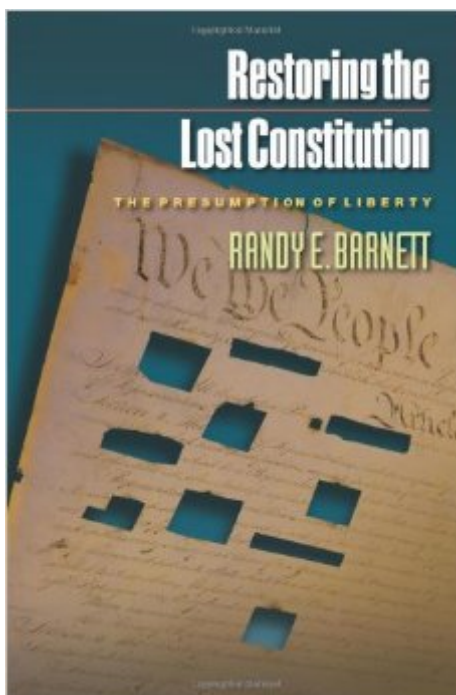


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Restoring The Lost Constitution: The Presumption Of Liberty



Synopsis

The U.S. Constitution found in school textbooks and under glass in Washington is not the one enforced today by the Supreme Court. In *Restoring the Lost Constitution*, Randy Barnett argues that since the nation's founding, but especially since the 1930s, the courts have been cutting holes in the original Constitution and its amendments to eliminate the parts that protect liberty from the power of government. From the Commerce Clause, to the Necessary and Proper Clause, to the Ninth and Tenth Amendments, to the Privileges or Immunities Clause of the Fourteenth Amendment, the Supreme Court has rendered each of these provisions toothless. In the process, the written Constitution has been lost. Barnett establishes the original meaning of these lost clauses and offers a practical way to restore them to their central role in constraining government: adopting a "presumption of liberty" to give the benefit of the doubt to citizens when laws restrict their rightful exercises of liberty. He also provides a new, realistic and philosophically rigorous theory of constitutional legitimacy that justifies both interpreting the Constitution according to its original meaning and, where that meaning is vague or open-ended, construing it so as to better protect the rights retained by the people. As clearly argued as it is insightful and provocative, *Restoring the Lost Constitution* forcefully disputes the conventional wisdom, posing a powerful challenge to which others must now respond.

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Customer Reviews

Like an grand old building that has been allowed to become run-down and dilapidated through neglect and abuse, the US Constitution of today is not the one meant by its authors. Randy Barnett,

professor of law at Boston University, lays out a plan to salvage it in his latest book *Restoring the Lost Constitution: The Presumption of Liberty*. He chronicles the Supreme Court's two hundred-year steady hollowing of the principles underpinning the US Constitution and then proceeds to build a case on how to salvage it. James Madison believed, as did most Founding Fathers, that the foundation for a just and moral constitution lay in one based on the presumption of liberty. Man's dark side of exploiting and imposing his will on others was well known to the Founders. They incorporated constructs into the Constitution to impede special interests to act upon these impulses. Inevitably, there arose those who began to regard such safeguards as roadblocks to "desirable" results. And the way to get those results is to delegitimize the Constitution's principles by viewing the document as a "living" one. Barnett strikes back in the first few chapters to build a novel case for a binding adherence to the founding principles of liberty. He argues that constitutional legitimacy cannot be grounded simply on the basis of the "consent of the governed": "...is one morally obligated to obey any law that is enacted according to constitutional procedures?" (p. 12). Furthermore, how can one bind a citizen to a constitution agreed to by neither himself nor his ancestors? The answer: ground the constitution in the moral force of natural rights. The Founders viewed natural (liberty) rights as those inherent rights people held apart and beyond the reach of government.

Randy Barnett has written a fascinating and well-argued book. The book is composed of four parts: "Constitutional Legitimacy," "Constitutional Method," "Constitutional Limits," and "Constitutional Powers." The first part takes seriously Lysander Spooner's arguments in "No Treason: The Constitution of No Authority" that the Constitution is not and cannot be binding on people who did not explicitly consent to it- the "we the people" in the preamble is a fiction. Barnett argues for a view that a Constitution can be legitimate and binding in the absence of explicit consent only if it incorporates appropriate limitations on government to safeguard individual rights. This is the most philosophical section of the book, and I found it the weakest--while I think Barnett had good arguments against tacit or implied consent, I'm not sure his alternative really provides the legitimacy it purports to, nor am I particularly persuaded by his account of natural rights. (I am a strong proponent of individual rights, but I am unconvinced that they are grounded in nature, as opposed to being justified by a combination of empirical fact and subjective values.) In Part 2, "Constitutional Method," Barnett argues that the Constitution is properly interpreted by a form of originalism based on original meaning, as opposed to original intent. He argues persuasively that the arguments against originalism which target original intent do not work against original meaning. I found this part

much more persuasive than Part 1, and I think he has formulated a consistent and rational methodology of Constitutional interpretation that takes seriously what is written in the text.

For those who love liberty and want to be better informed about how our Supreme Court has eroded our liberties "Restoring the Lost Constitution" is a book you must read. Barnett, the author, is the Austin B. Fletcher Professor at the Boston University School of Law. In the Preface he recounts how as a student he was disturbed by what he learned in his Constitutional Law class. On the basis of that experience he decided to specialize in contract law where the practice of law was more rational. There he remained until he was tenured. He "came out of the closet" when quite by accident he was asked to give a short talk about a constitutional law issue -- a fascinating story in its own right. Barnett brings his considerable knowledge and experience to bear on constitutional law in "Restoring the Lost Constitution." The first part of the book takes up the subject of constitutional legitimacy. Have you ever had an argument with someone who says, "I never signed onto the constitution, so I'm not bound by it?" Barnett takes that person's side and demolishes one counter argument after another. In reading his arguments I became more and more frustrated. I thought to myself what do I have to tell this guy? The constitution is in place; if you don't like it, make the most of it. But Barnett is much more gentle than that, in part I suppose, because he has an ace up his sleeve. He then figuratively turns to the person he was defending and asks a simple question. "What is the foundation for your belief that you are not bound in conscience to the constitution?" When I got to that point I said to myself, "Gotcha!!" Perhaps you can guess what the answer was and how Barnett uses it, but I am not going to spoil your fun by revealing it.

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