



BOOKS

**[1] RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION:
THE PRESUMPTION OF LIBERTY (2004)**

**[2] LARRY D. KRAMER, THE PEOPLE THEMSELVES:
POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)**

Review of [1] and [2] by Glenn Harlan Reynolds.....656

Review of [1] by Jack N. Rakove.....660

CONJURING WITH – AND FOR – THE PEOPLE

Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, Princeton: Princeton University Press, 2004. Pp. xv, 366.

Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, Oxford University Press, 2004. Pp. xii, 363.

Review by Glenn Harlan Reynolds

Mark Tushnet observes, “One of the most interesting phenomena in constitutional law is the way in which ideas move from being ‘off the wall’ (that is, basically ‘crazy’) into being within the range of reasonable argument, and then into the mainstream.”¹

I’ve noticed a similar phenomenon, in which theories that would have been out-of-bounds to people of one political persuasion rapidly become acceptable to them after a shift in the political winds. Surveying the political landscape after the 2004 elections, I noticed a sudden surge of interest in federalism among liberals, who – now that all three branches of the federal government are in the hands of Republicans – are suddenly appreciating the benefits of state and local autonomy.² Meanwhile, Republicans who previously talked about small government are showing new signs of interest in using federal power as an engine of social change. I confidently predict that these changes in the public climate will soon manifest themselves in the scholarly literature as well.

But, fortunately, not everyone in the scholarly world is as predictable as that, and Randy Barnett and Larry Kramer are among the best of non-party-line scholars. The publication of their two books – very different in some ways, but surprisingly similar in others – at this particular moment is especially opportune, as they may help us chart a more principled course.

¹ Mark Tushnet, *Off the Wall and into the Mainstream?, or “Here We Go Again”*, BALKINIZATION, Oct, 21, 2004, available at <http://balkin.blogspot.com/2004/10/off-wall-and-into-mainstream-or-here.html>.

² Jeffrey Rosen anticipated this shift in 1995. See Jeffrey Rosen, *Fed Up*, THE NEW REPUBLIC, May 22, 1995, at 13.

I. Kramer and The People

Larry Kramer's *The People Themselves* takes a position that would have been anathema to mainstream legal scholars not long ago: That popular sovereignty means something, and that popular opinions regarding constitutional questions may, in fact, be as deserving of respect as the opinions of courts.

Kramer engages in a detailed and fascinating historical analysis in support of his thesis that the people themselves were intended to be the most important engine of constitutional enforcement, both through political means and through what Gordon Wood has called "out of doors" activity. Kramer's political-constitutional historiography is interesting, and even experienced scholars in the field are likely to learn something useful.

I think that Kramer is right in his essential thesis. His later analysis, however, seems less persuasive. To oversimplify rather harshly, Kramer concludes that it would be inappropriate for courts to strike down the New Deal and the administrative state it created, because the constitutional boundaries crossed in FDR's time are the sort that should be policed, if at all, by the people and not by the judiciary.

Yet, in reading Kramer's analysis, I had a rather different take. If, in fact, the populace is responsible for constitutional enforcement via political means, then constitutional doctrines that make political supervision easier – like, say, federalism, enumerated powers, or especially the non-delegation doctrine – would seem especially important, and their muting or abandonment, post-New Deal, would seem to fly in the face of popular sovereignty. The administrative state has its virtues, no doubt, but amenability to popular scrutiny and control is not among them. This would suggest that the concern for political accountability that has marked a few of the Supreme Court's recent opinions, from *New York v. United States*³ to *United States v. Printz*⁴ is the merest shadow of the kind of judicial supervision that Kramer's theory would demand if it were taken seriously.

It is also interesting to me that Kramer's book eschews any mention of the single most significant popular-sovereignty provision in the Constitution: The Second Amendment. Kramer is right, of course, that "out of doors" political activity gradually lost significance in favor of more genteel methods (though in my state of Tennessee, at least, where a recent effort to impose an income tax was met by protesters who were actually carrying tar and feathers, something of the original tradition remains).⁵ But the right to bear arms enshrined in the Second Amendment was

³ 505 U.S. 144 (1992).

