

## DOES THE CONSTITUTION EMBODY A “PRESUMPTION OF LIBERTY”?

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Review of *Restoring the Lost Constitution: The Presumption of Liberty* by Randy Barnett, Princeton University Press (2004).

The constitutional limits on governmental power have been steadily eroding since the Founding Generation.<sup>1</sup> While the prevailing view is that the individual rights provisions of the Constitution have been given an increasingly broad construction, in many respects the Supreme Court has actually cut back on the scope of such guarantees. Moreover, it is indisputable that the structural provisions of the Constitution have been subject to significant erosion. Provisions that the Founders understood to contain implicit limitations on enumerated governmental powers, such as the Commerce Clause, have been largely unenforced. Only in recent years have courts placed renewed emphasis on the structural guarantees embodied in the Constitution.

Randy Barnett’s recent book, *Restoring the Lost Constitution: The Presumption of Liberty*, represents a significant response to the judicial failure to uphold these constitutional guarantees.<sup>2</sup> Professor Barnett argues that a “presumption of liberty” runs throughout the Constitution and requires judicial scrutiny of the propriety of both the means and ends of legislative and executive action. He observes, however, that this presumption, which the Framers incorporated into the Constitution, has since been abandoned. Thus, according to Barnett, in some circumstances, the Supreme Court has held that “the Constitution did not mean what it apparently said,” and in others the Court has “read out of the Constitution” “express right[s]” of which it “disapproved.”<sup>3</sup> The result has been a presumption in favor of the constitutionality of legislation—

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1. See ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM 15–31 (2001) (discussing erosion of the federal structure).

2. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

3. *Id.* at ix.

the exact opposite, according to Barnett, of what the Framers originally intended.<sup>4</sup>

In his book, Professor Barnett examines the erosion of these constitutional limitations. He claims the erosion “started early with the Necessary and Proper Clause, continued through Reconstruction with the destruction of the Privileges or Immunities Clause, and culminated in the post–New Deal Court that gutted the Commerce Clause and the scheme of enumerated powers affirmed in the Tenth Amendment.”<sup>5</sup> While many of his observations regarding the erosion of these fundamental guarantees are on point, it is less clear that the presumption of liberty that he proposes as the remedy is firmly rooted in the original meaning of the Constitution.

This review evaluates Barnett’s thesis regarding the constitutional presumption of liberty. Part I analyzes Barnett’s discussion of various theories of constitutional legitimacy. While Barnett critiques traditional theories of legitimacy, such as those based upon the consent of the governed, his analysis is not wholly convincing. Principles of natural law, to which Barnett otherwise adheres, provide support for these traditional theories. And if such theories suffice, there is no need to supplant them with alternative grounds such as the theories underlying Barnett’s presumption of liberty.

Part II discusses Professor Barnett’s analysis of interpretive methodologies. Professor Barnett sets forth a spirited defense of originalism and, in particular, advocates reliance upon the original meaning of constitutional provisions as understood by their ratifiers. In the process, he distinguishes an approach based upon the original intent of the Constitution’s drafters, an approach he considers inferior. While Professor Barnett and many other commentators have attached particular significance to this distinction, in practice it may not be altogether meaningful. The reality is that, in most instances, original meaning and original intent will give the same answer to questions regarding constitutional construction.

Finally, Part III addresses the main thesis of Professor Barnett’s work—that, when properly interpreted, the original Constitution and its subsequent amendments embody a presumption of liberty that should be enforced by the courts. While Professor Barnett’s interpretation of the various constitutional provisions he addresses may have some merit, it is uncertain that one can derive from them an across-the-board presumption of the type he describes.

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4. See *id.* at 228 (concluding that the “expansive reading of the Necessary and Proper Clause was facilitated doctrinally by adopting a presumption of constitutionality in favor of congressional judgment”); *cf. id.* at 260 (“A Presumption of Liberty would place the burden on the government to show why its interference with liberty is both necessary and proper rather than, as now under Footnote Four-Plus, imposing a burden on the citizen to show why the exercise of a particular liberty is a ‘fundamental right.’”).

5. *Id.* at 1.

In sum, the presumption of liberty that Professor Barnett outlines may represent an oversimplification of the original meaning of the Constitution and its subsequent amendments. There is evidence in the historical record suggesting that a more nuanced approach may be required. Moreover, from a theoretical perspective, such a presumption may not be necessary to support the Constitution's legitimacy. To the extent traditional theories of constitutional legitimacy, such as popular consent, withstand Professor Barnett's critique, there is no need for a constitutional presumption of liberty.

### I. CONSTITUTIONAL LEGITIMACY

Any theory of constitutional interpretation ultimately rests upon a theory of political authority.<sup>6</sup> In establishing governmental structures, there must be some rule or theory to determine the source of authority regarding how society will be governed and by whom. Professor Barnett's analysis therefore begins logically by presenting his own theory of constitutional legitimacy, one that differs dramatically from traditional notions.

Barnett attacks the traditional theory of constitutional legitimacy based on the consent of the governed, or "popular sovereignty,"<sup>7</sup> arguing that the "consent of the governed cannot justify a duty to obey the laws."<sup>8</sup> According to Barnett, "the argument from popular sovereignty or consent of the governed fails to legitimate legal commands in the absence of unanimous consent."<sup>9</sup> He asserts that the traditional theory fails because there are always members of society who never consented to the laws that have been established or, in fact, vigorously disagree with them. Such problems are only exacerbated when one considers the temporal aspect of constitution making. Established constitutions may have been created by those who are long deceased. As a result, there may be no member of society remaining who engaged in any affirmative act of consent.

Barnett proposes his own theory to address these perceived problems with legitimacy based upon consent. In the process, he argues that his theory is consistent with our own Constitution. Barnett first observes that the Framers of the original Constitution and the Bill of Rights in-

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6. See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 3 (1999) ("The justification for adopting any particular interpretive method depends on external reasons of normative political theory.").

7. BARNETT, *supra* note 2, at 13.

8. *Id.* at 9; *see also id.* at 11 ("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.'").

