

Freedom and the Burden of Proof

*Randy E. Barnett's
New Book on the Constitution*

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TIMOTHY SANDEFUR

We cannot believe that construction a sound one, which indulges every reasonable presumption against the citizen, when the legislature deals with his rights, and gives him the benefit of every reasonable doubt, when his life and liberty are in jeopardy before the courts of the country.

—*Sadler v. Langham* (1859)

It is extraordinarily difficult to review a book such as Randy Barnett's *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, N.J.: Princeton University Press, 2004), which covers so many subjects and does so with such seemingly effortless common sense. That the book will be controversial only indicts the constitutional scholarship of the past century. In fact, the worst that anyone can justly say about it is that it is too short.

In *Restoring the Lost Constitution*, Barnett argues two major theses: first, that a constitution's legitimacy rests not on the consent of the governed, but on its consistency with natural rights; second, that the U.S. Constitution, when correctly interpreted, is legitimate. Such an interpretation ultimately justifies what he calls the "pre-

Timothy Sandefur is a staff attorney at the Pacific Legal Foundation in Sacramento, California.

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sumption of liberty”—that is, a rule that the legislature bears the burden of proving the necessity and propriety of any limit on a person’s freedom.

Such a presumption conflicts with current practice. Today’s courts split freedoms into two broad categories: favored freedoms, such as speech or religion, receive the treatment that Barnett endorses, under what is called “strict scrutiny,” which presumes a law to be unconstitutional unless the government shows it is “narrowly tailored to advance a compelling state interest.” Disfavored freedoms—including the unobstructed exchange of private-property rights or the unmolested earning of a living—are accorded only “rational basis scrutiny,” under which laws are presumed constitutional unless litigants can prove absolutely that they are not. Barnett makes a convincing case that his approach is much more consistent with the Constitution’s original meaning and also more likely to preserve freedom.

Two Strands of Law

“[W]e must choose,” Barnett writes, “between two fundamentally different constructions of the Constitution, each resting on a different presumption. We must 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” (pp. 268–69). Although he barely mentions it, these conflicting views emerged very early in U.S. legal history. In 1795, Justice Samuel Chase, in his opinion in *Calder v. Bull* (3 U.S. 386), wrote:

The purposes for which men enter into society will determine the nature and terms of the social compact. . . . The nature, and ends of legislative power will limit the exercise of it. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power. . . . An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . A law that punished a citizen for an innocent action that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. (388)

Justice James Iredell disagreed. In his view, the legislature was limited only by the explicit provisions of the Constitution.

[T]here is no court that has power to defeat the intent of the Legislature, when couched in such evident and express words, as leave no doubt

whether it was the intent of the Legislature, or no.” In order, therefore, to guard against so great an evil, it has been the policy of all the American states . . . to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void. . . . If, on the other hand, the Legislature shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. (389)

Nor did this dispute originate with Chase and Iredell. The quotation with which Iredell begins this passage comes from William Blackstone, who thirty years before *Calder* wrote that “[s]overeignty and legislature are indeed convertible terms; one cannot subsist without the other” (1765–69, 1: 46). Blackstone defined sovereignty as “a supreme, irresistible, absolute, uncontrolled authority” (1: 49; see also 2: 160) that “can, in short, do every thing that is not naturally impossible” (2: 161). He explicitly rejected the views of “Mr. Locke, and other theoretical writers” (2: 161) who argued that the natural rights of individuals limited the legitimacy of any sovereign.

