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## Restoring the Right Constitution?

*Restoring the Lost Constitution: The Presumption of Liberty*

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**INTRODUCTION**

The past few decades have witnessed a dramatic renewal of interest in the natural law tradition within philosophical circles after years of relative neglect.<sup>1</sup> This natural law renaissance, however, has yet to bear much fruit within American constitutional discourse, especially among commentators on the left.<sup>2</sup> At the same time, some contemporary progressive constitutional theorists have begun to complain about the inadequacy of the conceptual tools at their disposal to discuss the interface between their moral and constitutional commitments. Robin West, for example, has recently argued that within contemporary liberal constitutional scholarship, “[t]here is almost nothing . . . about the possible constitutional grounding of the moral duties, whether enumerated or unenumerated, of either federal or state legislators to legislate, or to do so in particular ways, or toward particular ends.”<sup>3</sup> Related to West’s observation, there is an increasing tendency within progressive political circles to bemoan the absence of a vocabulary with which to articulate the moral grounds for the left’s political agenda.<sup>4</sup> The natural law tradition would seem to provide a great deal of what these commentators find lacking in current progressive political and legal discussions: rich concepts and language with which to probe the moral character and legitimacy of constitutional law and government action (or inaction). The failure of these constitutional theorists to

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1. For some major recent philosophical works exploring the natural law tradition, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); PHILIPPA FOOT, *NATURAL GOODNESS* (2001); ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (1993); ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* (1999); ANTHONY J. LISSKA, *AQUINAS’S THEORY OF NATURAL LAW: AN ANALYTIC RECONSTRUCTION* (1996); and ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988).
  2. See Lloyd L. Weinreb, *The Moral Point of View*, in *NATURAL LAW, LIBERALISM, AND MORALITY* 195, 196 (Robert P. George ed., 1996) (discussing the limited influence of contemporary natural law thinking).
  3. Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221, 223 (2006).
  4. See, e.g., Geoffrey Nunberg, *Speech Impediments*, *AM. PROSPECT*, Mar. 1, 2004, at 45, 47 (“Recapturing the language of morality is the most important single step in refashioning a new progressive rhetoric, one free of the technocratic jargon for which Democrats have had a lamentable penchant in the past.”). This complaint from political observers is connected to West’s complaint because, as Robert Post and Reva Siegel have argued, constitutional jurisprudence derives strength and coherence from its interaction with popular political discourse. See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545, 571 (2006) (“[C]onstitutional law is made in continuous dialogue with political culture.”). Post and Siegel argue that progressive constitutional jurisprudence will not be revived until the left learns to reconnect its jurisprudential vision with a broader discourse of progressive politics. See *id.* at 569-75.

embrace—or even to really engage with—the natural law tradition, however, reflects its marginal and—at least among progressives—deeply suspect status.<sup>5</sup>

In light of its low profile within contemporary constitutional debates, an effort to formulate a natural law constitutionalism is almost by definition an event worthy of sustained attention. In *Restoring the Lost Constitution*, Randy Barnett draws heavily upon a natural law theory of constitutional legitimacy to argue in favor of a radically libertarian reading of the Constitution.<sup>6</sup> His position is creatively and engagingly argued and has the potential to reshape the terms of debate on any number of issues. It is therefore unsurprising that Barnett's book has garnered significant attention, both inside the academy and beyond. Steven Calabresi has compared its significance to Richard Epstein's landmark work, *Takings*.<sup>7</sup> And since its publication, *Restoring the Lost Constitution* has been the subject of a seemingly endless stream of blog discussions.<sup>8</sup> Barnett's important book, and the substantial commentary it has generated, may well help to foster interest in natural law constitutionalism.

At least part of the progressive aversion to natural law theory, however, is likely rooted in a persistent hunch that there is something inherently conservative about natural law reasoning. It is hard to blame recent observers for forming that opinion. The most prominent of the “new” natural law theorists, after all, have expended enormous energy advocating expansive legal codification of a decidedly “old” sexual morality.<sup>9</sup> Princeton's Robert George, for example, has enthusiastically defended—on natural law grounds—laws criminalizing private, consensual homosexual conduct.<sup>10</sup> And John Finnis has deployed natural law arguments in defense of laws prohibiting the distribution

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5. See Weinreb, *supra* note 2, at 196 (calling natural law “marginalized”).
  6. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 82-83 (2004).
  7. See Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1081-82 (2005).
  8. See, e.g., Stephen Bainbridge, *Reply to Barnett*, ProfessorBainbridge.com, May 7, 2004, [http://www.professorbainbridge.com/2004/05/reply\\_to\\_barnet.html](http://www.professorbainbridge.com/2004/05/reply_to_barnet.html); *The Road to Hell Is Paved with Good Intentions*, The Smallest Minority, Mar. 28, 2004, <http://smallestminority.blogspot.com/2004/03/road-to-hell-is-paved-with-good.html>; Tung Yin, *Randy Barnett's Restoring the Lost Constitution*, The Yin Blog, Mar. 29, 2004, [http://yin.typepad.com/the\\_yin\\_blog/2004/03/randy\\_barnetts\\_.html](http://yin.typepad.com/the_yin_blog/2004/03/randy_barnetts_.html).
  9. See Stephen Macedo, *Against the Old Sexual Morality of the New Natural Law*, in *NATURAL LAW, LIBERALISM, AND MORALITY*, *supra* note 2, at 27, 27.
  10. See Brief Amicus Curiae of the Family Research Council and Focus on the Family in Support of the Respondent at 17-24, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 320 (1995).

of contraception to unmarried couples.<sup>11</sup> There is no essential connection, however, between natural law reasoning and the specific agenda advocated by George and Finnis.

While Barnett vigorously argues against the sort of morals legislation that George and Finnis have been eager to defend, his libertarian emphasis on unfettered rights of property and contract is likely to reinforce the notion that natural law theorizing is an activity best left to those on the rightmost end of the political spectrum. It would be a mistake, however, to understand Barnett's libertarian version of natural law constitutional theory—any more than George and Finnis's version—as exhausting the possibilities of the tradition. As I argue in Part I, although Barnett's theory of constitutional legitimacy is infused with language drawn from the broader natural law framework, his “natural rights” theory, as he calls it, actually departs in significant ways from the classical natural law tradition. Moreover, there are substantial reasons to favor a version of natural law with implications for state power that are far more progressive. Nor does Barnett establish, as I argue in Part II, that the Constitution *itself* somehow locks us into a commitment to his libertarian, natural rights version of natural law theory.

Indeed, without changing much in Barnett's account, it is possible to convert his theory from one that supports the conservative goal of limiting the power of government, restricting it to the narrow task of facilitating or preserving property and contract rights, into one that justifies a far more capacious and progressive view. If constitutional legitimacy comes from conformity with justice, as Barnett correctly argues, and if justice entails not only negative constraints protecting the individual from certain forms of state coercion, but also obligations to the community as well as affirmative entitlements held by individuals and groups against the community, then a constitution may well be illegitimate if it merely constrains particular state actions and does not empower, or at times even require, the state to enforce those obligations and satisfy those entitlements. Nor does support for an increased state role in the economic sphere commit a progressive natural law theorist to endorsing state activism in the area of sexual morality. As I argue in Part III and, indeed, throughout this Review, far from being inherently conservative (in the contemporary, popular political sense of that term), natural law constitutional theory is consistent both with respect for a robust sphere of individual autonomy and with active state regulation and redistribution of property.

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11. See John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 11, 38-39 (1995).

## I. NATURAL LAW OR NATURAL RIGHTS? TWO TRADITIONS

Throughout his book, Barnett draws heavily on what might, as a generic matter, be termed a traditional “natural law” methodology. As a libertarian, however, Barnett is eager to distance himself from certain aspects of classical natural law jurisprudence, especially its broadly statist tendencies. He therefore refers to himself and his Lockean fellow travelers as “natural rights” theorists, as distinct from “natural law” theorists—a broader category into which he places Thomas Aquinas.<sup>12</sup> “Whereas natural law ethics assesses the propriety of individual conduct,” Barnett says, “natural rights assesses the propriety or justice of restrictions imposed on individual conduct.”<sup>13</sup> Although I agree with Barnett that there is something fundamentally different about the projects in which Locke and Aquinas were engaged, his precise characterization of that difference is unsatisfying.

To begin with, while it is true that Aquinas explored the rightness or wrongness of individual actions, he was also, as Barnett recognizes, interested in questions concerning the proper relationship between the individual and the state and between morality and law; that is, he was interested in the same questions of political and legal theory that concern Barnett.<sup>14</sup> Of course, Aquinas’s answers to these questions differ in dramatic ways from those offered by Locke (and by Barnett). For example, Locke viewed private ownership as a natural institution preexisting the state, and he regarded the state’s principal function as safeguarding those private ownership rights.<sup>15</sup> In contrast, Aquinas understood property as socially constructed and subject to a great deal of communal control and redistribution.<sup>16</sup>

As Barnett acknowledges, to the extent that Locke and other natural rights theorists have sought to derive their political theory from their own observations about human nature, they share certain basic methodological commitments with those whom Barnett calls “natural law” theorists.<sup>17</sup> Aquinas and Locke (and Barnett) part company, however, when they begin to discuss

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12. BARNETT, *supra* note 6, at 82-83.

13. *Id.* at 83.