9. *Id.* at 53.

tended to guarantee certain natural rights.<sup>10</sup> He asserts that this motivation extended to those responsible for the next major revision of the Constitution—the Reconstruction Amendments enacted after the Civil War.<sup>11</sup> He concludes that a constitution such as ours that contains “adequate procedures to protect these natural rights” is “legitimate even if it was not consented to by everyone.”<sup>12</sup>

Yet, in attacking the traditional grounds for constitutional legitimacy, Professor Barnett may have overlooked one aspect of the natural law theories that he asserts underlie the constitutional structure.<sup>13</sup> The scholars upon whom the Framers relied made clear that the consent of each individual member of society was not required to support a constitution’s legitimacy.<sup>14</sup> Rather, these writers maintained that it is a majority of the members of society that must consent and thereby confer legitimacy. John Locke, in describing the theoretical foundation of society, for example, noted that members of society consented to “submit to the determination of the *majority*”:

[E]very Man, by consenting with others to make one Body Politick under one Government, puts himself under an Obligation to every one of that Society, to submit to the determination of the *majority*, and to be concluded by it; or else this *original Compact*, whereby he with others incorporates into *One Society*, would signifie nothing, and be no Compact, if he be left free, and under no other ties, than he was in before in the State of Nature.<sup>15</sup>

Emmerich Vattel, in his influential treatise *The Law of Nations*, similarly made clear that the authority to change a constitution rested with a majority of the members of society:

[I]t is unquestionable that a Nation which finds its very constitution unsuited to it has the right to change it.

No difficulty arises when the whole Nation unanimously desires the change. But, we are asked, what must be done if the Nation is divided? In the ordinary affairs of the State the opinion of the majority must pass unquestioned as that of the whole people; otherwise it would be impossible for the society to pass any measures at all. By like reasoning it appears that a Nation can change the constitution of the State by a majority of votes; and provided there be nothing in the change which can be regarded as contrary to

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10. See *id.* at 54 (“[T]he basic concept of natural rights was clear: Natural or inherent rights were the rights persons have independent of those they are granted by government and by which the justice or propriety of governmental commands are to be judged.”).

11. *Id.* at 60 (“This conception of natural rights as liberty rights was not abandoned after the founding period. It was held, perhaps even to a greater degree, by the framers of the Fourteenth Amendment.”).

12. *Id.* at 4.

13. See *id.* at 21 (“In the end, we return to the problem of inferring the consent of the minority or of the individual from the consent of the majority. Consent simply does not work that way.”).

14. See *id.* at 20.

15. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 332 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (emphasis in original).

the very act of civil association, and to the intentions of those who, thus united together, all are bound to conform to the will of the majority.<sup>16</sup>

Such scholars therefore rejected the premise that unanimous consent is required to ensure the legitimacy of a constitution. Rather, the theorists who outlined the scope of the natural rights that Barnett believes are guaranteed under our own Constitution also viewed constitutional legitimacy as flowing from the consent of the majority.

If the consent of only a majority of the members of society is required for constitutional legitimacy, and the constitutional regime allows for amendment of the constitution if the views of the majority change over time, then the potential problem Professor Barnett identifies arguably disappears. In any generation, a majority of society chooses either affirmatively by amendment, or implicitly through inaction, to alter or preserve the constitutional regime under which it lives. This action, or lack thereof, establishes the consent necessary for constitutional legitimacy.

While Barnett critiques the notion that constitutional legitimacy can rest on mere “acquiescence,”<sup>17</sup> acquiescence is not the issue. Our Constitution was ratified by an affirmative action, not mere acquiescence. Subsequent generations have the power to reverse that initial affirmative action through the amendment process. Moreover, Barnett’s rejection of acquiescence as a basis for constitutional legitimacy is itself subject to question. A failure to act when one possesses the power to do so can have the same implications as an affirmative act. Thus, the traditional view of constitutional legitimacy based upon the consent of the government withstands Professor Barnett’s critique.

These traditional prerequisites for legitimacy are expressly embodied in our own Constitution. The Constitution bases its legitimacy on the authority of “We the People.”<sup>18</sup> Its ratification and amendment, while not by simple majority, are based on the same natural law principles. Just as the federal structure mandated a constitution based upon the consent of both the people and the states, the Framers envisioned a majority of both the people and the states as necessary to authorize constitutional change.<sup>19</sup> Accordingly, the very natural law principles upon which Pro-

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16. EMMERICH DE Vattel, *THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, NATURAL LAW APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 76 (Joseph Chitty trans., 1863) (1833).

17. See BARNETT, *supra* note 2, at 23–24. Barnett’s critique can only end in a *reductio ad absurdum*, as Barnett’s argument would mandate that every member of society provide affirmative consent to the Constitution at every moment of its existence.

18. U.S. CONST. pmbl.

19. See generally Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 255 (1997) (discussing compound nature of the Constitution); THE FEDERALIST NO. 39, at 186–87 (James Madison) (Terence Ball ed., 2003) (“Were [the Constitution] wholly national, the supreme and ultimate authority would reside in the

fessor Barnett relies in interpreting the Constitution's guarantees of individual rights suggest that the traditional grounds are sufficient to confer constitutional legitimacy, and in turn obviate the need for an alternative theory.

## II. INTERPRETIVE METHODOLOGY

Having outlined his own theory of constitutional legitimacy, Professor Barnett proceeds to discuss the appropriate methodology for interpreting the Constitution, a topic that in recent years has been the subject of intense debate.<sup>20</sup> Professor Barnett begins his analysis by summarizing this debate and the ascendancy of originalist approaches to constitutional interpretation. He makes a convincing case for originalism based on his own theory of constitutional legitimacy—the existence of constitutional procedures designed to protect natural liberties.<sup>21</sup>

Originalism as an interpretive methodology is often attacked as allowing the “dead hand” of the past to govern current generations that were not involved in drafting or ratifying the constitutional text.<sup>22</sup> Similarly, scholars have criticized originalism on the ground that the original meaning of the Constitution is often indeterminate or difficult to ascertain.<sup>23</sup> Nonetheless, such objections to originalism often rest on a weak foundation.<sup>24</sup> Indeed, Barnett notes that “many scholars oppose original-

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majority of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government.”).

