reason for this divergence is that "statutes have a different representative character than the Constitution—these forms of law represent different democratic bodies—and that difference in the grounds of their democratic authority distinguishes the interpretive approach applicable to these two types of law."[55]

If statutes and constitutions represent different democratic bodies, the entities represented by contracts and constitutions are all the more disparate. Thus, the common fact of "writtenness" is even less useful. My point here is not that original meaning is necessarily irrelevant to the interpretation of poems, contracts, statutes, or constitutions. Rather, it is that, *assuming* originalism is an appropriate interpretive method, assigning original meaning must take account of documentary context. A contract binds the particular parties that negotiated it, and typically covers a fairly identifiable set of contemplated actions by the parties. A constitution, in contrast, is generally designed to subsist over a much longer period of time, and to cover such a wide range of practices and circumstances that it could not speak to all of them without "partak[ing] of the prolixity of a legal code."[56] Given these differences, the original meaning of a particular term in a contract may not be the same as the original meaning of that same word when used in a constitution. In short, only by attending to documentary context in constitutional interpretation can we heed Chief Justice Marshall's injunction never to forget "that it is *a constitution* we are expounding."[57]

My second point about Professor Barnett's discussion of interpretive theory is that he fails to come to grips with the current realities of constitutional interpretation. According to Professor Barnett, "[i]t takes a theory to beat a theory and . . . the opponents of originalism have never converged on an appealing and practical alternative."[58] As a descriptive matter, the first part of this statement seems clearly wrong. Doctrinaire originalism is by no means the dominant mode in contemporary judicial (or scholarly) constitutional interpretation. Yet at the same time, no single theory has displaced originalism. Rather,

---

54 *See id.* at 5, 57–58.

55 *Id.* at 58.

56 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

57 *Id.*

58 BARNETT, RESTORING, *supra* note 14, at 92.

constitutional practice has yielded a kind of interpretive eclecticism.[59] Judges and scholars frequently pay some attention to original meaning to the extent it can be discerned, but they also examine constitutional structure, judicial precedent, political branch practices, social and institutional reliance interests, and what H. Jefferson Powell calls "the ethos of American constitutionalism [and] the traditions of our law and our people."[60]

Professor Barnett resists this sort of interpretive eclecticism because he fears it will lead (indeed, has already led) judges to replace the Constitution as written with their own subjective policy preferences.[61] And because the legitimacy of the Constitution as written turns, for Professor Barnett, on his claim that the text happens to create a lawmaking procedure capable of respecting the retained rights of the people, any departure from that text imperils the legitimacy of the entire constitutional system.

Part of the power of Professor Barnett's argument here and elsewhere in the book is that each new assertion builds nicely on the last. Thus, if one accepts that (1) the legitimacy of the Constitution turns on its creation of a lawmaking system that protects people's retained liberty, and (2) the Constitution as written creates such a system, then Professor Barnett's defense of original meaning has considerable appeal. But if one takes a different view of constitutional legitimacy, then this defense of original meaning is less compelling. If, for example, one adheres to the Framers' vision of popular sovereignty but also bears in mind the rather antidemocratic character of one generation imposing its ideas of good governance on succeeding generations, then one might value a theory of constitutional interpretation that aims to keep the Constitution relevant, useful, and compelling to "the people" in the present day.[62] Alternatively, if one adopts the view that

---

59 Scholars have mounted powerful defenses of interpretive eclecticism. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–30 (1991); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988).

60 H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 208–09 (2002) (italics in original removed).

61 *See, e.g.*, BARNETT, RESTORING, *supra* note 14, at 1–2 ("Judicial redaction [of the Constitution] has created a substantially different constitution from the one written on parchment that resides under glass in Washington . . . . All this has been done knowingly by judges and their academic enablers who think they can improve upon the original Constitution and substitute for it one that is superior."); *id.* at 354–55 ("Judges should not put ink blots on the [constitutional] provisions they do not like."); *id.* at 356 (criticizing judges "who practice constitutional redaction to reach results they find congenial").

62 That is, we might favor something like the approach advocated by Justice Brennan:

> We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had

the Constitution's legitimacy depends on its fundamentally democratic character, then one might adopt a "representation reinforcing" mode of constitutional interpretation that seeks to maximize the fairness of the process of government.[63] In short, the method (or methods) of constitutional interpretation one chooses will depend in large measure on one's views of constitutional legitimacy, and, indeed, of the very purposes of constitutionalism.

My aim here is not to argue that the idea of a "living Constitution" or a process-based theory of constitutional interpretation is necessarily preferable to Professor Barnett's account of originalism. Rather, my point is simply that electing an interpretive method is a substantive value choice. And because current constitutional practice does not embrace any single political theory, it should not be surprising that eclectic, plural interpretive approaches are the order of the day.[64]

None of this poses any necessary problem for Professor Barnett's libertarian defense of original meaning. As noted, he begins the book by developing a candidly extratextual theory of constitutional legitimacy, grounded in a strongly individualistic conception of classical liberalism. By my lights, there is nothing inappropriate in Professor Barnett's choosing a method of constitutional interpretation that, in his view, fits best with the substantive values of his political ideology.[65]

---

> in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.

William J. Brennan, Jr., *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 7 (1985). I might also include under this general rubric Robert Post's concept of an ongoing "constitutional conversation" between the courts and the people. *See* Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 37–41 (2003).

63 That is, we might adopt a method of constitutional interpretation, and especially a theory of judicial review, along the lines proposed by John Ely. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

64 POWELL, *supra* note 60, at 209 ("As the traditionally accepted, longish list of legitimate methods [of constitutional interpretation] suggests, constitutional law is not the logical working-out of any unitary theory . . . . The Constitution does not ordain a particular moral or political theory." (italics in original removed)).