14. See RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 13-14 (1998); see also 1-2 THOMAS AQUINAS, *SUMMA THEOLOGICA* q. 96, art. 2 (Fathers of the English Dominican Province trans., 1947) (c. 1267-1273).

15. See JOHN LOCKE, *Two Treatises of Government* (1690), in *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 1, 155 (Ian Shapiro ed., 2003).

16. See 2-2 AQUINAS, *supra* note 14, q. 66, arts. 2, 7; see also JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 188-96 (1998).

17. See BARNETT, *supra* note 14, at 13-14.

the actual contours of a normative theory of human nature. Barnett takes issue with the frequent characterization of classical liberal political theory as embracing an “atomistic” conception of the person.<sup>18</sup> He correctly observes that theories of natural rights make no sense outside the context of community because an individual living apart from all others would have no need for the protection of individual rights. “[N]atural rights,” he explains, “are those rights that are needed precisely to protect individuals and associations from the power of others—including the power of the stronger, of groups, and of the State—when and only when persons are deeply enmeshed in a social context.”<sup>19</sup>

This is surely true. An individual living in total isolation need not worry about intrusions on his “liberty,” as Barnett understands that term. But Barnett’s observation also fails to identify accurately the basis for the critique of classical liberalism at which he is taking aim.<sup>20</sup> The critics to whom Barnett apparently refers do not allege that classical liberals believe that people actually do (or even want to) live as isolated individuals. Instead, they take issue with classical liberal theorists’ derivation of the rules of political community from a hypothetical state of nature made up of fully formed, freestanding individuals.<sup>21</sup>

The classical liberal contractarian argument typically looks something like the following: it begins with the mature individual in a state of nature characterized by maximal (negative) liberty and by the utter absence of involuntary communal commitments or obligations. From this starting point, classical liberal theorists typically seek to derive rules for society that preserve as much of this hypothetical state of nature as possible, at least with respect to the individual’s experience of liberty, while gaining for everyone the benefits of

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18. See BARNETT, *supra* note 6, at 83-84.

19. *Id.* at 84.

20. Whether this critique is apt when directed against contemporary liberal theory is a separate question and, given Barnett’s self-identification with classical liberal legal theory, is not relevant to my discussion. See, e.g., Will Kymlicka, *Liberalism and Communitarianism*, in 11 THE PHILOSOPHER’S ANNUAL 87, 87-88 (Patrick Grim et al. eds., 1988) (defending “modern liberalism” against communitarian arguments but distinguishing “classical liberalism” from the version he defends).

21. See JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 276-77 (Rowman & Littlefield Publishers, Inc. 2005) (1960); Charles Taylor, *Atomism*, in POWERS, POSSESSIONS AND FREEDOM 39, 48-49 (Alkis Kontos ed., 1979). Critics have made a similar argument against John Rawls’s contractarian arguments. See, e.g., MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 62-64 (2d ed. 1998); Thomas Nagel, *Rawls on Justice*, in READING RAWLS 1, 9-10 (Norman Daniels ed., 1989).

community life. They demand that the move from this hypothetical (and idealized) situation of isolation and freedom to one of social obligation either be the result of voluntary choice or, when the constraint is involuntarily imposed, be justified by the need to preserve (or enhance) every individual's enjoyment of the liberty present within the original state of nature.<sup>22</sup>

Barnett's underlying political theory perfectly illustrates this move. On the one hand, he praises voluntary associations and welcomes the substantial restrictions they often impose on individual liberty, but he does so only to the extent that they are voluntarily joined. "[U]nder conditions of unanimous consent," he argues, "*liberty is not inconsistent with both heavy regulation and even the prohibition of otherwise rightful conduct.*"<sup>23</sup> Accordingly, like many property libertarians, he celebrates the restraints on individual freedom assumed by those who join private residential communities.<sup>24</sup> On the other hand, he is extremely suspicious of the state precisely because he views it as an unchosen community from which exit is extremely costly:

The larger the land area, the higher the cost of exit and thus the less meaningful is 'tacit' consent to the jurisdiction of the lawmaking process. Most modern cities are probably too large, but even if they are small enough, states are certainly too large to command meaningful unanimous consent.<sup>25</sup>

Consequently, he favors dramatically limiting the power of virtually all territorially defined governments to intrude upon individual liberty. Drawing heavily on Lockean political theory, Barnett argues that the principal purpose of government must be limited to the protection of a constellation of negative individual liberties, such as private property and freedom of contract, the

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22. See LOCKE, *supra* note 15, at 154-57 (describing the transition from the state of nature to society as a voluntary choice driven by a desire to put the protection of one's liberty and property on a more secure footing); Richard A. Epstein, *One Step Beyond Nozick's Minimal State: The Role of Forced Exchanges in Political Theory*, 22 SOC. PHIL. & POL'Y 286, 289-96 (2005).

23. BARNETT, *supra* note 6, at 43.

24. At the same time, Barnett demonstrates an ambivalence about even such voluntarily joined communities by emphasizing the importance of the "low cost of exit" from these communities, a feature that is necessary, he says, to "make[] this initial consent meaningful." *Id.* at 41. He quotes with approval Frank Knight's statement that "effective freedom depends upon an alternative open to the non-conforming individual of leaving the group without suffering loss or damage." *Id.*

25. *Id.* at 43.



operation of which helps to preserve the individual liberty present in the prepolitical state of nature.<sup>26</sup>

From where does Barnett derive the content of these negative liberties? From an implicit normative account of the human person as an uncoerced individual living free from the constraints of involuntary community life. It is for this reason that Barnett (like other classical liberals) talks about the appropriate terms on which individuals hypothetically “enter” society with each other.<sup>27</sup> One can only enter society, after all, if one was not already there to begin with. And, as Charles Taylor has observed, classical liberals understand this being who enters into society and trades away her preexisting liberty to be a fully formed, rational, and autonomous individual.<sup>28</sup>

This normative reliance on the (hypothetically) isolated, autonomous individual is all that most theorists mean when they accuse Lockean liberals of constructing their political philosophy upon an atomized conception of human nature. They are not charging that Lockean liberals actually think that people prefer to live an antisocial existence or that liberals believe that the state of nature, as Locke described it, actually existed. Instead, they are charging, accurately, that classical liberals attribute overriding significance to a hypothetical individual in isolation, a hypothetical that critics of classical liberalism find to be normatively sterile.<sup>29</sup> We are a deeply social species, these theorists argue, and essentially so.<sup>30</sup> Indeed, as Taylor and others have argued, we cannot become the mature human beings capable of rational reflection and free decision (i.e., the sorts of beings presupposed by liberal contractarian political theory) without substantial, and for the most part involuntary, social interaction and preparation.<sup>31</sup>

In other words, the most significant distinction between what Barnett calls “natural law” and “natural rights” approaches to deciphering the proper relationship between the individual and the state is not a difference of subject matter but a radical divergence of normative conceptions of the person. As John Courtney Murray put it:

The premise of Locke’s state of nature is a denial that sociability is inherent in the very nature of man, and the assertion that the civil state

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26. See *id.* at 75.

27. See *id.* at 68-76.

28. See Taylor, *supra* note 21, at 49.

29. See 2 CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES 189-90 (1985).

30. See MURRAY, *supra* note 21, at 274, 296.

31. See ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES 107-09 (2001); Taylor, *supra* note 21, at 54-57.

is adventitious, that man is by nature only a solitary atom, who does not seek in society the necessary condition of his natural perfectibility as man, but only a utilitarian convenience for the fuller protection of his individual self in its individuality.<sup>32</sup>

For Aquinas, by contrast, the normative person is the contextualized individual already embedded in and shaped by the community.<sup>33</sup> In light of his fundamentally different starting point, Aquinas, along with many others whom Barnett would classify as “natural law” theorists, was not committed to viewing the state’s principal function as actively preserving an impermeable membrane of negative liberty that protects the individual from nonconsensual social obligations.

Contrast the standard Lockean depiction of the state of nature as consisting of isolated individuals with the story Aquinas told about the status of private property rights. Rather than beginning with individuals in isolation who then bargain their way into political community to protect preexisting property rights, Aquinas began from the point of view of a political community already in existence. He proceeded to argue that, given the somewhat selfish tendencies of human beings, communal recognition of limited individual rights of private ownership is (practically) necessary to encourage industriousness and to avoid conflict and confusion over who in the community is responsible for what.<sup>34</sup> On one of the few occasions when Aquinas spoke in terms that we might understand as referring to subjective natural rights, he did so not in favor of a property owner’s right to be free from communal interference but in favor of the affirmative entitlement held by a needy individual to share in the consumption of the community’s material wealth, even when the exercise of that entitlement involves appropriating the private property of another.<sup>35</sup>

To summarize, the difference between what Barnett calls “natural law” and “natural rights” theories is not the subject matter in which they are interested, as Barnett insists, but rather their substantive conception of the normative human person. Natural rights theorists, including Locke, build their political theories on the dubious foundation of a hypothetical, prepolitical individual bargaining his way into organized political community and holding out for the best possible deal. Classical natural law theorists begin from a far more realistic conception of human beings as we have always known them, as animals already living in society and struggling collectively to find sustainable and just

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32. MURRAY, *supra* note 21, at 276.