20. See, e.g., OFFICE OF LEGAL POLICY, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK (1987); WHITTINGTON, *supra* note 6; Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669 (1991); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987).

21. See BARNETT, *supra* note 2, at 85, 88 (maintaining that “originalism is entailed by a commitment to a written constitution, which is a vital means of subjecting lawmakers to limits on their law-making powers”).

22. See *id.* at 91 (“[E]ven were the Constitution somehow binding when adopted, it was adopted by long-dead men who cannot rule us from the grave.”). The framers did not view this as a significant problem. See Nelson, *supra* note 20, at 543 (“[T]he framers were aware of the dead-hand problem, but they seem to have thought of it as a *drafting* issue rather than an *interpretive* issue. They proposed to solve the problem not by inviting future generations to read new meanings into the Constitution, but rather by writing a Constitution whose permanent and fixed meaning would be ‘calculated for all circumstances.’”). Similarly, certain modern commentators have argued that the “dead hand” argument has little merit and, in fact, applies equally to many different interpretive theories. See, e.g., WHITTINGTON, *supra* note 6, at 43–44 (“Originalism . . . does not seek to bind the nation to the ideals and understandings of the dead past but to ensure that any new values are developed and articulated by current, living majorities.”); *id.* at 203 (“Although the dead hand label rhetorically biases the argument against historically oriented methods such as originalism, the logic of the argument goes against any interpretive method that looks outside the desires of current majorities.”).

23. See WHITTINGTON, *supra* note 6, at 68–76.

24. Professor Whittington observes, for example, that “[n]early all federal appellate court cases . . . are decided without filed dissents, suggesting that there does in fact exist a consensus of informed opinion on the application of the law in most instances.” *Id.* at 41. Professor Whittington also

ism: not because it cannot be done, but because the original meaning of the text *can* be ascertained and they find this meaning to be inadequate or objectionable.”<sup>25</sup>

In defending originalism from such attacks, scholars have distinguished among different variants of the theory.<sup>26</sup> In particular, they have favored reliance on the original meaning of the text as understood by the ratifiers rather than reliance on the original intent of the constitutional drafters. Original meaning is more justifiable based on standard democratic theory. The ratifiers of the constitutional text possess the ultimate political authority upon which the Constitution is based.<sup>27</sup> Moreover, as Professor Barnett observes, the historical record demonstrates that the Founding Generation understood this to be the appropriate interpretive approach.<sup>28</sup> Even critics of originalism have “persuasively establish[ed] the founders’ commitment to original meaning originalism.”<sup>29</sup>

Nonetheless, the practical differences between original meaning and original intent may be negligible.<sup>30</sup> First, in most instances the understanding of the drafters of the Constitution should be the same as the ratifiers. After all, drafters of constitutions endeavor to convey meaning in a manner that will be understood by members of the community in

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notes that “[a]lthough the historical record is hardly perfect, there is little reason for concluding that it is generally radically deficient. Unlike private contracts and literary works, the constitutional debates were extensive, public, and documented.” *Id.* at 162.

25. BARNETT, *supra* note 2, at 96; *see also* WHITTINGTON, *supra* note 6, at xi (“Scholars concerned with theories of constitutional interpretation have been too quick to dismiss originalism.”); *id.* at 160 (“Originalism has been plagued with a vast swarm of indictments against it. Perhaps the energy and desperation of the continuing effort to bury it are indicative of the strength and vitality of the idea.”).

26. BARNETT, *supra* note 2, at 93 (noting that the “shift to original public meaning obviates some, but not all, of the most telling practical objections to originalism and can be very disappointing for critics of originalism—and especially for historians—when they read original meaning analysis”); *see also* WHITTINGTON, *supra* note 6, at 163 (“The goal of originalism is not to imagine the subjective intent of members of the ratifying convention but to seek evidence of the objective intent that informs the meaning of the text.”); Nelson, *supra* note 20, at 554 (“To be sure, some originalists have indeed portrayed originalism as a search for the actual mental states of the people who participated in framing or ratifying the constitutional provisions in question. . . . But more recent originalist rhetoric has deemphasized the (potentially conflicting) views of individual participants in the process of framing and ratification. Instead of privileging the participants’ views, most originalists now urge interpreters to ask how an objectively reasonable member of the founding generation—applying the grammatical rules and other interpretive conventions of the day—would have understood the Constitution.”).

27. BARNETT, *supra* note 2, at 98 (noting that “antipathy to interpretation based on the original intent of the framers was a logical extension of this earlier argument that it was the ratifiers who enacted the Constitution, not its framers”).

28. Professor Barnett cites, for example, James Madison’s famous rejection of the debates of the Constitutional Convention as authority for interpreting the Constitution. *Id.* However, Barnett further observes that “Madison was . . . asserting not the complete irrelevance of the records of the Convention, but only denying their authoritative character. The public meaning of the words of the Constitution, as understood by the ratifying conventions and the general public, could be gleaned from a number of sources, including the records of the Convention, but where those intentions differed from the public understanding, it was the public meaning that should prevail.” *Id.* at 98–99.

29. *Id.* at 96.

30. *Cf.* Nelson, *supra* note 20, at 555 (“In theory, one can imagine differences between ‘original intention’ and what originalists think of as ‘original meaning.’ But in practice, the two concepts surely will match up fairly closely.”).

which the constitution will govern.<sup>31</sup> While commentators often point to the theoretical possibility that the drafters may attribute some “secret meaning” to the text that is not readily apparent,<sup>32</sup> actual examples of such hidden meaning are rare.<sup>33</sup> Accordingly, the drafters’ original intent may serve as evidence concerning the original meaning likely attributed to the Constitution by the ratifiers.<sup>34</sup>

Second, certain rules of construction may effect a de facto merger of original meaning and original intent. It is not unreasonable to suppose, for example, that ratifiers of a constitutional provision may delegate some measure of authority to the drafters of the constitutional text in the expectation that courts will rely upon such evidence as one source of authority in interpreting the constitution. Ratifiers understand that constitutions are legal documents that may use terminology with well-established meaning within the legal community. For example, the ratifiers of the Due Process Clause may not have fully comprehended the legal definition of “due process,” yet they may have understood that this phrase was a legal term of art with an established meaning within the legal community that could be applied by the courts in interpreting the constitutional text.

