

Is the Constitution Libertarian?

*Randy E. Barnett**

I am honored to be delivering the Seventh Annual B. Kenneth Simon Lecture. I have been philosophically close to the Cato Institute since its founding. And one of the fringe benefits of moving to the Georgetown University Law Center is that now I am physically close to Cato as well. As a public policy shop, the work of Cato touched only tangentially on my own scholarship. But ever since the establishment of its Center for Constitutional Studies, under the extraordinary leadership of my old friend Roger Pilon, I have enjoyed a much closer relationship to Cato than ever before. That I might be invited to deliver the prestigious Simon Lecture is, for me, a wonderful validation of a beautiful friendship.

In this lecture, I want to address a topic that goes to the heart of the mission of the Cato Institute and its Center for Constitutional Studies: Is the Constitution libertarian?

Libertarians and the Constitution: A Love-Hate Relationship

Truth be told, libertarians have a love-hate relationship with the Constitution. On the one hand libertarians, like most Americans, revere the Constitution. Libertarians particularly appreciate its express guarantees of individual liberty and its mechanisms to preserve limited government. If being American is to subscribe to a creed, then the Constitution and the Declaration of Independence that gave rise to it are the foundational statements of this creed. It is no coincidence, then, that the Cato Institute is famous for distributing millions of copies of its little red books containing the Declaration and Constitution so that the public, both here and abroad, might read and appreciate the actual words of these singular texts.

* Carmack Waterhouse Professor of Legal Theory, Georgetown University Law Center. Senior Fellow, Cato Institute. An abbreviated version of this article was delivered as the Seventh Annual B. Kenneth Simon Lecture at the Cato Institute on Constitution Day, September 17, 2008. Permission to copy for classroom use is hereby granted.

But some libertarians have issues with the Constitution as well. And here I speak for myself, as well as others. There was a reason I eschewed writing about and teaching constitutional law when I became a law professor in favor of teaching contracts. After taking constitutional law in law school, I considered the Constitution an experiment in limiting the powers of government that, however noble, had largely failed. Every time we got to one of the “good parts” of the text, we then read a Supreme Court opinion that explained why it did not really mean what it appeared to mean.

Nor was only one branch of the government to blame. The judicial passivism of the Supreme Court has combined with activism by both Congress and presidents to produce the behemoth federal and state governments that seem to render the actual Constitution a mere relic, rather than the governing document it purports to be. This fundamental failure of the Constitution to limit the size and scope of government has even led some libertarians to contend that the enactment of the Constitution represented a coup d'état by big government Federalists against the more preferable regime defined by the Articles of Confederation and favored by the Anti-Federalists.

Yet libertarians are genuinely torn—one might go so far as to say schizophrenic—about how the Constitution has actually worked out. Big and intrusive as government is today, it could be much worse. Few can point to other countries where individuals are freer in practice than in the United States. Many libertarians might be willing to move there, if such a place existed; yet no such exodus has occurred. And, in important respects, life as an American feels freer than it once did. We seem to have more choices than ever before and are freer to live the sorts of lives we wish. Libertarians still refer to the United States as a “free country,” maybe still the freest on earth, even as the Cato Institute documents the many ways in which our freedoms are unnecessarily restricted. That the Constitution deserves at least some of the credit for this freedom seems likely.

So is the Constitution libertarian or not? It turns out that this is not an easy question to answer.

What I Mean by “Libertarian”

For one thing, we need to settle on what is meant by “libertarian.” The most obvious meaning of “libertarian” is a belief in or commitment to individual liberty. In my experience, the world is divided

between Lockean and Hobbesian: between those for whom individual liberty is their first principle of social ordering, and those who give priority to the need for government power to provide social order and pursue social ends. Yet most Americans, like Locke himself, harbor a belief in *both* individual liberty *and* the need for government power to accomplish some ends they believe are important.

However, a general sympathy for individual liberty shared by most Americans should be distinguished from the modern political philosophy known as “libertarianism.” A libertarian, in this sense, favors the rigorous protection of certain individual rights that define the space within which people are free to choose how to act. These fundamental rights consist of (1) the right of *private property*, which includes the property one has in one’s own person; (2) the right of *freedom of contract* by which rights are transferred by one person to another; (3) the right of *first possession*, by which property comes to be owned from an unowned state; (4) the right to *defend oneself and others* when fundamental rights are being threatened; and (5) the right to *restitution* or compensation from those who violate another’s fundamental rights.¹

If modern libertarianism is defined by the commitment to these rights, it is not defined by the *justifications* for this commitment. Some libertarians are consequentialists, others are deontologists, while still others adopt a compatibilist approach that straddles the line between moral and consequentialist justifications. It is useful to emphasize that libertarianism is not a moral philosophy; it is a political philosophy that rests upon certain moral conclusions that can be supported in a variety of ways.²

Modern libertarianism can be viewed as a subset of classical liberalism, in the following way: All classical liberals believe in respecting and protecting these five rights, which distinguishes classical liberals from others who would deny some or all of these rights. Yet some classical liberals might add other rights to this list—such as an enforceable right to some minimum level of material support—or

¹ See Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (1998) (explaining how these five fundamental rights solve the pervasive social problems of knowledge, interest, and power).

² See Randy E. Barnett, *The Moral Foundations of Modern Libertarianism*, in *Varieties of Conservatism in America* 51 (Peter Berkowitz, ed. 2004).

might sometimes favor limiting the scope of these fundamental rights to achieve other important social objectives.

