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THE ORIGINALIST AND NORMATIVE CASE AGAINST JUDICIAL ACTIVISM: A REPLY TO PROFESSOR RANDY BARNETT

Steven G. Calabresi*

RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY. By *Randy E. Barnett*. Princeton: Princeton University Press. 2004. Pp. xv, 366. \$32.50.

In *Restoring the Lost Constitution: The Presumption of Liberty*, Professor Randy E. Barnett¹ lays out a bold defense of the theory of originalism in constitutional interpretation. Professor Barnett's book is perhaps the most important book about originalism since Robert H. Bork's *The Tempting of America*.² Barnett presents a normative case as to why contemporary Americans should agree to be governed by the original meaning of the Constitution, and, like most sophisticated originalists, he nicely distinguishes between original meaning and original intent. Barnett correctly notes that what really matters in constitutional interpretation is not what the Framers intended that provision to mean but rather what the original language actually meant to those who used the terms in question. In defending original meaning over original intent, Professor Barnett aligns himself with other sophisticated originalists like Robert H. Bork, Antonin Scalia, Gary Lawson, John Harrison, Akhil Amar, and Michael Paulsen. Barnett's book claims to use the exact methodology those sophisticated originalists use, and he claims that using that methodology leads us to the conclusion that the Constitution mandates libertarianism at both the state and federal level.

This raises the second way in which *Restoring the Lost Constitution* is of the greatest importance: It is the best defense ever written of a libertarian or conservative/libertarian approach to constitutional law. Barnett's book immediately replaces Richard Epstein's *Takings*³ as

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1. Professor of Law, Boston University School of Law.

2. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

3. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

the leading tome about constitutional law written from a libertarian perspective. Barnett concludes that two key grants of federal power — the Commerce Clause⁴ and the Necessary and Proper Clause⁵ — should both be read narrowly. From this, Barnett implies that the New Deal was unconstitutional and that the correct reading of federal power was that given in *Hammer v. Dagenhart*,⁶ and not the familiar reading of *United States v. Darby*.⁷ For state laws, Barnett defends a broad interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment.⁸ Barnett argues that this Clause authorizes all that the Supreme Court has done under its substantive due process case law and then some. Barnett is thus a fan of both *Lochner v. New York*⁹ and *Roe v. Wade*,¹⁰ decisions that other leading sophisticated originalists like Bork and Scalia have described as abominations.¹¹ Thus, Barnett's book poses a direct challenge to Bork and Scalia by arguing that their methodology of originalism, in fact, leads to results they abhor.

Third, in addition to defending originalism and a libertarian reading of the Constitution, *Restoring the Lost Constitution* issues a revolutionary challenge to the whole idea that the Court, in reviewing a congressional statute, should give that law a presumption of constitutionality. This doctrine of judicial restraint, which Barnett correctly traces back to the writings of James Bradley Thayer,¹² has been a guiding light of the Supreme Court's case law since *United States v. Carolene Products Co.*¹³ Barnett argues that the *Carolene Products* presumption of constitutionality wrongly puts the burden on individuals challenging governmental action; instead, the Ninth Amendment¹⁴ and Privileges or Immunities Clause suggest that the burden should be on the government — federal or state — to show

4. U.S. CONST. art. I, § 8, cl. 3.

5. U.S. CONST. art. I, § 8, cl. 18.

6. 247 U.S. 251 (1918) (striking down a federal law attempting to forbid child labor).

7. 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act of 1938, 52 Stat. 1068 (1938) (current version at 29 U.S.C. §§ 201-219 (2004)), and overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918)).

8. U.S. CONST. amend XIV, § 1, cl. 2.

9. 198 U.S. 45 (1905).

10. 410 U.S. 113 (1973).

11. BORK, *supra* note 2, at 111-16; Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 979-1002 (1992) (Scalia, J., dissenting).

12. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). For a one-hundredth anniversary look-back at this landmark article, see *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993).

13. 304 U.S. 144 (1938).

14. U.S. CONST. amend. IX.

that the law is a necessary and proper invasion of citizens' liberties. Barnett argues that the best way to realize the Ninth Amendment's and the Privileges or Immunities Clause's protection of unenumerated individual rights is by replacing the presumption of constitutionality with a presumption of liberty. This shifting of the burden of proof from the individual to the government is perhaps the most revolutionary and intriguing suggestion made in *Restoring the Lost Constitution*. It speaks to Barnett's tremendous creativity and his determined commitment to the cause of individual freedom that he was able to conceptualize and defend so radical a move. This feature confirms Barnett's standing as one of the most interesting and thoughtful scholars writing in the field of constitutional law today.