Similarly, the ratifiers may have anticipated that where constitutional terminology is not completely clear, courts would turn to the specific understanding of the drafters to aid in their interpretation. The ratifiers may have expected that in resolving ambiguity, courts would rely upon the original intent as one source of evidence concerning the meaning of the constitutional text. Thus, an original meaning approach to constitutional interpretation may collapse and become one with original intent in certain circumstances where those with authority to approve the Constitution have authorized the courts to rely upon the drafters’ original intent. While there may be reasonable debate over appropriate interpretive conventions,<sup>35</sup> under some such regimes the difference be-

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31. See WHITTINGTON, *supra* note 6, at 60 (“The Constitution had to be drafted so as to be comprehensible to the public that must give effect and authority to it. In ratifying the document, the people appropriated it, giving its text the meaning that was publicly understood.”).

32. See generally Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1115 (2003) (“The conventional wisdom in the legal academy appears to be that it borders on ‘cheating’ to use the secret drafting history of the Constitution as a permissible extratextual source of meaning.”).

33. See *id.* at 1188–89 (arguing that “the ‘mental states’ of the Framers may be thought to be at least accent evidence of the original public meaning of the Constitution’s provisions”).

34. See WHITTINGTON, *supra* note 6, at 36 (“Granting the priority of . . . direct evidence of the intent of the ratifiers, then additional information from the drafting convention, the popular debates surrounding ratification, and contemporary commentary are allowable as indicators of ratifying intent. The ultimate value of such additional sources, however, is merely evidentiary in the effort to elucidate the intent of the ratifiers.”).

35. See Nelson, *supra* note 20, at 522 (“The applicable conventions were not fully settled at the time of ratification, and the Constitution’s ‘meaning’ was correspondingly open to even more debate than originalists usually concede.”).

tween original meaning and original intent may not be particularly significant.

In any event, Professor Barnett's particular defense of originalism and, more specifically, his reliance upon original meaning, depends heavily upon his theory of constitutional legitimacy. Barnett contends that originalism furthers the implementation of constitutional provisions that provide procedural guarantees for natural liberty rights—the prerequisite, according to Barnett, for constitutional legitimacy:

[A]ssuming that the lawmaking process initially established by a written constitution is legitimate, the fact that a constitution says the right things in writing helps assure that these provisions will be respected over time—an assurance that an unwritten constitution or a written constitution that can be freely modified by legislative practice or judicial opinion cannot provide.<sup>36</sup>

Professor Barnett's observations are correct in the sense that a written constitution provides an effective mechanism for guaranteeing liberty. Yet, his arguments against other justifications for originalism are not fully convincing. To the extent one rejects Barnett's critique of the traditional theory of constitutional legitimacy based on the consent of the governed, one may also reject his critique of the traditional defense of originalism. An originalist approach to constitutional interpretation is required because it gives force to the will of those with political authority—the Constitution's ratifiers.

Indeed, it is difficult to envision how alternative theories can be justified. In many contexts, even nonoriginalists promote the application of the same originalist approach they reject when interpreting the Constitution. Many expect, for example, that the very judicial opinions that adopt a nonoriginalist methodology in interpreting the Constitution will be interpreted in strict accordance with the intent of the opinions' drafters.<sup>37</sup> Similarly, academic commentators ironically rail against the "indeterminacy" of the constitutional text in articles and books to which they fully expect their readers to attribute a determinate meaning.<sup>38</sup> There is, in sum, an inescapable logic supporting adherence to original meaning.<sup>39</sup>

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36. BARNETT, *supra* note 2, at 117.

37. See Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1287–88 (1997) (observing that commentators such as Ronald Dworkin had vigorously criticized decisions like *Bowers v. Hardwick* on the grounds that they "do not faithfully carry on the spirit of earlier decisions, like *Griswold* or *Roe*.").

38. Cf. WHITTINGTON, *supra* note 6, at 97 ("Since words do not have some 'natural' meaning but gain meaning through the shared experiences of interacting individuals, the very use of language assumes that the same meaning is cognizable in multiple minds.").

39. Professor Whittington observes that the very notion of language presumes an ability to communicate intent: "Wittgenstein's analysis of the impossibility of a private language elucidates, among other things, the fact that language is essentially communicative. The very idea of a language that attempts to avoid communication, that is, a private language that has no known or stable intersubjective referent, is nonsensical. If language is to communicate a meaning, that meaning must not only be available to others but must also be available to others by means of the language used." *Id.* at 59.

## III. THE PRESUMPTION OF LIBERTY

Nonetheless, Barnett's particular application of originalism to specific provisions of the Constitution and derivation of an across-the-board presumption of liberty is open to question. While his observation that the Framers of the original Constitution, the Bill of Rights, and the Fourteenth Amendment were strongly influenced by natural law theories is well supported, his conclusion that they embodied a presumption in the Constitution in favor of liberty does not necessarily follow.

Barnett relies upon certain specific provisions of the Constitution that he claims evince such a presumption. He finds, for example, a guarantee of natural rights in the Ninth Amendment, which references the reservation of rights "retained by the people."<sup>40</sup> According to Barnett, these retained rights are readily ascertainable in the "framers' theoretical writings on natural rights that were contemporaneous with the Ninth Amendment."<sup>41</sup>

Barnett further quotes the amendment's admonition that Congress not "deny or disparage" such rights as embodying a presumption that requires a showing that legislative or executive action interfering with these retained rights has an adequate justification:

Given its original meaning, the Ninth Amendment is best construed as establishing [a] constitutional presumption in favor of . . . rightful activities. This presumption requires the executive branch of the government to justify to the judiciary any legislative or executive interference. The fact that such legislation reflects a majority preference is insufficient to overcome the presumption established by the Ninth Amendment. Moreover, the bare assertion that such legislation serves a legitimate legislative end would also be insufficient.<sup>42</sup>

The presumption calls for judicial inquiry into not only the legitimacy of the ends of legislative or executive action but also the means by which the other branches seek to accomplish these ends.

Moreover, according to Barnett, this presumption did not first emerge in the Bill of Rights. Rather, it is evident in the original Constitution, and in particular, the Necessary and Proper Clause of Article I.