In contrast, modern libertarians are distinctive for their tendency to limit the set of fundamental rights to these five, and their reluctance ever to restrict the exercise of these rights to achieve other worthy objectives. They view these rights as “side-constraints”³ on the pursuit of any personal and collective ends. Their working thesis is that all genuinely desirable social objectives can be achieved while respecting these rights—the more rigorously, the better. Hereafter, I will consider the degree to which the Constitution is “libertarian” insofar as it respects and protects the fundamental rights to which modern libertarians and classical liberals generally adhere.

Holmes’s Denial that the Constitution Is Libertarian

Now for some, asking whether the Constitution is libertarian in either the classical liberal or modern sense may seem completely inappropriate. In one of the most famous lines in any Supreme Court opinion, Justice Oliver Wendell Holmes Jr., in his dissent in the 1905 case of *Lochner v. New York*,⁴ proclaimed that “[t]he Constitution does not enact Mr. Herbert Spencer’s *Social Statics*.”⁵ Because modern academics know so little about Spencer, and what they think they know is a distortion, Holmes’s exact meaning here is not always appreciated. Holmes was not rejecting the so-called social Darwinism that has been falsely associated with Spencer. Indeed, Holmes was himself a social Darwinist, as were most political progressives of his day.

No, Holmes was referring to Spencer’s “law of equal freedom,” the principle made so famous by Spencer that Holmes could be confident that his readers would not miss his reference. In *Social Statics*, Spencer affirmed “that every man may claim the fullest liberty to exercise his faculties compatible with the possession of like liberty to every other man.”⁶ Or, in another formulation, each “has freedom to do all that he wills provided that he infringes not

³ The term “side-constraints” was coined by Robert Nozick. See Robert Nozick, *Anarchy, State, and Utopia* 33-35 (1974).

⁴ 198 U.S. 45 (1905).

⁵ *Id.* at 75 (Holmes, J. dissenting).

⁶ Herbert Spencer, *Social Statics*: or, The Conditions essential to Happiness specified, and the First of them Developed 239 (1851).

the equal freedom of any other.”⁷ That this was Holmes’s target was made clear just before his reference to Spencer when he referred to: “The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same,” which Holmes dismissed as “a shibboleth for some well-known writers.”⁸

Holmes took on Spencer in this way because the majority opinion in *Lochner* came as close as the Supreme Court ever has to protecting a general right to liberty under the Fourteenth Amendment. In his opinion for the Court, Justice Rufus Peckham affirmed that the Constitution protected “the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family.”⁹ For this reason, ever since law school, Peckham’s opinion in *Lochner* has been my favorite majority opinion in any Supreme Court case. (Justice Scalia’s opinion in *District of Columbia v. Heller*¹⁰ has recently become number two!)

Holmes’s pithy dissent offered two influential arguments against recognizing a general constitutional right to liberty. First, he claimed that Supreme Court precedents were inconsistent with a general right to liberty. A citizen’s liberty, he wrote, “is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.”¹¹ And any constitutional right to freedom of contract was belied by previous decisions upholding vaccination laws and maximum hours laws for miners, and prohibitions on “combinations” and the sale of stock on margins or for future delivery.

Second, apart from precedent, Holmes offered a claim about the Constitution’s meaning. “[A] Constitution is not intended to embody a particular economic theory,” he contended, “whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.”¹² Rather, in Holmes’s view, the Constitution “is made for people of fundamentally differing views, and the accident of our

⁷ *Id.* at 337.

⁸ *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

⁹ *Id.* at 56 (Peckham, J.).

¹⁰ 554 U.S., —, 128 S.Ct. 2783 (2008).

¹¹ *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

¹² *Id.*

finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”¹³

Both of these objections to a constitutional right to liberty have become deeply embedded in constitutional discourse. For example, the first of Holmes’s arguments was echoed by Ronald Dworkin in his book *Taking Rights Seriously*.¹⁴ Dworkin denied there was a general right to liberty on the ground that no one has a “political right to drive up Lexington Avenue” (which is a one-way street running downtown, not uptown).¹⁵ Holmes’s second argument was echoed by John Rawls in *Political Liberalism*, when Rawls contended that, because of “the fact of reasonable pluralism,”¹⁶ a constitution was best conceived as a second-order process for handling political disagreement in a pluralist society rather than dictating a first-order answer to political disagreements.

Yet neither objection is compelling. Holmes contended that previous decisions accepting restrictions on liberty refute the existence of a constitutional right to liberty, but this does not follow. For one thing, prior decisions may have been mistaken to uphold these restrictions on liberty. Even if correct, however, such decisions do not refute the existence of a right to liberty. Instead, they could simply be “exceptions.” An exception presupposes the existence of a general rule (to which it is the exception).

Law professors have long derided what they call “slippery slope” arguments.¹⁷ This is an objection to a particular law or ruling because it makes more likely an even more objectionable law or ruling in the future. Once you take a single step on a slippery slope, you are likely to slide all the way down. Restricting liberty in one case is likely to lead to other restrictions down the road. Law professors

¹³ *Id.* at 76.

¹⁴ See Ronald Dworkin, What Rights Do We Have?, in *Taking Rights Seriously* 266–272 (discussing why there is “no right to liberty”).

¹⁵ *Id.* at 269.

¹⁶ John Rawls, *Political Liberalism* 36 (1996).

¹⁷ See Eugene Volokh, The Mechanisms of the Slippery Slope, 116 *Harv. L. Rev.* 117 (2003) (examining the logic of and defending slippery slope arguments from critics).

respond that the law makes distinctions all the time and each decision should be made on its own merits. If you don't want to go farther in a future situation, then that is the time to make one's objection.

