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Fallacies of Negative Constitutionalism

Cover Page Footnote

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CONSTITUTIONS IN EXILE: IS THE CONSTITUTION A CHARTER OF NEGATIVE LIBERTIES OR A CHARTER OF POSITIVE BENEFITS?

FALLACIES OF NEGATIVE CONSTITUTIONALISM

*Sotirios A. Barber**

I.

The organizers of this panel have asked us to compare two general views of the U.S. Constitution, the negative view and the positive view. The negative view sees the Constitution as a set of institutions for transforming popular preferences into law in a manner consistent with constitutional rights. This negative constitutionalism sees constitutional rights as exemptions from governmental power, exemptions it calls *negative liberties*; it emphasizes private rights over public purposes. Positive or welfare constitutionalism sees the Constitution as an instrument of positive benefits like national security, national prosperity, and equal opportunity.

Positive constitutionalism tends to conceive negative rights as elements of power that are dedicated to positive rights. An example would be freedom to criticize the government's foreign policy as integral to pursuing true national security, a real good about which any government can be wrong. Negative constitutionalism and positive constitutionalism are abstract models that rarely occur in pure form. How individual theorists are classified will depend on whether they associate the Constitution chiefly with representative processes and negative liberties or whether they place equal or greater emphasis on a *constitutional duty* to pursue substantive public purposes. One can defend either of these orientations on textual grounds, intentionalist grounds, pragmatic grounds, and moral grounds. I have argued for a positive or welfarist view on all these grounds.¹ My arguments for a welfarist view include an attack on some forms of negative

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1. *See generally* Sotirios A. Barber, *Welfare and the Constitution*, at chs. 2, 5 (2003) [hereinafter *Welfare and the Constitution*].

constitutionalism as insulting to the nation's past and harmful to the nation's future.²

Negative constitutionalism flows from error, not evil, and some of the error lies with the framers. Federalist 51 proposes negative constitutionalism as a strategy for pursuing public purposes, the self-conscious aims of positive constitutionalism. In place of statesmanship and self-critical public reasonableness, virtues James Madison thought too rare to rely on, he proposed checking and balancing private economic interests artfully arranged to yield policies in the public interest.³ Negative constitutionalism thus reflects the framers' strategy of constitutional maintenance: checks and balances, in government and society. It also reflects the framers' solution to the problem of democratic statesmanship: making people sensible of their true interests by diverting their energy from religious and ideological aims to their private economic aims.⁴

As Madison all but acknowledges in Federalist 49, however, the problem with what we can call his privatizing strategy—Benjamin Barber calls it a strategy of “national purposelessness”⁵—is that it disables the public from seeing the Constitution from the perspective of constitution makers.⁶ Far from the perspective of litigants who stand *under* the Constitution as law, the essentially aspirational perspective of the framers presents the Constitution holistically, an articulation of parts that converge on ends in a manner attractive to “a candid world.” The rights perspective of the negative constitutionalism for which the framers prepared the nation is the antithesis of their ends orientation or public purposefulness. In view of this shift in perspective and attitude, the Constitution had better be a machine that not only runs by itself, but also defends itself and repairs itself, for it leaves the requisite virtues and capacities to chance.

You can see the results of this gamble today in the failure of America's big government liberals to defend big government liberalism—the true successor of the American Founding.⁷ Madison simply erred in thinking that artfully structured private incentives could insure the Constitution's survival. He effectively acknowledged as much later in his career. In his last address to Congress as President, Madison called for a national university “as a model instructive in the formation of other seminaries” to recruit “youth and genius” from around the country and equip them to return home and represent the “national feelings” and “liberal sentiments”

2. *Id.* at 79-86.

3. The Federalist No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

4. See Welfare and the Constitution, *supra* note 1, at 100-06.

5. See Benjamin R. Barber, *The Compromised Republic: Public Purposelessness in America*, in *The Moral Foundations of the American Republic* 42, 47 (Robert H. Horwitz ed., 3d ed. 1986).

6. See *id.*; The Federalist No. 49 (James Madison), *supra* note 3, at 340-41.

7. See Sotirios A. Barber, *Liberalism and the Constitution*, 24 Soc. Phil. & Pol'y (forthcoming 2007).

that strengthen union and the nation's political fabric.⁸ We will never know what impact this institution would have had on the nation, but it could have created a leadership culture that spared the nation a civil war and the current culture war.