The Necessary and Proper Clause commands that all laws passed by Congress shall be proper. When a government restriction of liberty is challenged by an affected citizen, a Presumption of Liberty means that the citizen wins, unless the government can jus-

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He notes the following inherent problem with theories of constitutional indeterminacy: "Each theory of indeterminacy assumes that the text can be logically separated from the context of its writing and from the intent of the author, that the text is somehow autonomous. This assumption is flawed. The written text is identical to the author's intent; there can be no logical separation between them and thus no space for an autonomous text capable of adopting new contexts." *Id.* at 94.

40. U.S. CONST. amend. IX.

41. BARNETT, *supra* note 2, at 256.

42. *Id.* at 261.

tify its restrictions as proper. A “proper” exercise of power is one that is within the jurisdiction of the branch or department in question and that does not violate the rights retained by the people.<sup>43</sup>

The clause, Barnett asserts, requires judicial scrutiny of both the means and ends of legislative and executive actions. The judiciary must determine “whether or not a proposed action of government that restricted the liberty of the people was necessary, and therefore within the powers of Congress to enact” as well as “some assessment of whether the means chosen were essential to the pursuit of an enumerated end.”<sup>44</sup>

This presumption, Barnett argues, is not only consistent with the constitutional text, but also required under his particular theory of constitutional legitimacy: “When consent is lacking, . . . a law must be both necessary to the protection of the rights of others and proper insofar as it does not violate the rights of those upon whom it is imposed if it is to bind in conscience.”<sup>45</sup>

Similarly, Barnett points to the Privileges or Immunities Clause of the Fourteenth Amendment as applying the presumption of liberty to the state governments.<sup>46</sup> He argues that the Privileges or Immunities Clause includes protections both for natural rights and “additional rights.”<sup>47</sup> In support of this interpretation of the clause, he points to the drafters’ reliance on *Corfield v. Coryell*<sup>48</sup> and its listing of the “privileges” and “immunities” guaranteed under Article IV, Section 2 of the original Constitution.<sup>49</sup>

Barnett concludes that the debates over the Fourteenth Amendment show that “‘privileges or immunities’ was a reference both to inherent or natural rights and to various rights or privileges created by the

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43. *Id.* at 274.

44. *Id.* at 163–64; *see also id.* at 189 (“Wholly apart from the need to assess a measure’s necessity, Congress cannot be the sole judge of whether it is acting within its powers because that would give it license to pursue objects or ends that are beyond its powers. In other words, an otherwise necessary law can still be improper if it employs improper *means*—such as by prohibiting or discouraging rather than regulating and facilitating rightful conduct—or is intended by Congress to accomplish an improper *end*—such as an end not enumerated in the Constitution.”); *id.* at 336 (“Taking the First Amendment as a model, when law is used to accomplish a proper purpose by restricting the liberties of the people, the Presumption of Liberty imposes a burden on those defending the necessity of these restrictions to show two things: First, the government must show that there is a sufficient ‘fit’ between the liberty-restricting means it chose and the proper purposes it was seeking to attain. Second, the government must show that there were no less restrictive alternatives to the liberty-restricting means that were chosen.”); Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 *DUKE L.J.* 267, 288 (1993).

45. BARNETT, *supra* note 2, at 51; *see also id.* at 9 (contending that “a constitutional regime is legitimate only if it provides sufficient assurances that the laws it produces are ‘necessary and proper’—the standard for acts of Congress specified in the Constitution itself”).

46. *See id.* at 191–223.

47. *Id.* at 61.

48. 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).

49. *See* BARNETT, *supra* note 2, at 63; *see also* U.S. CONST. art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

positive law of particular governments.”<sup>50</sup> He further contends that just as the Necessary and Proper Clause and the Ninth Amendment impose constraints on both the means and ends of federal legislation, the Privileges or Immunities Clause authorizes federal courts to “scrutinize the necessity and propriety” of state legislation.<sup>51</sup>

However, reliance on *Corfield* as evidencing an intent on the part of the Framers to guarantee certain positive law rights in addition to fundamental natural rights may be somewhat misleading. Among the privileges enumerated by Justice Bushrod Washington in *Corfield* were certain rights that Congress indicated were expressly excluded from the scope of the Privileges or Immunities Clause.<sup>52</sup> For example, *Corfield* listed the “elective franchise” as one of the privileges or immunities of citizenship, yet Congress made clear that it had not conferred any such right under the Fourteenth Amendment.<sup>53</sup> The debates are filled with statements indicating that Congress did not intend to guarantee the right to vote.<sup>54</sup> Indeed, it was for this very reason that Congress subsequently drafted the Fifteenth Amendment.<sup>55</sup> Thus, while Barnett is correct in his observation that the Privileges or Immunities Clause sought to guarantee certain natural law rights, it is less clear that it guaranteed “the positive law of particular governments.”

Rather, a more plausible interpretation is that Congress intended the clause to protect only fundamental natural law rights while perhaps guaranteeing equality in the way such fundamental rights were regulated

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50. BARNETT, *supra* note 2, at 65–66 (“The quotations from Justice Washington and others suggest that ‘privileges or immunities’ is a broader term including both natural rights or inherent rights as well as those particular ‘positive’ procedural rights created by the Bill of Rights.”).

51. *Id.* at 192; 222 (“At the state level, an act must be within the police powers of a state, while at the national level it must be within an enumerated power. As Madison had urged, they began requiring of legislation a showing of actual means-end fit, rather than merely deferring to legislative judgment that measures were necessary to achieve a proper purpose.”).

52. See CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (indicating that the right to vote is not within the scope of the Privileges or Immunities Clause).

53. *Corfield*, 6 F. Cas. at 552.

54. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (“[T]he first section of the proposed amendment does not give . . . the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law.”); see also WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 125–26 (1988) (“The statement most frequently made in debates on the Fourteenth Amendment is that it did not, in and of itself, confer upon blacks or anyone else the right to vote.”); Earl M. Maltz, *A Minimalist Approach to the Fourteenth Amendment*, 19 HARV. J.L. & PUB. POL’Y 451, 453 (1996) (“[T]he historical record is clearly inconsistent with the view that the Fourteenth Amendment was understood to protect political rights. The committee report accompanying the Fourteenth Amendment explicitly stated that the amendment would have no effect on state authority over voting rights.”); cf. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (“To be sure we all agree, and the great body of the people of this country agree, and the committee thus far in reporting measures of reconstruction agree, that the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States.”).