The wide acceptance of Holmes's use of exceptions to deny the existence of a rule, however, supports skepticism about the feasibility of making exceptions in a common-law system in which any exception is thereafter transformed into a *precedent* for more of the same. Assuming the Constitution really does protect a general right to liberty, as the majority in *Lochner* appear to have believed, perhaps it was a mistake to recognize any of the exceptions on which Holmes rested his argument. On the other hand, how can the existence of all these approved constraints on liberty be consistent with a general right of liberty? Perhaps Holmes is correct that the existence of so-called exceptions is evidence that the purported rule is unsound. At a minimum, they would seem to be precedent for upholding further restrictions on liberty.

Holmes's argument assumes that a constitutional right to liberty must be absolute to be a right. If, however, a right to liberty is viewed as presumptive rather than absolute, then the existence of "exceptions" is not a bug, it is a feature. Take, for example, the freedom of speech. In practice, this right is presumptive rather than absolute. No one thinks that the constitutionality of "time, place, and manner" regulations of speech refutes the existence of the right. Holmes himself repeatedly asserted a general right to freedom of speech, notwithstanding his opinion that no one has a right to falsely shout fire in a crowded theater.¹⁸ That freedom of speech is a constitutional right places the burden on the government to justify its restriction as necessary and proper. It may not burden speech merely because it thinks it is a nifty idea. A court must pass upon its necessity.

Likewise, if a general right to liberty is conceived as a "presumption of liberty,"¹⁹ this does not automatically render all restrictions on actions unconstitutional. It merely means that, as with speech, any restriction on other types of conduct must be justified. The type

¹⁸ See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) ("The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic.").

¹⁹ See generally Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004).

of justification will vary depending on whether a law is a prohibition of wrongful conduct or a regulation of rightful conduct.

Prohibiting wrongful conduct is perfectly consistent with a right to liberty. By “wrongful,” I mean conduct that violates the rights of others.²⁰ As Spencer’s law of equal freedom maintains, no one has the rightful liberty to violate the equal rights of others. The prohibition of wrongful acts constitutes a protection of the rightful liberty of others, rather than an infringement on the liberty of the wrongdoer. One has no right to do wrong to another.

Nor are all legal regulations of rightful conduct inconsistent with a general right to liberty. A “regulation” is a law that specifies *how* a liberty may be exercised. It takes the form, “If you want to do X—make a contract, carry a gun, drive a car—then here is how you do it.” Legal regulations are consistent with liberty because the fundamental rights that define liberty are too abstract to be applied directly to all but the simplest of cases. For example, what constitutes a sufficient provocation to justify self-defense? What constitutes consent to a contract? How do we measure damages for breaches of contracts or torts? Rules of law are needed to answer these and countless other such questions. As Locke observed, in the state of nature: “There wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them. . . .”²¹

Whether a particular regulation is consistent with liberty depends on the justification offered on its behalf. Regulations are not inimical to liberty if they coordinate individual conduct as do, for example, traffic regulations mandating driving on one side of the street or the other. They may also be consistent with liberty if they prevent irreparable tortious accidents before they occur, as speed limits do. True, you could sue someone for negligently driving too fast after he crashes into you, but given the bodily harm caused by an accident, it might be better to reduce incidents of negligence by specifying in advance how fast one should drive on a particular stretch of road.

²⁰ As I am using the term, “wrongful” or *unjust* conduct that violates the rights of others is a subset of “bad” or *immoral* conduct that may or may not be rights violating.

²¹ John Locke, *Second Treatise of Government*, ch. IX, § 124.

Although many libertarians object to government ownership of highways, no libertarian objects in principle to a highway owner regulating its use to enhance the speed and safety of driving. Similarly, contract law is a body of rules regulating the making and enforcing of agreements, and libertarians are not opposed to contract law.

For libertarians, the issue is often not whether conduct should be regulated but who should regulate, the government or property owners? Property owners typically have greater incentives for more efficient regulations than government. And, even where this is not the case, the fact that governments typically exert ownership powers over all the streets, sidewalks, and parks in a given territory makes their regulatory powers far more susceptible to abuse.

A law restricting conduct is consistent with a right to liberty, therefore, if it is *prohibiting wrongful* acts that violate the rights of others or *regulating rightful* acts in such a way as to coordinate conduct or prevent the violation of rights that might accidentally occur. A law is inconsistent with liberty if it is either prohibiting rightful acts, or regulating unnecessarily or improperly. A regulation is improper when it imposes an undue burden on rightful conduct, or when its justification is merely a pretext for restricting a liberty of which others disapprove. And one way of identifying a regulation as pretextual is to assess whether the regulatory means it employs do not effectively fit its purported health and safety ends.

Here is how the majority in *Lochner* distinguished a constitutional exercise of the police power from an unconstitutional restraint on liberty:

In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?²²

²² 198 U.S. at 56 (Peckham, J.).

We may conclude from all this that, if a general right to liberty is presumptive, not absolute, and if the presumption may be rebutted by a showing that a law is prohibiting wrongful or properly regulating rightful acts, then the fact that regulations of liberty have been upheld as constitutional is no evidence that the general constitutional right to liberty does not exist. It may merely be a sign that the government has met its properly defined burden of proof.