Barnett's book is highly ambitious, and it is probably fair to say that he hopes it will become a manifesto or call-to-action for legions of young libertarian and conservative law students and lawyers. The book calls for a return to the pre-1937 New Deal understandings of the Constitution and is a ringing defense of libertarian/conservative constitutional outcomes. I have no doubt that Barnett will win many converts to his cause and that this book will prove influential for years to come.

The central challenge, though, raised by Professor Barnett's book is over who is right: Professor Barnett, who claims that originalism leads to judicial activism on behalf of a libertarian state, or Justice Scalia and Judge Bork, who claim that originalism leads to judicial restraint. I conclude that while both Barnett and Bork/Scalia contribute to our understanding of the correct answer to these questions, Barnett, for three reasons, has failed in his quest to accurately describe the true original understanding of the Constitution. These three reasons, each discussed separately below, are: (1) that Professor Barnett reads the power-granting and individual-rights-protecting clauses of the Constitution inconsistently; (2) that Professor Barnett, in the end, is wrong about there being a presumption of liberty; and (3) that Professor Barnett fails to rebut, or even discuss, the substantial case conservatives (and some liberals) have made against judicial activism over the last fifty years.

I.

The first serious flaw in *Restoring the Lost Constitution* is that Professor Barnett seems to follow different approaches in reading the power-granting clauses and the individual-rights-protecting clauses of the Constitution. Put simply, Barnett reads the power-granting clauses very grudgingly, strictly, and narrowly while he treats the rights-protecting provisions as being very open-ended and susceptible to evolution over time. This inconsistent treatment of the Commerce and the Necessary and Proper Clauses on the one hand, and of the Ninth

Amendment and the Privileges or Immunities Clause on the other, leads one to question the depth of Professor Barnett's commitment to originalism as a consistent methodology to be used in constitutional interpretation.

The first piece of evidence of Professor Barnett's inconsistency comes with his interpretation of the word "commerce." Barnett discusses the commerce power in Chapter Eleven, where he provides a superb discussion of the interpretive issues originalists face in construing the Commerce Clause (pp. 274-318). Barnett carefully surveys the other uses of the word "commerce" in the Constitution, the meaning of the Indian and Foreign Commerce Clauses,¹⁵ and numerous original uses of the word "commerce." In particular, Barnett looks at usages of the word "commerce" in the Constitutional Convention debates, in *The Federalist Papers*, and in the *Pennsylvania Gazette* (a contemporary newspaper) to find out the original meaning of the word "commerce." The end result is a superb originalist treatment of the meaning of "commerce" which concludes that the word "commerce" was almost always used in the narrower sense of meaning "trade or barter" rather than in the broader sense of meaning "any gainful activity."

Similarly, in Chapter Seven, Barnett thoroughly discusses the evidence on the original meaning of the Necessary and Proper Clause and concludes that "necessary" means more than merely convenient but less than indispensable (pp. 173-84). Consequently, intermediate means/ends scrutiny is appropriate when courts are reviewing the "necessity" of a law (p. 176). This inquiry, however, should also determine that the means chosen do not violate individual rights, federalism, or the separation of powers, together with a showing that Congress is not claiming to be pursuing a means merely as a pretext for pursuing some other power not actually delegated to it (p. 190). The final result is a narrow construction of the Necessary and Proper Clause under which many federal claims of power that have been thought to be valid since the New Deal would become unconstitutional.

Barnett's narrow construction of the Commerce and the Necessary and Proper Clauses can be seen by looking to whether federal legislation outlawing child labor and establishing a minimum wage would be constitutional under his reading of the Constitution. It, apparently, would not be constitutional; since Barnett reads the commerce power as extending only to actual trade and not to the pursuit of a gainful activity, it would not reach manufacturing conditions within a particular state. Similarly, the necessary and proper power would not be implicated because Congress would be

15. U.S. CONST. art. I, § 8, cl. 3.

relying on that Clause only as a pretext for exercising a power over manufacturing that it had not been delegated. In short, under Barnett's reading, *United States v. Darby* is wrong and *Hammer v. Dagenhart* was right.