55. See U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”); AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 273 (1998) (discussing drafting and ratification of the Fifteenth Amendment).

by the state governments. The contemporaneous case law under the Article IV, Section 2 Privileges and Immunities Clause made such a distinction, as did members of Congress when debating the amendment.<sup>56</sup> Moreover, the dissenters in *The Slaughter-House Cases* followed this authority, emphasizing that the scope of judicial review would be limited and thus result in only “a slight accumulation of business in the Federal courts” given that “the privileges and immunities protected are only those [that are] fundamental.”<sup>57</sup> Accordingly, the historical record suggests that the Fourteenth Amendment did not guarantee positive law rights but rather only applied to those rights that were deemed fundamental.<sup>58</sup>

In any event, as Barnett observes, the judicial construction of these provisions has been anything but faithful to the original meaning. Courts have been hesitant to rely upon the Ninth Amendment as a source of unenumerated rights, much less a presumption in favor of striking down legislation that is not sufficiently justified. Courts have similarly abandoned the Necessary and Proper Clause as a potential limitation on congressional power. Rather, the clause has been interpreted as actually expanding the scope of national power. Finally, the Court significantly limited the scope of the Privileges or Immunities Clause in *The Slaughter-House Cases*, holding that the clause merely guarantees certain rights of “national” citizenship.<sup>59</sup> While the Fourteenth Amendment had a brief resurgence as a means for scrutinizing the propriety of governmental action culminating in the Supreme Court’s decision in *Lochner v. New York*,<sup>60</sup> that decision was the subject of widespread criticism and was quickly reversed.<sup>61</sup>

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56. See generally Douglas G. Smith, *The Privileges and Immunities Clause of Article IV Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809 (1997) (discussing case law under the Privileges and Immunities Clause of Article IV prior to ratification of the Fourteenth Amendment).

57. 83 U.S. 36, 124 (1872) (Bradley, J., dissenting).

58. See generally Douglas G. Smith, *A Lockean Analysis of Section One of the Fourteenth Amendment*, 25 HARV. J. L. & PUB. POL’Y 1095 (2002) (presenting evidence regarding the original meaning of Section One of the Fourteenth Amendment and the scope of the rights afforded protection under that provision).

59. See BARNETT, *supra* note 2, at 195 (citing 83 U.S. (16 Wall.) 36 (1873)). *But cf.* Saenz v. Roe, 526 U.S. 489 (1999) (relying in part on the Privileges or Immunities Clause in striking down state residency requirements for welfare benefits).

60. 198 U.S. 45 (1905).

61. According to Barnett, “[i]n *Lochner* and other such cases, the Progressive Era Supreme Court began to require proof that both federal and state legislatures restricting the retained liberties of the people were actually pursuing a legitimate purpose rather than merely purporting to do so.” BARNETT, *supra* note 2, at 222; see also C. Ian Anderson, Book Note, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*, 92 MICH. L. REV. 1438, 1438 (1994) (reviewing HOWARD GILMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993)) (“The by now almost mythical Supreme Court decision in *Lochner v. New York* has long been the centerpiece of a series of debates over the evils of judicial activism, the abuse of judicial power, and the legitimacy of substantive due process—debates that are still very much alive today.”).

Whether or not the current judicial constructions of such provisions have any merit, the libertarian aspects of Barnett's theory may not be completely supportable.<sup>62</sup> In particular, an across-the-board presumption of liberty may not be appropriate because it would invade the states' traditional regulatory authority. Both during the Founding Period and later when the Fourteenth Amendment was ratified, there was an understanding that the states and the federal government possessed the authority to regulate citizens' fundamental rights.<sup>63</sup> Their regulatory authority, by necessity, entailed the power to curtail citizens' liberty. Accordingly, a blanket presumption of liberty may not always be appropriate.

At times, Barnett himself recognizes the traditional limits on the exercise of fundamental rights. He notes, for example, that "[a]ncient common law torts, such as fraud and defamation, provide boundaries beyond which the rightful exercise of free speech may not go. If speech is fraudulent—which I hasten to add is not the same as false—it is wrongful and may be prohibited, not merely regulated."<sup>64</sup> Yet, he arguably downplays the scope of the state's power to regulate for the moral good of the community. For example, laws against obscenity, incest, and other behaviors or activities traditionally considered morally objectionable were never thought to be unconstitutional even though they involved prohibiting certain activities. Yet, Barnett's narrow definition of the state's regulatory power could be read to forbid any such restrictions.

Barnett gives a particularly libertarian definition of the state's power to regulate citizens' conduct that may be at odds with the historical evidence. Barnett asserts that "when the rightful exercise of freedom involves more than one person, it can be 'regulated' or made regular to facilitate its exercise and, if necessary, to protect the rights of others."<sup>65</sup> He then ties this definition to his presumption of liberty by concluding that "laws that are necessary to prohibit wrongful or regulate rightful activity would satisfy the Presumption of Liberty. Laws that prohibit or unnecessarily regulate rightful behavior would not."<sup>66</sup> Barnett calls this a "Lockean theory" of the police power and suggests that it "is generally consistent with the conception of natural rights to which the framers of the Constitution and Fourteenth Amendment adhered."<sup>67</sup>

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62. See BARNETT, *supra* note 2, at 356 ("One thing is certain. The original meaning of the entire Constitution, as amended, is much more libertarian than the one selectively enforced by the Supreme Court. Far from wishful thinking, this conclusion is compelled by the evidence of original meaning presented here.").

63. See Thomas B. McAfee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 WAKE FOREST L. REV. 747, 788 (2001) ("A central motivation of those who drafted and ratified the Fourteenth Amendment was to combine federal empowerment to protect the civil rights of the freedmen with a structure that did not altogether shift the basic power to regulate these rights away from the states.").