Negative constitutionalism controls what most of us think about the Constitution. Its power is evidence for the central psychological hypothesis of Madison's political theory, namely, that the most common and durable source of faction is the different and unequal distribution of property⁹—that religious and ideological zeal wax and wane while our mortal insecurities insure that in the long run, we think and act politically as dictated by our pocketbooks. Focused on our personal economic well-being, as most of us are most of the time, ours is a rights orientation—the orientation of negative constitutionalism—not the positive constitutionalism of public purposes. One cannot hope to shake the grip of negative constitutionalism on constitutional theory simply by offering an intrinsically more attractive view. One must begin instead by exposing the fallacies of negative constitutionalism on its own terms. That accomplished, positive constitutionalism may then hope to bring coherence to our constitutional understanding, along with new categories of constitutional analysis, new research agendas, and, perhaps most important, a new policy agenda—a *constitutionalist* policy agenda.¹⁰ I review some fallacies of negative constitutionalism in Part II. Along the way, I will air some of my disagreements (and agreements) with my esteemed co-panelist, Professor Randy Barnett, whose prize-winning book calling for the restoration of a “lost Constitution” and a “presumption of liberty” against government¹¹ is part of my assignment for this symposium.

II.

The first fallacy of negative constitutionalism belongs to a category of fallacies that concerns the Constitution's basic normative properties, or the nature of the Constitution “as a whole.” This family of fallacies includes conceptions of constitutional structures like the separation of powers and federalism. The separation of powers is seen as antithetical to governmental efficiency, and American federalism is seen as a check on national power. I limit my comments here to the most comprehensive and influential member of this family, the notion that the Constitution's chief purpose is to limit government.

Limiting the government could be the chief objective of some constitutional documents; Magna Carta comes readily to mind. But Magna

8. James Madison, State of the Union Address (Dec. 5, 1815), available at http://www.constitution.org/jm/18151205_7cong.htm.

9. The Federalist No. 10 (James Madison), *supra* note 3, at 59.

10. See Welfare and the Constitution, *supra* note 1, at 114-15.

11. Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (2004).

Carta did not establish a government de novo, and limiting government could not be the leading purpose of constitutions that establish governments. Even where restraining government is one of a constitution's functions, the first and stronger concern of a constitution that established a government would be, well, governing. "[F]irst enable the government to controul the governed," says Madison in a famous passage of Federalist 51, "and in the next place, oblige it to controul itself."¹² Establishing a government for the chief purpose of limiting it would be as irrational as inventing a machine for the purpose of obstructing its operation.

I first heard this challenge to negative constitutionalism as a student of Herbert Storing in the early 1960s, and I once thought it unanswerable. To my surprise, however, and as a counsel against overconfidence in this field, Professor Randy Barnett attempts an answer. His disclaimers aside, his answer assumes that historical facts can be normative and that extratextual intentions trump textual meaning, assumptions I reject but that I can accept here, *arguendo*. His proposal, roughly described, is that the Constitution of 1789 transferred power from tyrannical state governments to a national government that, while stronger than the states in some limited respects, was more restrained than the states vis-à-vis individual rights, especially property rights, and especially after the Ninth Amendment was adopted in 1791. This transfer strategy was completed when the Fourteenth Amendment gave the nation's courts power to restrain the state governments in behalf of natural rights.¹³ Though I think that Barnett's view of the American Founding faces insuperable interpretive and historiographic problems,¹⁴ I can concede that, if there is a compelling moral argument for doing so—that is, if it would vindicate the Constitution's claim to be an instrument of its stated ends—one can read the Constitution's text and history as Barnett does. So, in America's case at least, maybe you can establish a government for the sake of limiting government in general. Shall we score one for negative constitutionalism, then? I do not think so.

No one claims that the Constitution of 1789, as amended in 1791 and 1868, abolished the state governments, and no one denies that the original Constitution vested important, albeit limited, powers in the national government. Barnett recognizes that these powers are granted to protect natural rights not only against government, but also against third parties.¹⁵

12. The Federalist No. 51 (James Madison), *supra* note 3, at 349.

13. See Barnett, *supra* note 11, at 33-38, 64-66, 192-95.

14. For a treatment of the Founding that emphasizes the substantive policy aims of the framers and, consequently, "energy of government" over checks on government, see Herbert J. Storing, *The Problem of Big Government, in A Nation of States: Essays on the American Federal System* 65 (Robert A. Goldwin ed., 1963). For a present-day conservative who holds the same generally pro-government view of the Founding as Storing did (with variations), see James W. Ceaser, *What Kind of Government Do We Have to Fear?*, in *Politics at the Turn of the Century* 78-83 (Arthur M. Melzer, Jerry Weinberger & M. Richard Zinman eds., 2001).

15. See Barnett, *supra* note 11, at 63-64, 75.

By all accounts, then, government restrained is still government, and *government* restrains. One government might be more limited than another, but the first object of any government must be some form of action, not restraint. As it turns out, we may establish a government that is more restrained than the one it displaces, and we may restrain a government that is already established, but we do not establish government for the chief purpose of restraining it. As the Preamble of the Constitution indicates, people who establish governments establish them to achieve good things.