Now, compare this narrow understanding of "commerce" and "necessary and proper" with Barnett's understanding of which "privileges or immunities" are protected under the Fourteenth Amendment. Barnett reads the Privileges or Immunities Clause in a standard manner, protecting the rights enumerated in the Bill of Rights and such basic civil rights as the right to make contracts, own and inherit property, and testify in court. But Barnett goes further, arguing that the Privileges or Immunities Clause protects liberty itself such that things can only be outlawed under the state's police power if the state can show that its police power regulation was a necessary and proper measure to promote the health, safety, and public morals of the populace (p. 334). Following this analysis to its logical conclusion, Barnett argues the Supreme Court's decision in *Lawrence v. Texas*,¹⁶ invalidating the sodomy laws of thirteen states including Texas, was rightly decided under an originalist understanding of the Fourteenth Amendment. Barnett recognizes no police power authority to prohibit purely private immoral acts: since the sodomy in question harmed no one and did not take place in public, the state's police power simply does not reach it. In short, Barnett reads "commerce" narrowly as not including the "gainful activity" of manufacturing goods with child labor, while "privileges and immunities" is read broadly as protecting not only sodomy but also all purely private but immoral conduct that does not directly harm some nonconsenting third party.

The first fundamental problem, then, with Barnett's originalism is that he reads "commerce" and "necessary and proper" very grudgingly, while reading the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment for all they could be worth. This inconsistency, whereby originalism rules out laws against child labor but effectively protects sodomy as a fundamental right, is quite damaging to Barnett's thesis. Put simply, it suggests that Barnett has unwittingly skewed his reading of constitutional language to produce the libertarian policy results which he favors. There is simply no way to argue that the framers of the Fourteenth Amendment would have understood sodomy or abortion as a privilege or immunity. Nor would the framers of the Ninth Amendment have understood the rights retained by the people as including a right to engage in sodomy or to have an abortion. Barnett has simply not read the rights-conferring clauses of the Constitution with the same attention to detail that he has used in reading the words "commerce"

16. 539 U.S. 558 (2003).

or “necessary and proper.” He has examined these latter phrases with a microscope while looking at the rights-conferring provisions without his reading glasses on.

Let me make it clear, however, that there is much in Barnett’s analysis with which I agree. Indeed, in many respects, Barnett’s analysis is far more penetrating and less superficial than what has been provided by any other originalist writer to date. For example, the textual, originalist case Barnett makes for reading “commerce” as meaning only trade and barter is very powerful, and I know of no counterarguments that rebut Barnett’s careful scholarship on the original meaning of the Commerce Clause. Similarly, I agree with Barnett that the Necessary and Proper Clause requires intermediate scrutiny of the connection between means and ends, although I disagree with him that legislation enacted under the Clause can be struck down if it is merely a pretext for exercising some other power not delegated. It seems that the only question presented under the Necessary and Proper Clause is whether a law is necessary and proper to carrying out one or more of the enumerated powers. If it is, that law is constitutional even if it invades some sphere of state power, such as the supposed state power over manufacturing. There is no core category of undelegated powers which the Constitution reserves to the states. That is the significance of *Darby’s* correct dictum that the Tenth Amendment¹⁷ states but a truism: that all that is not delegated is retained.¹⁸ In sum, Barnett’s reading of the Commerce Clause may well be right and his reading of the Necessary and Proper Clause at least half-right. Given that leading originalists such as Scalia and Bork have thrown up their hands about the original meaning of these terms, Barnett has clearly performed a very valuable public service by rediscovering what those Clauses meant.

Similarly, Barnett is far closer to discovering the original meaning of the Ninth Amendment and the Privileges or Immunities Clause than was Judge Bork when he memorably called both Clauses “inkblots” (pp. 191-252). I agree with major elements of Barnett’s reading of the Privileges or Immunities Clause. In particular, I agree with Barnett that it is the most important clause in section 1 of the Fourteenth Amendment and that it was construed absurdly narrowly in the *Slaughter-House Cases*.¹⁹ I also agree with him that the words “Privileges or Immunities” refer to all civil and common law rights, as well as the rights protected by the Bill of Rights.²⁰ Finally, I agree that

17. U.S. CONST. amend. X.

18. 312 U.S. at 124.

19. 83 U.S. (16 Wall.) 36 (1873).

20. For a powerful discussion of the incorporation of the Bill of Rights into the Privileges or Immunities Clause, see AKHIL REED AMAR: *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

the Clause protects unenumerated, individual rights per the discussion by Justice Bushrod Washington in the critical case of *Corfield v. Coryell*.²¹

The problem, however, with Barnett's reading of the Privileges or Immunities Clause is that he throws out two key limits in Justice Washington's opinion. First, Justice Washington makes it clear that privileges or immunities must, by their nature, be fundamental rights.²² This seems to put the burden on the individual to show that there is a fundamental right; it does not put the burden on the state to defend its exercise of the police power. Second, and more fundamentally, Justice Washington explicitly says that all privileges or immunities are held "subject . . . to such restraints as the government may justly prescribe for the general good of the whole."²³ This is a sweeping caveat that greatly limits the scope of the Privileges or Immunities Clause. All just restraints "for the general good of the whole" are allowed according to *Corfield*, and Barnett agrees that *Corfield* is the law when it comes to understanding the Privileges or Immunities Clause (pp. 62-63).

