

ME THE PEOPLE

OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE. By Randy E. Barnett.¹ New York: HarperCollins Publishers. 2016. Pp. xiv + 283. \$26.99 (cloth).

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INTRODUCTION

Randy Barnett begins *Our Republican Constitution*³ with a story of “triumph and tragedy”⁴ in the Supreme Court case of *NFIB v. Sebelius*.⁵ The triumph: five justices agreed that the minimum essential coverage provision of the Affordable Care Act exceeded Congress’s powers under the Commerce Clause; thus, however broadly Congress might regulate interstate commerce, it cannot impose economic mandates.⁶ The tragedy: five also agreed that Congress’s taxing power supported the statutory provision. “Although we had saved the enumerated powers scheme of the Constitution for the country,” Barnett concludes, “we had lost our fight to save the country from Obamacare” (p. 14).

The account reveals a good deal about the potential of and limits to Barnett’s project. In a nutshell, Barnett views courts as simultaneously dangerous to and essential for “securing the liberty and sovereignty of we the people.” On the one hand, Barnett complains, judicial decisions produced the consolidation

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3. RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016).

4. See ch. 1.

5. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012) (upholding minimum essential coverage provisions of Affordable Care Act as proper exercise of Congress’s taxing powers).

6. P. 11 (“This was huge.”).

of governmental power and the truncated rights that Barnett laments. On the other hand, fixing the problem requires highly motivated judges to keep power in check and promote rights. These two impulses are in tension and, at least without additional work on both the diagnostic and remedial sides, appear incompatible. The root of the tension is Barnett's failure to perceive the limits to judicial recognition of constitutional rights when judicial power itself is consolidated. Thus, in celebrating state authority to adopt different regulatory programs and the benefits of citizen foot-voting in response, Barnett writes that such "experimentation is impossible at the national level when adopting a one-size-fits-all regulatory scheme" (p. 176). Yet Barnett does not extend the same analysis to the courts, where a one-size-fits-all judicial scheme is equally problematic for Barnett's constitutional vision. Consolidated judicial power—where ultimate authority rests in the Supreme Court of the United States—does not serve well to generate expansive rights for "We the People."⁷ It is even less suited to Barnett's own individualistic version of rights—a sort of "Me the People"—in which *each* of us is sovereign and courts exist to vindicate our personal liberties.⁸

Part I of this essay briefly describes Barnett's account of constitutional structure, individual rights and the role of courts. Part II sets out why consolidation of judicial power stands as an impediment to the version of government authority and individual rights Barnett advocates. Part III discusses aspects of the jurisprudential approaches of Justices John Paul Stevens and Sonia Sotomayor that, perhaps surprisingly, point to a role for courts that would better promote experimentation and protect more securely individual rights along the lines Barnett advocates. The conclusion extends the analysis to suggest some broader lessons about Barnett's work and the structure of courts—and the implications for Our Constitution.

I. STRUCTURE, RIGHTS, COURTS

In Barnett's description, the Constitution of the United States is "primarily a structure that was intended to protect the

7. U.S. CONST. pmbi.

8. *See, e.g.*, pp. 22–23 (describing how sovereignty resides in "We the People" not as a collective entity but a set of individuals and stating that the role of government representatives is not to carry out the will of the majority but to "secure the preexisting rights of We the People, each and every one of us").

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individual sovereignty of the people” and “[o]nly secondarily, and incompletely, does it protect any particular individual rights retained by the people” (pp. 167-168). Barnett contends that federalism ensures that most laws that affect liberties will be made at the state level where individuals are empowered by foot-voting such that “subnational competition” with respect to economic and social policies “imposes a salutary constraint on state governments by threatening an exodus of dissenting citizens to other states.” (pp. 173, 177, 179). Separation of powers also serves to “secure the sovereignty of the people” by keeping the executive branch in check (though legislators tend to shift power and responsibility to the executive and so the checking role is not necessarily robust) (pp. 204-205).

For Barnett, structural constraints depend upon on courts policing the contours of power; the whole scheme collapses if courts abandon this key role. Most importantly, federalism only works to protect liberties if courts “hold Congress to its enumerated powers” (p. 188). Alas, in the modern age “judicial abdication” has undermined federalism constraints and the result is a runaway national government whose excesses undermine individual liberty. Barnett reports that, notwithstanding some isolated bright spots and the “partial revival” of federalism under the Rehnquist Court, from the time of the New Deal the courts have mostly given Congress “free rein to regulate or prohibit every economic activity in the country” (pp. 189-202). The cost has been an erosion of state autonomy. Courts have also failed to halt the growth of executive power as evidenced by the rise of the legislature-enabled modern administrative state, a development with “dangerous” consequences for the sovereignty and rights of the people (pp. 204-205).

As for constitutional rights, Barnett says they are merely emergency “lifeboats” for when “the constitutional structure proves inadequate” (p. 168). In the post-New Deal era, however, the courts, responsible for launching the lifeboats and saving us from the sinking structure, have also failed to perform their rights-protecting role. In deferring to federal and state power, courts have wrongly “honor[ed] the will of the people, as expressed by a majority of a handful of ‘legislators,’” rather than doing what they should be doing: “securing the rights of the people, each and every one” (pp. 126-127, emphasis omitted). Wrong-headed theories of

Thayerian deference⁹ and of counter-majoritarian difficulties¹⁰ have left courts frozen, unable to “protect . . . rights from being unreasonably restricted by the majority” (p. 162). As with federalism, though, it isn’t all doom and gloom. On occasion, courts have risen to the task of safeguarding liberties from the “majoritarian difficulty” of popular will. *Brown v. Board of Education*,¹¹ for example, represents “a redemption of the Republican Constitution” in Barnett’s view (p. 160).

Barnett offers a series of solutions for restoring his Republican Constitution. Most of his stock is placed in “an impartial judiciary” (the subject of the book’s final chapter). Courts, Barnett says, will play “a vital role” on the remedial side. By courts, Barnett means the federal courts¹² and in particular the U.S. Supreme Court.¹³ At the outset, only courts can protect structure. “Obtaining the benefits of federalism requires federal courts to develop doctrines that identify the outer limits of Congress’ enumerated powers” (p. 224). Likewise, “the Court must overcome its reluctance to enforce the separation of powers within the federal government—a reticence that has undermined the rights of the sovereign people by allowing the rise of an executive-administrative state with the prerogative powers of a sovereign king” (p. 257). While in the bleak alternative world of the “Democratic Constitution” courts defer to popular majorities and exercise judicial review with restraint, the Republican Constitution has “a completely different picture of judges” (p. 24). Judges themselves are the “servants of the people” with the “primary duty” of keeping government power in check so as to protect individual rights. And rights are “best protected” by “judicially enforcing the structural constraints on federal power, including the separation of powers and the limits on the powers of Congress” (pp. 111-112). When courts step up, the republic is saved.

9. *Id.* at 128; see James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

10. P. 162; see ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2nd ed. 1986).

11. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (holding racial segregation in public schools unconstitutional under the Equal Protection Clause).

12. P. 224 (“Obtaining the benefits of federalism requires federal courts to develop doctrines that identify the outer limits of Congress’s enumerated powers.”).

13. See, e.g., *id.* at 257 (“Every justice appointed to the Supreme Court must publicly commit to the principle that judges have no power to amend or modify the Constitution of the United States by ‘interpretation.’”).