But does the Constitution protect a general right to liberty of this type? This brings us to the second of Holmes's objections: that the Constitution does not "embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*,"²³ or the modern version of this argument that the Constitution establishes second-order decision mechanisms by which first-order political disagreements are hashed out. In *Lochner*, who was right about the Constitution, the majority or Holmes? The answer depends on what the Constitution means, and to figure this out requires a method of constitutional interpretation.

Originalism and Liberty

As a political philosophy, libertarianism does not specify how the Constitution should be interpreted. Should a libertarian simply favor any interpretation of the text that enhances liberty? I think not. The Constitution is the law that governs those who govern us. That those who govern may be restrained in the exercise of their power, it was put in writing. As John Marshall explained in *Marbury v. Madison*, "the powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."²⁴ A written constitution performs this restraining function because it has a semantic meaning that is independent of the desires of those who are called to interpret it.

This implication of a written constitution was clearly identified by Lysander Spooner, one of America's earliest constitutional theorists. In his 1847 book, *The Unconstitutionality of Slavery*, Spooner observed:

[T]he constitution, of itself, independently of the actual intentions of the people, expresses some certain fixed, definite, and legal

²³ *Id.* at 75 (Holmes, J. dissenting).

²⁴ *Marbury v. Madison*, 5 U.S. 137, 176 (1803) (Marshall, C.J.)

intentions; else the people themselves would express no intentions by agreeing to it. The instrument would, in fact, contain nothing that the people *could* agree to. Agreeing to an instrument that had no meaning *of its own*, would only be agreeing to nothing.²⁵

In other words, the meaning of a written constitution is the semantic meaning of its words in context.²⁶ We adopt a written constitution because it has a semantic meaning that defines the limits of the powers of those who govern, and thereby helps keep these powers within proper bounds. And we adhere to the semantic meaning at the time of enactment because a written constitution would fail to perform its purpose if legislatures, executives, or courts could, whether alone or in combination, alter the meaning of these constraints on their powers.²⁷ The name we use today to describe this approach to constitutional interpretation is “original public meaning originalism,” or “originalism” for short. An originalist is simply a person who believes that the semantic meaning of the Constitution must be followed until it is properly changed.

But there is a limit to the guidance provided by the original public meaning of the Constitution. Often the text is specific enough to be applied directly to most controversies it was meant to govern. For example, each state is to have two senators, and the president is to be 35 years of age. These are the provisions of the Constitution that are not usually disputed or litigated. But other provisions of the text are more general or vague.

The Eighth Amendment bans “cruel and unusual” punishments, not specific types of punishment; it also bans “excessive” bail and fines, not a specific sum of money. The Fourth Amendment bans “unreasonable” searches and seizures, and the Fifth and Fourteenth Amendments require the “due” process of law. Even seemingly more specific provisions, such as the prohibition on laws “abridging

²⁵ Lysander Spooner, *The Unconstitutionality of Slavery* 222 (rev. ed. 1860) (emphasis added). Part I of this work was published 1845. The quoted passage comes from Part II, which first appeared in 1847.

²⁶ See Lawrence B. Solum, *Semantic Originalism*, (July 2, 2008), Illinois Public Law Research Paper No. 07-24. Available at SSRN: <http://ssrn.com/abstract=1120244>.

²⁷ See Barnett, *supra* note 19, at 89–117.

the freedom of speech” require further specification of what constitutes “speech” given changing technology and what constitutes an “abridgment.”

That the original meaning of provisions like these are vague does not mean that they provide no guidance at all. For one thing there are core or paradigm cases to which they clearly apply, and peripheral cases to which they clearly do not. A text is vague when it is unclear whether a borderline case is included or excluded by its meaning. In this situation, the original meaning of the text must be supplemented. Constitutional interpretation is the activity of identifying the original meaning of the text; constitutional construction is the activity of supplementation when the meaning is too vague to settle a dispute.²⁸

This does not entail that constitutional construction is an entirely open-ended affair. A construction of the text that violated the original public meaning would be improper. You can think of constitutional interpretation as providing a frame within which choices must be made; but any choices that are outside the frame are unconstitutional.

Let me illustrate this by the Second Amendment, the original public meaning of which the Court in *Heller* correctly found to protect an individual right. Given that the D.C. statute prohibited the exercise of this right, it was a paradigm case of a statute that “infringed” the Second Amendment “right of the people to keep and bear Arms.” But what about laws that regulate rather than prohibit the exercise of this right? Suppose a law allows the concealed carrying of a firearm, but only by those adults who take an approved firearms safety course: Is this regulation reasonable? Because whatever answer to this question is given will not be deduced directly from the original meaning of the Second Amendment, a construction of the Constitution in addition to an interpretation is required.

How constitutional construction should be done is a bigger issue than I can address here, so let me simply summarize the conclusion I defend in *Restoring the Lost Constitution*: constitutional construction

²⁸ See Barnett, *supra* note 19, at 118–130. Constitutional construction is also needed when the original meaning of the text is irreducibly ambiguous in the sense that its words in context have multiple meanings and evidence is insufficient to establish a unique original semantic meaning. See Solum, *supra* note 26; Randy E. Barnett, The Misconceived Assumption About Constitutional Assumptions, 103 Nw. U.L. Rev. 615 (2009).

should be done in such a manner as to enhance the legitimacy of the Constitution.²⁹ By “legitimacy” I mean whatever quality makes the Constitution binding.

How people construe vagueness in the text will often depend on what they believe makes the Constitution legitimate. Some believe that the legitimacy of the Constitution rests on the original consent of the people. Others think its legitimacy rests on the consent of the people today.