Well, one might then ask if laws against sodomy are just restraints for the general good of the whole? They certainly have been thought of that way for thousands of years. It is true that they involve morals legislation against purely private immoral acts, but since the time of Saint Thomas Aquinas such legislation has been thought by most to be permissible. In the United States, we have many laws on the books that regulate private immoral conduct to promote the general good of the whole. In addition to sodomy laws, we have laws banning prostitution, adult incest, group sex, possession of obscene publications, and possession of drugs and other controlled substances. Are all these laws also to be thrown out under Barnett's originalist analysis as not being just laws for "the general good of whole"? What about laws against consensual, private duels between two parties — laws which we have had since the beginning of the nineteenth century? Do they also fall as not being just laws for "the general good of the whole?" There is simply no way that the language in *Corfield* permitting just regulation for "the general good of the whole" could have been understood in 1868 as not authorizing state morals laws of the kind discussed above. If the original meaning of the word "commerce" is strictly construed to not include "any gainful activity" then the original meaning of the words "Privileges or Immunities" cannot comprehend a right to engage in sodomy or to have an abortion. Professor Barnett has inadvertently replaced the Borkian

21. 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

22. *Corfield*, 6 F. Cas. at 551.

23. *Id.* at 552.

inkblot of privileges or immunities with the complete text of Mr. John Stuart Mills's *On Liberty*.²⁴

II.

The second major problem with *Restoring the Lost Constitution* is that Professor Barnett is wrong to replace the presumption of constitutionality with a presumption of liberty. While this move is highly creative and thought provoking, at the end of the day, I am not persuaded by Barnett's arguments in favor of the so-called presumption of liberty. To begin with, the Constitution is silent with regards to presumptions, so anything we say about presumptions must instead be derived from structural first principles. Barnett contends that the presumption of liberty is a way to protect the unenumerated rights that the text of the Constitution safeguards within the Ninth Amendment and the Privileges or Immunities Clause (pp. 259-68). At the same time though, neither clause says anything directly about a presumption of liberty, nor does Barnett have any evidence to offer that the framers of either the Ninth Amendment or the Privileges or Immunities Clause thought those clauses created a presumption of liberty.

In fact, the evidence from *Corfield* seems to suggest that the framers of the Privileges or Immunities Clause did not think it created a presumption of liberty. Justice Washington expressly says that only *fundamental* privileges or immunities are protected and that even those can be trumped by just restraints for the general good of the whole.²⁵ This sounds less like a sweeping general presumption of liberty and more like a regime where fundamental enumerated and unenumerated rights are protected, except against publically interested regulation which gets evaluated under intermediate scrutiny. I concede that under such an approach there would be greater judicial protection of economic rights than we have seen since 1937, but the resulting regime would not sanction anything as activist as either *Lochner* or *Lawrence* — two opinions Barnett expressly approves of.

Given the total absence of textual or historical evidence for the presumption of liberty when state laws are being judicially reviewed, it seems strange that Barnett would argue for such a presumption in a book that is purportedly about originalism. In fact, if one were trying to figure out, as an original matter, whether government or individuals have the burden of proving the law, one might be led to a contrary conclusion.

24. JOHN STUART MILL, *ON LIBERTY* (Hackett Publishing Co. 1978) (1859).

25. *Corfield*, 6 F. Cas. at 551-52; see also p. 198.

Gary Lawson, Professor at the Boston University School of Law, is the author of a major article entitled *Proving the Law*,²⁶ where he posits that since the state governments are governments of general jurisdiction, they presumptively have the power to act unless a federal constitutional right trumps their general power to regulate. Under this approach, the burden of proving the existence of that federal constitutional right would fall on the individual. This would make sense since, if the states presumptively have the power to act unless a federal constitutional right is proved to exist, it should be the case that the individual who wishes to restrain the state has the burden of proving the existence of that right.

In federal cases, on the other hand, the federal government is one of limited and enumerated powers; as such, the first thing that must be proved is the existence of a federal power to act. Under this analysis, the government has the burden in federal cases of showing that its claim of an enumerated power is a valid one. Thus, Lawson might agree with Barnett's presumption of liberty for federal cases but disagree with it for state cases. Since the Supreme Court reviews many more state than federal laws, in the vast majority of cases the burden of proof will be on the individual as opposed to the government.

