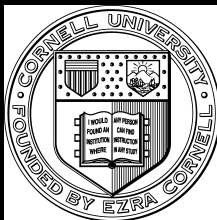


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## Why You Should Read My Book Anyhow: A Reply to Trevor Morrison

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# WHY YOU SHOULD READ MY BOOK ANYHOW: A REPLY TO TREVOR MORRISON

Randy E. Barnett<sup>†</sup>

## INTRODUCTION

Authors rarely have the opportunity to respond to their reviewers in the same issue in which the review is published, so I am grateful to the *Cornell Law Review* for inviting me to do so and to Trevor Morrison for graciously agreeing. I am also appreciative of the respectful tone that Professor Morrison employs in his comments on a book with which he so obviously disagrees. Coming from a critic, the positive qualities he attributes to *Restoring the Lost Constitution: The Presumption of Liberty*<sup>1</sup> are especially significant. Yet he does disagree with me,<sup>2</sup> which means that I disagree with him, and in this response I will explain why.

Our disagreements are rather straightforward and easy to identify, though not easy to adjudicate. They center upon his critiques of (1) the relationship I describe between constitutional legitimacy and constitutional method, (2) my particular defense of originalism, (3) the operation of my proposed construction of the Constitution—The Presumption of Liberty—and (4) my interpretation of *Lawrence v. Texas*.<sup>3</sup> In articulating these criticisms, Professor Morrison is invariably thoughtful and, with a few minor exceptions that I will note below, fair to the positions with which he disagrees. Because the principal objections he offers are not atypical of the reactions of many constitutional scholars today, my reply to his critique simultaneously anticipates the reactions of many prospective readers of the book. Having heard my response to what is likely to be their gut reactions, these remarks will hopefully induce even dissenting readers to examine the book for themselves.

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

<sup>2</sup> Professor Morrison's review is available at the following reference: Trevor W. Morrison, *Lamenting Lochner's Loss: Randy Barnett's Case for a Libertarian Constitution*, 90 *CORNELL L. REV.* 839 (2005).

<sup>3</sup> 539 U.S. 558 (2003).

## I

THE RELATIONSHIP OF CONSTITUTIONAL LEGITIMACY TO  
CONSTITUTIONAL METHOD

I stand in basic agreement with Professor Morrison's first, and perhaps most important, criticism of my argument,<sup>4</sup> though I consider it a strength of my approach rather than a weakness. I contend that one's approach to constitutional method—that is, how the Constitution should be interpreted and construed—depends crucially on one's theory of constitutional legitimacy—that is, the conditions that render a constitution legitimate and binding. More precisely, the problem of legitimacy is to establish a legal system capable of making laws that carry with them a moral duty of obedience. A legitimate constitution is one that creates such a legal system. In other words, a legitimate constitution defines a legal system that imposes laws on the citizenry that bind them in conscience.<sup>5</sup>

A significant deficiency in existing constitutional scholarship is its lack of serious, much less systematic, attention to this crucial issue. The deficit is shared by liberal and conservative scholars alike. One can search the relevant scholarship ranging from Bruce Ackerman to Michael McConnell in vain to find a constitutional scholar who explicitly defends the theory of constitutional legitimacy on which his or her interpretive methods and particular interpretations depend. Indeed, the theory of legitimacy underlying most constitutional scholarship is rarely even identified with any precision.<sup>6</sup> While scholars sometimes allude to their assumptions about legitimacy by professing a general commitment to democracy or equality, they are usually vague on their theories of legitimacy, which makes it nearly impossible to properly critique them.

The contributions of John Ely<sup>7</sup> and Ronald Dworkin<sup>8</sup> were landmarks and remain so largely because they have been among the very few even to try. Ely wrote in 1980; Dworkin in 1986. What major work in constitutional theory in the subsequent two decades has defended a coherent theory of constitutional legitimacy on which to ground a theory of constitutional interpretation? Few candidates suggest themselves, especially among the more prominent constitutional scholars.

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<sup>4</sup> Morrison, *supra* note 2, at 843–48.

<sup>5</sup> See BARNETT, RESTORING, *supra* note 1, at 12–14. See generally Randy E. Barnett, *Constitutional Legitimacy*, 105 COLUM. L. REV. 111 (2003) (arguing against constitutional legitimacy arguments based on consent or benefits received).

<sup>6</sup> Perhaps this situation is changing. See, e.g., Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. (forthcoming April 2005) (identifying different conceptions of constitutional legitimacy and stressing the importance of the issue).

<sup>7</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>8</sup> RONALD DWORKIN, *LAW'S EMPIRE* (1986).

To his credit, Professor Morrison acknowledges the dependency of one's theory of interpretation upon one's theory of legitimacy when he observes that "the method (or methods) of constitutional interpretation one chooses will depend in large measure on one's views of constitutional legitimacy, and, indeed, of the very purposes of constitutionalism."<sup>9</sup> He is also perfectly correct when he asserts, "if one takes a different view of constitutional legitimacy, then [Professor Barnett's] defense of original meaning is less compelling."<sup>10</sup> Were this not the case, I would have dispensed with the lengthy, inevitably controversial, and potentially alienating rejection of the theory of popular sovereignty or "consent of the governed" in Part I of my book.<sup>11</sup> Although I would have preferred not to lead my book with that discussion, I believed the logic of the argument compelled me to do so. Thus, on what I consider to be a fundamental matter, we are in complete agreement.