65 Professor Barnett objects to my use of the term "ideology," claiming that it "has a very negative connotation among academics." Barnett, *Reply*, *supra* note 44, at [6]; *see id.* at [13]. Yet, while "ideology" may sometimes be used in an unflattering sense, it does not have an inevitably negative meaning. Indeed, careful examination suggests that "ideology" can mean a variety of things, "some of [which] . . . are pejorative, others ambiguously so, and some not pejorative at all." TERRY EAGLETON, IDEOLOGY: AN INTRODUCTION 2 (1991). This variability need not disqualify the term for academic purposes, but it may warrant some specification. Let me clarify, then, that I have in mind a nonpejorative meaning akin to what the *International Encyclopedia of the Social & Behavioral Sciences* calls a "neutral conception of ideology": a "discrete and relatively coherent syste[m] of thought or belief which inform[s] social and political action." J.B. Thompson, *Ideology: History of the Concept*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 7170, 7170–74 (Neil J. Smelser & Paul B. Baltes eds., 2002), *available at* http://www.sciencedirect.com/science/referenceworks/0080430767 (last visited Nov. 20, 2004). So understood, ideolo-

It would be better, though, if he more openly conceded the nature of that choice. Instead, he appears to suggest that his preference for original meaning is independent of his libertarian political theory.[66] Even more problematically, he seems to say that disagreeing with his libertarian political theory and interpretive methodology would reflect not a difference in substantive principles, but the lack of any principles at all.[67]

More careful attention to the realities of contemporary constitutional interpretation might have led Professor Barnett to acknowledge that judges can seek constitutional meaning in sources other than the text as originally understood—for example, by looking to precedent and to the historical practices of the political branches—and still be constrained in their actions. That acknowledgement would not have undermined the substantive project of the book, but it would have removed the false choice between accepting Professor Barnett's argument and forsaking principled governance altogether.

My final point on originalism builds on the interpretive eclecticism of contemporary constitutional practice. As noted above, original meaning is a legitimate—though by no means exclusive—source of constitutional meaning in contemporary constitutionalism.[68] This is true for scholars as well as practitioners of constitutional law: as Professor Barnett correctly points out, many scholars opposed to an exclusively originalist methodology take the view that "original meaning is an important *part* of constitutional interpretation," but that it needs

---

gies are distinct from other modes of thought in that they are "relatively highly systematized or integrated around one or a few pre-eminent values." Edward Shils, *The Concept and Function of Ideology*, *in* 7 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 66, 66 (David L. Sills ed., 1968). This, I take it, is roughly what Professor Barnett himself intended when using "ideology" (and its cousin, "ideological") in his own writing. *See, e.g.*, Randy E. Barnett, Essay, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract*, 78 VA. L. REV. 1175, 1200 (1992) (stating that Ian Macneil's scholarship on contract theory has provided "insights that can be, and have been, embraced by a wide variety of legal scholars representing a broad theoretical and ideological spectrum"); Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593, 2615 (1994) (book review) ("The ideology of the public policy model of decisionmaking is that decisionmakers weigh the costs and benefits of human conduct as well as the costs and benefits of legally regulating or prohibiting that conduct and do so according to the will of the people."); Randy E. Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy*, 97 HARV. L. REV. 1223, 1224 (1984) (book review) (describing a renewed focus on "normative legal philosophy" and "traditional legal reasoning" among legal "thinkers represent[ing] a spectrum of ideological views, embracing modern liberal, classical liberal, and conservative philosophies" (footnote omitted)).

66 *See* BARNETT, RESTORING, *supra* note 14, at 96 ("[C]hoosing a method of interpretation because it justifies currently accepted outcomes puts the evaluative cart before the interpretive horse.").

67 *See id.* at 5 ("[T]he alternative may be to admit that, when judges pronounce constitutional law, there really is no one behind the curtain and their commands are utterly devoid of binding authority.").

68 *See* POWELL, *supra* note 60, at 208–09.

to be supplemented by other things.[69] Indeed, it seems safe to say that most mainstream constitutional practitioners and scholars pay at least some heed to original meaning, to the extent they can identify it.

This prevalence of "moderate originalism"[70] is due in part to the fact that attention to the Constitution's original meaning can yield a variety of results, depending, among other things, on the level of generality at which that meaning is assigned and the nature of the question being posed.[71] There is, as Henry Monaghan has suggested, no fixed way to "'do' original understanding."[72] To illustrate the point, Professor Monaghan contrasts the originalism of Justice Scalia with that of Justice Ginsburg.[73] Justice Scalia generally seeks to read particular constitutional phrases according to their original public meaning, thus minimizing the law-creating role of the judge.[74] Justice

---

69 BARNETT, RESTORING, *supra* note 14, at 94 n.21; *see also* Dorf, *supra* note 46, at 1766 (noting that "[a]lthough there are very few strict originalists, virtually all practitioners of and commentators on constitutional law accept that original meaning has some relevance to constitutional interpretation" (footnotes omitted)).

70 The phrase is Paul Brest's. *See* BARNETT, RESTORING, *supra* note 14, at 95 (quoting Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 222 (1980)).

71 For a thorough discussion of the problems inherent in trying to assign to the Constitution a single original meaning, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996). Professor Barnett contends that "we are bound to interpret the text at its original level of generality." BARNETT, RESTORING, *supra* note 14, at 258. Yet just as the relevant meaning of many constitutional provisions is vague, thus requiring "constitutional construction" as discussed later in this Review, much of the constitutional text does not straightforwardly specify its own particular level of generality. Indeed, constitutional construction often entails choosing a level of generality in the absence of any particular textual guidance one way or the other. *See* Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 408–11 (1997) (showing that choosing the appropriate level of generality at which to seek original understanding is a normative matter).

72 Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32, 33 (2004).

73 *See id.* at 33–35.

74 *See id.* at 34 ("For [Justice Scalia], the Constitution is a static document. . . . His mode of original-understanding inquiry necessarily has a heavy descriptive component, that is, 'In 1787 what were the central structural characteristics of the institutions to which the document refers?'"). Justice Scalia is not an absolutist in this regard, however. In interpreting Congress's legislative power under the Interstate Commerce Clause, for example, Justice Scalia has not joined Justice Thomas in advocating the abandonment of the Court's so-called "substantial effects" test and returning to what Justice Thomas contends is the correct original understanding of the Clause, under which Congress's ability to regulate the national economy would be severely curtailed. *See* United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring); *see also* Monaghan, *supra* note 72, at 36 (noting the divergence between Justices Scalia and Thomas on this point).