⁴ 521 U.S. 898 (1997).

⁵ See Glenn Harlan Reynolds, *Tackling Taxes in Tennessee* (1999) (quoted in Michal Wallace, *Tennessee vs the Income Tax*, manifestation.com, available at

certainly intended to preserve the ability of “the people themselves” to resist actions by government that they regarded as illegitimate. Its omission in a work on this subject seems quite striking; at least, it struck *me*.

This said, however, I found Kramer’s book to be one of the most interesting, enjoyable, and informative works on constitutional law that I have read in quite some time, and I highly recommend it. The history that he recounts is underappreciated and, I suspect, relevant to our own politically divided times. Kramer’s writing style is delightful, and his insights are keen.

II. Barnett and the Courts

It is fair to say that Randy Barnett’s *Restoring the Lost Constitution* is not a work of majoritarian or populist theory. Or, perhaps more accurately, Barnett simply retains far more enthusiasm for the notion of constitutional enforcement on the part of the judiciary. I imagine that if asked about judicial review, Barnett might invoke Gandhi’s assessment of western civilization and respond “it would be a good idea.”

Barnett spends considerable time and effort demonstrating that the Framers’ conceptions of liberty matter, and that courts can enforce them today. While courts may be forced to construe constitutional language in light of new facts, construction should not serve to deny or disparage the rights of the people that the Constitution, after all, was intended to protect. Indeed, Barnett places considerable emphasis on the Ninth Amendment, which, after all, specifically provides that “The enumeration in the Constitution, of certain rights, *shall not be construed* to deny or disparage others retained by the people.”⁶

In short, Barnett thinks that the courts have gotten it backwards – bending the Constitution to justify expansions of governmental power, while failing to perform their core task of protecting individual rights and enforcing limitations on government. Barnett would take a narrower approach to the Necessary and Proper Clause, and a broader approach to the Privileges and Immunities clauses. Most importantly, as the book’s subtitle suggests, Barnett would adopt a “presumption of liberty” that would require the government to demonstrate that any restriction on individual liberty is actually necessary and proper, rather than placing the burden on individuals to show the infringement of an enumerated Constitutional right. As Barnett notes right up front, the Constitution envisioned islands of governmental

<http://www.manifestation.com/hive/talkback.php3?contentID=721>) (“Thousands of cars circled Capitol Hill, bearing down on their horns and tying up traffic throughout downtown. Hundreds of protesters occupied the Legislative Plaza, with many barging into the capitol building itself carrying signs and—in one case—a can of tar and a feather pillow.”).

⁶ U.S. CONST. amend. IX. (emphasis added).

power in a sea of individual liberty; it has been interpreted so as to produce precisely the opposite. I find this assessment compelling.

Barnett's book is quite interesting, and if his prose style does not quite match Kramer's zest, it is marked by the thoroughness and care characteristic of Barnett's work. I highly recommend it, and I think that those who – like me – are fortunate enough to read these two books together will find that they take more from the experience than they would take from reading either book alone.

Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, Princeton University Press, 2004. Pp. 357.

Review by Jack N. Rakove¹

With Randy Barnett, I count myself a friend of that old constitutional joker, the Ninth Amendment. I love its wonderfully inventive choice of verbs: “deny or disparage.” As a historian, I also recognize that its significance within the context of the constitutional debates of the 1780s has not been fully or properly appreciated. The Ninth Amendment attempted to do something more than merely close weak points in James Wilson’s public address of October 6, 1787. In that controversial and widely publicized speech, Wilson attempted to forestall the emerging Anti-Federalist clamor over the omission of a bill of rights from the Constitution by arguing that the adoption of rights-protecting clauses would have implied the vesting of powers that had not in fact been granted.²