Although Professor Morrison does not care for my claim that "it takes a theory to beat a theory,"<sup>12</sup> if we both are correct about the dependency of constitutional method upon constitutional legitimacy, it is incumbent on those who reject my approach to (a) show where it is wrong *and* (b) present their alternative theory of legitimacy for comparison. I, for one, would like to see an explicit and coherent defense of the somehow qualified democratic majoritarianism that underlies so much of today's constitutional scholarship from both ends of the political spectrum. To do so, however, would require someone to take serious account of the normative critique I offer of popular sovereignty in *Restoring the Lost Constitution*.<sup>13</sup>

Professor Morrison leads his review with his sole substantive criticism of my treatment of constitutional legitimacy—a criticism that, as he faithfully notes, I address in the book itself:

When the Framers spoke of the consent of the governed, they had in mind something quite unlike Professor Barnett's aggressively individualistic, unanimity-requiring conception of consent. . . . In short, Madison and the other Founders thought of the consent of the governed in majoritarian (more precisely, supermajoritarian, given the requirements for constitutional ratification), not unanimous, terms.<sup>14</sup>

To be precise, this is not actually a criticism of the affirmative theory of legitimacy I present in the book. Indeed, Professor Morri-

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<sup>9</sup> Morrison, *supra* note 2, at 851.

<sup>10</sup> *Id.* at 852.

<sup>11</sup> See BARNETT, *RESTORING*, *supra* note 1, at 11–52.

<sup>12</sup> See Morrison, *supra* note 2, at 850 (stating that the proposition "seems clearly wrong").

<sup>13</sup> See BARNETT, *RESTORING*, *supra* note 1, at 11–52.

<sup>14</sup> Morrison, *supra* note 2, at 845.

son offers no such criticism in his review. Rather, this is a response to my critique of popular sovereignty. He is correct that I advance an individualist conception of consent—though I am not sure how “aggressive” it is. One of the signal features of consent is that, if it is to justify imposing duties on an individual, the consent must come directly or indirectly from that person. This is a fairly elementary point. Like going to the bathroom, consent is unavoidably a do-it-yourself affair. Genuinely consent-based legal systems can and do exist. In chapter two of *Restoring the Lost Constitution*, I describe the pervasiveness of “unanimous consent” regimes in which the individuals actually consent to constraints.<sup>15</sup>

The challenge for those relying on the “consent of the governed” to justify the imposition of laws by government legal systems is to explain just when and how the persons upon whom the laws have been imposed have truly—as opposed to figuratively or metaphorically—consented. I pose this challenge to governmental legal systems in some detail in chapter one of the book.<sup>16</sup> Most theories of popular sovereignty attempt to explain how some can consent for others, which, in my view, always renders them too clever by half.

In advancing his historical objection to my argument, Professor Morrison is in good company. I persistently hear appeals to the Founders’ view of legitimacy to undermine my normative argument and, in turn, the method of originalism that I think this normative argument justifies. Some of this may result from a simple confusion about what a normative theory of legitimacy entails. Before one can appeal to the Founders’ views of legitimacy, one must first establish why their views of legitimacy (as opposed to the public meaning of the document they enacted) have any normative bite today.

In addition to criticizing the theory of popular sovereignty, in *Restoring the Lost Constitution* I present an alternative theory of constitutional legitimacy that, in the absence of consent, looks to whether a legal system has procedures that ensure that enacted laws are just. If such procedures are followed, the resulting laws are presumptively binding in conscience, regardless of whether any particular law turns out to be just. The laws produced by such a legal system would merit a

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<sup>15</sup> See BARNETT, RESTORING, *supra* note 1, at 40–43. Ironically, some who would defend popular sovereignty would likely contest my claim that the legal systems I discuss there are indeed consensual. Those that would offer this objection hold the actual consent of individuals to contractual obligation to a much higher standard than they hold the fictitious “consent of the governed.” See Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627 (2002) (discussing why consenting to so-called “contracts of adhesion” is meaningful); cf. Randy E. Barnett, Essay, *Conflicting Visions: A Critique of Ian Macneil’s Relational Theory of Contract*, 78 *VA. L. REV.* 1175 (1992) (describing Ian Macneil’s similar double standard in assessing the existence of consent).

<sup>16</sup> See BARNETT, RESTORING, *supra* note 1, at 11–31.

“benefit of the doubt” as to their justice, unlike laws produced by legal systems lacking justice-ensuring procedures. I then go on to explain why a written constitution is a structural feature that can contribute to constitutional legitimacy, and how this feature requires that the meaning of the writing remains the same until it is properly changed.<sup>17</sup> Given the normative theory of legitimacy I defend, a written constitution should be interpreted according to its original public meaning.

It is, therefore, a non sequitur to respond to this normative defense of originalism with the observation that the Founders had a different theory of legitimacy. The fact that I defend an original public meaning version of originalism based on the contribution to legitimacy played by a written constitution is in no way undermined by an appeal to the Founders’ contrary views of legitimacy. To make such an objection is to confuse a theory of constitutional interpretation with its normative justification—a justification that stems from a theory of legitimacy that is either warranted here and now or is not.

The irony in this line of attack, however, is palpable. Professor Morrison and other nonoriginalists appeal to the authority of the Founders to undermine what I have explicitly presented as a normative, not a descriptive or historical, theory of legitimacy. Why these nonoriginalist critics should care what the Founders thought about constitutional legitimacy any more than what the Founders thought about slavery is a mystery. To be clear, in my view, *they should not care*. When we assess whether our Constitution (or any other constitution) is legitimate, we are simply not bound by the opinions of the Founders on this issue. Just as it is up to us to draw the present conclusion that slavery or rape or murder is wrong—without granting deference to the Founders—so, too, is the issue of constitutional legitimacy a normative assessment that must be made in the present.

So why would a critic of originalism raise the issue of the Founders’ views of popular sovereignty at all, much less lead with it? The reason is that it is supposed to place someone like me who defends originalist constitutional interpretation “in a rather awkward position.”<sup>18</sup> But it should now be apparent that this is not a substantive objection to the normative defense of originalism I present in *Restoring the Lost Constitution*. Any perceived awkwardness is short-lived once one realizes that constitutional legitimacy, as I use the term, is a normative judgment we must make now about what constitutes binding law today (and which I contend justifies a reliance on originalist inter-

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<sup>17</sup> See *infra* Part II.

