Book Review by Nelson Lund

A Libertarian Constitution

Restoring the Lost Constitution: The Presumption of Liberty, by Randy E. Barnett.
Princeton University Press, 360 pages, $32.50

Randy Barnett is one of the legal academy's leading libertarian theorists. His latest book is an exceedingly ambitious effort to show that the United States Constitution, rightly understood, protects individual liberty to a far greater extent than the Supreme Court has ever recognized. Through a complex series of arguments, Barnett attempts to demonstrate that the Constitution requires courts to adopt what he calls a "Presumption of Liberty," which should lead them to nullify every law abridging any of an open-ended class of natural rights unless the government can demonstrate that the law meets stringent criteria of necessity and propriety.

Restoring the Lost Constitution advances three main theses. First, Barnett presents a theory of legitimacy, arguing that laws are "binding in conscience" only if there is a sufficient reason to believe that they do not unnecessarily, or improperly, violate the natural rights of the governed. Second, he maintains that the Constitution requires courts to protect these natural rights by invalidating all federal laws that unnecessarily or improperly abridge them. Finally, he contends that the Constitution also requires the same aggressive judicial approach to state laws that it requires with respect to federal laws. Because I shall criticize some crucial elements in Barnett's argument, I should emphasize at the outset that this intelligent, thought-provoking book deserves to be read carefully by anyone who believes that the Constitution is a higher form of law than Supreme Court decisions.

Liberal political theories typically contain at least two basic principles: that the legitimacy of any government depends on the consent of the governed, and that the purpose of legitimate governments is to secure certain natural or inherent human rights. *Restoring the Lost Constitution* begins with an extended attack on the proposition that consent ever was or could be the basis of our government's legitimacy. Because express and unanimous consent is impossible, popular sovereignty is a fiction: any consent would have to be tacit, and mere acquiescence in governmental authority (which is all that most people exhibit) is insufficient to constitute genuine consent. Unlike those who gave us the Declaration of Independence, Barnett concludes that consent is unnecessary, and he maintains instead that a government is legitimate if, and only if, it has procedures that adequately protect the people's natural rights.

Distinguishing mere acquiescence from genuine consent may be a more difficult philosophical problem than Barnett recognizes, though he is surely right that there must be a line between the two. However that may be, it is striking that he does not subject his own theory of natural rights to the same kind of relentlessly skeptical questioning that he applies to consent theory. Had he done so, he would have encountered challenges that go unmet in his book.

How, for example, are we to identify the natural or inherent rights that legitimate governments must protect? Barnett's cryptic answer is that a study of the nature of human beings and of our world shows that only by respecting certain rights can we have a society in which people are able to pursue happiness and enjoy peace and prosperity. This blending of rights theory with utilitarianism may well be defensible, but he offers only an assertion, not an argument. Nor does he set forth the comprehensive analysis of human nature and of the world that might justify his claim that he knows which rights must be respected by every legitimate government.

Barnett's discussion of legitimacy is meant to tell us whether laws enacted by our governments are "binding in conscience." He seems to have drawn this term from Thomas Aquinas, and I would be among the last to deny or disparage the question's importance. But it has little relevance to the remainder of the book. Barnett's chief goal is not to assess the Constitution's legitimacy, but to take the Constitution seriously as a written text whose meaning is revealed by its words, and by what we know about the meaning of those words to the people who adopted it.

Barnett recognizes that the Constitution contains language that is ambiguous and vague, and knows how common it is to read one's own views of morality and justice into these provisions. He wants to resist that temptation, and he accepts the obligation to identify the most plausible original meaning of the text. His success in this endeavor can be evaluated independently of his ideas about legitimacy.

As the Declaration of Independence an-

nounces, and as other evidence confirms, there was a broad consensus among the founding generation that the principal purpose of human government is to secure certain inherent or natural human rights. The most obvious reflections of this consensus in the Constitution itself are the limited grant of enumerated powers to Congress, the separation of powers, and the enumeration of several individual rights.

In addition, Barnett believes, the judiciary has been commanded to identify and protect a vast, unenumerated body of natural rights by the 9th Amendment, which provides: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Because he thinks this provision establishes a constitutional Presumption of Liberty, Barnett vigorously objects to the Supreme Court's consistent refusal to rely on the 9th Amendment in deciding cases. I believe that he reads far too much into this provision, which says only that it is improper to infer from the recognition of certain rights that others do not exist. The 9th Amendment does not say what those other rights might be or where they come from, and it certainly does not say how they are to be protected or by whom.