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While structure, reinforced by judicial decisions, offers the best safeguard for rights, Barnett recognizes that structural safeguards might themselves fail: when they do, down we shinnny to the lifeboats. But these are no ordinary lifeboats whose passengers huddle until rescue arrives. Instead, courts play an aggressive role in protecting rights directly. With respect to that aspect of the republican constitution, Barnett wastes no time on the humdrums of “freedom of speech,”¹⁴ “unreasonable searches and seizures,”¹⁵ or “cruel and unusual punishments.”¹⁶ Instead, courts exist to evaluate *all* laws—federal, state, local—for compliance with due process. Barnett thus trumpets the approach of (certain) pre-New Deal Justices who “viewed the Due Process Clause[s] as providing a *procedure* by which a person . . . may challenge a[ny] law as outside the ‘just powers’ of Congress or state legislators to enact” (p. 227). As such, he says, “before a sovereign individual can justly be deprived of his or her ‘life’ (by capital punishment), ‘liberty’ (by imprisonment), or ‘property’ (by penalty or fine), the ‘due *process* of law’ requires a judicial evaluation of whether a statute is within the power of Congress or state legislatures to enact” (p. 227). In particular, courts keep a check on “irrational and arbitrary laws,” which, in Barnett’s view, are not really laws at all and thus invalid. He explains that “[a]lthough the sovereign people can consent to be governed, when their consent is not expressed but implied they cannot be presumed or supposed to have consented to a regime in which a legislature can act irrationally or arbitrarily” (p. 228). Thus “the *process* of applying a law to a particular person includes a fair opportunity to contest whether a statute (or administrative regulation) is within the ‘proper’ or ‘just power’ of a legislature to enact and therefore carries the obligation of a law” (p. 228, emphasis omitted). Because “an irrational or arbitrary statute is not within the just powers of a republican legislature,” courts must strike it down (p. 228).

Here, though, some chickens come home to roost. Barnett complains about consolidated federal power: congressional power displacing state power; federal executive power displacing legislative power. But the consolidation account can easily be extended also to the third branch. And recognizing the

14. U.S. CONT. amend. I.

15. *Id.* amend. IV.

16. *Id.* amend. VIII.

consolidation of *judicial* power casts serious doubt on the potential of the Supreme Court to play the vigorous rights-enforcing role Barnett imagines. The next Part takes up that problem.

II. CONSOLIDATION OF JUDICIAL POWER

Like most of us, Barnett takes for granted that in our constitutional system there is necessarily a single court at the top that is supreme and every other court has to fall in line with its decisions on questions of federal law, including the scope of federal constitutional rights. The arrangement might easily seem obvious and desirable: it means that federal constitutional law is uniform around the country, that you don't have more federal rights because you live in Massachusetts rather than in Alabama, or that constitutional protections expand and compress on interstate road trips.

However, this sort of complete power at the top of a judicial pyramid is actually a relatively recent development. Only in the twentieth century did the Supreme Court acquire *statutory* power that allowed it to have ultimate constitutional authority in the modern sense—to produce the kind of uniformity that we today take for granted. Before the extension of statutory authority in the twentieth century, indeed beginning with the 1789 Judiciary Act, the Supreme Court did not play that sort of role. Under the 1789 Act, the Supreme Court lacked power to review state court decisions holding that state government had violated the federal Constitution: the Supreme Court could only review state court decisions that rejected a federal constitutional claim against state government.¹⁷ As a result, state court decisions that went further than would the Supreme Court in recognizing federal constitutional rights against state government were immune from review. Consistency around the country wasn't seen as a particularly important virtue and the jurisdictional limits on Supreme Court review allowed the state courts to ratchet up federal constitutional rights when they reviewed claims against state government.¹⁸ Only in 1914 did Congress authorize the

17. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–81.

18. See Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1 (2007) (describing early state court applications of the provisions of the Bill of Rights against state government).

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Supreme Court to review state court decisions upholding federal constitutional claims against state government—thus providing for a checking function in both directions.¹⁹ Today’s system in which the Supreme Court has complete authority on the meaning of the federal Constitution and the power to correct any contrary decisions of the state courts (as well as the lower federal courts) is a change from historical practices.

A. CONSOLIDATION AND INDIVIDUAL SOVEREIGNTY

For Barnett’s project, the consolidation of judicial power presents a problem. There are costs in consolidating authority at the top and deeming that at the local level courts may not do something different, do something that is not authorized by the Supreme Court. Lodging authority over the meaning of federal constitutional rights in a single court that sits in Washington, D.C., has a significant curtailing effect upon the scope of judicially-recognized rights. In settling constitutional rights for the entire nation, the Supreme Court proceeds with caution. The Court is rarely ahead of political change and within the range of results they find satisfactory, Justices across the spectrum tend to opt for narrow rather than broad outcomes. The Justices understand that they are setting rules for a diverse nation, that those rules impose costs on state and local government, and that it is normally better to postpone deciding more than is necessary to dispose of the case at hand. Examples are everywhere. Here is one: the Court has held, in *Gideon v. Wainwright*, that in serious criminal cases the Sixth Amendment requires that the state provide an indigent defendant with a lawyer.²⁰ However, that right is quite modest: there is no guarantee that the state-supplied lawyer be particularly good and few defendants succeed in making out a case that in practice the quality of counsel rendered the right ineffective.²¹

19. Act of Dec. 23, 1914, Pub. L. No. 224, 38 Stat. 790.

20. *Gideon v. Wainwright*, 372 U.S. 335, 346 (1963).

21. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that in order to demonstrate counsel was constitutionally defective a convicted defendant must demonstrate (1) that “counsel’s performance was deficient . . . [by] showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment” and (2) that “the deficient performance prejudiced the defense . . . by showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable”). See also Erwin Chemerinsky, *Lessons from Gideon*, 122 YALE L. J. 2676, 2685 (2013) (attributing the “failure” of *Gideon* to the Court “impos[ing] an unfunded mandate on state and local governments with the only realistic

Put differently, it is difficult for the Supreme Court to tailor a rights-protecting rule to the worst offender state or locality because other states and localities will also bear whatever enforcement burden results. Even though the Court might be outraged by the practices of a particular police department or the conditions of a particular school district or (to take something Barnett focuses heavily on) state law hurdles to practice a trade,²² the Court must resist the temptation to generate from the particular case a requirement that will have effects everywhere. The Supreme Court, then, responsible for setting rules for the entire system, is predisposed to going small rather than big.

None of this bodes well for Barnett's remedial program. In describing how courts should protect rights, Barnett's Exhibit A is the lower court's opinion in *Lee Optical*,²³ which Barnett deems "a marvelous example of how impartial judges can critically assess whether a statute is truly justified as a health and safety measure" (p. 236). While Barnett thinks that the (lower) court went astray in presuming the constitutionality of the state law regulating the eye care business at issue, the court nonetheless properly demanded "a reasonable relation" between the statute's restrictions on the practices of opticians and the public health "purpose" behind those restrictions. Finding no such relationship (and suggesting the law was actually motivated by economic protectionism) the court, in Barnett's view, appropriately invalidated the statute as "arbitrary" (pp. 236-239). Barnett cheers the court's scrutiny of the means-end fit and its immediate focus on "rationality" rather than taking the usual judicial route of "identifying and defining the precise right being infringed" (p. 240). He explains:

Note that the panel spent no time discussing the origin, scope, or fundamentality of the right at issue, as modern "substantive due process" doctrine requires. Indeed, the court never specifically identified the right in question other than a passing reference to "a long recognized trade" and its characterization

enforcement mechanism being the finding of ineffective assistance of counsel in individual cases" but *Strickland* "make[ing] it very difficult for a convicted individual to obtain relief, even when counsel's performance is quite deficient.").

22. See, e.g., pp. 222–23 (discussing economic liberty).

23. *Williamson v. Lee Optical*, 348 U.S. 483, 490–91 (1955) (reviewing and upholding as rational state regulations governing fitting and selling of prescription eyeglasses, on a challenge brought by opticians).

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of the “skills and business” of the optician as a “valuable property right” (p. 240).

That approach was merited, Barnett says, because “[a]nalyzing the right does none of the work in assessing the rationality of the restriction” (p. 240). In other words—and here we come to the core of Barnett’s envisaged approach—*any* restriction on behavior is ripe for a due process challenge. Further (and consistent with Barnett’s notion of equal rights), the lower court did not “need to identify opticians as a ‘suspect class’ deserving of enhanced protection” because “under the Due Process Clause it was enough that they were ‘persons’” entitled to challenge the law. In sum, there is no need to worry about *who* is asserting a right or *what* the right even is: laws that a court decides are irrational violate due process.