I agree with Lysander Spooner that both original and contemporary consent is a fiction.³⁰ Laws enacted pursuant to the Constitution are imposed on those who do not consent to it, every bit as much as they are applied to those who do. If so, a constitution is legitimate, only if it provides adequate assurances that the laws it imposes on nonconsenting persons do not violate their rights and are necessary to protect the rights of others. When the text is too vague to resolve a dispute, the text should be construed to ensure that the rights retained by the people are not being denied or disparaged.

What the Constitution Says

With this analysis in mind, we are now in a position to refine the question, “Is the Constitution Libertarian?” to this: “Does the original meaning of the Constitution, as amended, respect and protect the fundamental individual rights that define the core of both classical liberalism and modern libertarianism?” To assess this, we must now briefly examine the original meaning of what the Constitution says and how it may fairly be construed.

Except for the prohibition of involuntary servitude in the Thirteenth Amendment, the Constitution does not apply directly to the people. Instead it creates a process by which laws are made, applied, and enforced. So when asking whether the Constitution is “libertarian,” we are really asking whether the laws that are applied to and enforced against particular persons pursuant to the Constitution respect their fundamental rights.

The Original Constitution. The original Constitution protected the rights to life, liberty, and property against infringement by the federal government in two ways. First and foremost, Congress was not

²⁹ See Barnett, *supra* note 19, at 32–52, 125–28.

³⁰ See *id.* at 11–31; Lysander Spooner, No Treason VI: The Constitution of No Authority (1870).

given a general legislative power but only those legislative powers “herein granted,”³¹ referring to those powers enumerated in Article I, section 8. It is striking how these powers avoid expressly restricting the rightful exercise of liberty. The power “to raise and support Armies”³² does not include an express power of conscription, which would interfere with the property one has in one’s own person. The power to establish the post office does not expressly claim a power to make the government post office a monopoly,³³ which would interfere with the freedom of contract of those who wish to contract with a private mail company of the sort founded by Lysander Spooner. (By contrast, the Articles of Confederation *did* accord the power in Congress to establish a postal monopoly.³⁴)

There are only three powers that might be construed as restricting the rightful exercise of liberty. First is the Necessary and Proper Clause granting Congress the power “to make all laws which shall be necessary and proper for carrying into Execution”³⁵ its other powers. Even here, a law must not only be necessary, it must also be *proper*, which suggests that a law that violates the rights retained by the people might well be improper.

Second, is the power of Congress “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³⁶ Libertarians are divided about whether granting patents or copyrights to some violates the rights of others. But even this provision does not mandate the creation of a patent or copyright system; it merely allows Congress to do so if it chooses.

³¹ U.S. Const. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States”).

³² U.S. Const. art. I, § 8.

³³ U.S. Const. art. I, § 8 (“The Congress shall have power . . . To establish Post Offices and post Roads”).

³⁴ See Art. of Confederation art. IX (“The United States in Congress assembled shall also have the sole and exclusive right and power of . . . establishing or regulating post offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office. . . .”).

³⁵ U.S. Const. art. I, § 8.

³⁶ *Id.*

Finally, I leave aside the question of whether the power “To lay and collect Taxes, Duties, Imposts and Excises”³⁷ is a violation of fundamental rights. This is a more complex issue than I can tackle here. Whether or not a general tax violates the fundamental right to property, however, it does not restrict liberty in the same way that a prohibition or regulation does. Compare the impact of conscription on a person’s liberty as compared with imposing a tax to pay others to enlist in the military.

Of course, the Supreme Court has upheld countless federal laws restricting liberty, primarily under the power of Congress “To regulate Commerce . . . among the several States”³⁸ combined with an open-ended reading of the Necessary and Proper Clause. Further it has upheld the power of Congress to spend tax revenue for purposes other than “for carrying into execution” its enumerated powers, thereby exceeding the scope of the Necessary and Proper Clause. This shows only that, with respect to federal power, the text of the original Constitution is far more libertarian than the redacted constitution enforced by the Supreme Court.

But the original Constitution is not all we have.

The Amendments to the Constitution. Two years after its enactment, the Constitution was amended by the Bill of Rights. These 10 amendments included several express guarantees of such liberties as the freedom of speech, press, assembly, and the right to keep and bear arms. The Bill of Rights barred takings for public use without just compensation. It also provided additional procedural assurances that the laws would be applied accurately and fairly to particular individuals.

All of the rights enumerated in the Bill of Rights are consistent with modern libertarian political philosophy. And to this list of rights was added the Ninth Amendment that said, “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” In this way, even liberty rights that were not listed were given express constitutional protection.³⁹ Finally, the Tenth Amendment reaffirmed that Congress could

³⁷ *Id.*

³⁸ *Id.*

³⁹ See Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 *Tex. L. Rev.* 1 (2006).

exercise only those powers to which it was delegated “by this Constitution.”

Despite the efforts of James Madison, the first 10 amendments restricted only federal power—or so the Supreme Court held in *Barron v. Baltimore*.⁴⁰ States retained their virtually unlimited powers to restrict the liberties of their residents, subject only to their own constitutions as interpreted by their own courts. And the Eleventh Amendment further expanded state powers by rendering them immune from suits in federal court by citizens of other states.

Article I, section 9 of the original Constitution placed some restrictions on the power of state governments, but these constraints were few. So great were their reserved powers that states could sanction the enslavement of some persons within their jurisdiction. And, unless one accepts the interpretive claims of such abolitionists as Lysander Spooner, William Goodell, Gerrit Smith, Joel Tiffany, and Frederick Douglass, the original Constitution also protected slavery by mandating the return of runaway slaves who managed to escape to free states. Because it allowed states to violate the rights of their citizens with near impunity, the original Constitution was deeply flawed from a libertarian perspective. Fortunately, it has been amended in ways that made it more libertarian.