Barnett may not really disagree, for he holds that legitimate government aims at protecting natural rights—rights that Lockean theory says existed in a state of nature prior to the institution of government.¹⁶ Existing as they did in nature before government, government could not have been established to protect these rights from government. If government was established to secure rights, third parties must have initially threatened rights, and therefore government must have been established to secure rights against third parties. In order to secure rights against third parties, government needs taxing, spending, and regulatory authority or power—for rights against government protect nothing, not even rights against government. Rights do not protect rights; power protects rights.¹⁷ To vindicate rights against government—that is, against officials who violate rights—you need the help of officials (and ultimately a tax-paying population)¹⁸ who support rights, officials like judges willing to declare rights, and executive officials willing to enforce court orders.¹⁹ So a government that actually protects rights needs the power and the will to collect and focus the resources for protecting rights, and a constitution that would establish such a government must empower it to do what it is supposed to do. Applying Madison's thought about what government must accomplish first, we can say that before a constitution lists exemptions from power, it had better empower a government to control human tendencies that explain the need for government in the first place.

The first object of government must therefore be a kind of action or *doing*, as opposed to inaction, restraint, or forbearance. And where action is involved, one must speak of purposes or ends, with the actor whose pronouncements count as supreme law aiming at the most comprehensive and compelling of ends. On this subject Madison speaks for both the sovereign people and the “good citizen” who conceives himself as a member of that sovereign, when he says, in Federalist 45, that

16. *See id.* at 75.

17. For an elaboration of this point, see Welfare and the Constitution, *supra* note 1, at 51-53.

18. Alexander Hamilton says in Federalist 84 that security for rights generally “must altogether depend on public opinion, and on the general spirit of the people and of the government.” The Federalist No. 84 (Alexander Hamilton), *supra* note 3, at 580.

19. *See* Stephen Holmes & Cass R. Sunstein, The Cost of Rights: Why Liberty Depends on Taxes 29-31 (1999).

the public good, the real welfare of the great body of the people is the supreme object to be pursued; and . . . no form of Government whatever, has any other value, than as it may be fitted for the attainment of this object. Were the plan of the Convention adverse to the public happiness, my voice would be, reject the plan. Were the Union itself inconsistent with the public happiness, it would be, abolish the Union. In like manner as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, let the former be sacrificed to the latter.²⁰

To a positive constitutionalist like Madison, government is instrumental to a good thing, the people's happiness; and because it is an instrument of this good, government is itself a good. If personal liberty is an end of government, then it must be the kind of liberty that is consistent with government that serves the people's happiness. In *West Coast Hotel v. Parrish*, an emblem of New Deal constitutionalism, Chief Justice Charles Evans Hughes referred to this kind of liberty as "liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."²¹ Alexander Hamilton refers to the same kind of liberty when he says, in Federalist 1, that "the vigour of government is essential to the security of liberty" and that "in the contemplation of a sound and well informed judgment, their interests can never be separated."²²

Statements like these hardly preclude restraints or limits on government. They suggest, for one thing, that government is limited to what it was established for: the public interest—in practice, good-faith and reasonably competent measures aimed at reasonable versions of the public interest.²³ Barnett recognizes this principle—indeed, he makes it central to his claim that the Ninth Amendment establishes a general presumption against government in behalf of liberty.²⁴ But being limited to legislation in the public interest has a positive aspect that Barnett ignores or depreciates, contrary to ordinary assumptions of practical reason fully recognized by the framers and possible to deny only by way of qualification. Understanding government as established to pursue good things—any good thing: national defense, security for property, or liberty itself—buys into an instrumentalist logic that creates a bias in behalf of power directed to its proper objects.

Thus Hamilton can say that powers granted to secure "the common defense" "ought to exist without limitation . . . [b]ecause it is impossible to foresee or define . . . national exigencies, or the correspondent . . . means which may be necessary to satisfy them."²⁵ Five paragraphs later he applies

20. The Federalist No. 45 (James Madison), *supra* note 3, at 309.

21. *West Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937).

22. The Federalist No. 1 (Alexander Hamilton), *supra* note 3, at 5-6.

23. See Barnett, *supra* note 11, at 73-75 (endorsing John Locke's application of this principle to legitimate government generally).

24. *Id.* at 253-55, 259-66, 311.

25. The Federalist No. 23 (Alexander Hamilton), *supra* note 3, at 147.

this same principle to “commerce, and to every other matter to which its [the national government’s] jurisdiction is permitted to extend.”²⁶ This is not the language of distrust and limitation; it is the language of empowerment. Behind it lie principles of practical reason that Hamilton calls “as simple as they are universal,” namely, that means should be proportional to ends and that an agent charged with “attainment of any end . . . ought to possess the *means* by which it is to be attained.”²⁷ “Limiting government” thus has a positive as well as a negative sense, the positive sense being one of keeping government focused on its proper objects. “Limiting government” in the negative sense of checking and restraining its proper pursuits is certainly a big concern of constitutions and constitution makers, born of the constitutional needs to compensate for fallible decisions and attain popular support, even for measures objectively in the public interest. But limiting government in a negative sense cannot be the *chief* concern of constitution makers.

