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Randy E. Barnett: Restoring the Lost Constitution

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INTRODUCTION

Why Care What the Constitution Says?

The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed.¹

—JOHN MARSHALL (1803)

HAD JUDGES done their job, this book would not need to be written. Since the adoption of the Constitution, courts have eliminated clause after clause that interfered with the exercise of government power. This 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, while greatly expanding the unwritten “police power” of the states. All along, with sporadic exceptions, judges have ignored the Ninth Amendment. As a result of judicial decisions, these provisions of the Constitution are now largely gone and, in their absence, the enacted Constitution has been lost and even forgotten.

Without these missing clauses, the general scheme of the Constitution has been radically altered, which is precisely why they all had to go. The Constitution that was actually enacted and formally amended creates islands of government powers in a sea of liberty. The judicially redacted constitution creates islands of liberty rights in a sea of governmental powers. Judicial redaction has created a substantially different constitution from the one written on parchment that resides under glass in Washington. Though that Constitution is now lost, it has not been repealed, so it could be found again.

All this has been done knowingly by judges and their academic enablers who think they can improve upon the original Constitution and substitute

¹ *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

for it one that is superior. This begs the question: Why care what the Constitution actually says, as opposed to what we might prefer it to say (or not say)? Whatever may be in their hearts, many constitutional scholars write as though we are not bound by the actual words of the Constitution because those words are obstacles to noble objectives. One way to slip these bonds is to imply that the original Constitution is illegitimate by repeating the refrain that we cannot be bound by the “dead hand of the past” or by constantly invoking the various sins of the framers. By delegitimizing the original Constitution, such rhetoric seeks to free us from its constraints. Yet it is both curious and significant that few come out and admit this. Why this avoidance? Why not frank confession?

Perhaps because those who practice and advocate judicial amendment of the Constitution seek the obedience of the faithful and, were their delegitimation entirely successful, why would anyone obey the commands of a mere judge, much less a law professor, a philosopher, or a political scientist? Why obey the commands of the man or woman in a black robe, apart from the fact that disobedience is likely to land you behind bars in an extremely treacherous environment?

To openly challenge the legitimacy of the Constitution—held sacred and regarded as authoritative by so much of the public—would be to admit that there is no “man behind the curtain.” Instead, by subtly undercutting the legitimacy of the Constitution while at the same time preserving its much-revered form, a judge or even a clever constitutional scholar can become the man behind the curtain. Pay no attention to that figure in the black robe or to that bookish professor; the great and powerful Constitution has spoken!

This is a fraud on the public. Imply but do not say aloud that the Constitution is illegitimate so we need not follow what it actually says. Remake it—or “interpret” it—as one wills and then, because it is The Constitution we are expounding, the loyal but unsophisticated citizenry will follow. This strategy also allows one to adopt a stance of moral superiority toward past generations without having to assume the responsibility of proclaiming that the document they wrote and by which the government rules is of no authority.

Because it is constantly under siege, the Constitution’s legitimacy cannot be taken for granted. Unless we openly confront the question of its legitimacy, we cannot respond to those who would replace it with something they think is better. We will never know whether we should obey it, improve upon it, or ignore it altogether. In this book, I begin by asking and answering the question that others shy away from: Why should anyone obey the commands issued by persons who claim to be authorized by the Constitution?

I explain why the most commonly held view of constitutional legitimacy—the “consent of the governed”—is wrong because it is a standard that no constitution can meet. Holding the Constitution to this unattainable ideal both undermines its legitimacy and allows others to substitute their own meaning for that of the text. This result is paradoxical because, notwithstanding the great expansion of suffrage, any new and improved “interpretation” of the Constitution will also fail to be legitimated by the “consent of the governed.” And this fiction turns dangerous when factions purporting to speak for “the People” claim the power to restrict the liberties of all.

Equally untenable is the principal alternative to the “consent of the governed”: the argument that the benefits received by citizens from a constitutional order and a duty of fair play obligate them, in return, to obey laws regardless of whether they consent to them. By dispensing with any need for obtaining even the fictional consent of the governed, this alternative turns out to be even more dangerous to liberty. We can do much better.

I contend that lawmaking by real unanimous consent is both possible and pervasive, although not in the sort of polity governed by present-day constitutions. Even in the absence of such consent, however, laws can still bind in conscience if the constitution that governs their making, application, and enforcement contains adequate procedures to assure that restrictions imposed on nonconsenting persons are just (or not unjust). Such a constitutional order can be legitimate even if it was not consented to by everyone; and a constitution that lacks adequate procedures to ensure the justice of valid laws is illegitimate even if it was consented to by a majority. Indeed, only by realizing that the “consent of the governed” is a fiction can one appreciate the imperative that lawmakers respect whatever may be the requirements of justice.