More generally, neither Justice Scalia nor Justice Thomas consistently advocates originalist positions. For example, both Justices believe that affirmative action by public educational institutions violates the Equal Protection Clause. *See* Grutter v. Bollinger, 539 U.S. 306, 348–49 (2003) (Scalia, J., concurring in part and dissenting in part) (advocating "a clear constitutional holding that racial preferences in state educational institutions are impermissible" on the ground that "[t]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception"); *id.* at 350 (Thomas, J., concurring in part and dissenting in part) (arguing that "[t]he Constitution

Ginsburg, in contrast, employs an approach "drawn from the Hart & Sacks legal process methodology. She looks for the central purpose of the relevant constitutional provision and tries to apply it in a vastly different world. Some evolution in the details is to be expected."[75] Neither approach, Professor Monaghan suggests, is *per se* illegitimate as a matter of original meaning.[76]

Not only can attention to the Constitution's original meaning yield competing answers, but some provisions of the Constitution are by their very nature so open-textured that their original meaning, even if reliably discernable, will resolve few cases. Professor Barnett acknowledges this point. Indeed, he devotes an entire chapter to the process of "constitutional construction," which picks up where constitutional interpretation can go no further.[77] As he describes:

> While the original meaning of the text might be demonstrably inconsistent with a multitude of possible outcomes, it may still not provide enough guidance to identify a single rule of law to apply to a particular case at hand. Indeed, it frequently will not. When this occurs, it becomes necessary to adopt a construction of the text that is consistent with its original meaning but not deducible from it.[78]

Although he allows that courts must inevitably engage in constitutional construction when resolving actual cases, Professor Barnett insists that interpretation and construction must be kept conceptually

---

does not . . . tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination," and implying that this position is based on "interpreting the people's Constitution"). But neither Justice even attempts to defend this position on originalist grounds, and for good reason: powerful historical evidence suggests that a state does not violate the original public meaning of the Equal Protection Clause by providing benefits to historically disfavored racial minorities. *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430–32 (1997) (discussing federal legislation passed in 1866 and 1867 by the same Congress that framed the Fourteenth Amendment, that provided special benefits to "colored" soldiers, sailors, and destitute women and children, and concluding that such statutes prove that "those who profess fealty to the 'original understanding' [cannot] . . . categorically condemn color-based distribution of governmental benefits").

75 Monaghan, *supra* note 72, at 35 (footnotes omitted). Thus described, Justice Ginsburg's approach might be likened to what Cass Sunstein has called "soft originalism." *See* Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311, 313 (1996) (describing a "soft originalist" as one who "will take the Framers' understanding at a certain level of abstraction or generality").

76 Although Professor Monaghan employs the term "original understanding," as he uses it the term is synonymous with Professor Barnett's use of "original meaning." *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 725–26 (1988) ("The relevant inquiry must focus on the *public* understanding of the language when the Constitution was developed.").

77 *See* BARNETT, RESTORING, *supra* note 14, at 118–30. Professor Barnett borrows the concept of constitutional construction from Keith Whittington. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

78 BARNETT, RESTORING, *supra* note 14, at 121.

distinct.[79] Maintaining that distinction enables him to argue that we should discard Supreme Court doctrine premised on erroneous constitutional constructions. In this respect, it is critical to Professor Barnett's argument that the "presumption of constitutionality"—the conventional judicial practice of presuming most legislative enactments to be constitutional unless proven otherwise—is a construction, not an interpretation, of the Constitution.[80] He stresses that "[n]owhere in the Constitution is it said, or even implied, that the judiciary must defer to or presume the correctness of the judgment of the legislative branch that a statute it enacts is constitutional."[81] By itself, the absence of a clear textual grounding does not doom the presumption of constitutionality.[82] It does, however, permit Professor Barnett to argue that the presumption fits poorly with the overall structure and original meaning of the constitutional text, and that a presumption of liberty should replace it.[83]

The critical point here is that, despite an aggressive defense of a fairly strict version of originalism, Professor Barnett ultimately agrees that much of the work of implementing the Constitution is necessarily a rather open-ended affair. To be sure, the process is not wholly unconstrained. Professor Barnett emphasizes that proper constitutional construction must pay careful attention to whatever original meaning can be gleaned from the Constitution.[84] But he also argues that constitutional construction should seek to "enhanc[e] constitutional legitimacy."[85] As described above, one's views about constitutional legitimacy necessarily reflect extratextual value judgments. And if constitutional construction should enhance constitutional legitimacy, constitutional construction will also inevitably involve extratextual value judgments.

Thus, even before turning to Professor Barnett's proposal for a presumption of liberty, we can see that whether we find the proposal compelling may depend in part on whether we share the extra-constitutional political theory upon which he relies for his conception of constitutional legitimacy. The case for the presumption of liberty, in other words, may end up deriving not from the Constitution itself, but from the libertarian ideology Professor Barnett reads into the Constitution.

---

79 *See id.* at 151–52.

80 *See id.*

81 *Id.*

82 *See id.* at 152 ("That a doctrine such as the presumption of constitutionality results from construction rather than interpretation is hardly fatal . . . .").

83 *See id.*

84 *See id.* at 127.

85 *Id.*

## III
## THE PRESUMPTION OF LIBERTY

Professor Barnett's argument for a presumption of liberty unfolds in part through a discussion of the key constitutional provisions respecting federal legislative power, especially the Necessary and Proper Clause,[86] the Commerce Clause,[87] and the Ninth Amendment.[88] Although there is much of interest (and potential controversy[89]) in those parts of the book, Professor Barnett's bottom-line position echoes arguments made by others for the imposition of greater limits on federal legislative authority. His account of the Commerce Clause, for example, parallels the position staked out by Justice Thomas in *United States v. Lopez*.[90] Rather than dwelling on those parts of the book, I will turn to a more novel part of Professor Barnett's argument: his call for aggressive judicial review of *state* laws implicating liberty, and for the revival of a *Lochner*-esque jurisprudence.

---

86 *Id.* at 153–90.

87 *Id.* at 274–318.

88 *Id.* at 224–52.

89 Professor Barnett's treatment of the Ninth Amendment, for example, has already attracted a significant amount of attention and disagreement. He argues that the Ninth Amendment recognizes the existence of unenumerated individual rights enforceable against the federal government and "mandates that unenumerated rights be treated the same as those that are listed." *Id.* at 252. This reading does not necessarily defeat a constitutional construction that would accord an across-the-board presumption of constitutionality to all legislation, but it does expose the flaws in the presumption of constitutionality that Professor Barnett says currently exists, which presumes legislation to be constitutional unless it implicates enumerated rights or certain specially favored unenumerated ones. The Ninth Amendment, in Professor Barnett's view, compels "equal protection" of all liberties, whether enumerated or not. *See id.*

Recently, however, Professor Barnett's account has been challenged by the work of Kurt Lash. *See* Kurt Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004) [hereinafter Lash, *Lost Original Meaning*]; Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005). Professor Lash argues that the Ninth Amendment must be read alongside the Tenth Amendment and that they "originally were understood to represent dual limitations on the power of the federal government to interfere with the states." Lash, *Lost Original Meaning*, *supra*, at 399. On this view, the Ninth Amendment is about federalism, not individual rights; it does not recognize and protect unenumerated individual rights as such, but simply directs that federal power be construed narrowly so as not to intrude upon the rights of the people, who, in this context, were understood to be synonymous with the states.