Negative constitutionalists can respond that the framers alone occupied an instrumentalist perspective on the Constitution, and that the framers would have their posterity obligated to receive the Constitution as “law.”²⁸ But, ironically, this response assumes a conception of “law” on the constitutional level that appeals from the positive law of the Constitution itself, whose surface logic is plainly instrumental. Deepening the irony, negative constitutionalists appeal, typically in the framers’ name, to a non-instrumentalist view of constitutional construction that rejects the framers’ own approach to legal construction. In Federalist 40, Madison describes this instrumentalist approach in terms of “two rules of construction dictated by plain reason, as well as founded on legal axioms.”²⁹ One is

that every part of the expression [in this case Congress’s legally binding charge to the Philadelphia Convention] ought, if possible, to be allowed some meaning, and be made to conspire to some common end. The other is, that where the several parts cannot be made to coincide, the less important should give way to the more important part; the means should be sacrificed to the end, rather than the end to the means.³⁰

I shall recall Madison’s statement below, in connection with Barnett’s view of the Commerce Clause.

III.

We come now to a second and related category of negative constitutionalist fallacies: fallacies regarding rights. Barnett joins other negative constitutionalists in viewing the Constitution as designed to protect natural rights. I have reservations about this view. I could agree if the

26. *Id.* at 149.

27. *Id.* at 147.

28. See Barnett, *supra* note 11, at 103-05.

29. The Federalist No. 40 (James Madison), *supra* note 3, at 259.

30. *Id.* at 259-60.

rights in question were conceived in positive terms—as rights or, better, goods like life, liberty, and property. But negative constitutionalists, Barnett among them, hold that, as James Ceaser puts it, “real rights” are negative rights and that protecting rights is either a practice of forbearance on government’s part, or government’s enforcement of forbearance on third parties.³¹ Here, then, is another fallacy of negative constitutionalism: a negative view of rights. Related fallacies are that the rights in question belong to a private sphere into which government cannot properly intrude, and, as Barnett puts it, that the Constitution establishes a presumption of liberty likened to islands of power in a sea of rights. I examine these three propositions here: (1) that real or natural rights are essentially negative; (2) that socially protected rights mark out a private sphere into which government cannot normally intrude; and (3) that the American Constitution establishes a presumption of liberty that can be symbolized as islands of power in a vast, if not unlimited, sea of rights. I comment also on a fourth tenet of negative constitutionalism that argues for a relationship between rights and justice that undermines the legitimacy of the redistributive state.

Let us start with the so-called private sphere. Barnett refers to a “private domain” in which each of us can do as he or she pleases, provided we do not encroach on the “rightful domain” of others.³² This statement is unclear. Does it refer to a private domain or to a *rightful* private domain? We all think and do things in private that do not offend others by sheer virtue of the fact that they occur in private. These actions become subjects of political concern only when others notice them and want to restrain them—that is, when the actions cease to be “private” in a physical sense. If others offer reasons for restraining these actions, our counterclaim of a “right to privacy” risks begging the question. For, by offering reasons, the other side holds, in effect, that the sphere we are claiming as private is not *rightfully* private. To answer by claiming “privacy” is sheer counter assertion, a rhetorical back-o’-the-hand. That is undeserved because, *ex hypothesi*, the other side offers reasons for its conclusions. Because they respect us enough to offer an argument, and because their taxes help in many ways to protect the privacy we claim, we owe them an argument in return.

This argument is not always one we have to articulate, for it can be an established, albeit controversial, part of our cultural understanding. This is the case with many claims regarding sexual matters and recreational drugs. The claim for our side is often (1) that our conduct is not hurting anyone, and (2) that the community would be a morally better community by leaving us alone (morally better because rights claims purport to be “justified claims,”³³ and it would be unjust to reject an admittedly justified

31. See Ceaser, *supra* note 14, at 90-92.

32. See Barnett, *supra* note 11, at 58.

33. *Id.* at 79.

claim). These propositions are weighed against their opposites by officials who claim to speak not for themselves but for the community (i.e., its better self), the moral truth, the scientific truth, and usually all three. In any case, the decision of what is rightfully a private domain cannot itself be a private decision. Our so-called private choices thus occur within spaces previously bounded by the civil law, the criminal law, and what we accept as the moral truth and the maxims of propitious conduct. This picture is closer to one of authority or power surrounding rights than of islands of power surrounded by an ocean of rights.