64. BARNETT, *supra* note 2, at 261.

65. *Id.* at 262; see also *id.* at 327 (explaining that the police power of the states was understood as "the legitimate authority of states to regulate rightful and prohibit wrongful acts").

66. *Id.* at 262.

67. *Id.* at 328. Barnett summarizes the state's police power as follows:

However, Barnett's formulation of the government's legitimate regulatory authority may not be consistent with all of the historical evidence, particularly with respect to the states' regulatory power. Unlike the federal government, state governments are not bound by a Necessary and Proper Clause. Accordingly, it is not immediately clear from the Constitution that the means and ends of state regulations must be subjected to scrutiny by the courts. Rather, the Fourteenth Amendment merely declares that states shall not "abridge" the privileges or immunities of citizens, nor deny them due process or equal protection.

Indeed, the *Slaughter-House* dissenters, upon whom Barnett relies, arguably had a broader conception of states' regulatory power. The dissent declared, for example, that "[t]he right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted."<sup>68</sup> Instead of applying an across-the-board rule that a state must not prohibit "rightful behavior," the dissent applied a well-established, bright-line, common-law rule in deciding the case.<sup>69</sup>

Justice Bradley noted at the outset that "there are certain fundamental rights which [the state's] right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves."<sup>70</sup> In the case before the Court, the regulation at issue had established a de jure monopoly on the slaughter-house trade in New Orleans. Thus, according to the dissent, it violated the well-established common-law prohibition of state-sponsored monopolies.<sup>71</sup> Justice Bradley did state that fundamental rights could only be restricted "by lawful regulations necessary or proper for the mutual good of all" and that such rights could not be "arbitrarily assailed."<sup>72</sup> However, in deciding the issue before the Court, the dissent applied a very concrete and well-established rule that prohibited a certain category of state action.<sup>73</sup>

In fact, the dissent expressly stated that the establishment of a monopoly did not constitute a "police regulation":

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There is no privilege to violate the rights of others, nor any immunity from liability should one do so. In nearly all instances, the Constitution leaves the general power to prohibit wrongful conduct where it was before its ratification: in the hands of states. It does, however, give Congress the power to prohibit and set the punishment for certain identifiable offenses, such as treason and piracy. The powers that came to be called the "police power" of the state are far from being inconsistent with the rights retained by the people. To the contrary, the protection of individual rights is at the core of a state's police power.

*Id.* at 333.

68. *The Slaughter-House Cases*, 83 U.S. 36, 114 (1872) (Bradley, J., dissenting).

69. *See id.* at 114–16.

70. *Id.* at 114.

71. Justice Bradley noted, for example, that "[t]he statute of 21st James, abolishing monopolies, was one of those constitutional landmarks of English liberty which the English nation so highly prize and so jealously preserve." *Id.* at 120.

72. *Id.* at 116.

73. *Id.*

To compel a butcher, or rather all the butchers of a large city and an extensive district, to slaughter their cattle in another person's slaughter-house and pay him a toll therefore, is such a restriction upon the trade as materially to interfere with its prosecution. It is onerous, unreasonable, arbitrary, and unjust. It has none of the qualities of a police regulation. If it were really a police regulation, it would undoubtedly be within the power of the legislature. That portion of the act which requires all slaughter-houses to be located below the city, and to be subject to inspection, &c., is clearly a police regulation.<sup>74</sup>

Thus, rather than applying judicial scrutiny to the means and ends of a police regulation, the dissent declared that this type of law did not even constitute such regulation. It therefore fell outside the scope of the government's legitimate regulatory power.

The approach adopted by the *Slaughter-House* dissenters would therefore require a more complex analysis under the Fourteenth Amendment than would Barnett's approach. There are certain rules, many of which Barnett identifies in the course of his discussion, that courts could apply in reviewing legislation. For example, government-established monopolies (such as those at issue in *The Slaughter-House Cases*) or laws which take from one citizen and give to another (an example Barnett cites) were categories of regulation that were viewed as constitutionally suspect.<sup>75</sup> Rather than applying an across-the-board presumption against state regulatory authority, the approach of the *Slaughter-House* dissenters would require the application of such discrete rules on a case-by-case basis.

Indeed, the examples Barnett offers further illustrate the potential problems with his definition of state regulatory authority. Barnett cites, as consistent with his theory of the state's regulatory authority, the Supreme Court's recent decision in *Lawrence v. Texas*<sup>76</sup> barring state restrictions on homosexual sodomy.<sup>77</sup> Such legislation regarding the morality of citizens, and in particular the restriction on consensual sodomy, was historically well within the states' regulatory authority.<sup>78</sup> As catalogued by the Court in *Bowers v. Hardwick*:

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74. *Id.* at 119–20.

75. See, e.g., *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 658 (1829) (discussing laws that “transfer the property of A. to B. without his consent”); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (discussing prohibition on “a law that takes property from A and gives it to B”); Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-examined*, 31 EMORY L.J. 785, 785 (1982) (discussing “the common law and constitutional tradition barring governmental grants of Monopoly”).

76. 539 U.S. 558 (2003).

77. BARNETT, *supra* note 2, at 334 (“Only very rarely was the power to protect ‘morals’ used to reach wholly private conduct. In other words, the traditional police power would more accurately be defined as giving states power to protect the ‘health, safety, and public morals’ of the populace.”).

78. See *Bowers v. Hardwick*, 478 U.S. 186, 192–94 (1986) (discussing historical evidence suggesting that prohibition of sodomy was constitutionally permissible); *id.* at 196 (Burger, C.J., concurring) (“Decisions of individuals relating to homosexual conduct have been subject to state intervention

Proscriptions against [sodomy] have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Colombia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is “deeply rooted in this Nation’s history and tradition” or “implicit in the concept of ordered liberty” is, at best, facetious.<sup>79</sup>

Even the majority in *Lawrence*, in striking down the Texas sodomy law, acknowledged that there was a wide range of “early American sodomy laws” that “sought to prohibit nonprocreative sexual activity.”<sup>80</sup> The majority merely asserted that “there is no longstanding history in this country of laws directed at *homosexual conduct* as a *distinct matter*.”<sup>81</sup> The Court did not question the state’s traditional authority to regulate sexual activity. It merely contested the state’s exercise of this regulatory authority in a manner that was specifically directed at homosexual activity and further asserted that “[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private.”<sup>82</sup>

The *Lawrence* Court’s analysis of the historical record is flawed. First, its assertion regarding the history of laws regulating homosexual conduct is subject to question. The Court in *Bowers* cited examples of early regulations prohibiting homosexual sodomy in particular.<sup>83</sup> Moreover, the state’s traditional authority to regulate all forms of sexual activity would encompass the narrower power to regulate homosexual activity.