33. See Taylor, *supra* note 21, at 60.

34. See 2a-2ae AQUINAS, *supra* note 14, q. 66, art. 2.

35. See *id.* art. 7.

mechanisms for balancing the legitimate demands of the community with the interests and dignity of the individual.

The arguments Barnett provides in this book on behalf of the libertarian conception of the person, and the basket of negative liberty rights it yields, are both underdeveloped and unpersuasive. "People living in every society," Barnett argues, "confront certain pervasive obstacles to the pursuit of happiness."<sup>36</sup> Echoing Locke's arguments about the origins of government, Barnett identifies the purpose of the political community as rooted in the human need to overcome what he calls problems of "knowledge, interest, and power."<sup>37</sup> As in Locke's political philosophy, people come together to form a government in order to enhance their ability to protect their preexisting individual rights without at the same time violating the rights of others. That is, government is created to permit people to spend less time defending their own rights against the depredations of others and to avoid the dangers that arise when people attempt to serve as judge, jury, and executioner in cases that concern their own interests.<sup>38</sup>

Even the most cursory consideration of the human condition, however, reveals the incompleteness of this account. All three of these "problems," as Barnett understands them, are challenges faced when individuals attempt to protect preexisting interests against other individuals or communities. On the one hand, it is true that this focus is not "antisocial" because these problems only arise when individuals are actually interacting. On the other hand, although Barnett intends his theory to be broadly descriptive of pervasive human experiences, he selectively emphasizes goods and problems associated with the avoidance of unchosen social interaction and with individual protection against others—a focus that gives rise to rights understood in the negative sense as shields. Accordingly, he neglects goods associated with preparation for, or facilitation and empowerment of, social interaction—a focus more comfortable with a conception of rights broad enough to encompass both defense and obligation.

This is not to deny that the problems Barnett identifies are real conflicts that may well be universal across human communities. But in focusing on these problems of knowledge, interest, and power, Barnett loses sight of what we might call problems of survival, preparation, and participation. A shift toward these neglected problems would push in favor of abandoning Barnett's narrowly negative conception of rights for a more capacious view.

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36. BARNETT, *supra* note 6, at 80.

37. *Id.*

38. See LOCKE, *supra* note 15, at 155.

For most theorists, it is uncontroversial to posit that human beings are entitled to access to the resources necessary for physical survival. As even some of the most libertarian of property scholars have acknowledged, the extreme needs of some in the community ought to trump the rights that others hold over their surplus resources.<sup>39</sup> Locke himself defended the idea.<sup>40</sup> Acknowledging a right to survival resources in effect recognizes the existence of an entitlement to the (even involuntary) assistance of others under certain circumstances and, on most accounts, to the assistance of the state in obtaining survival resources or in fending off attempts by private owners to prevent those in need from taking them. The very structure of this entitlement, and the forced sharing it justifies, fits only uncomfortably, if at all, within Barnett's discussion of natural rights, in which individual property and contract rights precede (and limit) the formation of community and pursuit of the common good.<sup>41</sup> An alternative conception views human beings as essentially embedded in community and understands property rights as the cooperative creations of the society in the service of human flourishing. On this view, in which the well-being of the individual and the health of the society (and other individual members of that society) are indissolubly intertwined, the qualification of individual property rights in order to protect the lives of individual community members makes perfect sense.<sup>42</sup>

In addition to survival, the long period of intellectual and moral training necessary for full human development means that all human societies confront the problem of how to ensure the provision and just distribution of scarce

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39. See RICHARD A. EPSTEIN, *SKEPTICISM AND FREEDOM* 98-100 (2003).

40. See LOCKE, *supra* note 15, at 29-30, 56, 111, 182-83.

41. Locke's affirmation of the doctrine of necessity does not demonstrate the compatibility of that doctrine with libertarian principles as much as it points to the ways in which Locke was not a pure libertarian. Locke's embrace of the necessity doctrine derives from his initial assertion that "God gave the world to Adam and his posterity in common." *Id.* at 111. This communal starting point, itself a remnant of the classical natural law tradition, see 2a-2ae AQUINAS, *supra* note 14, q. 66, art. 2, serves as a moderating force within Lockean property theory—one that does not survive among contemporary libertarians, who tend to reject both the notion of forced sharing and Locke's starting point of communal ownership, see, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 174, 238 (1974) ("Even to *exercise* his right to determine how something he owns is to be used may require other means he must acquire a right to, for example, food to keep him alive; he must put together, with the cooperation of others, a feasible package."); AYN RAND, *THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM* 54-56 (1964) (arguing that sharing with those in dire need, even in an emergency, is "an act of generosity, not of moral duty"). This makes some sense because the necessity doctrine's prescription of involuntary communal obligation clashes with libertarian insistence that communal obligation be voluntary.

42. See 2a-2ae AQUINAS, *supra* note 14, q. 66, art. 7; FINNIS, *supra* note 1, at 191-92.

resources for training the young, who are in no position to provide for themselves.<sup>43</sup> Again, the pursuit of a social conception of human flourishing points in the direction of some minimal provision for the well-being and education of the young, irrespective of the wisdom, diligence, or luck of their parents. Almost by definition, such an entitlement will demand a degree of economic redistribution and regulation, either in cash or in kind. Those whose parents cannot afford education must have that education provided to them at the expense of others. Moreover, this redistributive educational process arguably points in the direction of ensuring that the parents of such children have the economic resources necessary to provide a suitable home environment in which the educational effort can take root.<sup>44</sup> Plausible natural law arguments can therefore support not just a basic entitlement to education but also such welfare-state measures as minimum wages, subsidized housing, and social insurance<sup>45</sup>—the kinds of redistributive and regulatory economic measures that Barnett would very much like to rule out.

Finally, resources are necessary to facilitate the sorts of social interactions essential for a well-lived human life.<sup>46</sup> These resources take the form of both material goods that individuals need to function socially and an underlying social context in which individuals and groups may interact. With respect to the former, Adam Smith, Amartya Sen, and others have argued that the precise content and quantity of the resources necessary for a viable social life will vary between different societies and within the same society over time.<sup>47</sup> Nevertheless, because human beings experience sociability as an imperative and not as a choice, all societies must struggle with the challenge of providing adequate opportunities for individuals to obtain the things they need to function as social beings without at the same time undermining the necessary incentives for productive activity. In the context of a modern capitalist society

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43. See, e.g., MACINTYRE, *supra* note 31, at 107-09.

44. Recent studies, for example, affirm the importance of families' financial resources to children's educational outcomes. See, e.g., RICHARD ROTHSTEIN, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP 37-50 (2004) (describing the ways in which family poverty directly hinders the effectiveness of children's education); Doris R. Entwisle et al., *First Grade and Educational Attainment by Age 22*, 110 AM. J. SOC. 1458, 1481 (2005) (finding that family socioeconomic status has an enormous impact on children's ultimate educational attainment).

45. See ROTHSTEIN, *supra* note 44, at 129-47.

46. See Eduardo M. Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. (forthcoming May 2007).

47. See JOHN A. RYAN, A LIVING WAGE: ITS ETHICAL AND ECONOMIC ASPECTS 126-27 (1912); AMARTYA SEN, RESOURCES, VALUES AND DEVELOPMENT 325-43 (1984); 2 ADAM SMITH, THE WEALTH OF NATIONS 413-506 (Oxford, Clarendon Press 1869) (1776).

like our own, sociability entails meaningful participation in the market, and this observation in turn suggests a human right to a social safety net that guarantees a substantial basket of resources. This is not to say that an entitlement to receive those resources cannot be conditioned on, for example, a willingness to work if able to do so. But however the details are conceived, attention to human beings' social needs pushes strongly toward an entitlement to substantial and realistic opportunities to obtain the goods required for some minimally acceptable level of participation in the social life of the community.

An adequate account of the opportunities necessary for the social participation essential to human flourishing will also consider the background conditions within which individuals come together to interact. Human beings live a richer and freer life in a pluralistic social order in which neither the state nor large private actors can arrogate enough power to monopolize opportunities for social and economic expression. A progressive natural law therefore favors a vibrant, organic social and economic life that transpires on a human scale populated by diverse intermediary communities such as families, unions, small enterprises, neighborhoods, churches, and many others. It will also support efforts to responsibly steward the environment for future generations who are not represented in the political process and whose interests tend to be discounted by present economic decision-makers.<sup>48</sup> The maintenance of such a rich and humane social and environmental context requires state action to counterbalance (and redistribute) large concentrations of private economic power as well as constant vigilance against the possibility that the state will either overreach or become a tool of powerful private interests.

The problem these other interests pose for Barnett's theory of rights is that their interaction is anything but tidy. Human beings' material needs, for example, combine with the vicissitudes of luck and intergenerational effects to undermine the case for the inflexible and transgenerational protection of property entitlements that Barnett advocates. If we accept the proposition that property rights, at least in surplus resources, must give way to the more pressing needs of nonowners, it follows that a government that takes the side of property owners who attempt to block such transfers in order to protect preexisting property entitlements would be acting unjustly. Indeed, given the scale of modern society and the concomitant opportunities it provides for owners to shirk their duties to share, government is certainly justified, and perhaps—given the predictability of that shirking—affirmatively obligated, to

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48. See, e.g., Douglas A. Kysar, *Discounting, on Stilts*, 74 U. CHI. L. REV. (forthcoming Mar. 2007) (manuscript at 1-2, on file with author) (discussing the tendency of cost-benefit analysis to undervalue the interests of future generations).

compel the wealthy to share their surplus with the poor.<sup>49</sup> The natural law arguments on behalf of such involuntary redistribution are especially compelling when applied to the resource needs of the young, whose poverty cannot be attributed to poor choices of their own. But they also point toward the importance of protecting the poorest— young and old— against the effects of sheer bad luck. And the failure of any capitalist economy to provide employment opportunities at a living wage for all who are willing to work or to provide fully for the needs of the poor through voluntary philanthropy means that the implications of the analysis likely extend even further.