The same holds for the presumption of liberty. The term “presumption” is more appropriate in a criminal than in a regulatory context. In the latter, it misleads by implying that only one side of a regulatory disagreement needs an argument, and that without a good reason to regulate, people are free to do whatever they want to do just because they want to do it, as long as they do not harm others, within prevailing legal conceptions of harm.³⁴

I grant that this “presumption of liberty” appears to have held in different substantive contexts at different periods of constitutional history, economic liberty yesterday, personal and political liberties today. But this appearance is misleading. In every period, the side that appears to need no argument actually relies on an argument already made and accepted by the courts as probably true. The situation is not one in which the arbitrary liberty of one side is entitled to an advantage that the public authority must try to overcome. When Justice Rufus Peckham acted in *Lochner v. New York* on the maxim that liberty was the rule and regulation the exception, he affirmed background propositions grounded in both moral and scientific arguments.³⁵ The background moral argument was that, in contract negotiations, bargaining leverage lawfully earned is property, and that a just state does not take property without a good-faith and reasonably sound basis for believing that both of the negotiating parties and the community as a whole will benefit.³⁶ The background scientific argument in *Lochner* was that security for property lawfully obtained (including bargaining power) is essential to the economic well-being of the community as a whole.³⁷ These arguments were arguments about dimensions of the public interest. In *Lochner*, liberty had these public interest arguments on its side. Whether the arguments were either sound or rightfully applied, liberty was not favored merely because it was liberty.

Barnett’s openness to my interpretation of “the presumption” is amply indicated by the way he distinguishes liberty from license.³⁸ Liberty, he says, is “bounded freedom,” and license is “unbounded freedom.”³⁹ Only bounded freedoms can provide the content of “liberty rights” or “claims on

34. *See id.* at 80.

35. *See Lochner v. New York*, 198 U.S. 45, 57-65 (1905).

36. *See id.* at 60-61.

37. *See id.*

38. *See Barnett, supra* note 11, at 80-81.

39. *Id.* at 80.

other persons—including . . . ‘government officials’—that ought to be enforceable.”⁴⁰ These claims are “justified” “as essential to enabling diverse persons to pursue happiness while living in society with others.”⁴¹ And by “essential,” Barnett means necessary in a strong causal sense—just as essential, he says, as the “principles of engineering” are essential to “building . . . bridge[s].”⁴²

Barnett emphasizes that the bounded freedoms provide “principles of action” that follow from human nature and “the nature of the world” in which human beings find themselves. This explains why the bounded freedoms were sometimes seen as “the laws, which Almighty God has established in the moral world, and made necessary to be observed by mankind.”⁴³ To Barnett, these principles are not necessarily divine commands; they can also be discoveries of the practical sciences. These discoveries serve as what philosophers have called directives or technical norms, norms that figure in means-ends arguments based on what have been found to be causally necessary relationships.⁴⁴ Arguments deploying these causal relationships take an if-then form. Barnett’s example is “if you want a society in which people can pursue happiness, and in which civil society can enjoy peace and prosperity, then you had best respect certain rights,” like “the rights of several property, freedom of contract, first possession, self-defense, and restitution.”⁴⁵ For, analogously to the principles of “agriculture, engineering, and architecture,” these are “the fundamental[,] . . . inalienable[, and] . . . natural rights that all societies must recognize to some degree or they will cease to be functioning societies.”⁴⁶

Given this conception of rights, presumptions in their behalf are more than mere presumptions—they are backed by arguments that turn on factual premises as solid (albeit contingent) as the premises in directives for building bridges or harvesting crops. And the arguments that contain these premises, as Barnett describes them, aim less at rights than at the common good.

Contradicting the social nature of rights to which Barnett sometimes subscribes, he joins other negative constitutionalists in the next fallacy to be considered. This fallacy holds that liberal constitutions seek chiefly to protect rights, with most rights (the major exception being the tax-supported

40. *Id.*

41. *Id.* at 81.

42. *Id.*

43. *Id.* (quoting Elizur Goodrich, *The Principles of Civil Union and Happiness Considered and Recommended*, Sermon (May 10, 1787), in *Political Sermons of the American Founding: 1730-1805*, at 914-15 (Ellis Sandoz ed., 1991)).

44. See Georg Henrik von Wright, *Norm and Action: A Logical Enquiry* 9-10 (1963).

45. Barnett, *supra* note 11, at 82.

46. *Id.*

right to have one's other rights enforced) understood as negative rights, not positive, tax-supported, or welfare rights.⁴⁷

This is one of those propositions that cannot be true, for if it is true, it is false. Aside from any social function rights may serve, if liberal constitutions protect negative rights, they protect more than negative rights because negative rights protect more than negative rights. If you value things like life, liberty, and property, you will want to prevent others from interfering with your enjoyment of them. Excluding others, however, is not the end in view. The point of excluding others, when it has a point, is some positive good: the good of enjoying life, liberty, and property. Life, liberty, and property are not rights; they are the contents of rights—the things we have rights to. And the contents of rights are goods. When you speak sensibly of the Constitution protecting rights, you mean government providing or securing positive goods of one sort or another—positive benefits, not negative liberties. As an end of constitutional government, for example, your right to property would be a right to the many governmental services required for you peacefully to claim and enjoy property. This right is essentially a welfare right because the services it requires are tax-supported services that range from defending the nation to funding courts that enforce titles and police that remove trespassers.⁴⁸