Professors Barnett and Lash support their contending positions with considerable historical evidence, and I have not done enough primary research to say with confidence whose position is more persuasive. I do note, however, that it is striking how eagerly traditional conservatives have embraced Professor Lash's work as a means of refuting Barnett's reading of the Ninth Amendment. *See, e.g.*, Lund & McGinnis, *supra* note 19, at 1592 & n.139.

90 514 U.S. 549, 584 (1995) (Thomas, J., concurring); *see* BARNETT, RESTORING, *supra* note 14, at 317 ("The most persuasive evidence of original meaning—statements made during the drafting and ratification of the Constitution as well as dictionary definitions and *The Federalist*—strongly supports Justice Thomas's . . . narrow interpretation of Congress's power . . . .").

Professor Barnett begins his discussion on this point with the Privileges or Immunities Clause of the Fourteenth Amendment. He reads the Clause as fundamentally altering the power of state governments. Until the ratification of the Fourteenth Amendment, the states wielded a general police power that, Professor Barnett seems to concede, had few judicially enforceable limits.[91] The Fourteenth Amendment, however, prohibited states from "abridging any of the 'privileges or immunities' of their citizens, a phrase that included the background natural rights of the people along with other rights and privileges of citizenship expressly created by the Constitution."[92]

The Supreme Court did not read the Privileges or Immunities Clause as Professor Barnett does. Instead, the Court in the *Slaughter-House Cases*[93] effectively gutted it of any justiciable meaning. Like many scholars before him,[94] Professor Barnett is deeply critical of the *Slaughter-House* decision. He embraces the position of the dissenters in the case, who read the Clause to protect a broad set of civil and natural rights, including the liberties of contract and property.[95] Although that view did not prevail under the Privileges or Immunities Clause, it soon found expression in the Due Process Clause during the *Lochner* era.[96] Acknowledging that *Lochner*'s conception of substantive due process does not fit the original meaning of the Due Process Clause, Professor Barnett nevertheless asserts that "'substantive due process' restores rather than violates the original historical meaning of Section 1 of the Fourteenth Amendment taken as a whole from the damage done by *Slaughter-House*."[97]

In Professor Barnett's view, *Lochner*'s invalidation of a New York statute restricting the weekly and daily hours of bakery employees "can most accurately be characterized as adopting the conception of civil rights or 'privileges or immunities' held by the framers of the Fourteenth Amendment."[98] Plainly, the statute at issue in *Lochner* implicated the economic liberty of contract. As Professor Barnett is careful to point out, the *Lochner* Court did not categorically forbid all laws

---

91 *See* BARRETT, RESTORING, *supra* note 14, at 320.

92 *Id.*

93 83 U.S. (16 Wall.) 36 (1873).

94 *See, e.g.*, LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 1303–31 (3d ed. 2000). Although Professor Tribe criticizes the *Slaughter-House* decision, there is no indication that he would read it as a source of the natural rights Professor Barnett claims to find there.

95 *See* BARNETT, RESTORING, *supra* note 14, at 198–99.

96 *See id.* at 203.

97 *Id.* at 208.

98 *Id.* at 215. Professor Barnett's argument on this point is bolstered by his reliance on the work of Howard Gillman. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *Lochner* ERA POLICE POWERS JURISPRUDENCE (1993).

touching upon such rights, but instead subjected them to more searching scrutiny:

> When the liberty of the individual clashes with the power of the state, the Court would not accept the "mere assertion" by a legislature that a statute was necessary and proper. Instead, it required a showing that a restriction of liberty have a "direct relation, as a means to an end," and that "the end itself must be appropriate and legitimate."[99]

According to Professor Barnett, New York lost in *Lochner* because it failed to make such a showing.[100]

This claim may be somewhat unfair. Though apparently not contained in the formal record of the case, publicly available research at the time *Lochner* was decided amply documented the often severe health risks faced by bakery employees, and suggested that long working hours were part of the problem. Justice Harlan discussed that evidence extensively in his dissenting opinion,[101] and the Court certainly could have taken judicial notice of it. Nothing in the majority opinion suggests that the Court's refusal to rely on the evidence was based simply on the fact that it was outside the formal record. To the contrary, the opinion strongly suggests that the Court was unwilling to uphold the New York statute even with the evidence identified by Justice Harlan.

In any event, having cast *Lochner* as employing something fairly close to a presumption of liberty,[102] Professor Barnett goes on to discuss the eventual repudiation of *Lochner* and the rise, during the New Deal, of a presumption of constitutionality. As the Supreme Court has explained, "[t]he presumption of constitutionality [is] . . . based on an assumption that the institutions of state government are structured so as to represent fairly all the people."[103] The idea is that unelected federal judges should be reluctant to set aside democratically enacted legislation unless it is clearly unconstitutional. The presumption, in other words, aims to enhance democratic values and to constrain countermajoritarian judicial power. Professor Barnett, however, is little concerned with countermajoritarianism. He stresses that the Constitution contemplates judicial review, and that a too-lenient presumption of constitutionality poses a threat to the "entire constitutional practice of judicial review."[104] According to Professor Barnett, by 1937 the Court was in danger of succombing to that very threat. Its

---

99 BARNETT, RESTORING, *supra* note 14, at 214.

100 *See id.*

101 *See* Lochner v. New York, 198 U.S. 45, 70–72 (1905) (Harlan, J., dissenting).

102 *See* BARNETT, RESTORING, *supra* note 14, at 222.

103 Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 628 (1969).

104 *See* BARNETT, RESTORING, *supra* note 14, at 229.

decision in *West Coast Hotel Co. v. Parish*,[105] he contends, "marked the complete abandonment of scrutiny of state laws under the Due Process Clause."[106]

On Professor Barnett's account, it was the Court's decision in *United States v. Carolene Products Co.*,[107] and in particular the famous "Footnote Four" in the majority opinion, that finally imposed some limits on the presumption of constitutionality. *Carolene Products* reaffirmed the presumption of constitutionality for "regulatory legislation affecting ordinary commercial transactions," but Footnote Four stipulated that the presumption might not apply to legislation that implicated rights expressly protected in the Bill of Rights or the Fourteenth Amendment, or to legislation that reflected prejudice against "discrete and insular minorities."[108] Footnote Four, in other words, articulated a rationale for dispensing with the presumption of constitutionality when legislation touched upon rights specifically enumerated in the Constitution.