<sup>18</sup> Morrison, *supra* note 2, at 846.

pretation). Responding to a normative argument with an historical claim is a simple category mistake.<sup>19</sup>

To repeat my thesis: The particular historical method of interpreting the Constitution that I favor is justified (or not justified) because of a normative theory of constitutional legitimacy that is true or valid here and now, regardless of whether the Founders so thought. And if the normative argument goes through, it is also irrelevant whether the Founders thought an historical approach to interpretation was warranted.<sup>20</sup>

Professor Morrison characterizes my approach as a “theory of fortuitous legitimacy”<sup>21</sup> because the Founders, who believed in popular sovereignty, enacted a document that can be justified because it protects natural rights. Although perhaps fortunate, it was far from fortuitous that a group of men who were firmly committed to the

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<sup>19</sup> Professor Morrison responds to my contention that he has committed a “category mistake” by attempting to turn the table:

I want to suggest that a claim to restore original constitutional meaning needs to be attentive to original understandings about the nature and content of the constitutional document, and that the Framers’ understanding of the Constitution itself was surely connected to their views about its legitimacy. Rejecting the Framers’ ideas about constitutional legitimacy means rejecting the intellectual context within which the Constitution took its original meaning. Again, if original meaning is not the touchstone of the analysis, then this rejection is of no necessary consequence. But for an originalist like Professor Barnett, it is significant indeed. In this respect, if a “category mistake” exists here, I think it lies in Professor Barnett’s claim to be “Restoring the Lost Constitution” by propounding a theory that dispenses with the Framers’ own views about the nature and legitimacy of the constitutional system they were creating.

*Id.* at 848. This response still fails to appreciate the logic of my argument. In propounding a normative theory of constitutional legitimacy, an originalist is under no higher or different burden than anyone else. First, we must say why and how a constitution imposed on nonconsenting parties could ever produce laws that bind in conscience. My normative answer to this question rises or falls on its merits, which has nothing to do with the views of the Framers on this issue. If my theory of legitimacy is correct and if, as I contend, a written constitution contributes to such legitimacy when it is interpreted according to its original meaning, then we have a good normative reason for adopting an originalist methodology apart from any view of legitimacy, or for that matter of originalism itself, held by the Framers. Once we adopt originalism as our interpretive methodology, it is an entirely separate matter how the Framers’ theories of popular sovereignty might have influenced the original public meaning of the text they enacted. Perhaps the public meaning of what they wrote was affected by their theories of legitimacy. While I do not think so, I would have to consider any such claim seriously. But my original point remains: It is simply no response to a normative theory of constitutional legitimacy that some or all of the Framers, the Ratifiers, or the general public in 1789, 1791, or 1868 might have disagreed. This is our call to make, not theirs.

<sup>20</sup> In *Restoring the Lost Constitution*, I contend that the Founders did adhere to an original meaning approach to interpretation while rejecting an approach based on original intent. See BARNETT, RESTORING, *supra* note 1, at 96–100. In this passage of the book, I am responding to the largely accurate historical claims in the deservedly classic article by Jefferson Powell. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

<sup>21</sup> Morrison, *supra* note 2, at 846.

proposition that “first comes rights, then comes government,” and who had a largely correct view of these rights, would devise institutional mechanisms to protect their rights effectively (whatever their views of constitutional legitimacy may have been).

Indeed, a fair reading of the opening paragraphs of the Declaration of Independence would note a far greater reliance on the “unalienable Rights” of “Life, Liberty, and the Pursuit of Happiness” and the need “to secure these Rights” than on the claim that governments “deriv[e] their just powers from the Consent of the Governed.”<sup>22</sup> At minimum, *both* natural rights and the consent of the governed figure prominently in the Founders’ view of constitutional legitimacy. Even if they were wrong about the latter, their belief in the former helped them write a constitution that, as amended later by others who shared their commitment to natural rights to perhaps an even greater degree, makes a plausible claim to legitimacy.<sup>23</sup>

Given Professor Morrison’s acceptance of the proposition that “the method (or methods) of constitutional interpretation one chooses will depend in large measure on one’s views of constitutional legitimacy, and, indeed, of the very purposes of constitutionalism,”<sup>24</sup> it was perhaps a bit uncharitable of him to characterize my approach as depending on my “libertarian ideology,”<sup>25</sup> or to say that I have chosen “a method of constitutional interpretation that, in [Professor Barnett’s] view, fits best with the substantive values of his political ideology.”<sup>26</sup> First of all, the term “ideology” has a very negative connotation among academics.<sup>27</sup> A more neutral term, which he uses elsewhere in the review, would be “theory.”<sup>28</sup>

Second, in these passages, Professor Morrison elides a crucial step in my argument. It is not accurate to characterize my approach as what Professor Morrison calls “a libertarian theory of constitutional

<sup>22</sup> THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

<sup>23</sup> In my book, I make no claim about the legitimacy of the original Constitution before its later amendment. Indeed, I write: “It is an open question whether the U.S. Constitution—either as written or as actually applied—is in fact legitimate.” BARNETT, RESTORING, *supra* note 1, at 5.

<sup>24</sup> Morrison, *supra* note 2, at 852.

<sup>25</sup> *Id.* at 856.

<sup>26</sup> *Id.* at 852.

<sup>27</sup> In a lengthy footnote responding to this mild protestation, Professor Morrison notes that the term “ideology” need not be pejorative and cites instances where I myself have used the term nonpejoratively in my writings. *See id.* at \_\_\_ 115 n.65. To be sure, I do not view ideology pejoratively. Nevertheless, I know from experience that the term has a widespread negative connotation among academics, so Professor Morrison’s use of the term, rather than the more neutral term “theory,” is likely to be taken badly by many readers of his review. Whether or not this was his original intent is not for me to say. I accept his new footnote as evidence that it was not.