While the Thirteenth Amendment’s ban on involuntary servitude expanded the Constitution’s protection of individual liberty against abuses by states, it was the Fourteenth Amendment that radically altered the federalism of the original Constitution. After the Fourteenth Amendment, Congress and the courts could invalidate state laws that “abridge[d] the privileges or immunities of citizens of the United States.” The original meaning of “privileges or immunities” included the same natural rights retained by the people to which the Ninth Amendment referred, but also the additional enumerated rights contained in the Bill of Rights.⁴¹ The Fourteenth Amendment’s Due Process Clause required that any deprivation of the fundamental rights to life, liberty, or property be authorized by a valid state “law” and placed a federal check on the procedures by which such laws are applied to particular persons. The Equal Protection Clause

⁴⁰ See *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

⁴¹ See Barnett, *supra* note 19, at 60–68.

imposed a duty on state executive branches to provide the protection of the law to all persons without discrimination.

Although some libertarians are uncomfortable with what they view as a weakening of states' rights, the Fourteenth Amendment only expanded the power of the Congress and courts to protect against state infringements of individual rights. Libertarians might well favor some mechanism by which state courts could protect individual rights from federal infringements. Still, the federal government's power to combat what constitutional lawyer and Institute for Justice co-founder Clint Bolick has called "grassroots tyranny"⁴² represented a significant enhancement of the protection of individual liberty afforded by the Constitution. When the Privileges or Immunities Clause of the Fourteenth Amendment is combined with the Ninth, the unenumerated rights retained by the people are expressly protected against infringement by both federal and state governments.

But constitutional construction is required to put these protections of liberty into effect. Beginning in the 1930s,⁴³ the Supreme Court reversed its approach in *Lochner* and adopted a presumption of constitutionality whenever a statute restricted unenumerated liberty rights. In the 1950s, it made this presumption effectively irrebuttable.⁴⁴ Now it will protect only those liberties that are listed, or a very few unenumerated rights such as the right of privacy. But such an approach violates the Ninth Amendment's injunction against using the fact that some rights are enumerated to deny or disparage others because they are not.⁴⁵ Like the presumption of constitutionality, a presumption of liberty that places the burden on the government to show that its restriction on any liberty is both necessary and proper is also a constitutional construction. Neither is mentioned in the text, but a presumption of liberty is far more compatible with

⁴² See Clint Bolick, *Grassroots Tyranny: The Limits of Federalism* (1993).

⁴³ See *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257–58 (1931) (Cardozo, J.) ("the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.").

⁴⁴ See *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955) (Douglas, J.) ("the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it *might be thought* that the particular legislative measure was a rational way to correct it." [emphasis added]).

⁴⁵ See Randy E. Barnett, *Scrutiny Land*, 106 Mich. L. Rev. 1479, 1495–1500 (2008).

the original meaning of what the Constitution says in the Ninth and Fourteenth Amendments.

Of course, the protection of liberty afforded by the Constitution is not limited to the protection of liberty rights by courts. It includes as well the “checks and balances” provided by the separation of powers at the federal level and the division of powers between the national and state governments. In addition, the Constitution contains popular checks on legislative and executive power. These include the power of the electorate to remove legislators and presidents from office during regular elections and, eventually, term limits for the president. The constitutional guarantee of a jury trial originally included not only the power of citizen juries to pass upon both the facts of case to acquit the innocent, but also the power to refuse to convict persons charged with violating unjust laws.⁴⁶

It is worth noting that none of these structural and procedural protections is dictated by libertarian political philosophy. Instead, all are to be assessed pragmatically by whether, on balance, they serve to protect fundamental rights. With the weakening or loss of other liberty-protecting clauses of the Constitution, these structural constraints are responsible for preserving the liberty Americans still enjoy.

The Foreign Policy Powers

To this point, I have confined my analysis to the domestic powers of the federal and state governments that restrict the liberties of the people. I have not mentioned, much less analyzed, the foreign policy powers created by the Constitution. In this final section, I want to explain why libertarianism tells us very little about either the conduct of foreign policy or how the foreign policy powers of the national government should be allocated among the different branches. Not coincidentally, perhaps, neither does the original meaning of the Constitution.

Modern libertarianism is based on the recognition and protection of the five fundamental human rights of private property, freedom of contract, first possession, defense of self and others, and restitution. My thesis is that (1) a constitution is libertarian to the extent it creates a political order that respects and protects these rights,

⁴⁶ See Clay S. Conrad, *Jury Nullification: The Evolution of a Doctrine* (1998).

and (2) the original meaning of the amended Constitution is far more libertarian than the redacted version applied by the Supreme Court today. In this sense, the Constitution should be considered libertarian, at least relative to the status quo.

In the realm of foreign policy, however, the libertarian commitment to these individual fundamental rights complicates matters in ways that many libertarians do not appreciate. Some libertarians try to apply the same principles of self-defense and aggression to states that they apply to individuals. But doing so is a category mistake that results, ironically, in the reification of nation states in a way that should make libertarians uncomfortable. In the realm of foreign policy, libertarians need to think more carefully about the concept of sovereignty.