The trouble with all of this (the bravura of the *Lee Optical* panel aside) is that courts are orderly institutions, often rigidly so. Judges like to know the job they are to perform and the rules under which they are to perform it. Barnett’s approach requires courts to venture out on some thin and swaying limbs. In conducting its due process evaluation, Barnett posits that a judge should not even presume legitimate legislative authority because the proper starting point is judicial skepticism towards all laws (pp. 228-229). This is no mere theory of federal enumeration. In Barnett’s approach, skepticism that power even exists extends also to state laws: while the Constitution limits Congress to its enumerated powers, a due process analysis presumes limits on state power: thus there must be “an assessment by an impartial judiciary that a particular statute was indeed a *law* within the powers that a people may be presumed to have delegated to their agents in state legislatures” (p. 230). But that is just the starting point. Even if a court concludes that some restriction on life, liberty, or property is indeed within the “‘just powers’ of a republican government in a free society,” the judge must also decide whether “the restriction . . . is necessary to serve” the lawful purpose (p. 231). An inquiry of that nature roots out laws with improper motives such as favoritism or a desire to stigmatize individuals or whittle away at rights. As courts perform their roving inspections, the burden to establish that a law is actually valid belongs to the government: “Requiring the government to identify its true purpose and then show that the means chosen are actually well suited to advance that purpose helps to smoke out

illicit motives that the government is never presumed by a sovereign people to have authorized” (p. 232). Further, in the course of judicial review, “it is ‘the people’ as individuals who, as sovereign, merit the benefit of the doubt when challenging the acts of their servants or agents” (p. 244).

Barnett argues that the Republican Constitution will be saved if our Supreme Court (which, alas, reversed the lower court decision in *Lee Optical*) aggressively reviews laws and government action for their rationality. Yet once judicial authority to determine the scope of rights is pushed up to the top—to the level of the Supreme Court—the mechanisms of review slow down and seize up. With respect to the sort of claims made in *Lee Optical*, for instance, the Supreme Court is in a poor position to announce, in the name of due process, a right that tracks the claims of the opticians of a particular state and, following a close review of facts and of the arguments offered on both sides, invalidate as irrational the specific state-level regulations at issue—while at the same time saying nothing broader about whether a different state’s laws regulating opticians or other professionals are valid or not. The rare *lower* court untroubled by the broader impact of a ruling and not concerned about being reversed on appeal might be inclined to perform the sort of review Barnett imagines. But once the case moves up to the Supreme Court—or Supreme Court doctrine moves down to limit what the lower court can even do—the stakes change and so does the scope of possible outcomes. In sum, while Barnett complains that “experimentation is impossible at the national level when adopting a one-size-fits-all regulatory scheme,” he fails to acknowledge the impact of one-size rights that result when judicial authority is lodged at the top (p. 176). In Barnett’s vision, “each person [is afforded] the opportunity to contest a deprivation of their life, liberty, or property as irrational or arbitrary” (p. 245). But a consolidated system of judicial authority—in which once a decision is reached it applies everywhere—does not easily facilitate a challenge by and ruling tailored to the single rights-bearing citizen.

B. RIGHTS UNDEFINED

Worse still, Barnett’s whole vision of rights runs headlong into the modern system of consolidated judicial power. While the Supreme Court rules with an eye to the nation as a whole, Barnett

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sees rights in radically individualistic terms. Thus, he says, sovereignty resides in “We the People” not as a collective entity but only in the sense that the “We” comprises a set of individuals. Government representatives, on this account, do not serve to carry out the will of the majority but to “secure the preexisting rights of We the People, each and every one of us” (p. 23). The “people” who retain rights under the Ninth Amendment and to whom powers are reserved in the Tenth are thus actually “individuals, each and every one” (p. 65).

However energizing Barnett’s individualism might at first seem, it quickly gives one pause. How, after all, would we go about identifying and cataloging the liberty interests of 324,682,914 (and counting) Americans?²⁴ Barnett himself seems to recognize the dilemma. Thus instead of *identifying* rights that merit protection, Barnett urges “shifting the question” to whether government power is justly-exercised (p. 255). Accordingly, while modern due process doctrine “empowers judges to selectively identify ‘fundamental rights’ . . . deserving of special protection,” Barnett’s “traditional approach” would “protect[] all rightful exercises of liberty by everyone alike by examining the rationality and arbitrariness of a restriction on liberty” (p. 244). *Everything*, then, is up for challenge by *everyone*. There is no need to settle on a list of protected rights. And if that seems unsatisfactory, rights equality is an alternative approach. In one place, for instance, Barnett says the *only* valid government restriction of rights is to promote more equal rights: “[L]iberties of the individual may be regulated by law. But the proper purpose of such regulation must be limited to the equal protection of the rights of each and every person” (p. 25).

Nonetheless, Barnett also appears to recognize (quite rightly) that judges, orderly creatures, almost certainly will insist on knowing *which* right they are being asked to protect. Barnett’s book thus lurches between a freewheeling due process approach—in which the components of liberty never need specification—and advocacy of more particularized rights.

Thus, on the one hand, while modern due process doctrine stingily “empowers judges to selectively identify ‘fundamental rights’ . . . deserving of special protection,” Barnett says his

24. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock> (last visited Oct. 11, 2016, 10:42 AM EST).

“traditional approach” would “protect[] all rightful exercises of liberty by everyone alike by examining the rationality and arbitrariness of a restriction on liberty” (p. 244). On the other hand, Barnett insists that “[a] Due Process challenge . . . arises only if a government is restricting the life, liberty, or property of an individual” and “when a government action is not depriving a person of any of these, he or she cannot object to that law in court, but must confine such objections to the political process” (pp. 230-231). Yet that approach requires putting some meat on the bone. In so doing, however, Barnett describes “liberty” itself so broadly that any law that prevents or penalizes somebody from doing something seems open to a due process challenge. For example, in Barnett’s account, restrictions on commercial flower arranging, massage therapy, hair braiding, interior design, and embalming the dead all implicate liberty interests (pp. 232-233). Barnett gives just one example of a law *not* subject to liberty-based review by one of his *Me the People*: “the hours the postal service sets for its operation or myriad other regulations of government entities” (p. 231). (And yet, one wonders: why not? Surely there is somebody out there whose ability to arrange flowers, massage the sore, braid hair, design interiors, or embalm the dead requires off-hours access to the post office.)

In other parts of the book, liberty takes on more concrete form. Barnett invokes the “rights . . . retained by the people” in the Ninth Amendment and the “privileges or immunities of citizens” in the Fourteenth Amendments as a useful basis for identifying “just what rights and powers, privileges and immunities are retained by the sovereign people as individuals” (p. 24, omission in original). Barnett also invokes natural rights as a source of specificity: he says “universally accepted at the time of the founding was that each person needs a ‘space’ over which he or she has sole jurisdiction or liberty to act and within which no one else may rightfully enter” and that this space or liberty represented “natural rights” (p. 49, emphasis omitted). Indeed, Barnett reasons that natural rights correspond to the rights retained by the people under the Ninth Amendment. Another effort to pin down protected rights comes with the opening statements of the book that the rights and powers of individuals “closely resemble those enjoyed by sovereign monarchs” (p. 24). Here, Barnett identifies four things that should count: (1) “individual citizens have jurisdiction over their private property”;

(2) “no citizen may interfere with the person and property of any other”; (3) “individual citizens [may] use force in defense of themselves and their possessions”; and (4) “individual citizens [may] freely . . . enter[] into contracts with each other” (pp. 24-25). Besides the fact that the analogy to monarchs seems misplaced—monarchs enjoy absolute power (or at least seek to)—this catalog of four does not actually tell us much about the true scope of rights or the permissible range of government authority. Only (1) and (4), involving property and contract rights, arguably can be asserted against the government. As for (2) and (3), unless Barnett aims to resurrect long-abandoned arguments for positive constitutional rights, these two only become relevant to government action if the government punishes the defense of self and property.

Neither a freewheeling due process approach nor vaguely-articulated rights is likely to spur the kind of aggressive judicial interventions Barnett’s project requires. A judicial system in which ultimately power to adjudicate rights claims is lodged at the top of the pyramid cannot advance with any reliability the individualistic notion of rights Barnett offers. The system is not designed to respond to individual lawsuits grounded in unspecified notions of liberty that are triggered whenever the government restricts behavior. Nor are we likely to see slews of laws invalidated to protect the monarchical interests of individuals.