Second, the Court’s assertion regarding the enforcement of such laws is equally dubious. As Justice Scalia noted in his dissent, there were in fact prosecutions for private consensual sodomy, and it is not surprising that there were not more given the difficulty of detecting such “private” activity.<sup>84</sup> More fundamentally, however, the state’s enforcement power is part of its regulatory authority. To say that the executive made the conscious decision to refrain from enforcing certain regulations is not the same as saying that such regulations would be constitutionally pro-

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throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.”).

79. *Id.* at 192–94.

80. *Lawrence*, 539 U.S. at 568.

81. *Id.* (emphasis added).

82. *Id.* at 569.

83. In fact, the majority in *Lawrence* was willing to say only that “the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate.” *Id.* at 570–71.

84. *See id.* at 597 (Scalia, J., dissenting) (observing that “consensual sodomy, like heterosexual intercourse, is rarely performed on stage”).

hibited. Indeed, this leap represents nothing more than a blatant usurpation of power by the federal courts. Where state executive authorities once had the authority to determine whether to bar consensual private sodomy, the federal courts have now prohibited any such regulation as a violation of due process. Indeed, the results-oriented nature of the decision in *Lawrence* is vividly illustrated in Justice Scalia's dissent where he notes that the same reasoning, if followed through, would vitiate "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity," as well as those prohibiting the "recreational use of heroin"—none of which the Court is likely to strike down in the near future.<sup>85</sup>

Similarly, while Barnett properly notes that one of the fundamental constitutional rights that has been eroded in a manner inconsistent with its original meaning is the right to bear arms under the Second Amendment,<sup>86</sup> his discussion of the limits of that right shows the potential problems when his theory is applied to actual cases. He maintains that pursuant to the Second Amendment,

the only items that are properly prohibited under the police power are those that, when used as they are supposed to be, create an unreasonable risk of harm to third persons. Weapons of mass destruction, whether or not considered an "arm"—for example, biological weapons—would clearly fall within this category and would properly be banned.<sup>87</sup>

However, Barnett does not elaborate on the criteria for determining what is unreasonable regulation, illustrating that his theory may quickly degenerate into subjective judgments about the reasonableness of legislation or enforcement activities.<sup>88</sup> This result is exactly the sort of judicial conduct Barnett laments, where courts enforce rights of which they approve while simultaneously disparaging and eroding those of which they do not.<sup>89</sup>

Finally, aside from the historical accuracy of Barnett's reading of the Constitution, one wonders why such presumptions are even necessary or should be expected to be found in the constitutional text. Barnett claims that there are only two options in approaching this question: "We

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85. See *id.* at 590 (Scalia, J., dissenting).

86. BARNETT, *supra* note 2, at 348.

87. *Id.* at 348–49.

88. See NELSON, *supra* note 54, at 10 (indicating that "reasonableness" is a "broad concept[] that can mean almost anything"); *but see* HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 104–30 (1993) (discussing criteria applied by the courts in reviewing exercise of the police power and requiring that regulations be "reasonable" and not "arbitrary").

89. Cf. BARNETT, *supra* note 2, at 355–56 ("One should . . . resist the temptation to read *out* of the Constitution what one does *not* want it to say. . . . Those who practice constitutional redaction to reach results they find congenial should ask themselves why others who find an income tax deplorable must accept it as constitutionally authorized. For that matter, why should a racist judge accept the Equal Protection Clause or even the Fifteenth Amendment?").

either accept the presumption that in pursuing happiness persons may do whatever is not justly prohibited or we are left with a presumption that the government may do whatever is not expressly prohibited.”<sup>90</sup> Nonetheless, it is difficult to see why any presumption is required.

As Barnett correctly points out, one of the fundamental flaws in modern constitutional jurisprudence is the reliance on outcome-determinative presumptions, such as the levels of scrutiny applied by the courts in reviewing legislative or executive action depending on the nature of the right at issue.<sup>91</sup> While a presumption of liberty may be more attractive than the presumptions currently employed by the courts, a more legitimate and historically accurate approach would abandon such constitutional presumptions altogether and replace them with honest efforts to accurately interpret the constitutional text on a case-by-case basis.

#### IV. CONCLUSION

The debate over the proper balance between individual liberty and government regulation has existed as long as our Constitution has been in place. Randy Barnett’s *Restoring the Lost Constitution* provides additional insight into one possible resolution of this problem. Nonetheless, his thesis that the Constitution embodies an across-the-board presumption of liberty is open to question.

As a matter of history, a presumption of liberty of the type Barnett outlines in his book does not have a completely sound foundation. The government’s traditional regulatory authority is arguably broader than Barnett acknowledges. As a matter of political theory, the presumption of liberty, while perhaps desirable, is not required to support constitutional legitimacy. Traditional theories of constitutional legitimacy such as popular sovereignty provide a sufficient foundation. Accordingly, while Professor Barnett’s thesis may be attractive from a normative perspective, counterarguments exist on both scores.

Nonetheless, there may be room in some circumstances for the sort of presumption that Barnett envisions. Where the constitutional text is so indeterminate that no clear answer to a particular constitutional question can be found, a presumption that tends to preserve citizens’ liberty to the greatest extent possible might be useful and consistent with historical understanding. For where no clear delegation of authority to the government exists, a presumption that the people preserved their own authority to the greatest extent possible is consistent with the political theory on which the Constitution was based. Accordingly, while an across-the-board presumption of liberty may not be fully justified, there

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90. *Id.* at 268–69.

91. *Cf. id.* at 342–45 (critiquing the different levels of scrutiny applied by the courts).

may be room for a more limited application of Professor Barnett's theory.