<sup>28</sup> Indeed, Professor Morrison appears to use the terms “political theory” and “libertarian ideology” interchangeably.” *See, e.g., id.* at 853.

legitimacy.”<sup>29</sup> Rather, as indicated in the following passage, the theory of constitutional legitimacy I offer in chapter two is consistent with *any* conception of justice, not just a libertarian one:

As I have tried to make clear, you need not agree with the framers’ or my account of justice or natural rights to accept the theory of constitutional legitimacy advanced in this chapter. We can agree that, when consent is lacking, a constitution is legitimate only when it provides sufficient procedures to assure that laws enacted pursuant to its procedures are just. At the same time, we can disagree about what it is that makes a law just. . . . However, to apply this conception of legitimacy to the U.S. Constitution does require a conception of justice against which the effectiveness of the lawmaking procedures it establishes can be assessed.<sup>30</sup>

As the logic of my argument can be tricky, it may assist understanding to unpack it as follows:

1. The approach that one adopts for interpreting and construing a written constitution necessarily depends on one’s theory of constitutional legitimacy.
2. As an alternative to the consensual or “popular sovereignty” theory of legitimacy that I critique, I offer a theory of legitimacy based on whether procedures are in place to effectively ensure that laws enacted on nonconsenting persons are just.
3. I then endorse the view, which I defend in another book,<sup>31</sup> that justice consists of the protection of the natural rights of several property, freedom of contract, first possession, self-defense, and restitution.

Although step three of this argument can be fairly characterized as classical liberal or “libertarian,” steps one and two are not.

It is important that readers of Professor Morrison’s review who do not hold libertarian political views know that they can endorse steps one and two, the only steps defended in *Restoring the Lost Constitution*, while rejecting step three. If this is correct, then there is something potentially valuable in my accounts of both constitutional interpretation and constitutional legitimacy and the connection between them that is wholly independent of my “libertarian political theory.” Moreover, I qualify even my libertarian claims concerning step three in the following manner:

At this juncture, I am only offering a justification for a duty of obedience in the absence of consent, a justification that extends only to laws that are both necessary to protect the rights of others and proper insofar as they do not violate the rights of the persons whose freedom they restrict. I do not claim that this argument on behalf

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<sup>29</sup> *Id.* at 848.

<sup>30</sup> BARNETT, *RESTORING*, *supra* note 1, at 52.

<sup>31</sup> RANDY BARNETT, *THE STRUCTURE OF LIBERTY* (1998).

of this limited duty of obedience also provides an affirmative argument against any other source of nonconsensual legitimacy that might broaden a moral duty of obedience. In other words, *this* particular justification for a nonconsensual duty of obedience extends only so far and no farther. Readers who want more than this from lawmaking might wish to consider the protection of rights a baseline by which to assess legitimacy.<sup>32</sup>

Those who would seek to supplement my theory of nonconsensual legitimacy would then need to offer their own affirmative theory.

To sum up, I freely admit that my *ultimate conclusions* about interpretation and the legitimacy of the U.S. Constitution do depend upon the “libertarian” political theory I defend elsewhere.<sup>33</sup> In this regard, however, my approach is no different than that of anyone else—except that the degree to which my views of interpretation depend on a normative theory of legitimacy (which in turn depends on a conception of justice), is transparent and explicitly defended. If both Professor Morrison and I are correct about the dependency of methods of interpretation on theories of legitimacy, then all constitutional theorists need to address the dependence of their theories of interpretation on their theories of constitutional legitimacy, whatever they may be.

Those constitutional scholars who would reject my approach must either defend the consent-based theory of popular sovereignty against my criticisms, identify some alternative non-consensual theory of legitimacy, or accept my procedural theory. Should they choose the last of these alternatives, they still remain free to dispute the classical liberal conception of justice I use to inform my assessment of constitutional legitimacy and, in turn, of constitutional method, but it is only fair that they present and defend their own approach to justice so it can be critically assessed. A book review is no place to accomplish all this, of course, so Professor Morrison is not to be faulted for failing to do so, but neither does he provide any reason why those who favor some approach to the Constitution other than mine must do any less than I have attempted.

## II

### AN ORIGINALISM FOR NONORIGINALISTS

Contrary to the impression left by Professor Morrison, my defense of originalism is not simply that it leads to results that are consistent with my political theory. Rather, (and this is tricky too) I argue that a commitment to original meaning originalism stems from a com-

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<sup>32</sup> BARNETT, RESTORING, *supra* note 1, at 45–46.

<sup>33</sup> See *supra* note 31.

mitment to a written constitution.<sup>34</sup> I maintain that a written constitution is a structural feature of our constitutional order like federalism and separation of powers. The principal purpose of this feature is to subject legislative, judicial, and executive branch officials to legal constraints on their exercise of power that will effectively protect the rights retained by the people. If, however, those whom this foundational law is supposed to bind can alter its meaning as they choose, whether alone or in combination, a written constitution will cease to perform its function as higher law which is to protect adequately the rights of those upon whom the coercive commands of the government are imposed without their consent. If this occurs, the legitimacy of the process of legal coercion will be greatly undermined.