In his 1803 edition of Blackstone’s *Commentaries*, lawyer St. George Tucker repudiated Blackstone’s view of sovereignty. “[T]he American revolution has formed a new epoch in the history of civil institutions,” he wrote, “by reducing to practice, what, before, had been supposed to exist only in the visionary speculations of theoretical writers” such as Locke (Blackstone 1803, 1: appendix A, 4). In England, parliamentary authority was the rule and freedom the exception. In the United States of America, however, freedom was the rule, and government the exception. Thus, as Tucker pointed out, “supreme, irresistible, absolute, uncontrolled authority . . . doth not reside in the [American] legislature, nor in any other of the branches of the Government. . . . For if it did reside in them, or either of them, then would there be no limits, such as may be found in all the American Constitutions, to the powers of Government” (Blackstone 1803, 1: 49 n.10). As James Madison wrote, “In Europe, charters of liberty have been granted by power. America has set the example and France has followed it, of charters of power granted by liberty” (1999, 502).

Tucker’s “Whig” view of sovereignty is far more consistent with the American founding than was Blackstone’s “Tory” view. For the Founders, “all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity” (Virginia Declaration of Rights, 1776). Blackstone, by contrast, believed, as Herbert Storing puts it, that “the legislature can do what it likes” (1987, 676). It might choose to give people some degree of freedom, but only for prudential reasons, not because the people have a moral right to their freedom. Indeed, in the Blackstonian tradition, there is no freedom antecedent to government. Just as Lewis Carroll’s Red Queen tells Alice that she cannot have lost her way because all ways here are

the Queen's ways ([1872] 1996, 25), so, for Blackstone, there is no such thing as an unregulated state because all ways are the government's ways. The consequence was what lawyers call a "presumption" in favor of the government.

The Lockean tradition takes the contrary view: because rights derive from the characteristics of individuals irrespective of government, any limit on freedom must be justified on some rational grounds (pp. 323–28). People have the right to act without unjust interference.

It would seem obvious that the Lockean view was the one that the framers of the Constitution contemplated (Gerber 1995; Sandefur 2004b). Nevertheless, as early as the 1820s, Blackstone's perspective was gaining popularity in the legal academy. Late in life, Thomas Jefferson lamented that "when . . . Blackstone became the [law] student's hornbook, from that moment, that profession (the nursery of our Congress) began to slide into toryism, and nearly all the young brood of lawyers now are of that hue" (Jefferson 1984, 1513–14). James Wilson shared Jefferson's distress (Waterman 1933, 650–51). This trend was deeply affected by the political controversies leading up to the Civil War (Freehling 1966, 160–62, 171). Defenders of slavery were especially drawn to Blackstone's theory of sovereignty because it avoided the fundamental conflict between the Lockean philosophy and their "peculiar institution." According to Locke, a state may not legitimately violate the rights of individuals—indeed, it exists solely to protect those rights—but in the modified Blackstonian view of slavery's defenders, the state's sovereignty was essentially unlimited. If "the people" chose to deny blacks their freedom, no one could regard that choice as unjust. Thus, John C. Calhoun, the intellectual godfather of the Confederacy, explicitly denounced the fundamental Lockean premise that all people are born free (Jaffa 2000, 403–71).

By the 1850s, the conflict between Lockean and Blackstonian views had come head to head. In *Sharpless v. Mayor of Philadelphia* (21 Pa. 147 [1853]), the Pennsylvania Supreme Court adopted the Blackstonian view: the American Revolution had not limited the nature of government; it had simply transferred "[t]he transcendent powers of Parliament" to the state legislatures: "Antecedent to the adoption of the federal constitution, the power of the states was supreme and unlimited. If the people of Pennsylvania had given all the authority which they themselves possessed, to a single person, they would have created a despotism as absolute in its control over life, liberty, and property, as that of the Russian autocrat" (160). Four years later the California Supreme Court took the opposite side, observing that it had been "erroneously supposed, by many, that the Legislature of a State might do any Act, except what was expressly prohibited by the Constitution." Rather, "there are boundaries set to the exercise of the supreme sovereign power of the State" created by "the great and fundamental principles of the social compact," and "it cannot be converted into such an unlimited power, as to defeat the end which mankind had in view, when they entered into the social compact" (*Billings v. Hall*, 7 Cal. 1, 10 [1857]). Many other courts struggled with this issue (*Wynhamer v. People*, 13 N.Y. 378, 390–92 [1856]; *Sadler v. Langham*, 34 Ala. 311 [1859]; *Stockton and Visalia Railroad v. Stockton*, 41 Cal. 147 [1871]).