Professor Barnett skips from *Carolene Products* to the Court's modern substantive due process cases, beginning with *Griswold v. Connecticut*.[109] When read together with *Carolene Products*, the Court's decisions stretching from *Griswold* to *Planned Parenthood v. Casey*[110] form an approach that Professor Barnett dubs "Footnote Four-Plus."[111] Under this approach, the Court reverses the presumption of constitutionality not only for cases implicating rights specifically enumerated in the Constitution, but also for those touching upon the "judicially favored unenumerated rights" at issue in cases like *Griswold*, *Eizenstadt v. Baird*,[112] and *Roe*.[113] The unenumerated right of procreative autonomy, in other words, gets special treatment. Professor Barnett clearly prefers "Footnote Four-Plus" to the unconstrained presumption of constitutionality, but he thinks "Footnote Four-Plus" protects too few unenumerated rights. Instead, he would protect "*all* the rights retained by the people equally whether enumerated or unenumerated."[114] He defends this position by relying on the Ninth

105 300 U.S. 379 (1937).

106 BARNETT, RESTORING, *supra* note 14, at 229.

107 304 U.S. 144 (1938).

108 *Id.* at 152 & n.4.

109 381 U.S. 479 (1965) (invalidating a statute criminalizing the use of contraceptives on the ground that it invaded a constitutionally protected "right to privacy").

110 505 U.S. 833 (1992) (affirming the central holding of *Roe*).

111 BARNETT, RESTORING, *supra* note 14, at 232.

112 405 U.S. 438 (1972).

113 BARNETT, RESTORING, *supra* note 14, at 232.

114 *Id.* at 254.

and Fourteenth Amendments, which he says are properly read to require equal treatment of enumerated and unenumerated rights.[115]

But what are "all the rights retained by the people"? As Professor Barnett points out, many Founders recognized that "it was impossible to specify in advance all the rights we have and undesirable even to try."[116] Mindful of that difficulty, Professor Barnett proposes a different approach: "We can protect the unenumerable rights retained by the people by shifting the background interpretive presumption of constitutionality whenever legislation restricts the liberties of the people. We can adopt a Presumption of Liberty."[117]

Professor Barnett has a rather specific idea of how this "presumption of liberty" should work in practice. He argues that, to rebut the presumption, a law must be shown to be "necessary to prohibit wrongful or regulate rightful activity."[118] Professor Barnett also contends that this formulation tracks the contours of the "police power" of the states.[119] As noted above, he argues that the Privileges or Immunities Clause constrains the police power, and obliges the states to refrain from restricting the natural rights of the people. Beyond that, however, the Constitution does not fix the boundaries of state legislative power. To discern those boundaries, Professor Barnett turns to Lockean political theory.[120] According to his reading of John Locke, the purpose of government is to secure individual rights of liberty and property more effectively than they could be secured by individual action alone. If that is the point of government, the police power should extend only that far.[121] The police power, in other words, is "the legitimate authority of states to *regulate rightful* and *prohibit wrongful* acts," for in so doing the state achieves the aims of government under Lockean political theory.[122] And in this way, Professor Barnett's conception of the police power mirrors his presumption of liberty.

Although Professor Barnett claims that his account of the police power is consistent with the generally accepted meaning of the term in the late nineteenth century,[123] in fact the historical record is more mixed. First, as Professor Barnett concedes, courts in the late nineteenth century routinely upheld state legislation aimed at protecting

---

115 *See supra* note 89 (summarizing Professor Barnett's account of the Ninth Amendment).

116 BARNETT, RESTORING, *supra* note 14, at 259.

117 *Id.*

118 *Id.* at 262.

119 *See id.* at 325.

120 *Id.*

121 *See id.* at 326.

122 *Id.*

123 *See id.* at 328–30.

public morals, and in so doing construed the police power more broadly than Professor Barnett would allow.[124] Second, even the nineteenth century scholars on whom Professor Barnett relies had divergent views about the police power. On one hand, Professor Barnett cites the work of Thomas Cooley, whose 1868 treatise on constitutional law articulated a vision of the police power consistent with the Lockean reading described above.[125] On the other, he discusses the views of Christopher Tiedeman,[126] who took a somewhat broader view. In particular, Professor Barnett acknowledges that Tiedeman thought states could legitimately prohibit business activities devoted to certain "vices" like gambling and prostitution.[127] Tiedeman posited that states could not prohibit gambling and other vices in *private*, but he also thought that when commercial entities "pursue gambling *as a business*, and set up a gambling house, like all others who make a trade of vice, they may be prohibited and subjected to severe penalties."[128]

To Professor Barnett, Tiedeman's position on the state's power to prohibit commercial vice, like the judicial decisions upholding morals legislation more generally, is inconsistent with the proper scope of the police power.[129] Whatever the merits of that normative claim, it seems clear that, as an historical matter, the late nineteenth century understanding of the police power was hardly uniform. In that respect, I have doubts about Professor Barnett's claim that the original public meaning of the Fourteenth Amendment necessarily supports his Lockean version of the police power.[130] Indeed, by basing his "constitutional construction" on a rather truncated, abstract summary of Lockean political theory, and by thereby arriving at an account of the police power that is at odds with at least some prominent historical views, Professor Barnett appears less and less engaged in an effort to *restore* the "lost Constitution," and more and more involved in an attempt to *create* a Constitution he finds ideologically appealing. That does not necessarily doom his project; as I have suggested above, any approach to constitutional interpretation necessarily involves substantive, extraconstitutional value judgments. It does, however, mean that

---

124 *See id.* at 329 (noting that late nineteenth century courts "upheld the power of states to prohibit gambling, and consumption of alcohol, prostitution, doing business on the Sabbath, and other types of activities that did not violate the rights of others").

125 *See id.* at 323–27 (discussing THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION (1868)).

126 *See id.* at 328 (discussing CHRISTOPHER TIEDEMAN, TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (1886)).

127 *See id.* at 329–30 n.40.

128 *Id.* at 329 n.40 (quoting TIEDEMAN, *supra* note 126, at 291) (emphasis added by Professor Barnett).

129 *See id.* at 329–30 & n.40.