The adoption of the Ninth Amendment also illustrates a key conceptual difficulty that the black-letter, super-positivist conception of a constitution that Americans were coming to favor had now exposed. A decade earlier, no one would have said that the existence of rights depended upon their explicit mention in a constitutional text (or a quasi-constitutional text like the declarations of rights that accompanied, but were not formally part of, the first state constitutions). By 1787–88, however, both the Federalist supporters of the Constitution and their Anti-Federalist opponents were coming to grips with the new definition of a constitution as supreme fundamental law. Under this definition, there could be no greater security for rights than incorporating appropriate clauses in the constitutional text (a precedent first set in the Massachusetts constitution of 1780). But that left open the essential and troubling question the Ninth Amendment addressed: If your state-

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² Given the emphasis that he places on the Ninth Amendment, as well as his commitment to originalism generally, I find it curious that Barnett nowhere mentions this speech, which was arguably the single most important statement rendered by any Federalist in 1787–88. It was given early in the ratification campaign and could be deemed authoritative because Wilson was both known to have been a leading member of the Federal Convention and was widely recognized as the leading Federalist in Pennsylvania. Texts of the speech are widely reprinted in standard historical collections. See, e.g., 1 BERNARD BAILY, *THE DEBATE ON THE CONSTITUTION* 63-69 (1993); 2 *DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 167-69 (Merrill Jensen et al. eds., 1976). Given the amount of editorial labor that reputable historians have devoted over the past half century to providing authoritative collections of the documents from the Revolutionary era, it would behoove legal scholars—especially those committed to the projects of originalism and textualism—to take advantage of their labors and not rely on such older

ment of rights was in any ways incomplete, would that not risk relegating rights left unmentioned to some inferior position? *Expressio unius, exclusio alterius*.

So the Ninth Amendment is not some wasted stretch of constitutional junk-DNA. Whatever difficulties it has faced in its application since its adoption in 1791, and however much it might have been conceived to allay a reservation rather than propound a juridical program, its addition to the Constitution addressed a serious, substantive concern that the ratification debates of 1787–88 first revealed.

I have an additional, somewhat more academic reason for liking the Ninth Amendment. As Barnett notes, the language in which James Madison originally proposed it was not exactly a model of constitutional elegance—or what Madison himself would have called “perspicuity.” Here is the original wording:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights, retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution (p. 237).

But perhaps the difficulty Madison encountered in struggling for concision betrays a deeper tension in his thinking. One of the great concerns driving this intensely creative moment in his political thinking was the belief that the protection of rights was first and foremost a matter of cabining legislative power. One way to do that—the mode adopted in Article I, Section 8 of the Constitution—was to think of legislative power not as a plenary authority, but as an aggregate of specific delegated powers. But Madison doubted that any such enumeration would work. With the presumed weight of popular opinion behind it, and its very rule-making authority to exploit, any representative assembly worth its salt could deploy an “infinite of legislative expedients” to secure its aims.³ It might, for example, convert the Necessary and Proper Clause from a reasonable authority to act in the textual interstices into a virtual grant of substantive power, or adopt so expansive a definition of the Commerce Clause as to enable it to claim a general power to supervise an entire national economy. Madison accordingly worried that the attempt to limit legislative power by enumeration might well prove delusory. But an enumeration of rights could easily prove limiting in a way that the enumeration of legislative powers would not. Hence, it was all the more necessary to adopt something like the

compilations as JONATHAN ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* (1836).

³ The quoted phrase comes from the passage in Madison’s important letter to Jefferson of October 24, 1787, in which he defends his rejection of the proposed congressional negative on state laws on the grounds that it would enable the national government to intervene to protect individual and minority rights within the states. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in *MADISON: WRITINGS* 142 (Jack N. Rakove ed., 1999).

Ninth Amendment as an antidote to the dangers that open-textured language like the Necessary and Proper or Commerce clauses might embody.