Support for state intervention in the economy, however, does not require a progressive theory of natural law to endorse the sorts of intrusions on private sexual conduct advocated by Finnis, George, and other conservative natural lawyers. As Barnett helpfully highlights, even the classical natural law tradition, despite its perfectionist ambitions, provides ample tools to resist the state's insertion into every corner of life, including private consensual sexual relationships. Barnett quotes, for example, Aquinas's famous argument about the folly of trying to legally enforce all moral norms.<sup>50</sup> According to Aquinas:

[H]uman law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain but only the more grievous vices, from which it is possible for the majority to abstain; and *chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained*: thus human law prohibits murder, theft and suchlike.<sup>51</sup>

As Aquinas pointed out, attempts to embody all of morality in law are doomed to failure and are likely to be counterproductive, inducing in citizens a contempt for law and perhaps even an embrace of a sort of moral and legal nihilism.<sup>52</sup> The tools of legal prohibition should therefore be reserved for the kinds of harmful conduct that are likely to substantially disrupt the social order.

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49. See JEREMY WALDRON, *LIBERAL RIGHTS: COLLECTED PAPERS, 1981-1991*, at 240-44 (1993); cf. Carol M. Rose, *The Moral Subject of Property* 19 (Ariz. Legal Studies, Discussion Paper No. 06-30, 2006), available at <http://www.ssrn.com/abstract=926082> (discussing the collective action problems that push philanthropic impulses toward arguments for forced redistribution).

50. BARNETT, *supra* note 6, at 83.

51. 1a-2ae AQUINAS, *supra* note 14, q. 96, art. 2 (emphasis added).

52. See *id.*

As a general matter, these considerations apply with equal force to state efforts to enforce the (moral) demands of distributive justice. How far the state should go in attempting to enforce moral obligations to shift material resources toward the poor will be a complicated prudential calculation, deeply informed by empirical considerations.<sup>53</sup> Given this uncertainty and contingency, it is easier to draw negative than affirmative conclusions. For example, it is easier to rule out Barnett's rigidly libertarian constitution, which would categorically prohibit the state from interfering with the operation of the market, irrespective of empirical observations about the likely consequences of such intervention for the poor, than it is to spell out in precise detail the exact contours of economic entitlements or the most just system of taxation with which to fund them. Nevertheless, the correct questions are *prudential*, not questions about the *rights* of property owners against redistribution of their surplus property. A progressive natural lawyer, moreover, would argue that the state is justified in treating the enforcement of economic justice differently than questions of sexual morality (however defined) because of the relative difficulty of detecting and deterring violations of sexual norms, the harm to privacy of even attempting to do so, and the fundamental importance of distributive justice to the maintenance over the long run of a viable social order.

In the middle of the last century, for example, Murray built upon Aquinas's pragmatic discussion to argue against the legal prohibition of private sexual acts, such as the use of contraception.<sup>54</sup> Writing in terms that even a libertarian like Barnett might well endorse, Murray argued that respect for the important role of freedom within an adequate account of human flourishing meant that the law should be guided by the principle, "[a]s much freedom as possible; as much restriction and coercion as necessary."<sup>55</sup> Murray went on to note that, "in

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53. See, e.g., NAT'L CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY ¶ 20 (1986). The complex empirical inquiries relevant to the formulation of redistributive policy include, among many others, what resources the poor need at particular times and places to flourish, the best form in which to deliver those resources (e.g., in cash or in kind, as a grant or in exchange for required work), the effects of different degrees of economic inequality on the well-being of the poor and on society as a whole, and the consequences of redistributive policy for society's overall productivity and for the poor themselves.

54. See John Courtney Murray, Memo to Cardinal Cushing on Contraception Legislation, <http://woodstock.georgetown.edu/library/Murray/1965F.htm> (last visited Dec. 8, 2006). Finnis has indicated that he accepts reasoning along Murray's line of argument, although he rejects its extension to the case of public distribution of contraception to unmarried couples. See Finnis, *supra* note 11, at 38-39. Although Murray specifically declined to address the broader question about contraception, it is not clear from Murray's fairly sweeping analysis in the Cushing Memo that he would have accepted Finnis's distinction.

55. Murray, *supra* note 54.



the field of sex morality” in particular, “the public educative value of law seems almost nil.”<sup>56</sup> Finally, he observed that the lack of public consensus on the immorality of contraception put it beyond the proper reach of legal prohibition.<sup>57</sup> Others operating within the natural law tradition have used similar logic to defend the result the Court reached in *Lawrence v. Texas*.<sup>58</sup> Although a full evaluation of the various arguments raised on behalf of these positions is well beyond the scope of this Review, at a minimum these examples suggest that there is no essential connection between natural law theory and a commitment to the state’s involvement in the enforcement of sexual morality, or even to a particularly conservative conception of sexual morality.<sup>59</sup>

Drawing the appropriate limits around permissible state action in the private sphere ultimately depends upon the consideration of the effectiveness of legal norms in particular contexts as well as the development of an adequate account of human flourishing and the role of human freedom within that account. Barnett’s narrowly negative conception of the state’s proper role results from his failure to consider the dependence of human freedom on the social structures necessary to prepare human beings to exercise their freedom and on the material resources they need to affirmatively put that freedom into practice. Rejecting libertarian limits on state intervention in the economic sphere, however, does not require the progressive natural lawyer to jettison Barnett’s correct intuition that freedom from excessive government intrusion is an important component of human flourishing.

In drawing attention to the absence from Barnett’s book of an extended exploration and defense of the content of his natural rights theory, I do not intend to criticize him. After all, Barnett structures his argument precisely to avoid having to engage in protracted philosophical debate regarding the content of natural law. In the end, however, as I will argue in the next Part, I believe that he cannot get around the arduous job of fleshing out the

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56. *Id.*

57. *Id.*

58. 538 U.S. 558 (2003); see Gregory A. Kalscheur, *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INTERDISC. L.J. 1 (2006). Some prominent theorists have gone even further and have used natural law arguments to defend the substantive morality of homosexuality. See *infra* note 59.

59. See, e.g., HURSTHOUSE, *supra* note 1, at 214-15 (defending the morality of homosexuality on natural law grounds); Macedo, *supra* note 9, at 28 (“[T]he new natural law’s own moral stance, properly understood, provides grounds for affirming the good of sexual relationships between committed, loving homosexual partners . . . .”); Jean Porter, *Human Nature and the Purposes of Marriage* (2006) (unpublished manuscript, on file with author) (arguing in natural law terms for the permissibility of gay marriage).

philosophical bases for his libertarian political commitments. My only purpose in these past few paragraphs has been to suggest that, when he does set out to do so, he must confront these alternative conceptions of the natural law tradition.

## II. BARNETT'S NONORIGINALIST ORIGINALISM

### A. Barnett's Argument

Barnett attempts to rule out alternative versions of the natural law he believes to have been incorporated into the Constitution. As I have already indicated, however, he does not do so by setting forth extensive arguments on behalf of his particular conception of the content and nature of natural rights. Instead, he devotes a great deal of his book to an innovative nonoriginalist argument in favor of a rigidly originalist understanding of the Constitution's text.

As Trevor Morrison has noted, Barnett's commitment to original meaning is itself something of a paradox.<sup>60</sup> This is because originalism makes far more sense within a consent theory of constitutional legitimacy than within a theory, like Barnett's, that purports to base constitutional legitimacy on natural justice alone.<sup>61</sup> If a constitution only binds because "We the People" have collectively consented to its strictures, a backward-looking orientation that seeks to preserve the original terms of that bargain above all else makes a great deal of sense. The problem is that Barnett claims to reject these historical, consent-grounded theories of constitutional legitimacy in favor of a natural law, justice-based account.<sup>62</sup> Barnett's rejection of consent seems to undermine his case for hewing to an originalist interpretive methodology. After all, if, instead of trying to figure out the terms of the "deal" to which the People have agreed, we concern ourselves with the objective justice of an existing constitutional regime, then the deviation of that regime from the original meaning of a

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60. See Trevor W. Morrison, *Lamenting Lochner's Loss: Randy Barnett's Case for a Libertarian Constitution*, 90 CORNELL L. REV. 839, 849 (2005) (reviewing BARNETT, *supra* note 6).

61. See *id.* at 848-49; see also Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1766 (1997) ("The political theory underlying strict originalism is a form of social contract theory . . ."). After noting the connection commonly drawn between originalist and contractarian theories of constitutional legitimacy, Dorf suggests that this link can be severed and goes on to propose a noncontractarian case for the (limited) relevance of original intent. See Dorf, *supra*, at 1816-22.

62. See BARNETT, *supra* note 6, at 32-52.

historical document is not really very troubling (except to the degree that it increases the risk that the constitutional system will transform itself from one that is just to one that is unjust at some time in the future—an issue to which I will return shortly).