I think that Lawson's approach to the problem of who has the burden of proof on legal matters is highly intriguing and that it is far more likely to be correct than Barnett's view about there being a presumption of liberty. There is, however, another argument about presumptions that should be considered, which grows out of the fact that all three branches of the federal government play a role in constitutional interpretation. This fact, usually referred to as "departmentalism" (after the three great departments of the federal government), suggests that the federal courts have no unique license to interpret and enforce the federal Constitution. In fact, as every first year law student learns, there is no clause in the Constitution authorizing judicial review or enforcement of the Constitution by the courts. That power is instead deduced from the need for the courts to decide cases or controversies according to law. Just as the courts are obligated to decide cases or controversies agreeably to the Constitution, Congress is obligated to pass only legislation agreeable to the Constitution and the President is bound to exercise his powers agreeably to the Constitution. What this all means is that the Constitution is, in fact, enforced by all three branches of the federal government, each adopting its own independent construction of the Constitution as laws are first enacted, then enforced, and finally adjudicated. In sum, the federal courts have only one-third of the total power to enforce the Constitution. Before the federal courts can act in

26. Gary Lawson, *Proving the Law*, 86 Nw. U. L. REV. 859 (1992).

a case involving a federal statute, Congress must independently pass on the constitutionality of the statute and the President must decide that the execution of the statute comports with the Constitution.

What can we deduce then about which litigant should benefit from the departmentalist nature of the American system of constitutional enforcement? One possible conclusion is the one arrived at by James Bradley Thayer who, as Professor Barnett points out, argued for a “Rule of Clear Mistake” in constitutional law, i.e. a law should only be invalidated by courts as unconstitutional if it represented a clear mistake. Under the Thayerian approach, legislatures receive great deference from courts, with only clearly mistaken laws getting invalidated. I have previously argued against the Thayerian rule, and I continue to stand by my arguments against Thayer.²⁷ Departmentalism suggests to me that the courts need not defer to the legislature to the degree that Thayer suggested. If a court thinks there is a fifty-one percent chance that Congress has acted unconstitutionally that is enough to throw the law out. A court need not be sixty-seven percent sure that Congress has erred before it can act.

But the question raised by Professor Barnett is, what if the evidence is in equipoise? What should the Court do when there is a fifty percent chance Congress is correct and a fifty percent chance the individual asserting a claim of individual right is correct? In that situation, whoever has the burden of proof will lose their case. I think, under these circumstances, it is right to conclude from departmentalism that there should be a presumption of constitutionality. After all, no federal case reaches the Court until two-thirds of the federal government — both the Congress and the President — have concluded that the law in question is constitutional. Under such circumstances, it seems respectful of those branches’ coordinate rank to say there is a presumption of constitutionality. The Constitution is enforced by all three branches of the federal government acting together and, where two of the three branches have said an action is constitutional, the third branch should not invalidate the law unless it is prepared to say there is at least a fifty-one percent chance the other two branches are wrong.

Now, at this point, Professor Barnett might object that this is not the way the presumption of constitutionality in fact works in the federal courts. He might, quite validly, say that the *Carolene Products* presumption of constitutionality operates more like the Thayerian Rule of Clear Mistake than the kind of tiebreaker rule I endorse. As to this point, Barnett’s hypothesis may well have been true during the period between 1937 and the Court’s 1995 opinion in *United States v.*

27. Steven G. Calabresi, *Thayer’s Clear Mistake*, 88 Nw. U. L. REV. 269 (1993).

Lopez.²⁸ Since *Lopez*, however, the Court has aggressively reviewed congressional decisions, even those regarding what laws are appropriate measures to enforce the Fourteenth Amendment.²⁹ I think one can no longer claim that the Court is applying the highly deferential *Carolene Products* standard of review in federal cases. Accordingly, a presumption of constitutionality in federal cases today is likely to function more as a tie-breaking rule than as the very deferential Thayerian Rule of Clear Mistake.

III.

The third major flaw with *Restoring the Lost Constitution* is that it both essentially ignores and fails to respond to the main criticisms of judicial activism that have been developed over the last century. Beginning with the Progressive era's resistance to "Lochnerizing" and continuing with the resistance of many conservatives to the judicial imperialism of *Roe v. Wade*, a standard critique of judicial activism has emerged, whereby such activism is criticized as: (1) being lawless; (2) ignoring a countermajoritarian difficulty; (3) raising federalism concerns; (4) suffering from informational constraints; and (5) leading to excessive rigidity in the law. Professor Barnett's book calls on judges to assume a vastly increased role in striking down state and federal laws, but yet it does not address any of these five standard criticisms. This Review discusses each of these five criticisms as they relate to Professor Barnett's thesis.