As it happens, analysis of the constitutional provisions just cited form three main legs of the textual and historical justifications on which Barnett rests his Presumption of Liberty principle, “which places the burden on the government to establish the necessity and propriety of any infringement on individual freedom” (pp. 259–60). The fourth leg is the Privileges or Immunities Clause of the Fourteenth Amendment. The Presumption of Liberty stands in normative opposition to the dominant rational-basis standard of constitutional review that took effect (in the realm of Commerce Clause jurisprudence) after the “switch in time that saved nine” in 1937 received definitive form in Footnote Four of *Carolene Products*. Along with the Argonauts of the Constitution-in-Exile school of critical constitutional studies, Barnett shares the conviction that rational basis is fundamentally irrational when it comes to defining the role courts should play in evaluating economic legislation.

But unlike avowedly conservative critics of post-New Deal jurisprudence, Barnett favors advancing the other component of Footnote Four: its promise that the Court will remain vigilant in enforcing fundamental rights. In the original language of Footnote Four, that oversight was to be exercised on behalf of “discrete and insular minorities” whom the political process did not adequately protect. Of course, the plaintiffs in *Griswold v. Connecticut* hardly fell into that deprived category, but for Barnett, their victory marked a significant advance toward what he calls Footnote Four-Plus jurisprudence. Under this revision, “some judicially favored unenumerated rights could also be used to shift the burden to the government to justify its restrictions on liberty” (p. 232). Other, more recent cases, notably *Casey* and *Lawrence*, have also followed the Four-Plus line. But absent the recognition of a general principle capable of sustaining a full-fledged challenge to the prior prevailing presumption in favor of government, our lost Constitution cannot be fully restored.

The Presumption of Liberty is that principle—and Barnett makes a powerful, if (by some lights) rather perverse, case for its establishment as the guiding rule of constitutional law. I say “perverse,” because (if I follow him correctly⁴) for this Presumption to be stated persuasively, we would have to agree with at least the following propositions, all of which are highly contestable and, by my lights, inadequately corroborated: (1) that the Ninth Amendment, in its broad generality, has (and had for its adopters) an ascertainable meaning which could be equated

⁴ Admittedly, this may not be the case. I am merely a working historian, not a constitutional logician or theorist. Insofar as I have a coherent constitutional theory, it is that most (perhaps all) constitutional argumentation is instrumental. Hence inconsistencies abound, which is great for historians because it

with or extended to include fundamental natural rights; (2) that Madison and Jefferson similarly got the basic constitutional story right when they opposed Hamilton's plan for a national bank with the claim that necessity and propriety were to be construed strictly and robustly, and not as mere synonyms for convenient and useful; (3) that the framers and adopters of the Fourteenth Amendment would have accorded a similar breadth and latitude to the Privileges or Immunities Clause, so that it effectually compounded and reinforced the original (if now lost) meaning of the Ninth Amendment; (4) that the much-lamented *Lochner* decision of 1905, the *bete noire* of so much Progressive and pro-New Deal scholarship, was in fact a reasonable decision, and one that affords a useful way to identify economic regulations that fail to meet a bona-fide test of necessity and propriety while also infringing the modern equivalent of a natural right (in this case, to labor); (5) that the specter of judicial activism, that meaningless buzzword that so permeates the political discourse of contemporary constitutionalism, is no specter at all, but exactly what we need to enforce the Presumption of Liberty; and (6) that the police power of the state (or more precisely, the states), far from embracing an expansive authority to legislate broadly in pursuit of the public weal, should be similarly construed to place "the protection of individual rights" at its "core" (p. 333).⁵

There is much here that goes far beyond a historian's poor power to add or detract from the documentary record to which we remain professionally bound, and that, frankly, he cannot comfortably evaluate. Legal scholarship, it has often seemed to me, operates under different norms and standards.⁶ In many ways, it mirrors the profession whose practitioners legal academics train in their day jobs. That is, it is prone to overstatement, its findings often expressed in an advocatorial voice that would sound jarring and off-key in other disciplines. Of course, legal scholarship can be as nuanced and subtle as other disciplines. But in the dark and bloody ground of constitutional theory, where quarter is rarely given and few captives taken, the rewards go to the bold, especially when the project is to provide some compelling rule of interpretation.⁷ Legal scholarship is also admirably eclec-

creates problems for us to solve, but disturbing to those who think that, as a matter of principle and practice, constitutional interpretation should be consistent.