The 9th Amendment is a companion to the 10th Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As the 10th Amendment affirms that the Constitution's enumeration of powers is exhaustive, so the 9th Amendment affirms that its enumeration of rights is *not* exhaustive. This makes perfect sense because individual rights and government authority are correlative: if a government does not have the authority to issue certain commands to its citizens, they have a right not to be subjected to those commands by that government.

Thus, the 9th and 10th Amendments together serve as an emphatic, and indeed justiciable, reminder that the Constitution protects a vast number of unenumerated rights from infringement by the federal government, namely all those rights that the federal government is not authorized to abridge in the exercise of its enumerated powers. Some of them may be natural rights, some are positive rights established by state law, and some are political rights exercised in the course of establishing state law. The language of the 9th Amendment does not give a privileged status to any one of these categories of rights.

Barnett looks in the legislative history for evidence that the 9th Amendment means something far beyond what it actually says, but I do not think that the evidence as a whole supports his conclusion. I do agree, however, that the Supreme Court has seriously overstated the scope of federal legislative authority, and one effect of that judicial mistake has been an unjustified diminution of many individual rights.

Two principal sources of the vast expansion of federal power have been the Commerce Clause and the so-called Sweeping Clause: "The Congress shall have Power.... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The Supreme Court has interpreted these provisions to allow Congress to regulate or prohibit virtually any commercial activity, including wholly intrastate activities, and a vast range of non-commercial activities as well. The Court's theory, in a nutshell, is that such activities may "affect" commerce among the several states and that it is therefore necessary and proper for Congress to control them. Barnett provides a detailed demonstration that this theory is a departure from the original meaning of the Constitution, and he offers a number of thoughtful and generally plausible suggestions about how best to construe and apply the Commerce and Sweeping Clauses. If the Court were to accept something reasonably close to the original meaning of these provisions, the federal government would have a lot less power than it exercises today, and the people would correspondingly have much more freedom from federal interference in their lives.

THE MOST RADICAL THESIS IN BARNETT'S book is that judges are charged by the Constitution with protecting a vast range of unenumerated natural rights from interference by *state* law. At times, he seems to attribute this charge to the 9th Amendment, which I think is clearly a mistake. The 9th and 10th Amendments together confirm that the federal government (including the federal judiciary) lacks the authority to impose its views of natural or inherent rights on the states: one of the rights "retained by the people" is the right to govern themselves as they see fit in their own states, except to the extent that federal law specifies otherwise. The 9th Amendment, unlike such provisions as the Contracts Clause and the Import-Export Tax Clause, does not specify any exceptions to this right of the people.

Barnett also has a different, and somewhat more plausible basis for concluding that the Constitution commands judges to protect natural rights from state interference. The 14th Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...." Barnett argues that these privileges and immunities are the very same natural rights that he thinks are also protected by the 9th Amendment, a conclusion that he rests primarily on evidence from the legislative history of the 14th Amendment. He vigorously attacks the Supreme Court's contrary interpretation, and especially the landmark 1873 *Slaughterhouse* decision, which held that the only privileges and immunities protected by this clause are those peculiarly attributable to national citizenship, like the right to travel to the national capital.

I agree that *Slaughterhouse* misinterpreted the Constitution, but find Barnett's alternative interpretation unconvincing. The legislative history of the 14th Amendment is very extensive, and quite variegated. Although the debates in the 39th Congress contain statements that lend support to Barnett's view—and he ably marshals a number of these—there is also evidence on the other side. An alternative reading of the text and legislative history is that the Privileges or Immunities Clause of the 14th Amendment was meant to be an anti-discrimination provision modeled on the Privileges and Immunities Clause of Article IV, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Consistent with the reference to the rights of citizens "in the several States," the Supreme Court has read this provision to mean that each state must grant visitors from other states certain of the rights that state law gives to its own citizens, while each state is allowed to define those rights as it sees fit. By analogy, the 14th Amendment's Privileges or Immunities Clause can be interpreted to require each state to give the same rights to all classes of its own citizens—thus prohibiting discrimination based on race or similar characteristics—while leaving each state free to define the substance of those rights as it sees fit. This interpretation, which was suggested in Justice Field's *Slaughterhouse* dissent, has more recently been defended in detail and with great sophistication by David Currie and John Harrison.