Even Barnett himself appears to lack confidence in the capacity of the courts to promote his version of republican constitutionalism.²⁵ Indeed, despite the rousing notions of liberty that pervade the book, in places the rights program sounds exceedingly modest. Barnett says, for example, that states and localities actually have tremendous leeway to pursue their own desired economic and social policies: “[S]o long as they remain

25. Barnett seems to recognize that judges (whose past decisions “have crippled our Republican Constitution” and “gutted the enumerated power scheme, the separation of powers, and the textual safeguards for abuse of federal and state legislative power”) are not naturally predisposed to playing the role he would like to assign to them. Thus while we need “an independent, engaged judiciary to ensure that the structural constraints of our Republican Constitution are honored,” and judges who follow originalism, “even a judiciary committed to republican principles is not enough.” Pp. 249, 254, 257. Also essential are steps to stem the past damage done by judges and adopt, through constitutional amendment, a series of new “structural constraints” (Barnett has a list of ten) “that do not require judicial enforcement to operate effectively.” *Id.* at 257.

within the proper scope of their power to protect the rights, health, and safety of the public, fifty states can experiment with different regimes of legal regulation” (p. 175). But that presupposes that the sovereign individuals—empowered to challenge virtually any law—will most of the time lose in court on their liberty claims. If—as in the lower court in *Lee Optical*—litigants can regularly knock out regulations, there won’t be much space for legislative innovation and experimentation. Unless all that Barnett offers is a day in court—the chance to be heard but rarely to succeed—judicial review would undermine the fifty-state legislative experiment.

C. HELLER & MCDONALD

The Supreme Court’s decisions in *District of Columbia v. Heller*²⁶ and *McDonald v. Chicago*²⁷ amply illustrate the challenges of consolidated judicial power for Barnett’s project. While cheered by guns-rights advocates, *Heller* and *McDonald* were exceedingly modest rulings. The Court did indeed recognize that the Second Amendment protects an individual right separate from any participation in the militia. But the Court’s conception of that right was as narrow as it could possibly have been and deemed subject to so many exceptions to leave plenty of room for government regulation.²⁸ The cases served We the People not Me the People: The Court’s narrow conception of the individual right at issue (to possess an operable handgun for self-defense) tracked very closely the views of the majority of the American population on the desirable scope of gun rights. Indeed, *Heller* and *McDonald* have had very little practical impact. They invalidated gun laws that, as measured by the rest of the nation, were extreme outliers: a total ban in the District of Columbia and Chicago respectively. The Court thus brought those jurisdictions in line with the democratic preferences of the country as a whole. We do

26. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (holding that the Second Amendment protects an individual right to possess an operable handgun at home for purposes of self-defense).

27. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (holding that the Second Amendment right recognized in *Heller* applies to the states).

28. See *Heller*, 554 U.S. at 626–27 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”); *id.* at 627 (limiting protected weapons to those “in common use” so as to exclude “dangerous and unusual weapons”).

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not know, of course, how far the Court in the future will extend the right recognized in *Heller* and *McDonald*. But if the five justices in the majority in those cases were seeking to prevent We the People from adopting, through democratic measures, gun regulations, they have thus far failed in a spectacular fashion. Lower federal and state courts have rejected virtually all of the Second Amendment challenges brought since *Heller* and *McDonald*.²⁹ And the exceptions reinforce rather than disrupt the overall pattern. For example, in 2012, in *Moore v. Madigan*,³⁰ a panel of the U.S. Court of Appeals for the Seventh Circuit held that the Second Amendment protects also some right to carry a firearm in public.³¹ Again, though, the Illinois law at issue in that case—a near-total ban—was uniquely an outlier as measured by the rest of the nation.³² The Seventh Circuit panel also stayed its mandate to give the state legislature the opportunity “to craft a new gun law that will impose reasonable limitations, consistent with the public safety and the Second Amendment as interpreted in this opinion, on the carrying of guns in public.”³³ This, too, was hardly a case of preventing democratic bodies from regulating, as shown by the myriad restrictions that the Illinois legislature subsequently imposed when, in order to comply with the circuit court’s judgment, it authorized concealed carrying.³⁴

There is likewise little muscle in Barnett’s invocation of the federalism decision of *United States v. Lopez*³⁵ as serving Second

29. See, e.g., *Hamblen v. United States*, 591 F.3d 471, 474 (6th Cir. 2009) (holding that *Heller* does not extend to machine guns because “the Second Amendment does not protect weapons not typically possessed by law-abiding citizens for lawful purposes”) (internal quotation marks omitted); *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009) (affirming the constitutionality of a federal felon-in-possession statute, 18 U.S.C. § 922(g)), *cert. denied*, 129 S. Ct. 2814 (2009); *United States v. Masciandaro*, 638 F.3d 458, 474-75 (4th Cir. 2011) (rejecting Second Amendment argument and affirming conviction for carrying or possessing a loaded handgun in a motor vehicle within a national park area); *United States v. Yancey*, 621 F.3d 681, 682 (7th Cir. 2010) (per curiam) (holding that 18 U.S.C. § 922(g)(3), which prohibits unlawful drug users from possessing guns, is constitutional); *United States v. Chester*, 628 F.3d 673, 682-83 (4th Cir. 2010) (holding that domestic violence misdemeanants do not have a Second Amendment right to possess a handgun in their homes).

30. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

31. *Id.* at 941-42.

32. See *id.* at 940 (“Remarkably, Illinois is the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home.”).

33. *Id.* at 942.

34. Firearm Concealed Carry Act, 2013 Ill. Legis. Serv. P.A. 98-63 (West) (codified as amended at 430 Ill. Comp. Stat. 66 (2013)).

35. *United States v. Lopez*, 514 U.S. 549 (1995).

Amendment goals. Barnett writes that “by striking down the Gun-Free School Zone Act . . . as beyond the power of Congress to enact, the Court protected the right of the people to keep and bear arms, but did so without having to apply the specific prohibition of the Second Amendment” (p. 200). Any such protection, though, was short lived.³⁶ Congress reenacted the law invalidated in *Lopez* with a jurisdictional hook such that any Second Amendment benefit to *Lopez* evaporated.³⁷

Indeed, the ultimate impact of *Heller* and *McDonald* may be to *enhance* rather than *constrain* democracy. In recognizing an individual Second Amendment right, the Supreme Court provided a framework that could well facilitate future *restrictions* on guns. This is because the slippery slope argument long championed by the NRA—that if the government takes some guns it will take all guns—no longer has any force.³⁸ *Heller* and *McDonald* set limits: limits facilitate as well as constrain legislative and executive action.

D. STATE CONSTITUTIONS AND STATE COURTS

Barnett says surprisingly little about state constitutions and state courts. They deserve some mention in the story. A state court can recognize broader rights under its own state constitution than the Supreme Court is willing to recognize as a matter of federal constitutional law. And because the state’s highest court is authoritative on the meaning of the state constitution, those rulings (so long as they really are just state-law based) are not subject to reversal by the U.S. Supreme Court. State courts, using state law, would thus seem positioned to beef up protections for liberty.

State constitutional law, however, is also a casualty of the modern trend of consolidation of judicial power. Requiring the

36. For an alternative account of *Lopez* and other federalism decisions of the Rehnquist Court, see Jason Mazzone & Carl Emery Woock, *Federalism as Docket Control*, 84 N.C. L. REV. 7 (2015).

37. See 18 U.S.C. § 922(q)(2)(A) (Supp. IV 1998) (prohibiting in a school zone possession of a firearm “that has moved in or that otherwise affects interstate or foreign commerce”).

38. See Akhil Reed Amar, *When Legal Bullets Bounce Back*, N.Y. DAILY NEWS (Dec. 26, 2012, 4:30 AM), <http://www.nydailynews.com/opinion/legal-bullets-bounce-back-article-1.1225737> (“After the rulings, this slippery slope argument no longer works. Precisely because the court has declared total confiscation off limits, there’s no legitimate fear that reasonable regulation will slide into tyrannical confiscation.”).