⁵ Omitted from this list as well is a battery of arguments Barnett fires off in his opening chapters to falsify various consent-based theories of constitutional legitimacy.

⁶ I have offered similar reflections on these differences in Jack N. Rakove, *Two Foxes in the Forest of History*, 11 YALE J.L. & HUMAN. 191 (1999) (reviewing 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1993), and AKHIL REED AMAR, *THE BILL OF RIGHTS* (2000)).

⁷ Nor can I forbear objecting strongly to the casual remark Barnett offers about the Second Amendment, another of his passions and one of my own originalist sidelines. Barnett invokes this one realm of constitutional forensics (which I regard as something of a Twilight Zone of scholarship) to illustrate his claim that "compelling analyses of the original meaning of even the most controversial provisions of the Constitution have been developed, from those where the evidence of original meaning is overwhelming—the Second Amendment, for example . . ." (pp. 114–15). The authority for this claim is given as an article by Barnett and Don Kates (whom no one would ever mistake for a dispassionate scholar). See generally Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996). That purported, self-proclaimed consensus has since been challenged by a number of reputable scholars, myself included, who contributed to the symposium on the Second Amendment pub-

tic—normative here, empirical there, opinionated through and through—but that very eclecticism makes it difficult to assess critically.

There are, nonetheless, some obvious grounds on which the working historian might cast a measure of doubt on certain claims that figure prominently in Barnett's heroic bid to recover and restore his lost Constitution.

Start with the Ninth Amendment (which, you will recall, I like). Though I would not deny that it creates a potential independent source of fundamental rights that citizens ought to be able to claim, and judges should feel inspired and empowered to enforce, I remain skeptical that any attempt to explain definitively *how* those rights could be identified—whether by a presumption of liberty or by Herculean *cum* Dworkinian feats of philosophical strength—will prove successful. This is not to deny that some early proponents and interpreters of the Constitution regarded natural rights as one source of unenumerated but enforceable fundamental rights.⁸ Nor is it to insist that the only wells from which such rights could be drawn would be located either in the existing state declarations of rights or in some other compilation familiar to the adopters of the Ninth Amendment (or the Fourteenth, for that matter), so that future generations of interpreters would be obliged to engage in merely historical inquiries.⁹ I agree with the conclusion that “the original meaning of the rights retained by the people cannot be confined to the specific liberties identified by originalist materials” (p. 259). As Benjamin Rush, that gadfly of the American Enlightenment, observed before the amendment had yet become a glimmer even in James Madison's eye, Americans could not be certain they had yet discovered all the rights that future generations (the posterity to whom the Preamble secures “the blessings of liberty”) would want to enjoy (including, say, the right of

lished by the *Chicago-Kent Law Review* in 2000. See Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 *CHI.-KENT L. REV.* 103, 103–66 (2000) (revised and reprinted in *THE SECOND AMENDMENT IN LAW AND HISTORY* 74–116 (Carl T. Bogus ed., 2001)). As Barnett also knows, because we subsequently conducted a lengthy exchange on this issue on the H-Law listserv, I am still waiting for someone to refute my own review of this evidence.

In my own view, many of the writings that comprise Barnett and Kates's “new consensus” are replete with simple errors of fact, selective quotations, and highly questionable assumptions. None of this is meant to excuse Michael Bellesiles for committing the same—and worse—sins in his discredited book. Cf. MICHAEL A. BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* (2003). My point is simply that this is one area of scholarship that intellectual honesty should prohibit anyone from describing in the terms Barnett uses here.