A. Barnett's Approach Leads to Lawlessness

First, there is the concern that judicial activism is lawless, a concern that was central to Judge Robert H. Bork's book, *The Tempting of America*, published fourteen years ago.³⁰ Judicial activism is lawless first in the sense that the Constitution does not authorize federal courts to either make policy or play a large role in the actual governance of the nation. Professor Barnett attempts to respond to this point in Chapter Six where he argues that the Framers intended to create the institution of judicial review (pp. 131-52). Barnett is right that the Framers meant to give judges the power of judicial review, but that does not mean that federal judges were to second-guess the

28. 514 U.S. 549 (1995).

29. Bd. of Trs. of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000). *But see* Tennessee v. Lane, 541 U.S. 509 (2004) (upholding a section of the Americans With Disabilities Act as a valid exercise of the section 5 power); Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (upholding the Family Medical Leave Act as a valid exercise of the section 5 power).

30. BORK, *supra* note 2.

necessity of federal legislation under the Necessary and Proper Clause or the reasonableness of state legislation under section 1 of the Fourteenth Amendment, with no presumption of constitutionality attached to those legislative actions. Decisions about either the degree of necessity behind a law or about the reasonableness of an exercise of the state's police power are inherently legislative or policymaking decisions. As such, they are decisions that should be made in the first instance by the political branches of government.

The federal Constitution sets up three branches of government, and the federal courts are deliberately described as the third, last, and least powerful of the three branches.³¹ Just at a glance then, the constitutional text suggests the courts are to play a tertiary role. Both Article I, setting up the Congress, and Article II, describing the presidency, are far more detailed than Article III. Indeed, Article III neither establishes the size of the Supreme Court nor requires Congress to set up any lower federal courts. In theory, Congress could fulfill its obligations under Article III by creating a one-person Supreme Court and excepting from that Justice's jurisdiction many interesting and important constitutional cases. There is simply no way to read the bare-bones language of Article III, in contrast to the detailed language of Article I, and conclude that the Framers meant for the Court to be a powerful institution. Surely, if the Framers had wanted the Court to play the Council of Revision-like role that Barnett envisions, they would have set the size and jurisdictions of both the Supreme and lower federal courts in the text of Article III.

Nor does the bare text of the Constitution suggest that the federal courts have a distinct role as the defenders and protectors of the federal Constitution. To the contrary, the text explicitly gives that role to the President who is bound to take an oath "to preserve, protect, and defend the Constitution of the United States."³² The justices and judges are not charged with the task of preserving the Constitution, but the President, with his overridable veto power, is. This further suggests the Framers did not expect the Court to play a Council of Revision-like role.

Additionally, we know that the Framers considered creating a Council of Revision with justices of the Supreme Court as members of it and that they also considered giving the Supreme Court the power to issue advisory opinions. The Framers deliberately decided against both of these proposals because they would overly involve the judiciary in the making of policy decisions. This evidence also suggests

31. Article III is much shorter than Article I and II and, unlike those Articles, it contains only one clause that grants power to the federal courts.

32. U.S. CONST. art. II, § 1, cl. 8.

that the Framers originally intended a smaller judicial role than what Barnett seems to imagine.

Finally, the ratification debates and the *Federalist Papers* all suggest that the Court was to be, in Hamilton's words, "the Least Dangerous" branch to the people's liberties.³³ Given the hostility of the anti-Federalists to grants of federal power, I think it is virtually certain that if the courts were to play as big a role in the nation's government as Barnett imagines, we would have seen the emergence of some kind of check and balance on the power of judicial review such as an ability to override Supreme Court decisions by a two-thirds vote of both houses of Congress. The reason the Framers made presidential vetoes overridable, but not Supreme Court decisions, is that they had learned to fear the abuse of executive power at the hands of King George III, but had no experience with judicial usurpations of power. The Framers simply never imagined that the judicial power conferred by Article III would come to mean as much raw power as Barnett says it means. In this sense then, I think Barnett has overread the original meaning of the judicial power Article III confers on the federal courts.