I believe this interpretation provides the best reading of the evidence, and was disappointed to find that Barnett never discusses it. The omission is particularly striking because Barnett mentions—in passing and without elaboration—that he believes the Privileges or Immunities Clause was *also* meant to ban discriminatory class legislation. Unfortunately, he does not explain why he says this, or how the text of the Clause can simultaneously create both an anti-discrimination rule and a rule providing absolute protection for certain substantive rights.

Even if one accepted Barnett's claim that the 14th Amendment was meant to authorize judges to nullify state laws that abridge certain unenumerated substantive rights, one would still have to ask how judges are supposed to identify these rights. Barnett's answer is that everybody has a presumptive right to engage in any conduct that does not interfere with the rights of other persons, unless the government can show that a specific regulation is needed to facilitate everyone's exercise of the right. This approach, however, is uselessly circular unless one knows what the "rights of others" are. As Barnett recognizes, judges who adopted his approach would therefore need a prior definition of rightful and wrongful conduct. But how are judges to decide when legislatures have made mistakes about what is right and what is wrong?

Barnett emphatically denies that his reading of the 14th Amendment requires unelected judges "to determine what learned philosophers cannot agree upon," and I share his presumption that the Constitution does not command judicial philosopher-kings to substitute their own moral judgments for those of the people's elected representatives. Reassuringly, he writes: "A moment's reflection should dissipate such concerns." Unfortunately, his proposed alternative to federal philosopher-judges does not dissipate these concerns at all.

The privileges and immunities protected by the 14th Amendment, Barnett maintains, can be identified by looking at state common law. This cannot be right. The common law is a collection of rules adopted by judges in the course of deciding cases that are not covered by a state constitution or statute. These rules vary somewhat from state to state, and they can be altered or abolished in any state by its legislature. Because the 14th Amendment expressly imposes a restriction on state law, the substance of what it protects cannot possibly be determined by state law (unless the Privileges or Immunities Clause is only an anti-discrimination provision rather than a substantive guarantee, an interpretation that Barnett implicitly rejects).

While Barnett notes, accurately enough, that state common-law judges constantly make decisions distinguishing rightful from wrongful conduct, he neglects the significance of the fact that they are always doing so in the shadow of the state legislature's plenary authority (which is frequently exercised) to alter or preempt those decisions by statute. If these common-law decisions were suddenly to become the *unalterable* determinants of the rights protected by the 14th Amendment, state judges would be elevated to the role of philosopher-kings. Yet, if the distinction between rightful and wrongful conduct were defined by the common law *as altered or preempted by state statutes*, the Privileges or Immunities Clause would place no constraints at all on state governments, which would make an absurdity of the 14th Amendment provision.

Elsewhere, the book takes a different approach to identifying the relevant privileges and immunities. Courts and commentators have long assumed that the Constitution leaves largely intact something called the "police power" of the state governments, which is a general authority to regulate and govern the citizenry. Barnett suggests that 14th Amendment privileges and immunities are those rights not subject to this power. But what exactly is the police power's scope? It is never mentioned, let alone defined, in the Constitution. Barnett articulates and embraces what he calls a Lockean theory of the police power, but his only authorities for imputing this theory to the Constitution are judicial decisions and academic commentaries. And even those authorities generally give the states much more discretion to abridge people's liberties than Barnett is willing to allow. It is perfectly obvious that the states would be well advised to limit government power and protect important individual rights in their state constitutions. In fact, all the states have done just that, though not to the extent that Barnett thinks they should. Whatever the merits of his view of the proper scope of government power, and whether or not his is a correct interpretation of Locke, showing that the Constitution enacted his view into law would require far more evidence than Barnett provides.

Restoring the Lost Constitution is an impressive attempt to demonstrate that our written Constitution enacted into law a sweeping and highly libertarian theory of natural rights and limited government. I have passed more lightly than I would have liked over Barnett's attractively coherent analytical approach, which contrasts with the frequently sloppy Supreme Court opinions that our legal system treats as the authoritative expression of constitutional law. It is sad how much of our fundamental law has gotten lost beneath an obscuring blanket of Supreme Court decisions, and Barnett's effort to recover the lost Constitution is a noble undertaking, even if it is not completely successful.

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