Despite the strangeness of his combination of a justice-based theory of legitimacy with originalism, Barnett's arguments in favor of a fairly strict originalist hermeneutic are the foundation of his entire constructive project. Eschewing a direct defense of the cogency of his political theory against alternatives, Barnett's strategy is to avoid getting mired in deep philosophical argument by compelling his readers to accept that the Constitution itself incorporates the limitations on state action favored by his libertarian reading of Lockean political theory and that the Constitution itself rejects the obligations imposed by other theories of justice, such as the progressive version of natural law theory sketched out above.<sup>63</sup> To paraphrase Barnett's argument, his version of natural rights theory might be right or it might be wrong, but that theory is embodied in the original meaning of the Constitution. And because the original meaning is the only meaning that counts, if you want the Constitution to embody some other political theory, you will have to get your own constitution or amend the existing one. In other words, Barnett's argument for original-meaning textualism (along with the evidence he marshals in support of the original meaning he favors), if successful, allows him to enjoy all the fruits of a libertarian constitution while sidestepping the far more daunting task of laying out a full-fledged argument for the philosophical superiority of his theory.<sup>64</sup>

Barnett's argument for (Lockean) original-meaning textualism proceeds in three steps. First, he posits that, as a conceptual matter, the principal purpose of a *written* constitution is to constrain government actors who might otherwise be free to act in ways that trample on individual rights: "The

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63. Some scholars have identified less individualistic principles at work in Lockean political theory, particularly as it touches on property rights. See, e.g., ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 204-05 (2003) (describing Lockean property theory as consistent with stringent restraints on the intensive use of property); GOPAL SREENIVASAN, *THE LIMITS OF LOCKEAN RIGHTS IN PROPERTY* (1995) (arguing that Locke's theory results in highly limited property rights). Whether these theorists or Barnett read Locke more accurately is an interesting question but is beyond the scope of this Review.

64. Barnett's negative argument against the viability of consent as a basis for constitutional legitimacy does not rest on a fully developed argument for libertarianism but rather on a more truncated argument, the goal of which is simply to establish that "first come rights, and then comes law." BARNETT, *supra* note 6, at 44. As he is careful to point out, "One need not accept any particular formulation of background rights . . . to accept the conception of constitutional legitimacy advanced here." *Id.*

Constitution is a law designed to restrict the lawmakers. Although the Constitution itself may have multiple purposes and functions, its ‘writtenness’ has many fewer. . . . Primarily, constitutions are put in writing to better constrain the political actors [they] empower[] to accomplish various ends.”<sup>65</sup> To be clear, Barnett cannot merely be making a historical claim about the reasons why the Framers committed our particular Constitution to writing, and he cannot be arguing that we are somehow bound by their motives. Given his rejection of consent and other historical accounts of constitutional legitimacy, those motives are not relevant to his case for originalism. Instead, Barnett is making a sweeping conceptual claim that writtenness in constitutions serves the purpose of constraining government power.

He then goes on to claim that the only way for a written constitution to achieve, and then “lock in,” this constraint is to limit the text’s meaning to its meaning at the time it was put in place: “Adopting any meaning contrary to the original meaning would be to contradict or change the meaning of the text and thereby to undermine the value of writtenness itself. Writtenness ceases to perform its function if meaning can be changed in the absence of an equally written modification or amendment.”<sup>66</sup> In other words, Barnett believes that a commitment to original-meaning textualism follows “inexorably” from *the mere fact* that the Constitution is a written document.<sup>67</sup> Barnett goes on to argue that it is the constitution thus locked into place by original meaning, and only that constitution, that we should evaluate from the point of view of our preferred theory of justice. If, based on one’s conception of justice, the constitution locked in by this written document is inadequate, then the answer is not to reinterpret the text in a manner consistent with that conception but rather to amend the text.<sup>68</sup>

Finally, Barnett argues, the original meaning of *our particular* written Constitution locks in classical liberal views about the proper limits of government power and the sphere of negative liberty protecting the individual from communal coercion. Barnett points to provisions like the Necessary and Proper Clause, the Ninth Amendment, and the Fourteenth Amendment’s Privileges or Immunities Clause, as well as to a host of contemporaneous commentary, in support of this proposition. The combined effect of these provisions, he argues, is to limit both state and federal governments to

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65. *Id.* at 103.

66. *Id.* at 106.

67. *Id.* at 112.

68. *See id.* at 111-12.

activities that do not violate the natural rights retained by the people.<sup>69</sup> Barnett therefore argues for what he calls a “presumption of liberty,” an inversion of the prevailing, post-*Lochner* presumption in favor of the constitutionality of most legislative enactments. By a “presumption of liberty,” Barnett means that parties burdened by intrusions on (negative) liberty—whether at the hands of state or federal government—are presumptively entitled to judicial invalidation of those intrusions *unless* the government can demonstrate that its actions are (strictly) necessary to the accomplishment of (a very narrow conception of) permissible government ends.<sup>70</sup>

Barnett’s strategy, if successful, would allow him to enjoy all the fruits of his libertarian version of natural law theory without ever having to offer, in any detail, his reasons for favoring it over competing possibilities. As it turns out, Barnett’s argument in favor of original-meaning textualism and an exclusively Lockean originalist reading of the Constitution is far from watertight. Indeed, it raises serious questions at each step. To begin with, there does not seem to be an intrinsic connection between writtenness and the goal of constraining government intrusion on individual liberty. And even if there were such a connection, original-meaning textualism would not be the only means available to accomplish that goal. Finally, even if one were to accept original-meaning textualism, along with Barnett’s understanding of the Constitution’s original meaning, there would be ample room for a government that is substantially more activist than the one Barnett favors.

### *B. Writtenness and Constraint*

Barnett’s argument that the purpose of writtenness in constitutions is to constrain lawmakers could be taken to mean either of two things, one of which is facially implausible and the other of which appears to beg the question. If we understand Barnett to be saying that a constitution’s writtenness necessarily serves the purpose of constraining government actors in the sense of limiting their discretion, the argument crashes headlong into what Abner Greene has called the “grand, vague clauses of the Constitution.”<sup>71</sup> Writings, whether contractual or constitutional, can constrain discretion, or they can invite it. Our written Constitution, like many others, appears to do both.<sup>72</sup>

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69. See *id.* at 54, 189-90, 193-94.

70. See *id.* at 253-69.

71. Abner S. Greene, *The Missing Step of Textualism*, 74 *FORDHAM L. REV.* 1913, 1936 (2006).

72. Compare U.S. CONST. art. I, § 3, cl. 3 (“No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.”),

Barnett cannot simply write off the Constitution's many opaque provisions as atypical or peripheral to his libertarian project. After all, the Constitution is at its vaguest when it sets forth the terms on which government may deprive citizens of life, liberty, and property; when it specifies (or fails to specify) the privileges and immunities to which citizens are entitled; and when it safeguards the equal protection of the laws. And these are the very clauses on which Barnett wishes to hang a great deal of his constitutional theory.

If, as seems more likely, we understand Barnett to be saying that the purpose of writtenness is to constrain government actors in the sense of limiting their power (that is, checking and restraining state actors),<sup>73</sup> then Barnett seems to smuggle into his premises the libertarian conclusion he wishes to establish. From the point of view of a political theory that rejects libertarian conclusions and recognizes fundamental and affirmative material entitlements against the community, the goal of a constitution, even of the writtenness of a constitution, would not be *simply* to constrain state actors. Consider, for example, a conception of justice, like the progressive version of natural law theory introduced above, that understands the individual as affirmatively entitled to a basic education and level of material well-being, whatever his luck or the life choices or material circumstances of his parents. On such a view, a state that could only protect the prerogatives of private ownership but that was not empowered, or perhaps obligated, to tax its citizens in order to fund a redistributive system of public education (or private educational vouchers) would fall short of the demands of justice and would therefore, on Barnett's view of legitimacy, be invalid. By characterizing the purpose of the Constitution's writtenness as primarily about the constraint (by which he seems to mean limitation) of government power rather than about its compulsion, Barnett appears to be helping himself to the libertarian view of government as, above all, a threat to be restrained.<sup>74</sup>

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*with id.* amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."). In this respect, the U.S. Constitution seems typical of written constitutions, which often contain a mixture of vague principles and specific directives. Compare ALA. CONST. § 15 ("[E]xcessive fines shall not be imposed, nor cruel or unusual punishment inflicted."), *with id.* amend. 48o ("Effective the beginning of the next term of office after ratification of this amendment, the judge of probate of Greene county shall be compensated on a salary basis."). For a discussion of discretion-inviting constitutional provisions in the South African context, see GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 149-63 (2006).