Even if Barnett were right about the original meaning of the judicial power conferred by Article III, there still remains the question of whether the Framers of the Fourteenth Amendment intended section 1 of that enactment to confer a sweeping power on federal judges to consider the reasonableness of state exercises of the police power. Barnett seems to think the Fourteenth Amendment is a large blank check to judges to sit in judgment on the reasonableness of state laws. This view totally overlooks that one important purpose of the Fourteenth Amendment was to overturn the Supreme Court's activist, substantive due process decision in *Dred Scott v. Sandford*.³⁴ It seems most unlikely that an amendment meant to overturn the Supreme Court's first substantive due process decision was intended itself to authorize future substantive due process decisions as to state laws as in *Lochner* or *Roe v. Wade*. The Fourteenth Amendment was clearly meant to do two things: First, it constitutionalized the Civil Rights Act of 1866 so that no future Congress could repeal any portion of that act. Second, it gave Congress additional powers to protect civil rights vis-à-vis the states. Professor Barnett's reading of the Fourteenth Amendment as a blank check to judges is almost certainly contrary to the meaning of the Reconstruction Framers who sought to overrule *Dred Scott*, not to authorize future *Dred Scotts*!

So far, I have shown that judicial activism on the scale Barnett calls for is inconsistent with how the Framers of both the original

33. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

34. 60 U.S. (19 How.) 393 (1857).

Constitution and the Fourteenth Amendment imagined the judicial role. Such activism is lawless in a second sense as well, though, because it calls on judges to resort to their own policy views in deciding what federal and state laws are necessary and proper. Barnett's call for federal judges to weigh the necessity and propriety of all federal and state laws would force those judges to make policy decisions of the legislative sort which the Constitution expressly commits to the political branches. For this reason too, Barnett's argument fails.

B. *Barnett Fails to Address the Countermajoritarian Difficulty*

A second flaw in Barnett's book is that he nowhere addresses the central concern of constitutional theory over the last 100 years: that of the countermajoritarian difficulty.³⁵ Ever since *Lochner*, and certainly since *Roe v. Wade*, legions of critics have asked why unelected judges should have the power to trump the decisions of elected lawmakers at the state and federal level. It is very troubling in a democracy to have so many important decisions made by unelected judges interpreting a document written more than 200 years ago. It is especially troubling if the "interpretation" those judges make involves adjudicating upon the degree of "necessity" of a federal law or the "reasonableness" of a state's exercise of its police power.

The Constitution does, of course, protect individual rights, but the main way it does so is by setting up a system of democratic elections for the House, Senate, and Presidency. Barnett would sweep that system of elections aside, confident that federal judges would make better assessments of necessity than the people's elected representatives. But, what reason is there to think federal judges will be better judges of "necessity" than elected officials? Judges are disproportionately rich, elderly lawyers drawn from the upper classes of society. Does Barnett favor rule by judges because he is an oligarch or an aristocrat rather than a democrat? Who is to say judges will not simply impose their upper-class biases by, for example, protecting liberty of contract and social-issue liberalism upon the benighted masses?

Barnett does develop an argument as to why we should be bound by the original understanding of the Constitution even if we did not vote for it, which I do not take issue with here. What I do take issue with, however, is the presumption that unelected federal judges should sit as a Council of Revision over the necessity and propriety of all state and federal laws. This proposal, in effect, makes the federal courts the

35. This criticism was first pointed out to me by Andy Koppelman, a colleague of mine at Northwestern University School of Law.

first branch and Congress the third branch of the federal government, instead of the other way around.

At a bare minimum, I think Barnett needs to say a great deal more about the countermajoritarian difficulty. It is insufficient to simply wish it away with the fiction that since “We the People” authorized the Constitution, we have consented to having federal judges scrutinize the necessity and propriety of all federal and state laws. Barnett proposes an awesome increase in the power of the federal courts over the day-to-day running of this society. He ought at least explain and defend his proposal to transfer so much power to electorally unaccountable officials.

C. *Federalism and “Restoring the Lost Constitution”*

A third criticism of government by judges that has been current over the last 100 years is that it wrongly federalizes policy questions that are better left to the states to be handled in a decentralized way. Federalism allows each state to draw up laws according to the tastes and preferences of its own citizens. These tastes and preferences differ from state to state — for example, states like Texas and Vermont may have very different preferences with regard to gay rights. When the Supreme Court sets itself up as the judge of the reasonableness of state laws, it effectively requires that there be one national policy on matters like gay rights, abortion, or minimum wage and maximum hours laws. This is undesirable because, for many matters, it is valuable to let the states have differing policies. Those citizens who find that they sharply disagree with their state’s policies can always move to a new state whose policies they favor. In this way, more citizens will be happier than if there is a one-size-fits-all national policy solution.

More than seventy-five years ago, liberal Supreme Court Justice Louis Brandeis praised the states as laboratories of experimentation.³⁶ An advantage of federalism is that states can experiment with things like covenant marriage or civil unions for gays, or even something as ghastly as assisted suicide. These experiments can be tried out at the state level to see how they work before being nationally imposed. It is well known that states compete with each other for material resources and able citizens. Allowing the states to experiment and compete with each other leads to better policymaking. One-size-fits-all decisions of the Supreme Court, however, stifle innovation and change, and prevent needed experimentation.