This structuralist justification of originalist method does not tell us whether any particular written constitution merits adherence. To reach that conclusion, we must first discover what a particular constitution means and then normatively assess whether its meaning is “good enough” to provide legitimacy.<sup>35</sup> If it is not, then the text can be ignored. If it is, then it should be obeyed. But if an observer concludes that it is not good enough, then he or she should not claim to be following it. Such an observer should freely admit that the written constitution being critiqued does not merit obedience, as the radical abolitionists did when they characterized the Constitution of the United States as a “covenant with death and an agreement with hell,”<sup>36</sup> or as Lysander Spooner did when he later declared it “The Constitution of No Authority.”<sup>37</sup>

What stops critics or judges who really do not like what the original Constitution says—even as amended—from openly rejecting it? Perhaps they hesitate because the Constitution is so revered by the population. Moreover, if they discard all pretext of following the pre-existing Constitution, they would then bear the burden of explaining why people should follow their own alternative constitution, whatever it might be. The prospect of admitting that the Constitution of the United States is illegitimate does not frighten me, but it apparently frightens those who would ignore or reject its terms while still claim-

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<sup>34</sup> For an elaboration of the argument summarized in this paragraph, see *id.* at 100–09.

<sup>35</sup> For further discussion of this point, see *id.* at 110–13.

<sup>36</sup> William Lloyd Garrison, Resolution of the Massachusetts Antislavery Society, adopted on Jan. 27, 1843 (“[T]he compact which exists between the North and the South is a covenant with death and an agreement with hell.”), reprinted in *THE UNITED STATES CONSTITUTION: 200 YEARS OF ANTI-FEDERALIST, ABOLITIONIST, FEMINIST, MUCKRAKING, PROGRESSIVE, AND ESPECIALLY SOCIALIST CRITICISM* 96 (Bertell Ollman & Jonathan Birnbaum eds., 1990).

<sup>37</sup> See Lysander Spooner, *No Treason, No. VI: The Constitution of No Authority* (1870), in *1 THE COLLECTED WORKS OF LYSANDER SPOONER* (Charles Shively ed., 1971).

ing that it is “The Constitution” they are expounding. I merely maintain that they cannot have the Constitution and eat it too.

While acknowledging my insistence that the Constitution is not a contract,<sup>38</sup> I think Professor Morrison underestimates what contract law theory can tell us about constitutional interpretation. He observes: “That poetry is written, for example, does not mean that constitutional interpretation should employ the literary analysis needed to unpack the work of William Blake.”<sup>39</sup> True enough. But this only raises the question of what role writings play in constitutions versus contracts versus poetry.

Like written contracts, the Constitution was put in writing to “lock in” a certain meaning as a means of protecting the rights of the people.<sup>40</sup> In this way, it serves many of the same functions of formality that Lon Fuller identified as attaching to written contracts.<sup>41</sup> If the Constitution lacked an original objective meaning, then to what exactly were the ratification conventions agreeing? If that original meaning could afterwards be changed at the will of those whom it was put in writing to bind, what was the point of putting the Constitution in writing? What is the point of keeping the writing around at all? And despite the differences between interpreting constitutions and poetry, how would Professor Morrison feel about my publishing a collection of Blake’s poetry under Blake’s name while changing the poet’s words to something I think is better without even acknowledging the bowdlerization?

True, there are other ways of interpreting writings besides the “original meaning” approach of contract law. But will they serve—rather than undermine—this “lock in” function of the writing? Will they effectively limit the powers of those tasked with enacting statutes and those charged with interpreting and enforcing both statutes and the Constitution itself?<sup>42</sup> These are the questions that must be seriously addressed by those who treat the Constitution as literature to reach whatever “happy ending” they happen to desire.<sup>43</sup> Those who

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<sup>38</sup> Morrison, *supra* note 2, at 849 (“[Professor Barnett is] quick to disavow any claim that the Constitution is itself a contract in any literal sense . . .”).

<sup>39</sup> *Id.*

<sup>40</sup> For a discussion of the importance of the “lock-in” function, see BARNETT, RESTORING, *supra* note 1, at 103–09.

<sup>41</sup> See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941) (discussing the evidentiary, cautionary, and channeling functions of formality).

<sup>42</sup> Because constitutions and statutes are put in writing for different purposes, I would not assume that the same methods of interpretation should be used for both. For this reason, Professor Morrison’s use of Kevin Stack’s writings on the divergence of constitutional and statutory interpretation, Morrison, *supra* note 2, at 849, is inapposite. In *Restoring the Lost Constitution*, I say nothing about how statutes should be interpreted, and I have no strong views on the matter.

<sup>43</sup> See, e.g., Sanford Levinson, *Bush v. Gore and the French Revolution: A Tentative List of Some Early Lessons*, 65 LAW & CONTEMP. PROBS., Summer 2002, at 11 (“Almost all constitu-

respond to originalism by alluding to other methods of interpreting writings that constrain the interpreter fail to respond to this basic argument: If the purpose of putting commitments in writing is to *preserve* a certain meaning until it is properly changed, then mere constraint is not enough if the meaning is allowed to change by means of “interpretation.”

Having said this, I also devote a chapter in *Restoring the Lost Constitution* to the reasons why originalist interpretation of the text alone cannot resolve many constitutional controversies.<sup>44</sup> Because of the vagueness of language, original meaning must be supplemented by constitutional construction that is not inconsistent with that meaning.<sup>45</sup> This necessarily compels subsequent decision makers to make important choices of their own. The need for future choices is a consequence of locking into a writing an abstract or general meaning that is not automatically applicable to all cases or controversies. It is a consequence that enables a single writing to survive the changes in circumstances that would render a more particular and concrete constitution archaic in short order.