73. See BARNETT, *supra* note 6, at 105.

74. Barnett also fails to take notice of the special circumstances posed for a natural rights libertarian theory by large corporations. These massive and powerful entities, themselves artificial creations of the state, possess none of the natural traits that would entitle them to

Sotirios Barber has correctly noted that one need not even reject a fundamentally libertarian conception of the state to understand that the purpose of a constitution must be both to constrain and to empower.<sup>75</sup> After all, government will not act as an effective nightwatchman if it does not have the power and obligation to tax and spend. As Alexander Hamilton put it, “[T]he vigor of government is essential to the security of liberty . . . [and] a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of government.”<sup>76</sup> Acknowledging as much, Barnett notes that his conception of liberty will sometimes require government to take affirmative steps to satisfy its rights-protecting obligations.<sup>77</sup> But this admission does not keep him from often writing as if the “security of liberty” has an asymmetric relationship with government empowerment and constraint, to the disadvantage of the former.<sup>78</sup>

In light of the state’s affirmative role in protecting even narrowly negative conceptions of liberty, however, it is far from self-evident that the Constitution’s writtenness uniquely serves the purpose of constraining government power such that it does not also serve the purpose of empowering (or obligating) government to act to protect citizens’ rights. One move in Barnett’s direction would be to assert, as Barnett does, that state actors are in

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the same regard as actual persons within a natural law political theory, even a libertarian one. See MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 18-21 (1986). To be sure, there are reasons to protect the rights of large corporations, most having to do with instrumental goals of wealth creation or the indirect protection of the natural rights of their members or owners. But those rights will be of a different sort than the natural rights grounded in human nature that are of concern to Barnett, and there is no reason to assume that their content will be precisely the same. See *id.* at 88-96. Barnett largely ignores these complications and appears to endorse simply extending to corporations the same “natural” liberty rights enjoyed by real human beings. See, e.g., BARNETT, *supra* note 6, at 265 (discussing the liberty interests of companies that wish to carry first-class mail). There is nothing inevitable about that treatment, as Gregory Alexander makes clear in his discussion of German constitutional law. See ALEXANDER, *supra* note 72, at 103. A recognition of the dubious *natural* grounds for corporate rights would open up a far broader role for state regulation to protect the autonomy interests of actual persons against corporate giants.

75. See SOTIRIOS A. BARBER, WELFARE AND THE CONSTITUTION 44-53 (2003) (arguing that the pursuit and protection of so-called negative liberties demand government power).
76. THE FEDERALIST NO. 1, at 35 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
77. See BARNETT, *supra* note 6, at 84.
78. See *id.* at 103 (“The Constitution is a law designed to restrict the lawmakers.”); *id.* at 104 (“Unless rulers are constrained by law, they are dangerous to the not-at-all-fictional rights of the people.”); *id.* at 104-05 (“How can . . . governors [be] checked and restrained if the written words mean only what legislatures or judges want them to mean today?”).

fact inexorably prone to overstep their bounds in a way that renders writtleness's constraining function more fundamental than its empowering function.<sup>79</sup>

The "Ambitious Official," a well known trope, has been around since the beginning of American constitutional discourse.<sup>80</sup> And the Constitution's writtleness may well help to keep his ambitions in check, although, as I discuss below, perhaps not as much as Barnett seems to think. But another, less prominent trope demonstrates why, at least as a conceptual matter, writtleness can be just as crucial to the empowerment of government actors as to their limitation. I am thinking here of the "Lazy Bureaucrat." The Lazy Bureaucrat is as incompetent and shiftless as his overbearing cousin is savvy and ambitious. In response to a citizen's entreaty, the Lazy Bureaucrat is prone to wearily wave off the request by disclaiming the authority or obligation to act. For the Lazy Bureaucrat, government office is about short hours, steady paychecks, the accoutrements of power, and perhaps the occasional kickback.

In the aftermath of Hurricane Katrina, the Federal Emergency Management Agency (FEMA) – under the direction of Michael Brown, who may forever be identified as the paradigmatic Lazy Bureaucrat – explained the federal government's slow response to the disaster by saying that it did not have the authority to provide assistance until specifically invited to do so by state officials.<sup>81</sup> FEMA was very likely understating its authority, thereby attempting to minimize its responsibility to act in the early hours of the crisis.<sup>82</sup> Efforts by the Lazy Bureaucrats of the world to shirk their duties serve as important counterpoints to the assumption that government actors will relentlessly and ambitiously push toward the outer limits of their power.

Just as a written constitution can be said to serve the purpose of clarifying the limits on the Ambitious Official's powers, so too it provides needed ammunition for those attempting to convince the Lazy Bureaucrat that he has the discretion – or even the obligation – to act. In other words, the writtleness of a constitution can, as a conceptual matter, serve multiple functions at once: it can clarify the limits it imposes on government actors, and it can make plain

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79. See *id.* at 104.

80. See, e.g., THE FEDERALIST NO. 51 (James Madison) (discussing the system of checks and balances and explaining how setting bureaucratic ambitions against each other can protect against government abuse of power).

81. See *World News Tonight: Who's To Blame for Delayed Response to Katrina?* (ABC television broadcast Sept. 6, 2005), available at <http://abcnews.go.com/WNT/print?id=1102467>.

82. See ABA STANDING COMM. ON LAW & NAT'L SEC. ET AL., HURRICANE KATRINA TASK FORCE SUBCOMMITTEE REPORT 4-5 (2006), [http://www.abanet.org/natsecurity/publications/hurricane\\_katrina\\_report\\_2006\\_2.pdf](http://www.abanet.org/natsecurity/publications/hurricane_katrina_report_2006_2.pdf).



the powers and duties it grants to them. It may well be that, as classical liberals suppose, the task of constraining the Ambitious Official is a more pressing (or more frequent) problem than motivating the Lazy Bureaucrat,<sup>83</sup> but the truth of this empirical assertion cannot be deduced (as Barnett attempts to do) from the mere fact that the Constitution is a written document.

Moreover, it is not even clear that a belief in the greater threat posed by the Ambitious Official would mean that written constitutions must be understood to constrain the power of the actors toward whom they are directed. Another strategy, one apparently favored by the Framers, would be to *empower* competing bodies of government in the hope that they would limit each other.<sup>84</sup> Confronted with an expansionist executive branch, a weak and quiescent legislative or judicial branch arguably only further endangers liberty. Indeed, Barnett's solution to the problem of the "lost Constitution," in which he calls for a radical *empowerment* of one branch of the federal government—the federal judiciary—through his presumption of liberty, implicitly relies on a similar intuition.

In the final analysis, Barnett's argument that the Constitution's writtenness uniquely serves the purpose of governmental constraint appears to be simply a restatement of his classical liberal commitments.<sup>85</sup> Perhaps these commitments will turn out to be the correct ones, but Barnett must make that argument.

### C. *Constraint and Lock-In*

Even assuming that the principal purpose of a written constitution is to constrain, it is far from self-evident that, as Barnett claims, the only adequate way to honor the significance of that purpose is through a commitment to the original meaning of constitutional texts. To understand Barnett's argument for the exclusive suitability of original meaning, it is important to distinguish between two different, although related, concepts at play in Barnett's argument: constraint and "lock-in." Barnett argues that the purpose of the Constitution's writtenness is to constrain government actors—that is, to limit the government's present freedom of action or power. That constraint, however, is fairly meaningless, he suggests, if it is not accompanied by what he

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83. As Barber argues, it is not clear that this was the view of the Framers. See BARBER, *supra* note 75, at 39, 53.

84. See THE FEDERALIST NO. 51 (James Madison), *supra* note 76, at 322 ("Ambition must be made to counteract ambition.").

85. It is therefore no accident that, as Calabresi has observed, Barnett affords dramatically divergent treatment to the power-conferring and power-limiting provisions of the Constitution's text. See Calabresi, *supra* note 7, at 1083-88.

calls “lock-in”: the successful projection of that constraint into the future. Barnett’s concern for lock-in as an independent goal of constitutional writtenness can itself be understood as combining, on the one hand, concerns about predictability and stability in constitutional *interpretation*, and, on the other, a more substantive, justice-based demand for stability in the way a constitutional system actually operates. Barnett’s discussion does not always distinguish clearly among these various interests, but his objection to nonoriginalist hermeneutics of the constitutional text appears to be twofold: first, they do not adequately constrain constitutional interpretation, and second, they provide an inadequate guarantee that the constraints on government imposed today by the application of an interpretive method will not be modified (say, by judicial reinterpretation of the constitutional text) tomorrow. The latter failure is both unfaithful to the Constitution’s writtenness and, Barnett suggests, can be substantively unjust.

### 1. *Constraint*

To begin with, as many theorists have noted, it is important not to overstate how much actual constraint original-meaning textualism provides, particularly when we consider the difficulty of determining the proper level of generality at which to assess competing original meanings.<sup>86</sup> Setting aside originalism’s practical difficulties, let us assume that Barnett is correct that the highest degree of interpretive constraint comes from adherence to a written text’s objective original meaning. Interpretive anarchy, however, is not the only alternative to such a commitment. Barnett treats the constraint he advocates as if it were an all-or-nothing affair,<sup>87</sup> but the interpretive constraint of writtenness is a question of degrees.

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86. See BARNETT, *supra* note 6, at 119–22; see also Akhil Reed Amar, *The Supreme Court, 1999 Term – Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 53 (2000) (“To interpret the document . . . is to engage in an act of construction . . .”); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1812–13 (1996) (describing various originalist approaches to constitutional interpretation that vary in the generality of the principles they attribute to the Constitution’s original meaning); Morrison, *supra* note 60, at 854–55 (discussing the problem of generality); Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL’Y 311, 312–13 (1996) (contrasting “soft” and “hard” originalism); Michael J. Gerhardt, *The End of Theory*, 96 NW. U. L. REV. 283, 325 (2001) (reviewing JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001)) (“The challenge of originalism entails eliminating subjective discretion in choosing the level of generality at which to state the appropriate level of original understanding.”).