⁸ For the record, let me note that I personally (and fervently) believe that the most important natural right the Constitution explicitly recognizes is found in the Free Exercise Clause of the First Amendment. That right is natural because it depends on the truly natural attribute of humanity that makes religious belief an internal state of mind, immune to anyone's scrutiny. I develop this argument at further length in Jack N. Rakove, *Jefferson, Rights, and the Priority of Freedom of Conscience*, in *THE FUTURE OF LIBERAL DEMOCRACY: THOMAS JEFFERSON AND THE CONTEMPORARY WORLD* 49–64 (Robert Fatton & R. K. Ramzani eds., 2004).

⁹ Barnett devotes ten rather tedious pages to refuting such alternative interpretations of the Ninth Amendment (pp. 242–52).

postal workers to be secure from assault by arms-bearing disgruntled co-workers).¹⁰

What can be disputed is whether any avowedly originalist approach to the problem of discovering a *principle* whereby such unenumerated fundamental rights could be ascertained can ever reach a persuasive conclusion. And this doubt remains whether one follows the public-meaning approach to originalism favored by Barnett or the vacuum-cleaner, canvass-all-the-sources (making allowances for respective strengths and weaknesses) approach that I have propounded elsewhere.¹¹ Because our modern constitutional culture is so deeply invested in the interpretation of the first ten amendments as well as Section One of the Fourteenth, it also displays a penchant to presuppose that their framers were equally alert and thoughtful about their composition of each of the relevant clauses. That proposition may be true in particular cases, and consequential purposes can indeed be assigned to editorial changes made during the process of drafting. Barnett emphasizes the salience to our understanding of Roger Sherman's draft bill of rights, which included the statement: "The people have certain natural rights which are retained by them when they enter into society" (pp. 243, 246–47). Given Sherman's membership on the committee to which the House of Representatives assigned Madison's resolutions, his agency in convincing the House to replace Madison's scheme of placing or interweaving individual amendments in the most relevant sections of the Constitution with their appearance as separate posterior articles, and the recurrence of "retained" in the final version, his wording and ostensible purposes certainly deserve notice.

But are they dispositive? Sherman's thought was also the expression of a vague commonplace of eighteenth-century thinking which did not deter any of a number of commentators from assuming that governments could still substantially regulate and restrict the exercise of these retained natural rights.¹² Barnett's insistence that the Ninth Amendment implicitly incorporates or subsumes natural rights rings hollow for other reasons. The First Federal Congress rejected, after all, the statement of natural rights that Madison had originally proposed, among his amendments, as a sort of second preamble to the Constitution. Absent recorded discussion on this point, it is possible to assume that those rights had migrated, *sub silentio*, into the Ninth Amendment. But it is equally possible, and arguably more plausible, to reach a completely different conclusion. Statements affirming natural rights were more naturally found in the preambles to the first state constitutions or their accompanying declarations of rights because the revolutionaries of 1776 were

¹⁰ JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 329 (1996).

¹¹ See generally *id.*

¹² There is a good discussion of this basic point in FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 9–56 (1986).

consciously acting to leave the condition of “a dissolution of government” to restore lawful rule under legally reconstituted institutions. They sounded the natural-rights theme for the same reason that Jefferson did in the Declaration of Independence (which was also, in its way, a bill of rights affirming the fundamental natural right of resisting tyranny).