After accurately describing my use of the distinction between interpretation and construction, Professor Morrison correctly observes: “The critical point here is that, despite an aggressive defense of a fairly strict version of originalism, Professor Barnett ultimately agrees that much of the work of implementing the Constitution is necessarily a rather open-ended affair.”<sup>46</sup> Later when criticizing my reliance on the private law of contract, property, and torts to distinguish rightful from wrongful behavior, Professor Morrison offers this complaint: “But if looking beyond the text includes constant adjustment of constitutional meaning with reference to changes in the common law, then this is an originalism that only a ‘living constitutionalist’ could love.”<sup>47</sup>

The subtitle of the chapter in which I defend original public meaning originalism is “An Originalism for Nonoriginalists,”<sup>48</sup> the same title of the law review article in which I first defended this version of originalism as distinguished from a version based on original

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tional analysts, as a matter of brute fact, seem committed to a de facto theory of ‘happy endings,’ whereby one’s skills as a rhetorical manipulator . . . are devoted to achieving satisfying results.” (footnote omitted); see also BARNETT, RESTORING, *supra* note 1, at 348–53 (admitting some unhappy endings entailed by my approach).

<sup>44</sup> For an elaboration of the argument summarized in this paragraph, see BARNETT, RESTORING, *supra* note 1, at 118–30.

<sup>45</sup> When more than one construction is consistent with the text, we should favor the one that enhances the legitimacy of the Constitution. See BARNETT, RESTORING, *supra* note 1, at 118–30.

<sup>46</sup> Morrison, *supra* note 2, at 856.

<sup>47</sup> *Id.* at 864.

<sup>48</sup> BARNETT, RESTORING, *supra* note 1, at 89–117.

intent.<sup>49</sup> One would think that the degree of choice my originalist approach still leaves in the hands of future decision makers would be deemed by a nonoriginalist to be a mark in its favor rather than condemned as an internal inconsistency. On the other hand, my approach is not, in the end, completely open-ended. If my version of originalism and constitutional construction were accepted, the enumerated powers scheme would mean something it does not today, as would the Necessary and Proper Clause, the Ninth Amendment, and the Fourteenth Amendment's Privileges or Immunities Clause. Many of those who disagree with my approach do so because, however underdeterminate<sup>50</sup> original meaning originalism may be, it *does* convey a meaning of the text that would lead to legal results they find objectionable.

### III

#### THE PRESUMPTION OF LIBERTY

In *Restoring the Lost Constitution*, I contend that a constitutional "Presumption of Liberty" is a superior construction to either a blanket "presumption of constitutionality" or the post-New Deal Footnote Four-Plus approach (which presumes constitutionality unless rebutted by selected enumerated rights or certain judicially-favored unenumerated liberties). Professor Morrison's principal criticism of this construction has already been discussed: The proposal flows from my "libertarian ideology," so it can safely be dismissed by readers who do not share that ideology. We have seen how the actual claim I make is much more complex, and I think more difficult to contest, than this characterization would suggest.

Professor Morrison passes over my analysis of the enumerated powers scheme as a means of putting the Presumption of Liberty into effect and chooses to train his fire instead on my treatment of the so-called "police power" of states.<sup>51</sup> The police power, of course, is nowhere mentioned in either the original Constitution or in the Fourteenth Amendment. By my analysis, this makes it a constitutional construction, rather than a matter of straight-forward interpretation of the text. Nevertheless, whatever the substance of this constructed power, it must be compatible with the original meaning of the Fourteenth Amendment.

In other words, we cannot determine the exact contours of the police power by means of originalist interpretation, except that it

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<sup>49</sup> See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOYOLA L. REV. 611 (1999).

<sup>50</sup> See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (distinguishing "indeterminacy" from "underdeterminacy").

<sup>51</sup> See Morrison, *supra* note 2, at 861-66.

must be consistent with protecting the privileges or immunities of citizens, as well as the Due Process and Equal Protection Clauses. As mentioned in my chapter on constitutional construction, I contend that, from among those constructions that are consistent with original meaning, we should choose those that enhance rather than detract from constitutional legitimacy.<sup>52</sup> To this end, I defend a conception of the police power according to which state governments possess the power to impose laws on the nonconsenting citizenry when such laws are necessary to protect the rights of others without improperly violating the rights on whom they are imposed.<sup>53</sup> This view of the police power is not original to me. Thomas Cooley identified and explained it in his treatise on the police power that was published the year the Fourteenth Amendment was ratified,<sup>54</sup> and it was further defended and refined by Christopher Tiedeman.<sup>55</sup>

Professor Morrison argues that this conception of the police power looks less and less like “an effort to *restore* the ‘lost Constitution,’ and more and more . . . [like] an attempt to *create* a Constitution [Professor Barnett] finds ideologically appealing.”<sup>56</sup> Apart from again using that loaded term “ideology,” this seems an effort to make virtue look like vice. Where the Constitution does not speak clearly, I contend—as Professor Morrison acknowledges—that we must move beyond originalist interpretation and into the realm of constitutional construction. Of course this is an act of “creation.” Furthermore, I maintain that this act of creation must not only be consistent with the original meaning of the text, it should also enhance the legitimacy of the Constitution.<sup>57</sup>

<sup>52</sup> See BARNETT, RESTORING, *supra* note 1, at 118–30.

<sup>53</sup> See *id.* at 333–34.

<sup>54</sup> See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868).

<sup>55</sup> See CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (1886); see also BARNETT, RESTORING, *supra* note 1, at 323–31 (discussing the views of Cooley and Tiedeman).

<sup>56</sup> Morrison, *supra* note 2, at 862.