130 *See id.* at 328.

we should examine very carefully whether Professor Barnett's presumption of liberty would help or hinder the practice of constitutional law. That is, we should consider the practical consequences of adopting and applying his presumption of liberty.[131]

Any attempt to apply Professor Barnett's presumption of liberty would immediately face two sets of difficulties. The first relates to his method for distinguishing rightful from wrongful conduct—an endeavor that is necessitated by his rule, described above, that states may prohibit wrongful conduct but only regulate rightful conduct.[132] Professor Barnett relies on the common law for this distinction:

> In our legal order, distinguishing rightful from wrongful conduct is generally done every working day at the state level. Indeed, at least a quarter of a law student's legal education is devoted to this subject in courses such as contracts, torts, property, agency and partnership, secured transactions, commercial paper, and portions of criminal law. In contrast with constitutional law, which provides rules for the conduct of government agents, these private law subjects provide principles to regulate the conduct of persons toward each other. . . . For example, when one person injures another and this injury is considered to be "tortious," then it is deemed to be wrongful and a duty to compensate is held to exist. It is also wrongful to breach a valid contract without a valid defense.[133]

This is all relevant to constitutional law, Professor Barnett maintains, because "[t]he freedom to act within the boundaries provided by one's common law or 'civil' rights may be viewed as a central background presumption of the Constitution—a presumption reflected in both the Ninth Amendment and the Privileges or Immunities Clause."[134]

By allowing private law doctrines of tort, contract, and property to define constitutional rights, Professor Barnett necessarily assumes that constitutional rights will change over time. The common law, after all, is by definition an evolving entity. Common law judges do not

---

131 The idea that constitutional law should be sensitive to the likely consequences of a decision or interpretive approach has received prominent defense in recent years. *See, e.g.*, Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 246–47 (2002) (discussing "an approach to constitutional interpretation that places considerable weight upon consequences" and "disavows . . . a more 'legalistic' approach that places too much weight upon language, history, tradition, and precedent alone while understating the importance of consequences"); Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 8 (1998) (suggesting the Court should "[e]xplicitly pay[ ] greater attention to the likely consequences of its decisions and to the empirical assumptions underlying its doctrines . . . because . . . any sound account of the role of courts should make real-world experience relevant to adjudication" (footnotes omitted)).

132 *See* BARNETT, RESTORING, *supra* note 14, at 325.

133 *Id.* at 262–63.

134 *Id.* at 263.

simply apply the law to the facts; they also "*make* the law."[135] I do not mean to suggest that the common law's dynamic nature necessarily makes it unsuitable for constitutional purposes. Contemporary constitutional doctrine clearly accepts the idea that the content of certain individual rights may change over time,[136] and I see no compelling reason to oppose such changes categorically. As I have already discussed, however, Professor Barnett advocates originalist constitutional interpretation as a means of "locking in" constitutional meaning.[137] On those terms, a jurisprudence of constitutional change is more difficult to justify. Professor Barnett may deny any inconsistency here by stressing that because both the Ninth Amendment and the Privileges or Immunities Clause refer to natural rights not contained in the text, fidelity to original meaning requires that judges "look outside the four corners of the Constitution to determine the content of these rights."[138] But if looking beyond the text includes constant adjustment of constitutional meaning with reference to changes in the common law, then this is an originalism that only a "living constitutionalist" could love. Indeed, there is precious little original meaning to "lock in" if the contours of constitutional rights can change every time a common law judge decides a tort case of first impression.

Moreover, to the extent we *do* openly accept the proposition that constitutional meaning may evolve over time, it is unclear why the law of tort, contract, and property should be the source of the change. Most of the common law is designed to mediate relationships between private parties, not to structure the relationship between a people and its government. In addition, the logic of change in the common law may reflect none of the enduring values—equality, for example—of our constitutional culture. And even on their own terms, it is far from clear that the liability rules of tort and contract necessarily reflect any meaningful conception of "rightful" and "wrongful" action. The influence of law and economics, for example, has led to the develop-

---

135 Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 6 (Amy Gutman ed. 1997).

136 As the Supreme Court recently explained:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

137 *See* BARNETT, RESTORING, *supra* note 14, at 103.

138 *Id.* at 108.

ment of efficiency-seeking rules in these areas. Such rules may or may not be appropriate for the private law of tort and contract. But on what basis should they define the boundaries of individual rights protected by the Constitution? Surely the Constitution does not protect only those individual pursuits that a judge or economist would deem efficient. If "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,"[139] it also does not enact Richard Posner's *Economic Analysis of Law*.[140]

Further complicating Professor Barnett's reliance on the common law is the fact that legislatures have long passed laws that alter or supplant the common law. In contract law, for example, the Uniform Commercial Code rejects or substantially amends a number of common law rules as applied to the sale of goods.[141] Similarly in tort law, there have been scores of legislative measures designed to displace traditional common law rules with new, significantly different regulatory regimes.[142] Professor Barnett, it appears, would hold at least some such statutes unconstitutional. He would permit laws that merely "correct doctrinal errors," but would prohibit those that more fundamentally change the underlying rules in a way that "invade[s] individual rights."[143] Practically speaking, it is unclear to me how we are to make this distinction. Even minor doctrinal corrections are likely to come at the expense of someone's "rights," broadly construed. How much is too much? Should we consider the number of people whose rights are affected? The importance of the rights at issue? The magnitude of the doctrinal change? On a more fundamental level, I see no reason why legislatures should be specially disabled from making even major changes to the law of contract, tort, and the like. Professor Barnett seems prepared to allow substantial changes to the common law, provided they are effected by judges on a case-by-case basis.[144] Why should legislatures be prohibited from doing by

---

139 Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

140 *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (6th ed. 2003).

141 For example, the U.C.C. abrogates the common law mirror image rule of offer and acceptance, provides that no consideration is required when the parties agree to modify a preexisting agreement, and makes substantial changes to the common law liquidated damages rule. *See* U.C.C. §§ 2-207(1), 2-209(1), 2-718 (1977).

142 Such measures include workers' compensation schemes around the turn of the last century, no-fault automobile insurance regimes in the late 1960s and 1970s, medical malpractice reforms in the 1970s, and products liability laws and other tort reform measures in the 1980s and 1990s. *See* MARK A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES 718–800 (6th ed. 1996).

143 BARNETT, RESTORING, *supra* note 14, at 263–64.

144 *See id.* at 264–65 (advocating an "institutional allocation" under which "[s]tate common law processes determine the rights that each citizen enjoys against others, whereas state and federal judges are authorized to protect citizens from having their 'civil' rights infringed by state and federal governments").

statute what judges may do by decision? And why should we think the Constitution dictates an answer to that question?