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state courts to enforce federal constitutional provisions as defined and policed by the Supreme Court has left state constitutional law in the modern era relatively undeveloped. Rather than decide independently what provisions of state constitutions mean, modern state courts have tended to hew to the Supreme Court's (cautious) understandings of analogous provisions in the federal Constitution. While the trend is not entirely in one direction, "systematic studies demonstrate that most state courts, when presented with the opportunity, have chosen not to depart from federal precedents when interpreting the rights-granting provisions of state constitutions."³⁹ As a result, today, "the practice of interpreting state constitutional provisions to have the same meaning as—in lockstep with—parallel provisions of the U.S. Constitution remains the norm."⁴⁰ Reasons for this phenomenon may include that state courts spend so much energy adhering closely to Supreme Court precedent when resolving federal constitutional issues that they have lost capacity for independent analysis that could be brought to state constitutional questions; litigants tend to press claims in terms of federal rather than state rights; judges and their staff members are trained in nationally-oriented law schools that devote little attention to issues of state constitutions; and expansive rights rulings under state constitutions could provoke popular backlash, particularly in states where judges face reelection. Whatever the explanation, the federal floor has to a large degree capped the development of rights at the state level.

III. STRANGE BEDFELLOWS

Good friends often go unrecognized. Rather than mourn the passing of William Rufus Day and Rufus Peckham or hope for a future Supreme Court filled with originalist jurists (pp. 141, 138, 257), Barnett might recognize some significance to his project in the jurisprudence of Justices John Paul Stevens and Sonia Sotomayor. Each has advocated a retreat from the consolidation of judicial power in a way that opens the door—at least a crack—to the liberty goals that Barnett pursues.

39. Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338 (2002).

40. James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L. J. 355, 365 (2016) (internal quotation marks omitted).

A. JUSTICE STEVENS AND STATE COURTS

Justice Stevens long argued that in exercising its power to control its docket the Supreme Court should not review criminal cases in which the only alleged error is that the state court granted the defendant stronger protection under the federal Constitution than the Supreme Court's own precedents required. Stevens first expressed this view in 1983 in *Michigan v. Long*.⁴¹ In *Long*, the Michigan Supreme Court reversed a criminal conviction for marijuana possession, holding that a police search of the passenger compartment of the defendant's vehicle violated the Fourth Amendment.⁴² When the state sought review in the U.S. Supreme Court, the defendant argued against jurisdiction because the state court holding rested on an independent and adequate state law ground (the Michigan Constitution) which, he said, afforded stronger protections from searches and seizures than did the Fourth Amendment itself.⁴³ In her opinion for the Court, Justice O'Connor held that jurisdiction was proper because although the Michigan Supreme Court had referred in two places to the state constitution, it had otherwise "relied exclusively on federal law."⁴⁴ Justice O'Connor held that for the Supreme Court to deny jurisdiction in such circumstances, the state court was required to make clear in its opinion its independent reliance upon state law: absent a plain statement of reliance upon state law, the Court would presume jurisdiction to review the state court decision.⁴⁵ On the merits, O'Connor held that the Michigan court had erred and that the search of the defendant's vehicle was reasonable under the Fourth Amendment.⁴⁶

Writing in dissent in *Long*, Stevens thought several factors combined to counsel against the Court exercising jurisdiction to hear the case: the Court's traditional presumption that when a state court invokes state law it is an independent basis for the state court's decision; respect for state courts; and the scarceness of federal judicial resources.⁴⁷ Justice Stevens reasoned that the Supreme Court should allow "other decisional bodies to have the

41. *Mich. v. Long*, 463 U.S. 1032 (1983).

42. *Id.* at 1035–37.

43. *Id.* at 1037–38.

44. *Id.* at 1037.

45. *Id.* at 1040–41.

46. *Id.* at 1051.

47. *Id.* at 1066–67 (Stevens, J., dissenting).

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last word in legal interpretation until it is truly necessary for th[e] Court to intervene.”⁴⁸ He contended that there was no need even for the Supreme Court to concern itself with “cases in which a state court has upheld a citizen’s assertion of a right . . . under both federal and state law” and a state officer complains that “the state court interpreted federal rights too broadly and ‘overprotected’ the citizen.”⁴⁹ Instead, Stevens urged, when it came to reviewing decisions of state courts, “the primary role of this Court is to make sure that persons who seek to vindicate federal rights have been fairly heard.”⁵⁰ In sum, it was no business of the Supreme Court that a state court had adopted a more expansive view of federal constitutional rights in a criminal case.

On the same day as *Long*, Justice O’Connor also wrote for the Court in *California v. Ramos*.⁵¹ *Ramos* reversed a decision of the California Supreme Court that the Eighth Amendment prohibited instructing a capital sentencing jury that it could take into account the governor’s power to commute a life sentence.⁵² Dissenting, Justice Stevens again argued that review of the state court decision was unwarranted because, while based on the federal Constitution, it had no impact on any other state.⁵³ Stevens complained that “[n]othing more than an interest in facilitating the imposition of the death penalty in California justified this Court’s exercise of its discretion to review the judgment of the California Supreme Court.”⁵⁴ Application of the Eighth Amendment in a way that favored the defendant was, in Stevens’s view, “plainly a matter that is best left to the States.”⁵⁵

Although Justice Stevens’s dissents in *Long* and *Ramos* did not attract a single other vote, he did not forsake the cause. In particular, in three cases decided during the Court’s 2005 term, Stevens again argued that the Supreme Court should stay its hand when all that a state court had done was over-protected a federal right in a criminal case.⁵⁶ For example, *Kansas v. Marsh* involved

48. *Id.* at 1067.

49. *Id.* at 1068.

50. *Id.* (emphasis omitted).

51. *California v. Ramos*, 463 U.S. 992 (1983).

52. *Id.* at 1002–10.

53. *Id.* at 1031 (Stevens, J., dissenting).

54. *Id.*

55. *Id.*

56. *Kansas v. Marsh*, 548 U.S. 163 (2006); *Brigham City v. Stuart*, 547 U.S. 398 (2006); *Washington v. Recuenco*, 548 U.S. 212 (2006).

a defendant convicted in state court of capital murder and sentenced to death.⁵⁷ On appeal, the Kansas Supreme Court held the state's capital sentencing statute—which required the death penalty if the jury found there were aggravating circumstances that were not outweighed by mitigating circumstances, i.e. if aggravating and mitigating circumstances were in equipoise—violated the Eighth Amendment.⁵⁸ Writing for the Court, Justice Thomas first found jurisdiction proper because the state court decision was not based on an adequate and independent state law ground.⁵⁹ On the merits, the Court reversed the state court: it held that the Kansas statute was indistinguishable from the statute the Court previously upheld in *Walton v. Arizona*⁶⁰ and it was also valid under other Supreme Court precedent.⁶¹

In his dissent in *Marsh*, Justice Stevens argued that even if *Walton* governed (he thought not), the grant of certiorari was “a misuse of [the Court’s] discretion.”⁶² In *Walton*, Stevens observed, the petitioner was a convicted capital defendant: the Court’s task in that case was thus to “to consider whether the Arizona Supreme Court had adequately protected his rights under the Federal Constitution.”⁶³ Here, by contrast, the petitioner was the State of Kansas asking the Court to “review a ruling of its own Supreme Court on the grounds that the Kansas court had granted more protection to a Kansas litigant than the Federal Constitution required.”⁶⁴ Under those circumstances, Stevens contended, there was no reason for the Court even to hear the case. Rather, “[a] policy of judicial restraint would allow the highest court of the State to be the final decisionmaker in a case of this kind,” thereby promoting federalism interests.⁶⁵

Stevens’s renewed push for decentralizing judicial power provoked a response. Justice Scalia, who joined Justice Thomas’s majority opinion in *Marsh*, wrote a separate concurrence in which

57. *Marsh*, 548 U.S. at 166.

58. *Id.* at 167.

59. *Id.* at 169.

60. *Id.* at 169–73 (citing *Walton v. Arizona*, 497 U.S. 639, 655–56 (1990) (upholding statute requiring judge to impose death penalty upon finding aggravating factors if there were no mitigating factors sufficiently substantial to warrant leniency)).

61. *Id.* at 173–79.

62. *Id.* at 199 (Stevens, J., dissenting).

63. *Id.* at 200.

64. *Id.*

65. *Id.* at 200–01.