The taxes that support these services are of two kinds: the state's tax collectors take money from people, and the state's police, prosecutors, and courts act under the criminal law to prevent people from using their natural equipment and their natural opportunities to preserve themselves as they see fit. Classical liberal theory holds this equipment and these opportunities to be aspects of the liberty and property that people possess in a state of nature. The government can justly deprive people of this liberty and property only if it has reason to believe that doing so constitutes a net contribution to everyone's true well-being. The theory supporting this last requirement is the same as the theory of legitimacy that Justice Peckham acted on in *Lochner*: Our governments have power only to serve good faith and reasonably competent versions of the public interest.

Barnett and I can agree that Justice Peckham was right about this.⁴⁹ Justice Peckham failed to see, however, as Barnett fails to see,⁵⁰ that the rights of first possessors are entirely contingent. In nature, men generally, including latecomers, have a right to whatever they think they need for their self-preservation, including the holdings of first possessors, especially if they think first possessors have more than they need and if first possessors

47. See *id.* at 57, 60, 70; Ceaser, *supra* note 14, at 91-92; Michael P. Zuckert, *Launching Liberalism: On Lockean Political Philosophy* 312, 315-16 (2002).

48. See Holmes & Sunstein, *supra* note 19, at 14-15, 50-52.

49. See Barnett, *supra* note 11, at 75, for his favorable quote from John Locke to the effect that legitimate government acts only for the common good. See also *supra* note 24 and accompanying text.

50. Barnett joins Peckham's condemnation of "class legislation" (hour and wage laws, in this case). See Barnett, *supra* note 11, at 221-22.

leave only the crumbs or less for latecomers.⁵¹ The standard answer to this limitation on first possessors is that protecting their unlimited acquisition insures more and better opportunities for latecomers than they can expect in any alternative arrangement.⁵² But this response implicitly concedes that, in justice, latecomers must be compensated for their undeserved losses of opportunity to first possessors. And whether latecomers remain better off where first possessions are protected—or, where consent is necessary to legitimacy, whether they *think* they are better off—depends on contingencies. When circumstances are such that government takes from latecomers without benefiting them proportionately in turn—that is, when government takes property from latecomers to make only first possessors better off—government practices theft.

A final difficulty of negative constitutionalism is the three-part thesis that rights precede both the state and the idea of justice, that a just system is one that protects lawfully held property, and that “social justice,” which calls for redistributing property, is therefore a misnomer.⁵³ Because this thesis is not altogether false, I have not listed it as a fallacy. But the thesis is false in part, and its overall effect is misleading.

While I need not question the article of liberal theory that rights precede the formation of the state, it is difficult to see how rights can precede justice if rights are justified claims. The distinction between liberty and license and what Barnett describes as the socially responsible nature of “bounded liberties” is encapsulated in the definition of rights as “justified claims.” But if rights are “justified claims,” then some sense of justice must precede rights. Put differently, if we had no sense of what justifies a claim, we could not distinguish liberty from license and claims that the community should honor from claims that it should ignore. Because some sense of justice must precede rights as justified claims, and because justified claims are socially responsible claims,⁵⁴ a sense of justice shapes what claims will count as rights, including property rights. This priority of justice is enough to remove a major objection to the redistributive state—especially when we realize that all states are redistributive states. The state that protects first possessors must tax latecomers of their natural property in order to do so, for their property in nature includes rights of self-help that the state declares against the criminal law.⁵⁵

51. See John Locke, *Two Treatises of Government* 311, 315, 328-29 (Mentor Books 1963) (1690).

52. See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 11 (1985).

53. For versions of this thesis, see Barnett, *supra* note 11, at 3-4, 60, 70-71, 82-84, 211-15, 328-33; Zuckert, *supra* note 47, at 317, 321-22, 327.

54. This is the unstated upshot of Barnett. See Barnett, *supra* note 11, at 80-81, 83-84.

55. See *Welfare and the Constitution*, *supra* note 1, at 14-15; Holmes & Sunstein, *supra* note 19, at 59-76.

IV.

The first kind of fallacy we discussed involves constitutional institutions, and the second kind involves constitutional rights. Our final species of fallacy concerns constitutional powers or authorizations to pursue specific kinds of policies or perform specific kinds of functions, like declare war or regulate commerce or coin money. Negative constitutionalism places greater normative weight on constitutional rights than constitutional powers because it sees restraint as the principal task of popular constitutions and rights as restraints on power. Positive constitutionalists place greater, or at least equal, weight on constitutional powers because positive constitutionalists are interested in goods like national security and prosperity, and it is through power and specific powers that such ends are pursued.