The second set of difficulties with Professor Barnett's presumption of liberty involves his distinction between laws that "prohibit" and those that merely "regulate." Recall that on Professor Barnett's account, "laws that are necessary to prohibit wrongful or regulate rightful activity would satisfy the Presumption of Liberty."[145] Relying on eighteenth-century dictionaries and other sources, he argues that "[t]he power to regulate is, in essence, the power to say, 'if you want to do something, here is how you must do it.'"[146] Thus, the power to regulate commerce includes the power to "specify the manner by which trade is to be conducted."[147] The power to prohibit, in contrast, means the power to forbid, interdict by authority, and hinder.[148] Hence Professor Barnett's distinction: "Forbidding, interdicting, and hindering are not the same thing as regulating, or 'making regular,' or adjusting by rule or method."[149]

Are prohibition and regulation really so distinct? When does the prescription of rules for undertaking a certain activity—on its face seemingly an act of regulation—become so stringent as to amount to a prohibition? For example, a license requirement for those wanting to engage in a certain trade would appear to be a regulation. But what if the law seeks to create a monopoly by granting only a single license, and what if it further contains harsh penalties for anyone who operates without a license? Is such a law not better thought of as a general prohibition with a limited exception? If not—that is, if we would still call it a regulation—what then remains of prohibition? What of endangered species laws that make it a criminal offense to hunt certain animals, but that recognize a complete defense for those instances where the government permits select individuals to hunt certain species for limited times, as a population-management measure? Indeed, what of the law of homicide, which on its face is obviously prohibitory but which might be reconceptualized as merely regulating killings that are undertaken in self-defense or under other justifiable circumstances? All these examples suggest that Justice Holmes had it right: "Regulation means the prohibition of something."[150]

---

145 *Id.* at 262.

146 *Id.* at 303.

147 *Id.* at 306.

148 *See id.* at 303.

149 *Id.*

150 Hammer v. Dagenhart, 247 U.S. 251, 277 (1918) (Holmes, J., dissenting) (rejecting the argument that, for purposes of Congress's power under the Commerce Clause, "the power to regulate does not include the power to prohibit"). The Court ultimately adopted

The lack of a clear distinction between regulation and prohibition, combined with the malleability of concepts like "rightful" and "wrongful" conduct, triggers concern that any attempt to implement Professor Barnett's presumption of liberty might produce a jurisprudence far less tethered to our constitutional text, traditions, and values than anything that has gone before. Professor Barnett simply has not made the case for why we should abandon current doctrine for an approach that is both so unfamiliar to American constitutional law and so unlikely to work in practice.

## IV

## *LAWRENCE V. TEXAS* AND THE VARIETIES OF LIBERTY

Might the Supreme Court ever adopt the presumption of liberty? In one of the book's most intriguing (if understandably brief[151]) passages, Professor Barnett offers the Court's recent decision in *Lawrence v. Texas*[152] as an answer.[153]

In *Lawrence*, the Court struck down a Texas statute criminalizing homosexual sodomy. Explaining that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,"[154] the Court determined that the Texas statute impermissibly infringed on that autonomy. The choice to engage in consensual same-sex relations in the privacy of one's home, in other words, is part of the autonomy of self included within the constitutional protection of liberty.[155] On the other side of the scales, the government's only justification for the statute was that the Texas legislature deemed homosexual sodomy to be immoral. The Court rejected that defense, holding that the statute "further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[156]

To Professor Barnett, *Lawrence* is a watershed for a number of reasons. First, he stresses that the Court's opinion expressly refers to

---

Justice Holmes's position in *Hammer*, calling his opinion a "powerful and now classic dissent." United States v. Darby, 312 U.S. 100, 115 (1941) (overruling *Hammer*).

151 The Court announced the *Lawrence* decision in June 2003, only about six months before *Restoring the Lost Constitution* was released. Professor Barnett has, however, provided a more detailed analysis of *Lawrence* in a recent essay. *See* Barnett, *Libertarian Revolution*, *supra* note 9. My discussion here will refer to that essay as well as to *Restoring the Lost Constitution*.

152 539 U.S. 558 (2003).

153 *See* BARNETT, RESTORING, *supra* note 14, at 334.

154 *Lawrence*, 539 U.S. at 562.

155 *Id.* at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.")

156 *Id.* at 578.

liberty, not the right of "privacy" recognized in *Griswold*, *Roe*, and other cases in that line.[157] Moreover, the Court nowhere held the liberty interest at stake to be a "fundamental right," arguably jettisoning additional conceptual baggage from *Roe*.[158] In place of that analysis, Professor Barnett suggests, *Lawrence* employed an "implicit 'Presumption of Liberty.'"[159] Rather than asking whether the particular liberty interest qualified as a fundamental right, the Court simply observed that liberty was at stake. Having done that, the Court "place[d] the onus on the government to justify its statutory restriction."[160] Because the government's proffered justification exceeded the proper bounds of the police power, it could not rebut the presumption of liberty.

For Professor Barnett, then, *Lawrence* and *Lochner* are cut from the same cloth. Rather than trying to define the precise nature of the individual right in each case, Professor Barnett regards each as involving liberty, full stop. Legislation infringing on liberty should be presumptively unconstitutional; neither Texas (in *Lawrence*) nor New York (in *Lochner*) was able to rebut the presumption.

Though engaging, Professor Barnett's reading of *Lawrence* is ultimately unpersuasive. First, Professor Barnett (along with Justice Scalia in his *Lawrence* dissent[161]) reads too much into the absence of any express statement from the Court that the case involved a fundamental right. The lack of such an express statement does not necessarily signal an abandonment of the field.[162] Indeed, more significant than the presence or absence of certain magic words is the fact that the Court's opinion drew directly on fundamental rights cases like *Griswold* and *Roe*.[163] And in so doing, the Court did in fact employ the language of fundamentality, though not with the words "fundamental right." The Court approvingly described *Roe*, for example, as "confirm[ing] once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance

157 *See* BARNETT, RESTORING, *supra* note 14, at 334.

158 *See* Barnett, *Libertarian Revolution*, *supra* note 9, at 35.

159 *Id.*; *see* BARNETT, RESTORING, *supra* note 14, at 334 ("*Lawrence* can be viewed as escaping the Footnote Four-Plus framework . . . and employing in its place a Presumption of Liberty.").

160 Barnett, *Libertarian Revolution*, *supra* note 9, at 35.

161 *See Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (noting that "nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental' right under the Due Process Clause . . . .").

162 *See* Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916–17 (2004) (noting that "the practice of announcing such a standard . . . has not shown itself worthy of being enshrined as a permanent fixture in the armament of constitutional analysis").

163 *Lawrence*, 539 U.S. at 564 (describing *Griswold* as "the most pertinent beginning point" for the analysis in *Lawrence*); *see* Tribe, *supra* note 162, at 1917.

in defining the rights of the person."[164] In light of such reaffirmations, it is not plausible to read *Lawrence* as abandoning, *sub silentio*, the doctrine of fundamental rights.[165]

Professor Barnett also goes too far in suggesting that *Lawrence* represents a turn toward greater judicial protection for all forms of liberty, rather than certain liberties of fundamental importance. As Laurence Tribe has explained, the problem with this reading is that it is "predicated . . . on little beyond the Court's refusal to name a particular set of acts that it deemed presumptively protected as 'fundamental rights.'"[166] To be sure, *Lawrence* did not undertake to enumerate a set of independent fundamental rights, nor did it characterize the liberty interest at issue in such discrete terms. But neither did the Court give any indication that its more generalized account of liberty encompassed the economic liberty of the *Lochner* era.[167] Moreover, to characterize *Lawrence* as embracing an abstracted conception of liberty is to overlook certain distinctive features of the Court's intimate association jurisprudence, features apparent in the *Lawrence* opinion itself.[168] In particular, a close reading of the majority opinion suggests that the Court was engaged in identifying and safeguarding a special form of liberty with close links to another overarching constitutional value—equality.