Almost two centuries later Blackstone and Iredell's interpretation has prevailed. Although Locke and Chase's view exerts considerable influence, few modern judges take seriously the notion that liberty precedes the state or that the law is legitimate only if consistent with natural rights. Now, however, Randy Barnett has taken it upon himself to vindicate the Lockean presumption of liberty.

The Presumption of Liberty

Choosing or Refusing

In his *First Treatise*, John Locke explained that the theory of absolute monarchy espoused by Robert Filmer "lies in a little compass, 'tis no more but this, *That all Government is absolute Monarchy*. And the Ground he builds on, is this, *That no Man is Born free*" ([1698] 1963, 175–76). Locke argued, however, that all people are born free and that their freedom places inherent limits on legitimate government. No one has a fundamental right to govern; that right derives only from the consent of people who are fundamentally free. And because the people cannot legitimize injustice by consent, they may not use government to commit injustice.

Surprisingly, Barnett begins by rejecting consent as the basis of legitimacy. He believes that this idea contradicts the views of the Framers (p. 76). Moreover, he argues that the people have given no actual consent to government (as the Framers themselves recognized) and that legal fictions such as "tacit consent" are flawed. "[A]cquiescence only establishes that a legal regime exists," but not that it is legitimate: "If acquiescence, which every functioning regime can claim, equaled the requisite consent, even the most oppressive regime could claim to be entitled to a duty of obedience . . . so long as it manages to maintain its existence" (p. 23).

This argument does not differ from the Framers' views as much as it seems. The Framers never believed that consent alone legitimized government; rather, the Declaration holds that consent only vests government with "just" powers and that free and independent states may do only those "acts and things which free and independent states may *of right* do" (emphasis added). In the state of nature, Jefferson wrote, the people are "inherently independent of all *but moral law*" (1984, 1426, emphasis added). Madison also expressed serious doubts about the consent principle (Rosen 2000, 132–35), but in an 1835 essay entitled "Sovereignty" he adopted precisely the approach that Barnett takes:

Whatever be the hypothesis of the origin of the *lex majoris partis*, it is evident that it operates as a plenary substitute of the will of the majority of the society for the will of the whole society; and that the sovereignty of the society as vested in & exercisable by the majority, may do anything that could be *rightfully* done by the unanimous concurrence of the members; the reserved rights of individuals (of conscience for example) in becom-

ing parties to the original compact being beyond the legitimate reach of sovereignty, whenever vested or however viewed. (1900–1910, 9: 570–71, emphasis in original)

In other words, although majoritarian decision making is desirable for policy reasons (because it tends to prevent tyranny), government is legitimate only in the degree to which it protects the people’s rights. Like other libertarians who have argued that government may provide “public goods” as well as protecting individual liberty (for example, Murray 1997), Barnett recognizes that government might place “more ambitious . . . duties” on the people, but those duties are legitimate only if based on actual unanimous consent or if they include an opt-out provision for the nonconsenting (p. 46).

The consent principle acknowledges that people are basically free (Rand 1964, 110). *That* they consent is not as important as their possession of the right *not* to consent (p. 47), which ensures that they have rights valid against the government (p. 44). Filmer and the defenders of slavery *had* to build on the foundation that no man is born free because where government is primary and individual rights secondary, rights end up not being rights at all, but merely permissions given to the people (and always revocable) by the sovereign (Rand 1964, 102–3; Pipes 1999, 289).