A decade later, however, such affirmations appeared redundant and beside the point. Edmund Randolph explained why this was so in a working memorandum for the committee of detail that met between July 26 and August 5, 1787, converting the resolutions adopted thus far by the Federal Convention into a draft constitution. In discussing what kind of preamble such a document might take, Randolph dismissed the idea that it need not express “the ends of government and human polities” in the round terms used a decade earlier: “This display of theory, howsoever proper in the first formation of state governments, *is* unfit here; since we are not working on the natural rights of men not yet gathered into society, but upon those rights, modified by society, and *interwoven with* what we call the rights of states.”¹³ The same logic probably prevailed in the House two years later. Absent any real discussion of the rejection of Madison’s preamble (which he himself described as “a bill of rights,” in opposition to the specific rights-protecting clauses he wished to interweave in the main text), or of the evolution of the Ninth Amendment, it takes quite a leap of the historical imagination to support *any* conclusive reading of how this text, with its wonderful verbs, is to be definitively read. Far from stating a robust principle, capable in turn of sustaining the Presumption of Liberty, the Ninth Amendment can also be described as something of a constitutional afterthought. And such a description, wholly plausible on historical grounds, would be wholly compatible with the rather casual way that Congress went about acting upon what Madison himself called the “nauseous project of amendments.” To reach a confident judgment about exactly what had been agreed to, one would not only want but need to have a far broader record than the deliberations of 1789 generated. One would want, in other words, to move beyond the realm of plausible inferences resting on a handful of texts to a robust debate pitting one possible reading against another. That simply did not happen, and in its absence, prudence suggests that the cautious, indeed disparaging reading that has led most commentators (and jurists) to deny that the Ninth Amendment has any real interpretive authority, though regrettable, are unsurprising.

A similar set of reservations can be leveled against the extension of Barnett’s argument from the Ninth Amendment to the Privileges or Immunities Clause of the Fourteenth Amendment. As we know from Justice Bushrod Washington’s familiar language in *Corfield v. Coryell*,¹⁴ the privileges and immunities Americans

¹³ Memorandum from Edmund Randolph to George Mason (c. 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 137 (Max Farrand ed., 1996).

¹⁴ 6 F.Cas. 546, 551 (E.D. Pa. 1823).

enjoy as citizens begin with the acceptance of “fundamental principles” that “would perhaps be more tedious than difficult to enumerate.” Before passing on to the civil rights that appear to be the more immediate referent and direct concern, Washington first invoked the familiar natural rights in language that any revolutionary of 1776 or constitutionalist of 1789 could have used: “Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind [presumably including human chattel], and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole” (p. 62). The final qualifying clause is as familiar as the summary of natural right that precedes it, and places us back into the equally conventional formulation that we surrender control over the unrestrained enjoyment of our natural rights for their more secure, if circumscribed, exercise under law. From this statement of “fundamental principles” Washington then passed on to the more immediate catalog of privileges or immunities whose enjoyment is what finally matters.

When, as Barnett notes, the members of the Thirty-Ninth Congress repeatedly cited this passage, were they thinking more about the fundamental principles or their specification in particular civil rights? Were they implicitly agreeing, without explicitly recognizing, that they were endorsing something akin to the Presumption of Liberty? Barnett’s examination of the framing of the Fourteenth Amendment is too cursory to satisfy anyone who wants to reason from robust evidence rather than imaginative inference. It provides nothing like the framework that William Nelson presents in his account of the drafting of the Fourteenth Amendment¹⁵ for thinking about how well a constitutional debate conducted in the highly politicized and impassioned atmosphere of 1865–68 could reach conceptual closure on so broad a proposition. Nelson offers numerous reasons to explain why the circumstances under which the amendment was framed were not wholly conducive, either intellectually or politically, to attaining that result. Barnett instead rushes past the adoption to consider how the original meaning of the amendment was gutted by the line of interpretation that began with *Slaughterhouse*. In fact, Barnett never cites Nelson, not because he is unfamiliar with his work (which seems unlikely), but (more likely) because Nelson’s account of the untidy process of framing the amendment cannot be easily squared with the strong conclusion about its meaning that Barnett wishes to draw.