In several places, the *Lawrence* Court drew an express connection between liberty and equality. "When homosexual conduct is made criminal by the law of the State," the Court explained, "that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[169] Conversely, safeguarding an individual's liberty to engage in certain conduct helps protect him from undue discrimination: "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[170] In this respect, *Lawrence* can be understood as protecting a

---

164 *Lawrence*, 539 U.S. at 565; *see* Tribe, *supra* note 162, at 1917.

165 *See* Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140, 1151 (2004) ("Nowhere does the Court actually say it is abandoning the familiar substantive due process analysis. Such a major departure ought to be announced by the Court, not interpolated by others.").

166 Tribe, *supra* note 162, at 1938 n.174.

167 *See* Carpenter, *supra* note 165, at 1151–52 ("There are no references in the opinion to protecting economic liberties. . . . A Court about to embark on a new and highly controversial adventure into judicially mandated laissez-faire economics would at least drop a hint . . . stronger than simply using the word 'liberty' multiple times.").

168 *See Lawrence*, 539 U.S. at 564–76; Tribe, *supra* note 162, at 1938 n.174.

169 *Lawrence*, 539 U.S. at 575.

170 *Id.*

liberty interest in order to promote equality. The Court dealt not in liberty *simpliciter*, but in equality-reinforcing liberty.

To be clear, I am not suggesting that *Lawrence* should be viewed in formal terms as both an equal protection and a substantive due process case. Indeed, although the statute was challenged on both equal protection and due process grounds,[171] and although Justice O'Connor's concurring opinion was based exclusively on equal protection,[172] the majority disavowed any formal reliance on that ground.[173] But the Court did not eschew equal protection because it saw no equality issues in the case. Rather, as the Court made clear, it declined to decide the case under the Equal Protection Clause for fear that its opinion might be read too narrowly, as permitting antisodomy laws as long as they target heterosexual as well as homosexual conduct.[174] Immediately after making that formal doctrinal point, the Court, as described above, explicitly connected the liberty interest it was upholding to ideas about equality.[175] In this way, even though it did not rely on the Equal Protection Clause, *Lawrence* incorporated equality values into its analysis.

More broadly, a liberty-equality connection exists throughout the Court's substantive due process jurisprudence.[176] Indeed, certain of the Court's substantive due process decisions—*Roe*, for example—are probably best justified on both equality and liberty grounds.[177] The

---

171 *See id.* at 574.

172 *See id.* at 579 (O'Connor, J., concurring in the judgment) ("Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.").

173 *See id.* at 574–75.

174 *See id.* ("Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.").

175 *See id.* at 575.

176 *See* Tribe, *supra* note 162, at 1902–03 n.32 (stating that "equal protection and substantive due process [are] regularly interlocking and powerfully complementary sources of protection").

177 The idea that *Roe* is most justifiable on equality grounds is hardly new. For example, while she was a judge on the United States Court of Appeals, Ruth Bader Ginsburg argued that the Court should have decided *Roe* on equal protection grounds. *See* Ruth Bader Ginsburg, Essay, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375 (1985). Before that, Donald Regan proposed an equal protection argument focusing on "the law of samaritanism":

> It is a deeply rooted principle of American law that an individual is ordinarily not required to volunteer aid to another individual who is in danger or in need of assistance. In brief, our law does not require people to be Good Samaritans. I shall argue that if we require a pregnant woman to carry the fetus to term and deliver it—if we forbid abortion, in other words—we are compelling her to be a Good Samaritan. I shall argue further that if we consider the generally very limited scope of obligations of samaritanism under our law, and if we consider the special nature of the burdens imposed on pregnant women by laws forbidding abortion, we must eventually

freedom to make personal decisions about one's body and one's intimate associations helps secure one's status as an empowered, equal member of society. Put simply, equality is promoted by the protection of the liberties associated with procreative autonomy, bodily integrity, and intimate association.

In addition, the liberty-equality connection provides a ready means for distinguishing modern substantive due process doctrine from *Lochner*-era jurisprudence. Far from promoting equality, *Lochner* privileged a form of economic liberty that too often exacerbated social inequalities. As Professor Tribe has described, *Lochner* protected an "impersonal kind of contractual 'self-government'" that perpetuated "great inequalities of wealth and bargaining power" and stood as "a mockery, more than a model, of . . . democratic self-government."[178] Unlike *Lawrence*, *Lochner* protected an equality-defeating, not an equality-enhancing, form of liberty.

In sum, if *Lawrence* reflects a new sympathy for a presumption of liberty, it is not the presumption Professor Barnett has in mind. Rather, *Lawrence* is best understood as according special attention to liberty-based claims that also seek to promote equality. And in that respect, *Lawrence* highlights a liberty-equality connection implicit in much of the Court's work. By focusing on that connection, we may be able to pursue a jurisprudence of liberty that, unlike Professor Barnett's libertarian account, is both grounded in existing constitutional doctrine and tailored to the freedoms that the modern Court seems most inclined to protect.

## CONCLUSION

The perpetual challenge of constitutional theory is to provide analytical rigor and insight while remaining relevant to constitutional practice.[179] Analytically, *Restoring the Lost Constitution* certainly delivers. But by proceeding from an ideology of pure liberal individualism unsupported by constitutional doctrine, by adopting a method of originalist constitutional interpretation to the exclusion of a more pluralistic approach, and by championing a unitary view of liberty that

---

conclude that the equal protection clause forbids imposition of these burdens on pregnant women.

Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1569 (1979). Regan's argument built on Judith Jarvis Thompson's highly influential article, *A Defense of Abortion*, 1 PHILOSOPHY & PUB. AFF. 47 (1971).

178 Tribe, *supra* note 162, at 1939.

179 Constitutional theory's record in this regard is not particularly encouraging. *See* Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837, 1838–39 (1997) ("The language of constitutional theory is now unspeakable by practitioners of constitutional law—unspeakable both in the sense of not being understood and in the sense of not contributing to real debates about constitutional law.").

eschews important distinctions in how the Court and the country have conceived of liberty over time, Professor Barnett has written a book whose enduring relevance is less certain.