The Burden of Freedom

The existence of natural rights is the most basic justification for the presumption of liberty. Barnett has formulated his theory of natural rights elsewhere (Barnett 1998) and does not go into the subject in depth here. It suffices to say that the existence of these rights means that “first come rights, then comes government” (p. 44). This leads to his second justification for the presumption of liberty: the Constitution’s text requires it. In particular, the Ninth Amendment, with its reference to rights “retained by the people,” implies the existence of prepolitical rights (pp. 54–55, 224–252). As a matter of constitutional interpretation, Barnett’s argument is entirely convincing. The Blackstonian presumption is incompatible with the Ninth Amendment’s open-ended reference to “other” rights. That presumption holds that government may do what it pleases except where expressly prohibited, but the Ninth Amendment tells us that the express prohibitions in the Bill of Rights are not the only prohibitions; in any other light, the framing and ratification of that amendment make no sense. Hamilton, Madison, and others expressed concern that adding a bill of rights to the Constitution might lead people to think that such a bill was exhaustive, and thus reverse the presumption of liberty (see, for example, *Federalist* no. 84). Because, Madison explained, a bill of rights must “be so framed as not to imply powers not meant to be included in the enumeration” (1999, 420), he added the Ninth Amendment as an interpretive guide. The Blackstonian presumption that government may do what it likes absent express prohibitions would mean ignoring that guide.

Barnett might have gone further. The Ninth Amendment is only one of several constitutional clauses that reflect the presumption of liberty. The Constitution nowhere speaks of “creating” rights; rather, it states that no person shall be “deprived” of liberty without due process, implying that persons have liberty already; it declares that the Constitution is created “to *preserve* the blessings of liberty”; that freedom of speech or the press shall not be “abridged”; that habeas corpus “shall not be suspended”; that the right to keep and bear arms shall not be “infringed”; that contracts shall not be “impaired.” Indeed, the very requirement that Congress approve statutes by a majority vote—coupled with the freedom of speech provided to members of Congress—shows that in the Framers’ view, laws should not be enacted until convincing reasons for them had first been given. The Constitution consistently recognizes that freedom is the rule and government the exception (Sandefur 2003b, 243–44).

In *The Federalist*, James Madison angrily replied to those who argued that ratification of the Constitution would entail the destruction of state power:

Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine in the Old World, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the New...? (*Federalist* no. 45)

Unfortunately, most modern legal scholars have adopted this doctrine. Cass Sunstein, for example, takes the Blackstonian view when he writes that “respect for private rights, the private sphere, and limited government should themselves be justified by publicly articulable reasons... In the United States, any particular conception of the private sphere must be defended by substantive argument” (1993, 247). Without apparent irony, he describes this proposition as “Madisonian”! For Sunstein, those who would be free must prove to “society’s” satisfaction that their freedom is unobjectionable. This view is exactly the opposite of James Madison’s.

Such burden shifting is also illogical. As Anthony de Jasay writes, Sunstein is proposing “a needle-in-the-haystack type of task, very difficult and costly if the set of potential objections is large, and logically possible if the set is not finite” (2002, 150). Because proving a negative is impossible, demonstrating that one ought not to be regulated is an impossible burden. Indeed, proving that one should be free to act is *itself* an action that would require justification. Hence, an infinite regress: a person trying to prove he ought to be free to exercise his freedom of speech would have to be free to speak in order to do so. The presumption of liberty is therefore not only a

matter of political principle, concludes de Jasay, but also “a matter of epistemology, of how knowledge works and how verification differs from falsification” (151).

Barnett, unfortunately, fails to follow this avenue of inquiry, yet it is highly relevant. Consider a practical example from the famous Supreme Court decision in *New State Ice Co. v. Leibmann* (285 U.S. 262 [1932]). Oklahoma adopted a law prohibiting businesses from selling ice without first proving to the government that a new ice provider was necessary. Such a scheme is absurd because it is practically impossible to meet every conceivable objection, and impossible to imagine a business’s potential a priori. Concluding that the law “shut out new enterprises, and thus create[d] and foster[ed] monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public,” the Court struck it down.