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he disputed Justice Stevens’s view that—as Justice Scalia described it—”[w]hen a criminal defendant loses a questionable constitutional point, we may grant review; when the State loses, we must deny it.”⁶⁶ Justice Scalia rejected Stevens’s claim that the Court had no interest in hearing the case: “Our principal responsibility . . . and a primary basis for the Constitution’s allowing us to be accorded jurisdiction to review state-court decisions . . . is to ensure the integrity and uniformity of federal law.”⁶⁷ Allowing state courts to apply federal constitutional rights in criminal cases more generously, Scalia argued, would “change the uniform ‘law of the land’ into a crazy quilt.”⁶⁸ Scalia also argued that Stevens’s approach was based “on a misguided view of federalism.”⁶⁹

B. JUSTICE SOTOMAYOR AND RIGHTS DIVERSITY

In 2009, during her first term on the Supreme Court, Justice Sotomayor joined Stevens’s dissent in *Michigan v. Fisher* in which he again called for the Court to decline review where a state court had given enhanced federal protections to criminal defendants.⁷⁰ In *Fisher*, police officers responding to a disturbance entered the defendant’s home without a warrant after they saw him inside the home screaming, throwing things, and bleeding.⁷¹ At the defendant’s trial for assault, the state court held that the Fourth Amendment rendered the evidence the police obtained from the home (including a gun) inadmissible.⁷² The intermediate state appellate court affirmed and the Michigan Supreme Court denied review.⁷³ In a per curiam decision, the Supreme Court reversed, holding that under the emergency aid exception to the Fourth

66. *Id.* at 185 (Scalia, J., concurring).

67. *Id.* at 183.

68. *Id.* at 185.

69. *Id.* at 184. Scalia wrote:

When state courts erroneously invalidate actions taken by the people of a State (through initiative or through normal operation of the political branches of their state government) on state-law grounds, it is generally none of our business; and our displacing of those judgments would indeed be an intrusion upon state autonomy. But when state courts erroneously invalidate such actions because they believe federal law requires it—and especially when they do so because they believe the Federal Constitution requires it—review by this Court, far from undermining state autonomy, is the only possible way to vindicate it. *Id.* (emphasis omitted).

70. *Michigan v. Fisher*, 558 U.S. 45, 50–51 (2009) (per curiam).

71. *Id.* at 45–46

72. *Id.* at 46.

73. *Id.*

Amendment recognized by *Brigham City v. Stuart*⁷⁴ the warrantless entry into the home was permissible.⁷⁵ According to the decision, “[a] straightforward application of the emergency aid exception, as in *Brigham City*, dictates that the officer’s entry was reasonable.”⁷⁶ Stevens criticized the majority for reviewing the case and “micromanaging the day-to-day business of state tribunals making fact-intensive decisions of this kind.”⁷⁷

While Sotomayor joined Stevens in *Fisher*, she did not join a similar dissent he wrote that same term in *Florida v. Powell*⁷⁸ and thus the extent to which she embraced the Stevens approach to the Court’s role vis-à-vis state courts was not clear. With Stevens’s retirement at the end of that term, it seemed perhaps that no member of the Court thought state courts could have leeway to over-protect federal constitutional rights.

In the Court’s 2015 term, however, Justice Sotomayor embraced the Stevens approach with new vigor. In *Kansas v. Carr*,⁷⁹ a Kansas jury had sentenced three defendants to death but the Kansas Supreme Court vacated the death sentences, holding that the sentencing instructions violated the Eighth Amendment in failing “to affirmatively inform the jury that mitigating

74. *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006).

75. *Fisher*, 558 U.S. at 47–48.

76. *Id.* at 48.

77. *Id.* at 51–52 (Stevens, J., with Sotomayor, J., dissenting). Stevens had also thought in *Brigham City* that the Court should not have granted review to correct a state court decision over-protecting the defendant; he called the case “an odd flyspeck.” *Brigham City*, 547 U.S. at 407 (Stevens, J., concurring).

78. *Florida v. Powell*, 559 U.S. 50 (2010). In *Powell*, police gave the defendant a *Miranda* warning that included the statements “You have the right to talk to a lawyer before answering any of our questions” and “You have the right to use any of these rights at any time you want during this interview” but did not specifically advise the defendant he had the right to have a lawyer present during questioning. *Id.* at 53–54. The Florida Supreme Court held that the warning was defective under *Miranda* and that the defendant’s statement (admitting he owned a gun) had to be suppressed. *Id.* at 54. In an opinion by Justice Ginsburg the Supreme Court reversed, holding 7-2 that the warning was adequate. *Id.* at 56. Justice Stevens dissented. *Id.* at 65 (Stevens, J., dissenting). Criticizing (once more) the standard of *Michigan v. Long*, Stevens contended that the Court should not have heard the case at all because the Florida decision rested on an independent and adequate state law ground and he predicted that the state court would simply reinstate its prior ruling under the state constitution. *Id.* On the merits of the federal issue, Stevens argued that the Court should not have intervened when reasonable judges can disagree about whether specific language satisfies *Miranda* and “the judges of the highest court of the State have decided [a specific *Miranda*] warning is insufficiently protective of the rights of the State’s citizens.” *Id.* at 76. Breyer, also in dissent, did not join this portion of Stevens’s opinion.

79. *Kansas v. Carr*, 136 S. Ct. 633 (2016).

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circumstances need only be proved to the satisfaction of the individual juror in that juror's sentencing decision and not beyond a reasonable doubt."⁸⁰ Without such an instruction, the state supreme court reasoned, the jurors might have labored under an erroneous standard and excluded relevant mitigating evidence.⁸¹ In an 8-1 decision with an opinion by Justice Scalia the Supreme Court reversed, holding that the Eighth Amendment, as construed by the Court in prior capital cases, imposes no requirement to instruct a jury that mitigating circumstances need not be proven beyond a reasonable doubt.⁸² Further, Scalia held, even if it were unconstitutional to require the defense to prove mitigating circumstances beyond a reasonable doubt the record did not support the defendants' claim in the case that the jurors had actually applied that standard in imposing the death penalty.⁸³

Justice Sotomayor dissented. She wrote: "I do not believe these cases should ever have been reviewed by the Supreme Court."⁸⁴ She explained that she saw "no reason to intervene in cases like these—and plenty of reasons not to" intervene in instances where a state has "not violated any federal constitutional right" and merely "overprotected its citizens based on its interpretation of state and federal law."⁸⁵ Reviewing those sorts of cases, Sotomayor reasoned, "prevent[s] States from serving as necessary laboratories for experimenting with how best to guarantee defendants a fair trial."⁸⁶ Sotomayor would thus have dismissed the writs as improvidently granted.⁸⁷

Invoking Stevens's own earlier arguments, Sotomayor identified several costs to the Supreme Court reviewing cases where a state court had afforded criminal defendants more

80. *Id.* at 640.

81. *Id.*

82. *Id.* at 643.

83. *Id.* at 643–44.

84. *Id.* at 646 (Sotomayor, J., dissenting).

85. *Id.*

86. *Id.* Sotomayor emphasized the significance of a state law issue in the case that underlay the federal claim. *See id.* at 647 ("[t]he instructions did not state that, under Kansas' statutory scheme, mitigating circumstances need only be proven to an individual juror's satisfaction and not beyond a reasonable doubt"); *id.* ("[t]he court found that the instructions therefore both undermined Kansas' state law and created a reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevents consideration of mitigating evidence as required by the Federal Constitution") (omission in original) (internal quotation marks omitted).

87. *Id.* at 646.

generous protection of federal constitutional rights. First, “[w]e risk issuing opinions that, while not strictly advisory, may have little effect if a lower court is able to reinstate its holding as a matter of state law.”⁸⁸ Second, “[w]e expend resources on cases where the only concern is that a State has ‘overprotected’ its citizens.”⁸⁹ Third, “[w]e intervene in an intrastate dispute between the State’s executive and its judiciary rather than entrusting the State’s structure of government to sort it out.”⁹⁰ Fourth, “we lose valuable data about the best methods of protecting constitutional rights—a particular concern in cases like these, where the federal constitutional question turns on the ‘reasonable likelihood’ of jury confusion, an empirical question best answered with evidence from many state courts.”⁹¹

In addition, Sotomayor argued, review where the only error was overprotecting rights has the effect of diminishing rights. “In explaining that the Federal Constitution does not protect some particular right,” she wrote, “it is natural to buttress the conclusion by explaining why that right is not very important.”⁹² Such explanations from the Supreme Court, Sotomayor argued, “risk[] discouraging States from adopting valuable procedural protections even as a matter of their own state law.”⁹³ The result, she wrote, is to undermine “[s]tate experimentation with how best to guarantee a fair trial to criminal defendants,”⁹⁴ which serves as “an essential aspect of our federalism scheme.”⁹⁵ Sotomayor explained that in holding that the Eighth Amendment does not require an instruction that mitigating factors need not be proven beyond a reasonable doubt, the majority “uses this Court’s considerable influence to call into question the logic of specifying *any* burden of proof as to mitigating circumstances”⁹⁶ and thus “denigrates the many States that do specify a burden of proof for the existence of mitigating factors as a matter of state law.”⁹⁷ Weighing in unnecessarily, she cautioned, imposes “unexpected

88. *Id.* at 647.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 648.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* (emphasis omitted).