The fallacy I discuss in this section is that enumerating powers is restraining the powers enumerated—that, for example, the mere fact (without more) that the commerce power appears on a limited list of powers argues for a narrow view of what the commerce power authorizes. A full discussion of this fallacy leads to issues that lie beyond the scope of this essay—such as the social psychology of the population for which the Constitution was made—so here I will discuss only a threshold matter.⁵⁶

Return for a moment to the proposition that constitutional power is power to pursue only good-faith and competent dimensions of the common good, like the common defense and general welfare. This requirement is plain on the surface of the Preamble and in the rhetoric of every public defense of the Constitution and every one of its parts. If you take at all seriously the language of the Constitution as written and the public comments of its defenders in every era, this requirement is one you cannot deny. Barnett accepts this proposition, as we have seen.⁵⁷ If, on the other hand, you think that the references to the common good that one hears in live political discourse are cognitively meaningless, you cannot take constitutional language and history with any normative seriousness. Whatever you might have to say, therefore, would be said in a discourse other than the present one, which has to assume some things to get started and to keep going.

Now consider the rule against pretextual uses of power, the rule Justice John Marshall announced in *McCulloch v. Maryland*⁵⁸ and Justice Peckham followed in *Lochner v. New York*.⁵⁹ This rule suggests that constitutional powers authorize acts in terms of the purposes of the acts. The commerce power would authorize regulations that served commercial purposes. The least it would authorize is regulations of commercial activities for

56. For a more complete discussion of this point, see Sotirios A. Barber, *On What the Constitution Means* 89-104 (1984).

57. See *supra* notes 24, 48 and accompanying text.

58. 17 U.S. (4 Wheat.) 316 (1819).

59. 198 U.S. 45 (1905).

commercial purposes.⁶⁰ In broader context, however, it can reasonably be construed to authorize more. This broader context includes the Preamble, powers in Article I and elsewhere that refer to economic activities, and a sense that, as Marshall said, "it is a *constitution* we are expounding," one designed to serve for ages to come.⁶¹ In this broader context, the commerce power can both indicate and function as a general power to pursue the nation's economic health. For an affirmative demonstration of this conclusion I must refer readers elsewhere.⁶² Here, I can only point out difficulties in Barnett's opposing position. I do so in hopes of persuading readers that the affirmative case for a general power over the economy might be worth their time.

Barnett isolates the Commerce Clause from the rest of the Constitution and conducts an extensive lexicographical analysis to contend that the Clause authorizes little more than facilitating interstate commercial traffic.⁶³ A remarkable thing about Barnett's theory of the commerce power is that it falls short of the broader expectations of the framers, as he himself describes them. He acknowledges that the framers sought what they repeatedly said they sought: the people's happiness. He suggests that the framers thought Article I, Section 8 granted power sufficient to pursue the people's happiness. We can assume he would agree that a general economic prosperity would constitute a familiar version of the general welfare, an end listed in the Preamble, and a plausible condition of the people's happiness. He also agrees that free-flowing traffic could be no more than a small part of the picture.⁶⁴

How Barnett's commerce power is related to constitutional language is not clear. Though his argument for a narrow power focuses largely on dictionary entries and other evidence of language usage in the eighteenth century, he admits that "possible original meaning[s]" of the text include a regulatory power over the nation's economic activity.⁶⁵ He also acknowledges that his choice between broad and narrow powers is influenced by "principles of federalism and limited enumerated powers."⁶⁶

Principles of federalism and enumerated powers are at least as controversial as the scope of the commerce power—in fact these controversies are aspects of the same debate. Dual federalism and a narrow view of the commerce power imply each other, as do national federalism and a broad view of the commerce power. One theory of enumerated powers would, under the right circumstances, give Congress direct regulatory power over all the nation's schools if motivated chiefly by economic and security considerations; another theory would reserve such

60. See Barnett, *supra* note 11, at 310-12.

61. *McCulloch*, 17 U.S. at 407.

62. See Barber, *supra* note 56, at 80-91.

63. See Barnett, *supra* note 11, at 278-91, 302-12.

64. See *id.* at 350-53.

65. *Id.* at 313.

66. *Id.* at 48, 313.

power to the states under all circumstances. So by acknowledging the influence of his view of federalism and enumerated powers, Barnett inadvertently informs us that he has begged the question about the meaning of the commerce power.