Finally, there is Barnett’s account of the Necessary and Proper Clause, which reminded me of a talk Justice Scalia gave four years ago at Princeton University on the occasion of a conference honoring the 250th anniversary of the birth of James Madison (whom Princeton regards as its first graduate student because he stayed on some months past his degree to pursue studies in ancient Greek and He-

¹⁵ WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

brew). Scalia's talk was devoted to a defense of his textualist version of originalism (to which I suppose Barnett is sympathetic), and it featured a similarly careful parsing of *necessary* and *proper*. In the question-and-answer period, I asked Scalia how he could speak so confidently about the original meaning of that portentous phrase when two principal framers and interpreters of the Constitution (Madison and Hamilton) soon disagreed about it so strongly. Scalia conceded that might be a problem, and I managed a quick follow-up, asking which framer-interpreter he thought had the better case. With his celebrated twinkle, Scalia suggested he would side with Madison.

So does Barnett, which is well and good, except for the fact that Madison and his sidekick, Secretary of State Thomas Jefferson, were the losers in this famous debate. Of course, from an originalist perspective, the outcome of this debate does not really matter. Their interpretation of the clause might well have been more accurate and even more authoritative than Hamilton's, and perhaps more than intellectual diffidence explains why the Convention's presiding officer and the nation's first president, George Washington, was reluctant to sign the act chartering the first national bank until Madison, Jefferson, Hamilton, and Attorney General Edmund Randolph had all weighed in on it. Moreover, legislatures are expected to act in self-aggrandizing, liberty-restricting ways, which is why Barnett is such an enthusiast for judicial activism.

There remain, however, two problems with concluding that Madison got it right. The first is that Madison's thinking about the nature of legislative power was far ahead—in a sense, far more modern—than that of any of his contemporaries. He understood, as they did not, that henceforth representative assemblies would be the active force in government; that the business of republican legislatures would be to convert the people's will into legislation; and that, indeed, that popular will was the true active force within (but also outside of) government. From 1785 until 1793, his thinking about the vices of republican government was dominated by his fear of legislative excess and his recognition, also thoroughly modern, that the real problem of rights within a republic polity was not to protect the people as a whole against the government, but rather to protect individuals and minorities against popular majorities ruling through legislation. It was this principled concern, rather than pressure from his constituents, that led Madison to oppose Hamilton's scheme for a national bank. To accept a Hamiltonian reading of the Necessary and Proper Clause—the loose canon of Hamiltonian construction—would be to make Congress the effective judge of its own authority, and this at a time when the idea of judicial review, though already intellectually accepted, remained highly problematic because no one yet knew whether judges would have the courage and authority to challenge legislative misrule. But the concerns that made Madison so creative a constitutional thinker also left him, in many ways, an unrepresentative one, and perhaps nowhere more so than in his approach to the Necessary and Proper Clause.

In his modern concern for the protection of individual rights, Madison may also have been exceptional. There was, in fact, a strong libertarian element in his thinking, to be found, for example, in his complaints about the “multiplicity,” “mutability,” and lurking “injustice” of the legislation the states had been busily adopting since 1776,¹⁶ as well as the deep and formative importance he ascribed to rights of conscience, the first passion of his young political life. But the Constitution was not written and ratified to make the protection of rights—natural, constitutional, or civil—the first priority of government. Any government that systematically jeopardized rights would, of course, be antithetical to basic principles of republican government. But the real business of 1787 and 1789 was to empower government, not weaken it; to make it capable of action; to undertake a program of state-building that would ensure the survival of a national republic in a dangerous world.¹⁷ Madison certainly supported that project, but with a concern for rights and liberties that may have set him apart, to some degree, from many of his coadjutors. In that state-building project, anxious anguish about the misuse of the Necessary and Proper Clause was the anomaly, not the rule.

It is this fundamental fact about the Constitution—that it was much more about powers than rights—that makes Randy Barnett’s notion of a lost Constitution historically untenable. As much as the adoption of the Ninth Amendment illustrates important facets of the American language of rights, then and arguably now, it is not the smoking pistol that best explains how the Constitution is to be interpreted.

¹⁶ See James Madison, *The Vices of the Political System of the United States*, in MADISON: WRITINGS, *supra* note 3, at 69-79 (items 9, 10, 11).

¹⁷ This is a pronounced theme in some recent historical writings on the Constitution, including most notably MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT* (2003).