<sup>57</sup> After reading a draft of this reply, Professor Morrison added a discussion of Cooley and Tiedeman’s disagreements on the scope of the police power, differences which, as he notes, I discuss in the book. From this he concludes that “it seems clear that, as an historical matter, the late nineteenth century understanding of the police power was hardly uniform.” *Id.* at 862. No doubt. I was neither asserting a broad consensus on the scope of the unwritten police power of states, nor basing my views of the police power on original meaning. Being nowhere written in the text, the police power is a constitutional construction rather than an interpretation, and I argue in the book that, from among those constitutional constructions that are consistent with the original meaning of the text, we should adopt the construction that enhances constitutional legitimacy. Any disagreement between Cooley and Tiedeman does not go to this determination. The existence of a clear consensus about the scope of the police power at the time the Fourteenth Amendment was enacted might well be germane to the original meaning of the Privileges or Immunities Clause in ways too complex to elaborate here. However, if there was no uniform view of the scope of the police power of states, as Professor Morrison suggests, then this under-

My approach to the police power is, therefore, no more or less ideological than anyone who asserts how the Constitution *ought* to be interpreted, as contrasted with someone making, for example, a purely historical argument or describing Supreme Court doctrine. I do, however, go to some lengths to show how this conception of the police power is more consistent with the original meaning of the Privileges or Immunities Clause than the more deferential approach preferred by others for equally “ideological” reasons.<sup>58</sup> To this extent, originalism has bite even here where the Constitution does not speak directly. The meaning it does provide, not its allegedly open-ended nature, is why some nonoriginalists would reject rather than embrace the original meaning of the Privileges or Immunities Clause.

Professor Morrison contests the practicality of a conception of the police power by which the states may prohibit wrongful acts but may only regulate rightful acts by questioning whether “prohibition and regulation [are] really so distinct”?<sup>59</sup> With every conceptual distinction, however, there will always be problems of distinguishing one side of an otherwise clear conceptual line from the other. In practice, this necessitates the creation of legal doctrines by which to identify the line, however imprecisely. Although it may well be that a particular conceptual distinction—whether it be clear or fuzzy at the margins—is not worth making, this would be a different argument.

I can assure Professor Morrison that those who wish to use medical cannabis to alleviate their pain and suffering or to enable them to withstand the side-effects of chemotherapy can tell the difference between a prohibition and a reasonable regulation of that activity. And for these citizens, the distinction between regulation and prohibition is well worth making. Even Congress can tell the difference. Under the Controlled Substances Act, Schedule 1 controlled substances like marijuana are prohibited entirely whereas Schedule 2 substances like cocaine and methamphetamines are only regulated.<sup>60</sup> Were cannabis available by prescription as part of a scheme of regulation, rather than prohibited, it would make all the difference to those who have undertaken extensive and largely successful political action to legally obtain cannabis pursuant to state regulations.<sup>61</sup> Under the

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mines the claim that the original meaning of “abridge the privileges or immunities” was shaped or limited by background assumptions about the nontextual police power. Although regrettably I do not fully address this issue in the book, it is a serious matter requiring additional evidence and analysis.

<sup>58</sup> BARNETT, RESTORING, *supra* note 1, at 319–34.

<sup>59</sup> Morrison, *supra* note 2, at 866.

<sup>60</sup> See 21 U.S.C. §§ 801–904 (2000).

<sup>61</sup> Ten states have enacted laws allowing medical use of cannabis. See ALASKA STAT. §§ 11.71.090, 17.37.010–.070 (Michie 2004); CAL. HEALTH & SAFETY CODE § 11362.5 (West 2004); COLO. CONST. art. 18, § 14; HAW. REV. STAT. ANN. § 329-121–128 (2004) (Michie 2004); ME. REV. STAT. ANN. tit. 22, § 2383-B (West 2004); NEV. REV. STAT. ANN.

Lockean view of the police power I advance, unless the patients can be accurately characterized as wrongfully violating the equal rights of others, their activities are rightful and can only be regulated, not prohibited.

Professor Morrison sees many difficulties with distinguishing rightful from wrongful behavior by reference to the background private law doctrines of contract, property, and tort. In my treatment, however, this distinction is used only to distinguish conduct that may properly be regulated by state governments from conduct that states may also prohibit altogether. On my account, even rightful acts can be the subject of necessary regulation. But only wrongful acts may justly be prohibited. This is a fairly modest claim, though drawing this line is essential to keeping the force exerted by state governments within its proper scope.<sup>62</sup>

These days, most prohibitory laws punish conduct that is not even arguably wrongful in the sense that the banned conduct violates the rights of others. The cultivation and use of medical cannabis is a good example. Indeed, many would object to the construction of the police power I defend precisely because it would permit only the reasonable regulation rather than the prohibition of conduct that, while “immoral,” is not wrongful in the relevant sense. But this is a substantive objection that admits the distinction itself is clear enough to apply in a host of important cases, including a case involving consensual sex between adults of the same gender. This brings us to the case of *Lawrence v. Texas*.<sup>63</sup>

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§ 453A.200–.250 (Michie 2004); OR. REV. STAT. §§ 475.300–.346 (2004); VT. STAT. ANN. tit. 18, § 4472–4474d (2004); WASH. REV. CODE ANN. §§ 69.51A.005–.070 (West 2004); Montana Initiative No. 148, at <http://www.dphhs.mt.gov/medicalmarijuana/i148text.pdf> (last visited Feb. 2, 2005). In all but Hawaii and Vermont, these laws were enacted by popular initiative or referendum.

<sup>62</sup> After reading this reply, Professor Morrison also added a paragraph concerning the legislative alteration of common law rights. He asks: “Why should legislatures be prohibited from doing by statute what judges may do by decision?” Morrison, *supra* note 2, at 865–66. In *Restoring the Lost Constitution*, however, I allow that “legislative alteration of common law rights is permissible,” BARNETT, RESTORING, *supra* note 1, at 263–64, though I admit that this “complicate[s] the story a bit,” *id.* at 264. I invoke “state common law processes” merely to distinguish rightful from wrongful conduct, so as to know whether an act may be prohibited if it is wrongful or only regulated if it is rightful. My principal point was that federal courts need not engage in philosophical inquiry to distinguish rightful from wrongful conduct. In making this distinction, they may look to the positive law of states, which remains primarily but not exclusively the province of common law judges. See *id.* at 264–65.

<sup>63</sup> 539 U.S. 558 (2003).