Although my thesis concerning legitimacy does depend on the claim that “justice” is independent of whatever may happen to be commanded by positive law, it does not depend on acceptance of any particular conception of justice. Regardless of what conception of justice one holds, constitutional legitimacy can be seen as a product of procedural assurances that legal commands are not unjust. Even those who reject the view of justice held by the founders, and which I have defended elsewhere,² can accept this conception of constitutional legitimacy provided they also

² See Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Clarendon Press, 1998) (defending a liberal conception of justice based in certain individual natural rights that distinguish “liberty” from “license”). Although I am unable to re-create here all the arguments presented there on behalf of this conception of justice, I shall summarize them briefly in chapter 3. Readers need not, however, be convinced by my arguments for these liberty rights to be persuaded by the thesis of this book—provided they accept

accept the proposition that justice is independent of legality. That is, that laws are not just solely because they are validly enacted.

To assess the legitimacy of any given legal system, however—including the system governed by the Constitution of the United States—requires both this procedural conception of legitimacy and a theory of justice by which to assess the adequacy of lawmaking procedures it employs. In short, while readers need not agree with the founders' or my conception of justice based on “natural rights” to accept the procedural conception of constitutional legitimacy I shall advance, they must produce and defend a conception of justice before they can pass judgment on the legitimacy of the Constitution. So must I.

To that end I will explain the founders' view that “first come rights, and then comes the Constitution.” The rights that precede the formation of government they called “natural rights.” I contend that if a constitution contains adequate procedures to protect these natural rights, it can be legitimate even if it was not consented to by everyone; and one that lacks adequate procedures to protect natural rights is illegitimate even if it was consented to by a majority.

The natural rights to which they and I refer are the “liberty rights” that, given the nature of human beings and the world in which we live, make it possible for each person to pursue happiness while living in close proximity to others and for civil societies to achieve peace and prosperity. It is precisely because the consent of the governed is impossible on a national scale that a constitution must provide protection for the preexisting rights retained by the people if the laws it sanctions are to create a duty of obedience in a nonconsenting public.

With this analysis of constitutional legitimacy and natural rights, we will then be in a position to understand why the words of the Constitution should be interpreted according to their original meaning and, where this meaning is incomplete or vague, how the inevitable gaps in meaning ought to be filled. Although I do not believe we are bound by the dead hand of the past, I will explain how, by committing ourselves to a written constitution, we commit ourselves to adhere to the original meaning of the text and any later amendments. In addition, original meaning must be respected so that those who are to govern by laws have little or no hand in making the laws by which they govern. We will also see that, where the original meaning is incomplete or vague, the text must be “construed,” as opposed to “interpreted,” in a way that enhances its legitimacy without contradicting the meaning that does exist.

these rights for other reasons the reader finds more compelling. In this important respect, the analysis presented here is independent of that presented in *The Structure of Liberty*.

It will then be time to examine the original meaning of key provisions of the text that have been either distorted or excised entirely from the judges' Constitution and ignored: the Commerce and the Necessary and Proper Clauses in the original Constitution, the Ninth Amendment, and the Privileges or Immunities Clause of the Fourteenth Amendment. We will also need to examine the nature and scope of the so-called police power of states—a power that appears nowhere in the text of the Constitution and results from construction rather than interpretation.

Finally, I shall show how, when the meaning of these missing provisions is correctly understood, we can choose properly between two opposing constructions of the powers the Constitution delegates to government officials: Are all restrictions on the liberties of the people to be presumed constitutional unless an individual can convince a hierarchy of judges that the liberty is somehow “fundamental”? Or should we presume that any restriction on the rightful exercise of liberty is unconstitutional unless and until the government convinces a hierarchy of judges that such restrictions are both necessary and proper? The first of these is called “the presumption of constitutionality.” While this construction has never been accepted in its entirety, the exceptions that have been created to it are revealing in the way they run afoul of the text. The second of these constructions may be called the Presumption of Liberty, which can provide a practical way to restore the lost Constitution.

It is an open question whether the U.S. Constitution—either as written or as actually applied—is in fact legitimate. Intellectual honesty requires us to acknowledge the possibility that no constitution lacking unanimous consent is capable of producing laws that bind in conscience. Therefore, while the theory of constitutional legitimacy, the conception of natural rights, the method of constitutional interpretation, the interpretations of key clauses, and the Presumption of Liberty I advance here all raise serious questions—is there any constitutional theory that does not?—readers should think long and hard before rejecting them. For the alternative may be to admit that, when judges pronounce constitutional law, there really is no one behind the curtain and their commands are utterly devoid of binding authority.

We need not, I submit, reach this conclusion. The lost Constitution has not, after all, been repealed. It remains before our eyes and its restoration within our grasp. Once it is remembered in its entirety, the case for a constitutional Presumption of Liberty becomes compelling. But to restore, we must first remember.