Nowhere are these points better illustrated than by reference to the mess the Supreme Court has made of our national politics of

36. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting).

abortion law in the wake of *Roe v. Wade*. The Court took an issue as to which the conservative South and Rocky Mountain West disagreed with the culturally liberal Northeast and Pacific Coast states, and the Court just declared by fiat that the Northeast and Pacific Coast states' policies were to be the national rule. This infuriated Southerners and other cultural conservatives and set off a thirty-year war over federal abortion policy that rages even to the present day. The cultural war which the Court set off over abortion has completely tied in knots the process of appointing and confirming federal judges, and it has utterly poisoned our national culture. Barnett, instead of regretting this fact, argues that the judges should do this a great deal more often. Can anyone doubt that, if they did, the whole system of appointing Supreme Court justices would collapse altogether?

If the High Court had stayed out of the abortion mess, each of the fifty states would have had their own abortion policies, with some states legalizing abortion on demand and others restricting it to situations where the life of the mother was in danger. Anyone who really wanted an abortion would have been able to get one by crossing state lines, but at least pro-lifers would not have had to endure the indignity of being told that abortion was a national constitutional right. I think our politics over the last thirty years would have been far more harmonious had the Court left abortion to the states. Barnett's failure to recognize the federalism arguments against judicial activism is a major weakness of his book.

D. *Informational Constraints and Rigidity*

A fourth flaw with Professor Barnett's book is that he fails to consider some functional arguments that might be made against judicial governance. First, judges have very poor information about the outside world on which to base their decisions. All they know about the issues a case poses is what the briefs and oral arguments tell them. Judges cannot conduct oversight hearings, they cannot conduct on-site inspections, they cannot get constituent feedback on an issue or even chat informally with one of the parties without the other party being present. In a whole host of ways, judges have far less-perfect empirical information about what is going on in the real world than do legislative or executive officials.

The absence of empirical data and information makes judges less qualified to be good policymakers than politically accountable officials. Often, there are real world questions of fact which are important to the making of a policy decision. For example, is the profession of being a baker a dangerous one? Will abortion on demand lead to sexual promiscuity or infanticide? Will the legalization of assisted suicide cheapen the value of life and cause depressed people to commit suicide more often? All of these questions are

questions of fact, and the legislature is better situated to answer them than a life-tenured, cloistered judge who talks only to his law clerks, his family, and other judges. Functionally, legislative and executive agencies are better suited to make policy than courts. In other areas of constitutional law, we show deference where an institution is functionally a better decision-maker. This is why the courts and Congress often defer to the President on matters of foreign policy. For exactly the same reason, the federal courts ought to defer to the political branches of government on matters where empirical knowledge is important. The political branches have a functional advantage as to these issues that Barnett totally overlooks.

There is a second functional argument for judicial deference to the policymaking branches: those branches are less rigid decision-makers because they can reverse themselves more easily than courts can if they make a mistake. Judges serve for a long time, and when they make mistakes, they have no incentive, not being subject to election, to admit them. In fact, judges often seem to dig in and defend their mistakes as if their reputations depended on it. The result is that judicial decisions tend to be very rigid. This is even more true at the Supreme Court level where ten years can easily go by before any decision gets seriously revisited.

The political branches, on the other hand, have every incentive to revisit their mistakes and make corrections. Politicians have many devices at their disposal for splitting the baby and reaching compromises on issues, which judges often do not have. The end result, then, is that the political branches can make and change decisions faster in response to events than judges can. In this respect too, the political branches are superior decision-makers to judges. It is a weakness of Professor Barnett's book that he overlooks the functional advantages the political branches have as decision-makers relative to the courts.

CONCLUSION

Restoring the Lost Constitution is a very impressive and sophisticated book, but it overlooks some important originalist and normative arguments against judicial activism. It is also very unrealistic. Professor Barnett may hope that the Supreme Court will ride again as a stalwart defender of individual freedom as it did between 1933 and 1937, but that will not happen. The High Court, as Mr. Dooley once said, "follows th' illiction (sic) returns."³⁷ The only way the Court will become as libertarian as Barnett wants is if we start electing libertarian presidents and senators to pick the justices. If that

37. Finley Peter Dunne, *The Supreme Court's Decision* (1901).

happens, we won't need a libertarian Supreme Court. The way to reform government in the United States is not through libertarian public interest litigation but through running in elections and winning them. That is the real original way in which to achieve libertarian-conservative reforms in this country.