A Libertarian Constitution

Randy Barnett is one of the 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 would 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.

Retiring the Last 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 unreasonably or improperly abridge the natural rights of the governed. Second, he maintains that the Constitution requires courts to protect these natural rights by invalidating all laws that unreasonably 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 is no idle speculation, though it is not entirely clear how the courts will respond to Barnett's arguments. Barnett recognizes that the Constitution contains language that is ambiguous and vague, and knows how common it is to read such views of morality and justice into these provisions. He wants to insist that this is no excuse for interpreting the Constitution in ways that conflict with his own views. He goes on to argue that the Constitution, as interpreted by the courts, does not provide the moral guidance that he seeks. However, Barnett's argument is ultimately unconvincing. It is based on a series of assumptions that are not logically justified. Furthermore, it fails to take into account the fact that the Constitution was adopted by the states, and that the states have the right to interpret it as they see fit. Barnett's arguments are therefore not convincing, and his conclusions are therefore not persuasive.

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 pursuit of legitimate government is to secure certain natural or inherent human rights. Retiring the Last 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 unambiguous consent is impossible, popular sovereignty is a fiction; any consent would have to be illusory, and more acquiescence in governmental authority (which is all that most people regard) is insufficient to constitute genuine consent. Unlike those who gave us the Declaration of Independence, Barnett concludes, 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, the fact that he is drawing this line in a way that conflicts with the views of the founding fathers, and that he goes on to argue that the Constitution, as interpreted by the courts, does not provide the moral guidance that he seeks, is therefore not convincing, and his conclusions are therefore not persuasive.

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innances, and as no other evidence confirms, there was a broad consensus among the founding generation that the principal purpose of the federal government was to secure certain inherent or natural human rights. The more obvious restrictions of this consensus in the Constitution itself are the limited grant of enumerated powers to Congress, the protection of powers, and the enumeration of intrastate and natural rights.

In addition, Barron 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, Barron vigorously objects to the Supreme Court's conclusion that certain rights are "as of the 9th Amendment. This 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 9th Amendment affirms that an enumeration of rights is not exhaustive, this makes perfect sense because individual rights and a vast array of intrastate and natural rights are protected by the Constitution. The 9th Amendment, therefore, broadens the scope of federal legislative authority and requires a course of action if a government does not have the authority to issue certain commands to its citizens, they have a right to assert and object to those commands by their government.

Thus, the 9th and 10th Amendments urge a variety of consequences from the interferences of state and federal government, essentially all those rights that the federal government is not authorized to change in the exercise of its enumerated powers. Some of these may be national rights, some are positive rights established by state laws, and some are political rights exercised in the course of establishing state laws. The language of the 9th Amendment does not give a precise meaning to its terms, and indeed (recall the language that the Constitution protects as a variety of enumerated rights from state interference by state laws. At times, it seems to authorize the change in the 9th Amendment, which I think is not consistent with 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 state-natures as they see fit in their own states, except to the extent that federal law specifies otherwise." The 9th Amendment, unlike the 11th Amendment, curtailed as particular provisions in the Commerce Clause and the Import-Export Tax Clause, does not specify any interference in the same way. Barron adds a different, and somewhat more plausible basis for criticizing where the Constitution commands judge to protect natural rights and can interfere. 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,..." Barron argues that these privileges and immunities are the very same natural rights that he wishes are also protected by the 9th Amendment, a conclusion that he rests primarily on evidence from the legislative history of the 15th Amendment. He vigorously attacks the Supreme Court's analysis of the issue and especially the landmark 1873 Slendelbaker decision, which held that the 9th Amendment and the 15th Amendment statutes are those peculiarly attributable to national citizenship, like the right to vote in the national electoral. I agree that Slendelbaker misinterpreted the Constitution, but I find Barron's alternative interpretation unsatisfying. The legislative history of the 14th Amendment is extensive, and quite variegated. Although the debates in the 15th Amendment contain statements that had support to Slendelaker's view and he ably marshal a number of claims — 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 and not only the Privileges and Immunities Clause of Article IV, which provided: "The Privileges of citizens of each State shall be entitled to all Privileges and Immunities of citizens in the several States." Consistent with this interpretation, 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—prohibiting discrimination based on race or gender, for example—and to those states that do not have a constitutional right to do so. This interpretation, which I believe is consistent with the Constitution, has more recently been defended and refined with great sophistication by David Currie and others. I believe this interpretation provides a better reading of this provision, and was disappointed to find that Barron never discussed it. The omission is particularly striking because Barron's main method of analyzing the 15th Amendment's provisions is to evaluate the process of Federalism and the nature of...
EVEN ONE ACCEPTS BARNETT'S CLAIM that the 16th Amendment was meant to authorize judges to nullify state laws that abridge certain unenumerated substratum 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 specific regulations are needed to facilitate 'property's exercise of the right. This approach, however, is necessarily 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 rights and wrongful conduct. But however judges decide when legislative harms truly intrude on what is right and what is wrong.

Barnett emphatically denies that his reading of the 16th Amendment requires untrained judges 'to determine what learned philosophers cannot agree upon,' and shares his presupposition that the Constitution does not command judicial philosophy to substitute its own moral judgments for those of the people's elected representatives. Because truly he writes, 'A nation's constitution should dispense such concerns.' Unfortunately, his proposed alternative to learned philosophers judges does not dispense these concerns at all.

The privileges and immunities protected by the 16th 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 16th 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 ill-defined provision requiring a substantive guarantee, an interpretation that Barnett arguably rejects).

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While Barnett argues, accurately enough, that state common-law judges customarily make decisions distinguishing right from wrong, he neglects the significance of the fact that they are always doing so in the shadow of the state legislatures' primary authority (which is frequently exercised) to alter or prohibit these decisions by statute. If these common-law decisions were suddenly to become the absolute determinants of the rights protected by the 16th Amendment, state judges would be elevated to the role of philosophers kings. Yet, if the distinction between right and wrongful conduct were defined by the common law as altered or prohibited by state statute, the Privileges or Immunities Clause would pose no constraints at all on state governments, which would make an absurdity of the 16th Amendment provision.

EIGHTEEN TOPICS TAKE A DIFFERENT approach to identifying the relevant privileges and immunities. Through and through, Barnett's effort to recover the lost Constitution is a noble undertaking, even if it is not completely successful.