## IV

## LAWRENCE V. TEXAS

Because the *Lawrence* case was decided while the book was in galley, I could only add mention of it where white space existed on the page proofs. In critiquing my lengthier treatment of *Lawrence* offered elsewhere,<sup>64</sup> Professor Morrison relies on Laurence Tribe's recent analysis of the case<sup>65</sup> and on Dale Carpenter's criticism of my reading of *Lawrence*.<sup>66</sup> In his article, Professor Tribe contends that *Lawrence* is best viewed as protecting equality rather than liberty, or more precisely, "equality-reinforcing liberty."<sup>67</sup> Professor Carpenter, in contrast, considers *Lawrence* to be a straight-forward privacy case.

I reply to Professor Carpenter's critique elsewhere,<sup>68</sup> and this is not the place to analyze Tribe's complex and provocative analysis. Suffice it to say that it requires all his considerable ingenuity to transform a due process decision in which "liberty" is protected into an equality decision—especially in light of Justice O'Connor's lone concurrence rejecting the Due Process Clause rationale entirely in favor of an Equal Protection Clause theory not embraced by any other Justice!<sup>69</sup>

Nor do I dismiss as lightly as Professor Morrison does the Court's complete refusal to engage in the sort of "fundamental rights" analysis employed in every other substantive due process case since *Griswold v. Connecticut*.<sup>70</sup> Much more is absent from Justice Kennedy's opinion than "certain magic words."<sup>71</sup> Missing as well is the use of the well-established judicial doctrines by which the Court in the past has distinguished fundamental rights from mere liberty interests. Surely these doctrines did not slip the mind of the majority. If so, the draft of Justice Scalia's dissent would have served as a reminder.<sup>72</sup>

Had a student in Professor Morrison's Constitutional Law class submitted Justice Kennedy's opinion as an answer to an exam question using the facts of *Lawrence*, I doubt that Professor Morrison would

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<sup>64</sup> See Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas, 2002–2003 CATO SUP. CT. REV.* 21.

<sup>65</sup> See Morrison, *supra* note 2, at 867–68 (discussing Laurence H. Tribe, Essay, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004)).

<sup>66</sup> Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140 (2004).

<sup>67</sup> Morrison, *supra* note 2, at 869.

<sup>68</sup> See Randy E. Barnett, *Grading Justice Kennedy: A Reply to Professor Carpenter*, 89 MINN. L. REV. (forthcoming May 2005).

<sup>69</sup> See *Lawrence v. Texas*, 539 U.S. 558, 579–85 (2003) (O'Connor, J., concurring in the judgment).

<sup>70</sup> 381 U.S. 479 (1965).

<sup>71</sup> Morrison, *supra* note 2, at 868.

<sup>72</sup> See *Lawrence*, 539 U.S. at 586–605 (Scalia, J., dissenting).

have given the student an A.<sup>73</sup> For he or she would have failed to demonstrate mastery of the doctrines I am sure Professor Morrison taught before *Lawrence*. That Justice Kennedy eschewed the fundamental rights analysis, together with his repeated emphasis on liberty, as opposed to a right of privacy, strongly suggests that *Lawrence* represents a departure from previous decisions.

In the end, however, my descriptive claims about *Lawrence* are quite modest. It is undeniable that, having found the activity in question to be “liberty,” the Court shifted the burden to the state to justify its prohibition without first finding the particular liberty at issue to be fundamental.<sup>74</sup> The Court then held that the State of Texas had failed to meet its burden.<sup>75</sup> Perhaps this really is the equality-based decision that law professors had been rooting for before it was delivered, but it looks like a liberty-based decision to me. While the protection of any liberty including this one can be “equality reinforcing,” I find little textual support in the opinion for holding this liberty to be protected solely for this reason. Perhaps this is a garden variety right of privacy case, as suggested by Professor Carpenter. But one wonders why, if it was so easily done, Justice Kennedy refrained from utilizing explicitly the tools of the fundamental rights trade.

But suppose either Professor Tribe or Professor Carpenter are correct about the “true” meaning of *Lawrence*. No matter. Regardless of why the opinion was written as it was, it still looks like the Court does what I would want it to do: apply a Presumption of Liberty. In my article on *Lawrence*, I made no prediction that the Court would adopt an across-the-board Presumption of Liberty in future cases. To the contrary, I wrote that cabining “this case to the protection of ‘personal’ liberties of an intimate nature” is “a fair prediction [of] what the Court will attempt.”<sup>76</sup> Still, I believe that even libertarian observers are entitled to take what the Court says at face value and imagine the good uses to which its language and reasoning could be put if the Court happens to decide to pursue this line of reasoning in the future. And whatever it may hold for the future, *Lawrence* provides an illustration of how a Presumption of Liberty can be used in a legitimacy-enhancing manner in a concrete case. I consider this to be a mark in favor of its recognition.

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<sup>73</sup> For an elaboration of the reasons why I give Justice Kennedy an A for what a student would receive a B, see Barnett, *supra* note 68.

<sup>74</sup> See *Lawrence*, 539 U.S. at 578.

<sup>75</sup> *Id.* (“The Texas statute furthers no legitimate interest which can justify its intrusion into the personal and private life of the individual.”).

<sup>76</sup> Barnett, *supra* note 64, at 41.

## CONCLUSION

Professor Morrison has paid me the honor of a respectful and thoughtful treatment of my book. An author can ask for little more. In his review, he clearly articulated what is likely to be the reaction of many professors of constitutional law to *Restoring the Lost Constitution*. No one ever entirely wins these sorts of debates about fundamentals. The best an author can reasonably hope for is to persuade the uncommitted while inducing his intellectual opponents to respond with new and improved defenses of their positions. I hope that this exchange between Professor Morrison and me will encourage readers to examine the book for themselves with an eye towards honing their own assumptions and theories about both constitutional legitimacy and constitutional method.