To reduce the likelihood of religious wars, the Peace of Westphalia in the seventeenth century gave every monarch a “sovereign” control over the lives and property of all within its territory. Every monarch could establish the religion of his realm to which all must adhere and no monarch was to interfere with the internal affairs of any other sovereign, for example, to aid persons being persecuted for their religious beliefs. In effect, each sovereign monarch became the recognized legal “owner” of his territory and the people residing thereon, and each sovereign was obliged to respect the ownership rights of the other sovereign monarchs.

Whatever the practical advantages of this system of nation-state sovereignties, the founding of the American republic greatly complicated the theory on which it rested. Lacking a monarch or aristocracy, Americans were skeptical of the very notion of sovereignty. Consider the 1793 case of *Chisholm v. Georgia*,⁴⁷ the Supreme Court’s first great constitutional case.⁴⁸ In *Chisholm*, the Court rejected the state of Georgia’s claim of sovereign immunity against a suit for breach of contract, which had been brought against it in federal court by a citizen of South Carolina. Justice James Wilson began his opinion by observing: “To the Constitution of the United States the term

⁴⁷ 2 U.S. (2 Dall.) 419 (1793).

⁴⁸ For a more detailed discussion of the concept of individual sovereignty articulated in *Chisholm*, see Randy E. Barnett, *The People or the State? Chisholm v. Georgia and Popular Sovereignty*, 93 U. Va. L. Rev. 1729 (2007); and Randy E. Barnett, Kurt Lash’s Majoritarian Difficulty, 60 Stan. L. Rev. 937, 954–960 (2008).

SOVEREIGN, is totally unknown."⁴⁹ For Wilson, "[t]here is but one place where it could have been used with propriety. . . . They might have announced themselves 'SOVEREIGN' people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration."⁵⁰

It is worth noting that, as a delegate to the Constitutional Convention from Pennsylvania, Wilson—perhaps our most neglected Founder—was a member of the Committee of Detail that produced the first draft of the actual wording of the Constitution.⁵¹ He was also the first professor of law at the University of Pennsylvania. In his lengthy opinion in *Chisholm*, Wilson rejected both the feudal notion of monarchical sovereignty and the Blackstonian notion of parliamentary sovereignty in favor of the concept of individual sovereignty.

According to Wilson, governments were not sovereigns themselves, but aggregates of individual sovereigns. "The only reason, I believe, why a free man is bound by human laws, is, that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the Courts of Justice, which are formed and authorised by those laws."⁵² Wilson then identifies what can only be called an individualist notion of popular sovereignty: "If *one free man, an original sovereign*, may do all this; why may not an aggregate of free men, *a collection of original sovereigns*, do this likewise? If the dignity of each singly is undiminished; the dignity of all jointly must be unimpaired."⁵³ Likewise, in his own *Chisholm* opinion, Chief Justice John Jay referred to "fellow citizens and joint sovereigns."⁵⁴

⁴⁹ 2 U.S. (2 Dall.) at 454 (Wilson, J.).

⁵⁰ *Id.*

⁵¹ See James Wilson (1742–1798), in Joseph C. Morton, *Shapers of the Great Debate at the Constitutional Convention of 1787*, at 301, 304–07, 307 n.1 (2006) (describing Wilson's contributions to and influence at the Constitutional Convention); Julian P. Boyd, James Wilson, in *Dictionary of American Biography* 326, 329 (Dumas Malone ed., 1936) (describing Wilson's contributions to and influence at the Pennsylvania ratification convention).

⁵² 2 U.S. (2 Dall.) at 456 (Wilson, J.).

⁵³ *Id.* (emphases added).

⁵⁴ *Id.* at 479 (Jay, C.J.).

James Wilson was a forceful proponent of natural rights⁵⁵ and the notion of individual sovereignty he articulated in *Chisholm* is indistinguishable from the libertarian view that each person is sovereign with respect to what is properly hers as defined by the five fundamental rights. Like a monarch within her realm, she may do or refrain from doing anything with what she rightfully possesses. Any forcible interference with this individual sovereignty constitutes an aggression that may be resisted by force, if necessary, in self-defense. Furthermore, others may justly come to the assistance of a person whose rights are being violated.

Indeed, the close relationship between natural rights and individual sovereignty is reflected in the pairing of the Ninth Amendment's protection of the natural "rights . . . retained by the people" with the Tenth Amendment's reservation "to the states respectively, or to the people," of any powers that were not delegated to the federal government.

While *Chisholm* concerned the assertion of state sovereign immunity within a federal system, the libertarian concept of individual sovereignty also complicates and qualifies the Westphalian notion of unfettered state sovereignty in international relations. If the people are the true joint sovereigns, then no ruler may justly deprive them of their inalienable fundamental rights. Since the horrors of the Holocaust, the Westphalian concept of sovereignty has been qualified in international law by the recognition of "human rights" that no state may violate—though it is far from clear when one state, or group of states, may intervene to protect these rights.

Individual-empowering technology has also undermined the neat Westphalian picture of sovereign nation states with the power to control what takes place within their borders. Transnational globalization is a liberating upside of empowered individuals; the new-found power of nongovernmental terrorist organizations to wage wars against the populations of nation states is a most unfortunate downside.

This erosion of the Westphalian nation state system requires new and more careful theoretical analysis by libertarians. The first

⁵⁵ See James Wilson, *Of the Natural Rights of Individuals*, in 2 *The Collected Works of James Wilson 1051–1083* (Kermit L. Hall & Mark David Hall, eds. 2007) (part of Wilson's lectures on law originally delivered at the University of Pennsylvania in 1790–91).

instincts of collectivists have been to create and empower international organizations that resemble governments writ large. For them, the New World Order requires one world government. Libertarians know this is a bad idea, but they have yet to develop their own coherent approach to the protection of individual rights from abuses by nation states.