Even so, the role of federalism in Barnett's thought remains unclear. If federalism justifies the narrowest possible reading of the commerce power, you would expect it to justify the narrowest possible reading of the Privileges and Immunities Clause of the Fourteenth Amendment. Yet Barnett, correctly in my view, rejects the majority opinion in the *Slaughterhouse Cases*,⁶⁷ and construes the Privileges and Immunities Clause broadly to encompass not only the Bill of Rights, but the innumerable natural rights Barnett holds embraced by the Ninth Amendment, rights of the kind discussed by Justice Bushrod Washington in *Corfield v. Coryell*.⁶⁸ We have seen also that the depreciation of states' sovereignty is crucial to his account of the Founding as a move toward a libertarian state.⁶⁹

If the framers' intent and constitutional text do not justify Barnett's commerce power, and if federalism cannot do it without begging the question, can liberty justify Barnett's choice? In a word, no. The answer cannot be "liberty" because Barnett is not talking about liberty when he construes Congress's power narrowly. Here he is talking about liberty from government, and liberty-from-government, the complex whole, is different from liberty. Liberty can be an end of government; liberty-from-government cannot be an end of government. Because liberty can be an end of government it is not intrinsically antithetical to government; hence Hamilton's claim in Federalist 1 that liberty and powerful government are on the same side. Liberty is a state of affairs whose realization and maintenance requires coercive state power, often in its deadliest form, as the Civil War proved, while liberty-from-government negates state power. So liberty as such cannot be a reason for a narrow reading of the commerce power.

Well, then, can liberty-from-government justify Barnett's commerce power? No again, though not simply no. As an abstract matter, the valuable component in liberty-from-government is *liberty*. Liberty-from-government, the complex whole, is not a value, at least not categorically. Liberty-from-government can be valuable, but only when it serves as a means to liberty. Sometimes liberty-from-government means loss of liberty, at the hands of third parties, say, or by the loss of forms of liberty that government enables (voting, securing title to property, and enjoying it without fear).

67. 83 U.S. (16 Wall.) 36 (1873).

68. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230), cited in Barnett, *supra* note 11, at 62-63; see also Barnett, *supra* note 11, at 61-66, 192-96.

69. See *supra* note 13 and accompanying text.

So the value of liberty-from-government is contingent on circumstances. Where government threatens liberty, and weakening government does not risk loss of liberty, then liberty-from-government can be valuable. Where freedom from labor laws does not mean loss of liberty in the form of child labor and subsistence wages that make the upward mobility of workers practically impossible, then Barnett's commerce power achieves value by giving the owners of farms and factories the opportunity to display personal virtue. All that this proves, however, is that regulatory policies can, in liberty's name, fluctuate in scope and strength. But regulatory policies can fluctuate in scope and strength only under a broad constitutional authorization. Barnett's commerce power will not permit this fluctuation in the breadth of regulatory pressure. It is too narrow. So liberty-from-government cannot justify Barnett's decision to read the commerce power narrowly.

Barnett's narrow reading of the commerce power thus lacks a coherent justification. A more sensible view of the commerce power emerges from an approach to interpretation that Madison says is "dictated by plain reason, as well as founded on legal axioms": reading authorizations to facilitate the ends that justify them.⁷⁰ This more sensible view would be a broader view, for Barnett himself finds that the framers thought that the enumeration in Article I, Section 8 was adequate to meet "genuinely national problems."⁷¹

V.

This survey of "fallacies" is not meant to deny that the Constitution has a negative aspect or that the principles of negative constitutionalism can sometimes be functional to public purposes. To deny these things would be entirely to reject the framers' strategy of pursuing public purposes through private incentives. This essay aims at no more than motivating the reader to ask whether more might be needed—whether the Constitution might not have a positive aspect in addition to its negative aspect, a pro-government aspect that emphasizes public purposes over private incentives and suggests broader constitutional responsibilities than aggregating private interests. I have made the affirmative case for a positive view of the Constitution in other works, as noted in the preceding pages. Two things about this positive view attract me, and I think that they will eventually attract many other observers. One of these things appeals to academics; the other appeals to citizens.

In Federalist 51, Madison defends a strategy of checks and balances, the emblem of negative constitutionalism, as a "policy of supplying . . . the defect of better motives."⁷² From this alone it would seem that a full understanding of checks and balances, and negative constitutionalism

70. See The Federalist No. 40 (James Madison), *supra* note 3, at 259-60.

71. See Barnett, *supra* note 11, at 351.

72. The Federalist No. 51 (James Madison), *supra* note 3, at 349.

generally, would involve a grasp of the ends that inform those better motives and how constitutional means facilitate their pursuit.

The citizen in me is depressed by the nation's continuing fall into the hands of forces that are so fixated on private pursuits that they question whether there can be genuine public purposes. These forces doubt the power of public reasonableness to affirm value beyond private preferences and private "commitments." Their position makes sense only if they can structure moral reality and even nonmoral reality—witness their depreciation of Enlightenment science—to their liking, something they seem ready to attempt. Negative constitutionalism has not caused this development, and positive constitutionalism will not reverse it. But negative constitutionalism has provided some of its justification, and positive constitutionalism can hope to reverse that.

Notes & Observations