Absurd as the regulatory scheme in *Leibmann* seems in retrospect, it is the prevailing method of economic regulation in the United States today (Sandefur 2004a, 500–503). Indeed, the Supreme Court has gone to the greatest extreme in presuming in favor of government. Under current law, government “has no obligation to produce evidence to sustain the rationality” of economic regulations; instead, such regulations are “presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record” (*Heller v. Doe*, 509 U.S. 312, 320–21 [1993]).

The presumption of liberty is required not only by the Constitution’s text, but also by principles of logic. Further, as Barnett argues, it is required by the purpose and nature of government—an argument that came to be known as “substantive due process.”

Substantive Due Process

One of the best parts of Barnett’s book—although it, too, is disappointingly brief—is his explanation of “substantive due process” (pp. 322–34), the notion that the Due Process Clauses of the Fifth and Fourteenth Amendments not only require certain *procedures* before a person is deprived of rights, but also prohibit certain types of legislation absolutely (*Planned Parenthood v. Casey*, 505 U.S. 833, 846–47 [1992]). Although this doctrine has been attacked severely, its origins are every bit as legitimate as any legal principle and are compelled by the philosophy of the American founding.

Recall Justice Chase’s statement that “[t]he purposes for which men enter into society will determine the nature and terms of the social compact.” He did not mean merely that the Declaration’s principles limit government’s authority—although they do (Sandefur 2004b). Rather, Chase was driving at what public-choice analysts call “government failure” (Buchanan and Tullock 1962). Ideally, government is created for certain purposes—generally to protect individual rights. As Madison explained in *The Federalist*, however, it may fall into the hands of powerful interest groups, or “factions,” that use government power to oppress or exploit others. They might pass a tax to benefit themselves or grant themselves a monopoly in a trade or censor people

who disagree with them. Such actions pervert government from its proper purpose, turning it into just another tool of injustice; government under the sway of factions would enact laws that would be “mere exercises of will” for the benefit of the powerful. Under such arbitrary legislation, the citizen in effect would have returned to the state of nature (*Federalist* no. 51). The government’s enactments then could not be properly described as law (p. 261). As the Supreme Court put it in an unusually lucid decision, “[t]o lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms” (*Loan Ass’n v. Topeka*, 87 U.S. 655, 663–64 [1874]). Because an arbitrary decree is not “law” by definition, it would deprive a citizen of property without due process of law.

Early American lawyers in the Lockean tradition were led to this line of thought by seeking the origin of the phrase “due process of law” (for example, *Hoke v. Henderson*, 15 N.C. 1, 13–14 [1833]; *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 [1856]). They held that the phrase corresponded to the Magna Carta’s provision that prohibited any “freeman” from being “outlawed or exiled, or deprived of his standing in any other way . . . except . . . by the law of the land.” This barred the outlawing of particular, disfavored citizens and required the government to adhere to reasonable and fair rules for all. In short, due process of law and therefore the due process clauses were a “bulwark . . . against arbitrary legislation” (*Hurtado v. California*, 110 U.S. 516, 532 [1884]).

The clause “Law of the Land,” means a general and public law, equally binding upon every member of the community. . . . The right to life, liberty and property, of every individual, must stand or fall by the same rule or law that governs every other member of the body politic, or “Land,” under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies, would be governed by one rule, and the mass of the community who made the law, by another. (*Vanzant v. Waddel*, 10 Tenn. 260, 270–71 [1829])

As Barnett concludes, the substantive due process cases that modern scholars criticize were motivated by this “aversion to class legislation” (p. 332) rather than by any preoccupation with economic theory (see also Arkes 1998, 78).

Substantive due process is untenable to those who embrace the Blackstonian notion of legislative supremacy. In this view, rights are the product, not the source, of political society; the legislature may choose to govern some people by one rule and others by another rule because they have no rights outside of government. The mere

enactment of a statute constitutes “due process.” If the Framers meant to create this condition, though, why did they write a constitution?