87. See BARNETT, *supra* note 6, at 106.

At least as a conceptual matter, between original-meaning textualism and utter disregard of a written text, there are a number of intermediate positions that, while perhaps less constraining than the most optimistic descriptions of original-meaning textualism, still take seriously the Constitution's writtenness. Alternative hermeneutics, of either the soft originalist or nonoriginalist variety, might direct lawyers to look to the present consensus meaning of the text,<sup>88</sup> the relevant paradigm cases implicated by a particular textual provision,<sup>89</sup> the best "translation" of what they take to be the motivating general principle behind the text,<sup>90</sup> or their understanding of the requirements of legal "integrity" as they operate on understandings of that particular text.<sup>91</sup> A judge faithfully applying one of these interpretive methods might be able to make the Constitution mean many things, but she could not make it mean anything she wanted. Texts are not infinitely pliable, particularly when read according to an established interpretive practice.<sup>92</sup> An overriding desire to honor the Constitution's writtenness, understood as a constraint on interpretation, does not by itself necessitate an exclusive commitment to original-meaning textualism.

At most, Barnett has established that his favored interpretive method is one possibility among many or, perhaps, that it provides the greatest interpretive constraint among the various contenders. What Barnett needs is some argument that lesser forms of constraint are somehow inadequate and that only the *highest possible* degree of constraint will do justice to the function of a document's writtenness—but he provides us with none.

## 2. *Lock-In*

As with constraint, lock-in is a matter of degree. If a particular nonoriginalist reading of the constitutional text can provide enough interpretive constraint to do justice to the Constitution's writtenness, an independent concern for stability, understood as future interpretive predictability, would not seem to change the equation. If an interpretive method provides sufficient constraint for interpreters today, at least as a matter of constitutional writtenness, it is not clear why the degree of future lock-in it

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88. See Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 510-11 (1996).

89. See RUBENFELD, *supra* note 86, at 178-95.

90. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

91. See RONALD DWORKIN, *LAW'S EMPIRE* 225-75 (1986).

92. Cf. Merrill, *supra* note 88, at 510 ("[I]f you assembled a diverse group of lawyers and asked them to give a legal opinion to a real client about the meaning of a written text, there typically would be substantial consensus about what the text means.").

provides would be inadequate. Indeed, as Thomas Merrill has argued, a nonoriginalist interpretive method accompanied by a strong theory of stare decisis might well provide *more* interpretive predictability than an originalist method in which newly discovered or indeterminate historical evidence concerning original meaning creates the possibility of a constant reassessment of even longstanding constitutional readings.<sup>93</sup>

Of course, under almost any political theory, the substantive question of justice is not wholly separate from inquiries about constitutional stability. Barnett is therefore certainly correct when he suggests that some degree of stability in the actual operation of constitutional structures is necessary for a constitutional system to be worthy of obedience.<sup>94</sup> But he never specifies precisely how much stability justice requires, nor does he make the case that the requisite stability can only be provided by adherence to the original meaning of our written Constitution.

The closest Barnett comes to an argument in this regard is his suggestion that a sufficiently stable system of liberty would be impossible to maintain in the absence of a written constitution and that, as a consequence, an unwritten constitutional system—or a written constitutional system not constrained by originalist interpretation—would be substantively unjust.<sup>95</sup> Barnett would be hard-pressed, however, to demonstrate that a seemingly stable system that operates justly in all other respects is ultimately unjust and is therefore unworthy of obedience simply because it does not hew closely to the original meaning of a unitary constitutional document. But this is exactly what he needs to establish in order to sustain his argument that *only* original-meaning textualism is consistent with constitutional legitimacy (understood as substantive justice). This assertion, however, depends upon extremely controversial empirical assumptions that go completely unsupported in his book.<sup>96</sup> Without such a premise, Barnett cannot, given his strictly justice-based

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93. See *id.* at 516.

94. See BARNETT, *supra* note 6, at 109, 117 (noting an essential connection between constitutional legitimacy—that is, justice—and constitutional writtenness).

95. See *id.*

96. Larry Kramer's description of the stability of the customary English Constitution seems to belie Barnett's prediction of the uncertainty and oppression that would result from a failure to memorialize constitutional constraints in a written document. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 12–15 (2004). The government system produced by this unwritten constitution does not seem to have been so unstable as to become, for that reason alone, unjust. Even if Kramer has painted an overly rosy view of the English Constitution's clarity and stability, see, e.g., J.W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 2 (1955); J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT*

theory of constitutional legitimacy, rule out in advance the legitimacy of a nonoriginalist judicial reinterpretation of a constitutional text, as long as that reinterpretation coheres with the substantive demands of justice.

Nor is it even clear that a written constitution interpreted according to its original meaning is *sufficient* to provide the actual stability that justice demands. For example, the original meaning of a written constitution might make the amendment process exceedingly easy.<sup>97</sup> Even for a constitution with onerous amendment provisions, however, it is not the words themselves, or their original meaning, that ensures that today's constraints on government action will survive tomorrow. It is only the words *in conjunction with* an institutionalized commitment to recognizing the authority of those words or that meaning.<sup>98</sup> After all, there is no more assurance that the commitment to the original meaning of the writing will survive than there is a guarantee that an otherwise perfectly just, although unwritten, constitutional system will continue to operate justly in the future. Barnett's story about a "lost Constitution" is precisely one in which he argues that a commitment to original meaning has been missing in this country for the greater part of a century.

If it is the case that constitutional stability owes more to a (nontextual) commitment of government actors to be constrained by particular meanings than to the words of the Constitution itself, it would seem that as much (or as little) actual stabilizing work could be done even with a commitment to nonoriginalist readings of the constitutional text. We can imagine, for example, that there might be an entrenched customary commitment not to change the nonoriginalist principles on which the government operates absent some formalized, supermajoritarian—but perhaps unwritten—"amendment" process that gauges public sentiment to permit such a fundamental change. Bruce Ackerman's dualist constitutional theory could be described as setting forth

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IN THE SEVENTEENTH CENTURY 49 (reissue 1987) (1957), we can fairly easily imagine a society that operates along the lines Kramer describes. Barnett must do more to convince readers that not only a written constitution but, indeed, one interpreted according to its original meaning, is *necessary* to achieve the degree of stability actually required by natural justice.

97. The current Alabama Constitution (the state's sixth), for example, allows amendment by legislative proposal, a process that requires a three-fifths vote in both houses of the Alabama legislature. ALA. CONST. § 284. Amendments so proposed are then submitted for approval by a majority of voters. *Id.* Perhaps unsurprisingly, in light of the ease with which it can be altered, the Alabama Constitution has been amended nearly 800 times since its adoption in 1901.
98. See H.L.A. HART, THE CONCEPT OF LAW 56-57 (2d ed. 1994).

such a “cultural” model of constitutional stability.<sup>99</sup> Would such a constitutional culture necessarily yield substantively inadequate lock-in, understood as actual stability? Barnett rejects Ackerman’s theory as providing inadequate stability compared to textual originalism,<sup>100</sup> but he does not set forth any good reasons for doing so. Although Ackerman’s theory provides a slightly easier method of constitutional amendment, both theories would appear to provide stability to a degree that is at least sufficient to satisfy the requirements of justice. Their most salient difference seems to be the precise legal *content* they identify for perpetuation.

In summary, the Constitution’s writtenness, even if understood as performing a constraining or stabilizing function, does not, by itself, compel us to accept original-meaning textualism as the only possible interpretive method. Barnett cannot rule out alternative hermeneutics without making substantive arguments in favor of the libertarian commitments plainly underlying his interpretive preferences.

#### *D. The Nature of Natural Rights*

Even if one were convinced by Barnett’s argument that original-meaning textualism is the only way to lock in a just constitutional scheme, Barnett’s plausible reading of the original meaning of the Privileges or Immunities Clause and the Ninth Amendment as incorporating elements of natural law into the constitutional scheme is not properly limited to the libertarian conception of the content of natural law at the expense of more progressive versions of natural law theory. Barnett’s natural rights theory and its progressive natural law rival agree in their views of human rights and obligations, whatever their content, as in some sense objectively grounded.<sup>101</sup> As Barnett says, in language that many adherents to a progressive natural law methodology could easily accept, “[T]he existence of individual rights is an appropriate conclusion from the nature of human beings and the world in which we live.”<sup>102</sup>

Given such a conception of the status of human rights, it is possible, in fact practically necessary, to take Barnett’s originalist reading of the Ninth Amendment and the Privileges or Immunities Clause as gesturing toward

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99. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 266–94 (1991).

100. See BARNETT, *supra* note 6, at 108–09.

101. See ALASDAIR MACINTYRE, *A SHORT HISTORY OF ETHICS: A HISTORY OF MORAL PHILOSOPHY FROM THE HOMERIC AGE TO THE TWENTIETH CENTURY* 118 (2d ed. 1998).