Libertarians need to look beyond the Westphalian system of sovereignty, and explore how existing governments and their militaries might evolve within a polycentric regime of competitive private ordering that arises spontaneously across national boundaries. In both the domestic and international spheres, the respect for and protection of individual sovereignty defined by the fundamental rights of all persons provides the ends against which the performance of government can be assessed.

The foreign policy of noninterventionism to which the Cato Institute is committed is, by and large, the most workable approach to the preservation of the liberties enjoyed by Americans and the avoidance of the unanticipated consequences of initiating or provoking foreign wars. But a policy of nonintervention should not be equated with the fundamental human rights that define modern libertarianism. It is a policy that must be evaluated pragmatically, and one in which exceptions are sometimes warranted, for example when the protection of the rights of Americans is best served by protecting the individual sovereignty of foreigners.

By no means am I proposing that any single nation state, such as the United States, should take it upon itself to go to the rescue of all those whose fundamental rights are being systematically violated by their own governments. I am merely noting that a nation state is not violating libertarian fundamental rights when, for reasons of its own national interest, it protects those whose individual sovereignty is being systematically violated by a government that claims jurisdiction over them. When the French government provided military assistance to the American revolutionaries, for example, it did so after the Declaration of Independence specified how the British government had systematically violated the rights of Americans. That the French government interfered with British "sovereignty" does not, by itself, entail any transgression of libertarian fundamental rights and individual sovereignty.

In foreign policy matters, the text of the Constitution provides much less guidance than it does with respect to domestic powers.

While the proper scope of the domestic powers of the federal government is limited, the scope of its foreign policy powers is not. While its allocation of domestic powers among the three branches of government is specified to some degree, its allocation of foreign policy powers is far more open-ended.

For example, the Constitution says Congress has the power “to declare War,”⁵⁶ but the original meaning of this term had a technical sense of altering the legal relationship of two nations under international law from a state of peace to a state of war. It did not purport to govern the use of the armed forces of the United States in response to a “state of war” initiated by the aggression of a foreign power against Americans, whether at home or abroad. One can declare war without firing a shot, but when shots are fired a state of war may nevertheless exist even without a declaration.

The Constitution says that the president is “Commander in Chief”⁵⁷ of the armed forces, but does not specify the degree to which his powers can be constrained by statutes enacted by Congress, which the Constitution says the president has a duty to “take Care”⁵⁸ are faithfully executed. The Constitution gives Congress the enumerated power to “make Rules for the Government and Regulation of the land and naval Forces”⁵⁹ but is unclear as to whether these regulations apply to the president himself, or to the minute details of a military campaign. The Constitution also empowers Congress “To regulate Commerce with foreign nations”⁶⁰ and provides procedures to govern the making of treaties. And only Congress has the power to commit funds “to raise and support Armies.”⁶¹

In short, the text of the Constitution provides little guidance on the proper separation of powers with respect to the conduct of foreign policy and no guidance whatsoever on the substance of foreign policy. As wrong as Holmes was to claim a lack of constitutional constraints on the domestic powers of government, his description might well be accurate with respect to the realm of

⁵⁶ U.S. Const. art. I, § 8.

⁵⁷ U.S. Const. art II, § 2.

⁵⁸ U.S. Const. art II, § 3.

⁵⁹ U.S. Const. art. I, § 8.

⁶⁰ *Id.*

⁶¹ *Id.*

foreign policy. For better or worse, the Constitution may well be “made for people of fundamentally differing views”⁶² about foreign policy, whether these views be interventionist or noninterventionist. While the domestic powers of the federal government are constitutionally limited, its foreign policy powers are, for all intents and purposes, limited only by political mechanisms.

Conclusion

So is the Constitution libertarian? Even with all the caveats and qualifications, the answer is clear. As written, the original Constitution of the United States, together with its amendments, may be the most explicitly libertarian governing document ever actually enacted into law. The Supreme Court says that only the liberties that are listed in the Bill of Rights, plus a right of privacy, merit judicial protection.⁶³ But the Constitution says that the enumeration in the Constitution of certain rights shall not be construed to deny or disparate others retained by the people. The Supreme Court says that the states must respect a mere handful of liberties. But the Constitution says that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

Why then have these and other libertarian protections been excised from constitutional law and lost from our conception of the Constitution? Tempting as it is to blame the Court, the Founders understood how unrealistic it is to expect judges to withstand majoritarian pressures for very long. After all, justices are typically chosen by presidents from among those who share the zeitgeist of their day. The Constitution has been redacted precisely because its across-the-board protection of liberty stood in the way of the politically popular growth of government that culminated in the New Deal and the Great Society. Once grown, these powers are very difficult to pare back even when they become less popular.

The lost provisions that make the Constitution libertarian will be restored only when the constitutional imperatives of individual liberty are as well understood today as they were by those who wrote the Constitution, the Bill of Rights, and the Thirteenth and

⁶² *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

⁶³ See Barnett, *supra* note 45.

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Fourteenth Amendments. All who read these words have a role to play in bettering their own understanding of individual liberty so they may explain the blessings of liberty to others. These lost parts of the Constitution will not be restored by erudite legal arguments or clever litigation strategies until the public's demand for individual liberty and limited government produces a president who will appoint faithful originalist justices who believe in the power of courts to nullify unconstitutional laws and senators who will confirm them. And when that day arrives, the libertarian Constitution will be waiting.