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costs by disrupting . . . state experimentation.”⁹⁸ In other words, intervention on the federal issue shapes also how state law itself will develop. “Though the Court pretends that it sends back cases like this one with a clean slate,” Sotomayor wrote, “it rarely fully erases its thoughts on the virtues of the procedural protection at issue. By placing a thumb on the scale against a State adopting—even as a matter of state law—procedural protections the Constitution does not require, the Court risks turning the Federal Constitution into a ceiling, rather than a floor, for the protection of individual liberties.”⁹⁹

Perhaps most intriguingly, Sotomayor also warned in *Carr* of the risks associated with the Supreme Court issuing constitutional decisions in cases that may be unrepresentative. Noting the severity of the defendants’ crimes in the case, she said that “the majority is understandably anxious to ensure they receive their just deserts” but that she did not “believe that interest justifies not only ‘correcting’ the Kansas Supreme Court’s error but also calling into question the procedures of other States.”¹⁰⁰ She concluded: “The standard adage teaches that hard cases make bad law. . . . I fear that these cases suggest a corollary: Shocking cases make too much law.”¹⁰¹

Referencing his own prior responses to Justice Stevens, Justice Scalia disagreed with Sotomayor’s position. He wrote:

It generally would have been ‘none of our business’ had the Kansas Supreme Court vacated . . . [the] death sentences on state-law grounds. But it decidedly did not. And when the Kansas Supreme Court time and again invalidates death sentences because it says the Federal Constitution *requires* it, review by this Court, far from undermining state autonomy, is the only possible way to vindicate it.¹⁰²

98. *Id.*

99. *Id.* at 649. Nonetheless, Sotomayor did not suggest review is never warranted when rights have been over-protected:

There may, of course, be rare cases where certiorari is warranted in which a state prosecutor alleges that a State’s highest court has overprotected a criminal defendant. These circumstances may include: Where a state court’s decision in favor of a criminal defendant implicates another constitutional right . . . ; where a state court indicates a hostility to applying federal precedents . . . ; or where a state court’s grant of relief is particularly likely to destabilize or significantly interfere with federal policy. *Id.* at 651.

100. *Id.* at 651.

101. *Id.*

102. *Id.* at 641 (emphasis and internal quotation marks omitted).

In Scalia’s view, “[t]he state courts may experiment all they want with their own constitutions, and often do in the wake of this Court’s decisions. . . . But what a state court cannot do is experiment with our Federal Constitution and expect to elude this Court’s review so long as victory goes to the criminal defendant.”¹⁰³ Besides the problem of federal constitutional law becoming a “crazy quilt,”¹⁰⁴ denying review “would enable state courts to blame the unpopular death-sentence reprieve of the most horrible criminals upon the Federal Constitution when it is in fact their own doing.”¹⁰⁵

The Stevens/Sotomayor approach would seem to serve Barnett’s purposes more reliably than our present-day uniform approach to federal constitutional rights. Wide-ranging liberty claims and demands for a judicial check on the rationality of legislation would fare better in a system in which courts could limit the reach of decisions. Immunity from Supreme Court review would provide that sort of opportunity.

C. *MCDONALD*, REVISITED

When considered in light of *Michigan v. Long* and *Kansas v. Marsh* (and similar cases), Justice Stevens’s dissenting opinion in *McDonald v. Chicago* might also hold more promise for Barnett’s approach than did the majority opinion in that case. In *McDonald*, Stevens argued that the question was “not whether the Second Amendment right to keep and bear arms . . . applies to the States”¹⁰⁶ but rather “whether the particular right asserted by petitioners applies to the States because of the Fourteenth Amendment itself, standing on its own bottom.”¹⁰⁷ In other words, because (according to Stevens) the Second Amendment only constrains the federal government, the question was whether the Fourteenth Amendment’s Liberty Clause (which does constrain the states) itself includes an individual right to keep arms. Incorporation was, therefore, a “misnomer.”¹⁰⁸ And *Heller*, which involved only the meaning of the Second Amendment, “sheds no

103. *Id.*

104. *Id.* at 642.

105. *Id.*

106. 561 U.S. 743, 883 (Stevens, J., dissenting).

107. *Id.* Stevens construed the petitioners’ claim as about the right to keep a handgun in the home, i.e. not necessarily tied to self-defense, but this aspect of his opinion is not important for present purposes.

108. *Id.* at 864.

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light”¹⁰⁹ on whether there is a parallel right held against state government under the Fourteenth Amendment. “Inclusion in the Bill of Rights,” Stevens wrote, “is neither necessary nor sufficient for an interest to be judicially enforceable under the Fourteenth Amendment” against the states.¹¹⁰

Further, Stevens argued, because the Liberty Clause of the Fourteenth Amendment uniquely applies to the states, the scope of a right can apply *differently* to the states than it applies to the federal government (to which the Bill of Rights applies directly).¹¹¹ Stevens explained: “The rights protected against state infringement by the Fourteenth Amendment’s Due Process Clause need not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights.”¹¹² While, Stevens noted, the Supreme Court has applied fully some (but not all) provisions of the Bill of Rights against the states, “elementary considerations of constitutional text and structure suggest there may be legitimate reasons to hold state governments to different standards than the Federal Government in certain areas.”¹¹³ Thus, he wrote, “the ‘incorporation’ of a provision of the Bill of Rights into the Fourteenth Amendment does not, in itself, mean the provision must have precisely the same meaning in both contexts.”¹¹⁴

Stevens thought there are good reasons not to hold the states to the same standard of rights that constrain the federal government. Variation in how rights apply, he argued, can produce federalism benefits of experimentation.¹¹⁵ Uniformity, by contrast, undermines the possibility of tailoring rights to local conditions.¹¹⁶ In addition, he contended, insisting on uniformity in rights leads to a watered-down version of rights—one that is palatable to all jurisdictions.¹¹⁷ This did not mean that congruence between how rights apply to the federal government and the

109. *Id.* at 861.

110. *Id.* at 866.

111. *Id.* at 866–67.

112. *Id.* at 866.

113. *Id.* at 867.

114. *Id.* at 868. In making this point, Stevens drew upon the view of Justice Harlan in *Williams v. Florida*, 399 U.S. 78 (1970), and other cases. *Id.*

115. *Id.* at 869.

116. *Id.*

117. *Id.* at 870.

states is never warranted. Stevens noted that under the Court's precedents most criminal procedural protections of the Bill of Rights apply in the same way in state and federal court so as to "ensure a criminal trial satisfies essential standards of fairness."¹¹⁸ He explained that this made sense because "[t]he need for certainty and uniformity is more pressing, and the margin for error slimmer, when criminal justice is at issue."¹¹⁹ (In light of his position, in *Michigan v. Long* and subsequent cases, that the Supreme Court should not intervene to correct state courts that over-protect the federal rights of state criminal defendants, by "uniformity" Stevens must mean here a common baseline of protection below which no court can drop.) Stevens therefore thought the cases cited by Justice Alito in his opinion for the Court in *McDonald* that seemingly rejected any variation between how a provision of the Bill of Rights applies to the federal government and the states had to be understood in the special context of criminal justice.¹²⁰

According to Stevens, the right to keep and bear arms does not require uniform application to the federal government and the states.¹²¹ Based on a textual and historical argument, Stevens concluded that the right the petitioners claimed in *McDonald* did not fall within the scope of "liberty" the Fourteenth Amendment protects.¹²² But even if it did, he argued, the Court should not so hold. Stevens contended that given wide variations in crime rates and demographics, "this is a quintessential area in which federalism ought to be allowed to flourish without this Court's meddling."¹²³ In his view, the Court should decline to apply the rule of *Heller* to the states because the Court lacks the "technical capacity and . . . localized expertise" to determine the proper

118. *Id.* at 868.