The debate between the Lockean and Blackstonian perspectives has raged for generations. Ironically, only ten years after his *Calder* opinion, Justice Chase abruptly switched sides (Lerner 1987, 108–15). In a long public tirade, he insisted that “there could be no rights of man in a State of Nature previous to the institution of society” and that “liberty and rights (and also property) must spring out of civil society, and must be forever subject to the modification of particular governments . . . that all the rights of man can be derived only from the conventions of society, and may with propriety be called social rights” (14 *Annals of Cong.* 676 [1805]). At the time, this switch was so scandalous that Chase was very nearly impeached. Nevertheless, this view gained ground steadily in the nineteenth century as the principles of natural rights were gradually abandoned (Sandefur 2003a, 632–37). Finally, in the 1930s, the Supreme Court adopted fully the presumption in favor of government. The story is well known: angered by a series of Supreme Court decisions striking down some of his most extreme programs, President Franklin Roosevelt concocted a plan to pack the Supreme Court with a new majority of justices chosen by himself. Although the plan failed miserably, the Court was threatened seriously enough that it abandoned judicial review almost entirely, only to revive it in some areas—to protect so-called “fundamental rights”—later on (pp. 224–34; Shughart 2004). As one legal writer of the time put it approvingly, the New Deal’s “reorientation of policy” toward “wholesale and pervasive governmental interference with all branches of private business” required “a readjustment of constitutional values” and “new conceptions of liberty and property” (Alfange 1937, 14–15).

Unfortunately, Barnett’s defense of substantive due process theory is too short to give a thorough picture of this “reorientation.” His history of judicial review of state laws in chapter 8, for instance, fails to mention *Munn v. Illinois* (94 U.S. 113 [1876]) or *Nebbia v. New York* (291 U.S. 502 [1934]), two of the three great milestones in the rise of the regulatory state. Of course, his point is not to present a history of due process, but to demonstrate that courts have taken an inconsistent approach in scrutinizing both the necessity and propriety of legislation. Still, the brevity of his account may mislead readers into thinking that the “Constitutional Moment” of the 1930s was entirely unprecedented, whereas it was actually another step in a conflict that has preoccupied American law from the very beginning.

Conclusion

Barnett’s brevity may also account for one other major omission. Basing his theory of constitutional legitimacy on the existence of procedures that protect nonconsenting persons from having their rights violated (p. 3), he concludes that the Constitution, properly interpreted, meets this criterion (p. 276). He acknowledges that “some powers granted Congress are proper and others are not,” and he suggests that constitutional duties to protect slavery would have been illegitimate (p. 277). A much more

obvious and pertinent example of a constitutional power that deprives nonconsenting persons of their rights, however, is taxation. The power to tax is the first of Congress's enumerated powers, and, to my knowledge, the founding generation never questioned its legitimacy. A strong case may be made that taxation is unjust and therefore illegitimate as a matter of political philosophy (Rand 1964, 116–20; Feser 2000), and Barnett hints that this power may make the Constitution itself illegitimate (p. 355), but he fails to discuss the subject. Because he rejects the argument that people owe allegiance to government in exchange for benefits they receive from it (pp. 25–29), he slams the door on the possibility that legitimate government may tax. Does he believe that the taxing power “[does] not bind in conscience” (p. 277)? Not usually shy about controversy, Barnett is silent on this point, which is doubly disappointing because he has hinted elsewhere that he has alternatives to suggest (“The Lesser Evil,” *Reason* 35, no. 10 [2004], p. 45).

Such complaints, however, are of the most flattering sort: *Restoring the Lost Constitution* leaves room for further scholarship, and it leaves the reader eager to learn what Barnett will say next. For now, though, he has touched on most of the major controversies in modern constitutional law from the perspective of the political philosophy of the Framers themselves. Despite its occasional lack of focus, *Restoring the Lost Constitution* is a succinct and accurate distillation of libertarian constitutional theory, and it shows convincingly that this phrase is largely redundant.

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