102. BARNETT, *supra* note 6, at 44.

objective moral categories—rights and obligations grounded in human nature—that serve as constraints on (or imperatives for) government action. Even if the Framers happened to understand the precise content of those natural rights in specifically libertarian terms, Barnett does not offer a reason why we must understand the referent of the constitutional provisions on which he focuses to be Locke’s conception of the content of those rights and not the actual natural rights themselves, whatever they might be.<sup>103</sup> Indeed, Barnett’s claim of a consensus at the time of the Framing regarding the content of natural rights may actually undermine the result he seeks, because it renders fundamentally ambiguous any reference to natural rights in the Framers’ reflections on the Constitution’s meaning. Without any controversy over the issue, there was no need for the Framers to clarify whether they understood the Constitution to reflect the rights actually retained by the people or only the Lockean understanding of those rights.

Originalist considerations would also seem to favor an interpretation not limited by libertarian presuppositions. The Ninth Amendment refers to the “rights . . . retained by the people.”<sup>104</sup> It is far more straightforward to understand this language as referring to the “rights . . . [actually] retained by the people,” whatever those might be, than to treat the text as somehow self-referentially limiting its significance to the Framers’ specific understanding of the content of those rights. The Framers were not proto-pragmatists or postmodernists, in the mold of a Richard Rorty or a Stanley Fish, intent only on articulating and preserving what they understood to be a particular (and parochial) tradition of Western liberal discourse. As Barnett notes, the Framers (and indeed, most everyone in their generation) really believed in something called “natural rights” and thought it impossible to reduce the rights with which they were concerned to some finite list that could, as such, be incorporated by reference into the constitutional scheme.<sup>105</sup> Indeed, he argues, it was just this impossibility that led the Framers to include the Ninth Amendment in the Bill of Rights in the first place.<sup>106</sup>

In other words, a natural law view that identifies the referents of the Ninth Amendment and the Privileges or Immunities Clause as those rights grounded in human nature, and not one contingent (and contested) theory of those rights, could, *without changing any other aspect* of Barnett’s theory, open the door to the constitutional assertion of a progressive natural law theory. As our

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103. See Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 563-68 (2006).

104. U.S. CONST. amend. IX.

105. See BARNETT, *supra* note 6, at 54-60.

106. See *id.* at 59-60.

best working theories about human flourishing and, consequently, about the content of human rights developed, so too would the precise content of the rights understood to be incorporated by reference into the constitutional text. Moreover, even assuming broad agreement on a stable conception of human flourishing, changing material conditions in society might yield new theories about how to translate that conception into a system of rights recognized by the state. Embracing this more flexible, and more plausible, understanding of the nature of the rights protected by the Constitution would free constitutional exegetes to bring into their analysis the insights of progressive theories of natural justice—theories that would incorporate the sorts of affirmative obligations and entitlements that Barnett’s libertarian theory very much tries to rule out.

Once we start down this path, Barnett’s most startling doctrinal innovation, the “presumption of liberty,” becomes unnecessary and, indeed, indefensible. When the only rights that matter are rights to be free from government interference, Barnett is arguably correct that all government restraints on liberty labor under a cloud of illegitimacy. But when, for example, satisfying the economic rights or entitlements of some entails the state’s restraint on the property rights of others, the grounds for suspicion of government action across the board, particularly in the economic realm, are substantially mitigated. If, for example, justice guarantees workers’ rights to safe working conditions, a living wage, and collective bargaining, the state cannot act to safeguard that right without at the same time restricting employers’ contract and property rights. Economic regulation on this view becomes no different from government regulation of conflicting property rights through nuisance law—a function that libertarians are happy to ascribe to the state. When the field of permissible (or obligatory) state action becomes sufficiently broad, a device like Barnett’s presumption of liberty would tip the balance too far in favor of a narrow subset of rights at the expense of other government obligations of equal or greater importance. Rejecting Barnett’s narrow conception of rights therefore compels a rejection of his dramatic expansion of judicial authority to second-guess legislative action.

### III. REVIVING A PROGRESSIVE NATURALISM?

Barnett deserves a great deal of credit for helping to raise interest in the potential (even the progressive potential) of natural law constitutional theory, although I fear that Barnett’s book will reinforce the reflexive tendency to associate natural law reasoning with the political right. Despite the current domination of natural law theory by political conservatives, however, natural law arguments have provided the raw materials for some of the most



progressive moments in modern American history. As Barnett and others have observed, the Founding generation was deeply motivated by democratic commitments drawn from natural law political theory.<sup>107</sup> Similarly, abolitionists drew heavily upon natural law to formulate their jurisprudential arguments and to justify their civil disobedience against fugitive slave laws.<sup>108</sup> More recently, in his *Letter from a Birmingham Jail*, Martin Luther King, Jr., turned to the classical natural law tradition to justify his civil disobedience against, among other things, segregationist practices in Birmingham's private businesses.<sup>109</sup> And, as Michael Perry has observed, natural law theory provides a powerful foundation for the pervasive modern discourse of universal human rights. In Perry's words, natural law is the very "position presupposed by the idea of human rights."<sup>110</sup> In light of this long tradition of natural law progressivism, and despite a renewal of interest in natural law among moral philosophers and conservative legal thinkers, it is perplexing that the tradition has been largely disregarded by contemporary progressive legal scholars and political theorists.

Some people will no doubt worry that the danger that natural law methodology will engender an untethered judicial activism makes even a progressive natural law constitutionalism unattractive. To favor a natural law constitutional theory, however, does not require that one join in Barnett's call for a dramatic expansion of judicial power. As I have discussed above, natural law theory is consistent with a number of rules of recognition and constitutional hermeneutics. Indeed, there is no inconsistency in

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107. See *id.* at 53-86; ROBERT M. COVER, JUSTICE ACCUSED 9-10 (1975); RUBENFELD, *supra* note 86, at 67-68.

108. See COVER, *supra* note 107, at 34-35.

109. See Martin Luther King, Jr., *Letter from a Birmingham Jail* (1963), in FREEDOM ON MY MIND: THE COLUMBIA DOCUMENTARY HISTORY OF THE AFRICAN AMERICAN EXPERIENCE 347 (Manning Marable ed., 2003). In the letter, King relied on the Thomistic natural law tradition to justify his movement of nonviolent resistance:

One may well ask: "How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. . . . One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all."

Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law . . . .

*Id.* at 352.

110. MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 68 (1998).

simultaneously affirming both a natural law political theory and an overriding commitment to judicial restraint.<sup>111</sup> An image of how such a combination might operate in practice emerges from Robert Cover's description of antebellum slavery jurisprudence:

In the judge's eclectic groping for canons of construction and principles of exegesis in his work with statutes, in his search for a common law process, both adequately flexible and sufficiently certain; in his struggle to adjust conflicting rules and principles of diverse sovereign entities, he often spoke of the preference for liberty or the natural right of freedom or the undesirability of slavery. His warrant for making and applying these judgments was taken to be an "abstract" principle of natural law. I must stress, however, that almost all of these interesting and often important applications of natural law and preferences for liberty were subject to the usual hierarchy of sources for law: constitutions, statutes, and well-settled precedent.<sup>112</sup>

One might have wished for a bit more judicial activism regarding slavery's constitutional status, but Cover's discussion makes clear that there is no intrinsic connection between the natural law's potent language for talking about the moral quality of the law and unrestrained judicial power. In other words, an affirmation of natural law theory is every bit as consistent with the judicial minimalism advocated by Larry Kramer as it is with the judicial supremacy favored by Barnett. Following the lead of Lawrence Sager, a progressive natural lawyer might affirm a broad set of constitutional entitlements without committing to their full judicial enforcement.<sup>113</sup> Failure by the state to honor those entitlements might sound instead in legal obligation, justifying acts of protest and civil disobedience, and perhaps even self-help appropriation, without demanding judicial micromanagement of the political branches.<sup>114</sup>

Finally, on a more pragmatic level, at a time when many observers view the political left as alienated from religious voices and badly in need of a moral language in which to frame its goals,<sup>115</sup> natural law discourse provides the

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111. See Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1075 n.85 (1990).

112. COVER, *supra* note 107, at 35.

113. See LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 102-28 (2004).

114. See Peñalver & Katyal, *supra* note 46 (manuscript at 82-91, on file with author).

115. See Nunberg, *supra* note 4.

possibility of translation. There is no intrinsic connection between natural law, as a philosophical system, and any particular religious faith. On the other hand, there is a longstanding practice of reliance on natural law argumentation within various religious traditions concerning issues of social and legal significance. Indeed, religious adherents often shift to the language of natural law when they want to speak to an audience outside their particular faith tradition.<sup>116</sup> Natural law's ability to speak simultaneously to both secular and religious audiences points to its unique potential to serve as a unifying discourse for progressives of various spiritual stripes.

## CONCLUSION

There is much to admire in Barnett's interesting and innovative contribution to constitutional theory. Nevertheless, his attempt to impose on federal and state government the straitjacket of Lockean liberalism without actually defending Lockean political theory is ultimately unconvincing. It's a good thing too: Lockean natural rights theory is built on a singularly implausible conception of the person. Luckily, we are not compelled, either by our existing Constitution or by the "lost Constitution," to rely on it. Despite this, and indeed because of it, Barnett's book—as well as his difficulty in containing natural law within the confines of libertarian political theory—is a welcome reminder of the many potential advantages to be gained from further developing a progressive natural law constitutional theory.

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116. See, e.g., Stephen J. Pope, *Natural Law in Catholic Social Teachings*, in *MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES AND INTERPRETATIONS* 41, 64 (Kenneth R. Himes ed., 2005).