119. *Id.* Elsewhere in his opinion, Stevens refers to "matter[s] not critical to personal liberty or procedural justice," rights like "the ability independently to define one's identity" that lie at the "conceptual core" of the Liberty Clause, and the interests of politically powerless groups. *Id.* at 869, 879. It is not clear whether Stevens's point was that there should be no variation with respect to these rights also.

120. *Id.* at 869.

121. *Id.* at 883–84 ("Even accepting the Court's holding in *Heller*, it remains entirely possible that the right to keep and bear arms identified in that opinion is not judicially enforceable against the States, or that only part of the right is so enforceable. It is likewise possible for the Court to find in this case that some part of the *Heller* right applies to the States, and then to find in later cases that other parts of the right also apply, or apply on different terms.").

122. *Id.* at 890.

123. *Id.* at 902.

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scope of gun regulation (and therefore the scope of the corresponding right).¹²⁴ States and localities, he argued, are in a much better position to set the proper contours in this area and they should be allowed to do so provided that “the regulatory measures they have chosen are not arbitrary, capricious, or unreasonable.”¹²⁵ In other words, the right recognized in *Heller* could and should “apply on different terms” to the states compared to the federal government.¹²⁶

In his *McDonald* opinion, Justice Alito rejected Stevens’s “special incorporation test applicable only to the Second Amendment.”¹²⁷ In Alito’s view, a “two-track approach”¹²⁸ by which “in order to respect federalism and allow useful state experimentation”¹²⁹ the Second Amendment “should not be fully binding on the States”¹³⁰ was inconsistent with the Court’s interpretations of the Bill of Rights and with the fact that the Bill limits the ability of states and localities to experiment.¹³¹

Justice Scalia also wrote a concurring opinion in *McDonald* in which he criticized Stevens for (among other things) his willingness to treat the Second Amendment as different from other provisions of the Bill of Rights.¹³² In Scalia’s view, Stevens’s proposed Liberty Clause analysis would put too much discretion in the hands of judges. “Deciding what is essential to an enlightened, liberty-filled life is an inherently political, moral judgment—the antithesis of an objective approach that reaches conclusions by applying neutral rules to verifiable evidence.”¹³³ Scalia complained also that under Stevens’s approach, “whatever the Constitution . . . may say, the list of protected rights will be whatever courts wish it to be.”¹³⁴ Stevens’s call for localized experimentation was thus just a smoke-screen for enhancing judicial power: “The implication of Justice Stevens’s call for abstention is that if We The Court conclude that They The

124. *Id.* at 903.

125. *Id.* at 902 (internal quotations omitted).

126. *Id.* at 884.

127. *Id.* at 784.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 784–85.

132. *Id.* at 791–92 (Scalia, J., concurring).

133. *Id.* at 800.

134. *Id.* at 805.

People’s answers to a problem are silly, we are free to ‘intervene’ . . . but if we too are uncertain of the right answer, or merely think the States may be onto something, we can loosen the leash.”¹³⁵

A different image emerges, however, if we read Stevens’s dissent in *McDonald* in light of his dissenting opinions in *Long* and *Marsh* and other cases advocating that the Court stay its hand when state courts have over-protected the rights of criminal defendants. Stevens made no mention of *Long* or *Marsh* in *McDonald*. But in all three cases, Stevens’s dissents rest on similar ideas: Provisions of the Bill of Rights need not apply in the same way everywhere. So long as states do not drop below a national floor, they can pursue different approaches. Variation can be a good thing because it produces the federalism benefit of experimentation.¹³⁶

The specific sort of variation Stevens had in mind in *Long* and *Marsh* is, of course, distinct from that in *McDonald* because the starting points in the two contexts differ. In *Long* and *Marsh*, state government and the federal government begin equally constrained by the Bill of Rights as the Supreme Court understands it; a state court can apply more stringent rules against state government in state criminal proceedings than apply in federal court. In *McDonald*, state government is less constrained by the Second Amendment than is the federal government under the Court’s precedents. Nonetheless, in each context Stevens is in favor of variable application of Bill of Rights provisions.

Reading Steven’s dissent in *McDonald* through the lens of *Long* and *Marsh* also suggests the possibility that state courts could apply *stronger* Second Amendment protections against state government than the Supreme Court itself imposes. As in the criminal procedural context of *Long* and *Marsh*, state court decisions could raise the level of Second Amendment rights against the states above what the Supreme Court requires. Indeed, state court generosity could result in state governments

135. *Id.* at 803 (alteration in original).

136. See *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015) (“[T]he Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity. *McDonald* circumscribes the scope of permissible experimentation by state and local governments, but it does not foreclose *all* possibility of experimentation. Within the limits established by the Justices in *Heller* and *McDonald*, federalism and diversity still have a claim.”) (rejecting Second Amendment challenge to local ban on possession of assault weapons and large-capacity magazines), *cert. denied* 136 S. Ct. 447 (2015).

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actually being more constrained than is the federal government under whatever post-*Heller* case law the Court develops.

Nonetheless, we do not know whether Stevens himself thought it desirable to apply his approach in *Long* and *Marsh* beyond the context of criminal cases so as to allow state courts to construe the Second Amendment more broadly against state government.¹³⁷ One reason for thinking Stevens might have been inclined to apply his approach in *Long* and *Marsh* beyond criminal procedural rights is that Stevens's very notion of federalism includes the possibility of differences between federal and state judges on issues of federal constitutional law. Throughout his dissent in *McDonald*, Stevens presents his concern as centered on federal *courts*. Stevens complains, for example, of "federal courts' imposing a uniform national standard,"¹³⁸ and of "a federal court insist[ing] that state and local authorities follow its dictates."¹³⁹ Further, in urging his colleagues to exercise restraint, he writes: "it is more in keeping . . . with our status as a court in a federal system . . . to avoid imposing a single solution . . . from the top down."¹⁴⁰ In criticizing Stevens's position in *McDonald* as aggrandizing judicial power, Alito and Scalia refer generally to "courts" and "judges." They do not recognize Stevens's particular focus on delineating the proper role of the federal courts (including the Supreme Court) in the federal system. Accordingly, they misconstrue Stevens's analysis as based on a framework invented just for gun rights and thus miss much of the richness of Stevens's federalism argument—and its implications for rights.

Even if Barnett thinks Stevens reached the wrong conclusion in *McDonald*, there is much in Stevens's dissent that could be useful to Barnett's overall project. Like Barnett, Stevens emphasizes "liberty" and "due process" as the key concerns in adjudicating rights, along with a judicial role in reviewing laws for arbitrariness. More significantly, accepting that federal

137. One issue in this regard is that state government prosecutes state defendants only in state court. Second Amendment cases against a state can be brought in either state or federal court. Extending Stevens's approach in *Marsh* to the Second Amendment therefore raises the possibility that a state court would invalidate a state law that a federal court has held constitutional.

138. *McDonald*, 561 U.S. at 869 (Stevens, J., dissenting).

139. *Id.*

140. *Id.* at 902–03 (first and third omission in original) (internal quotation marks omitted).

constitutional rights can properly vary from one location to the next opens the door to the possibility of more robust federal rights than those that emerge when, as now, the Supreme Court sets both floors and ceilings.

CONCLUSION: OUR CONSTITUTION

Consolidated judicial power poses a significant barrier to Randy Barnett's efforts to restore a "Republican Constitution" of the form he describes. The path forward for Barnett's project is far from obvious. Some success might result from developing existing tools, including those (like the Stevens/Sotomayor approach to state courts) found in unexpected places. Nonetheless, securing the very broad scope of individual sovereignty Barnett advocates would likely require a basic restructuring of the judicial system. For example, development of robust individualized rights might require shutting off entirely appellate review of judicial decisions that invoke the Constitution to invalidate statutes or executive actions. Likewise, commitments to precedent and *stare decisis* might need to be abandoned so that litigants seeking to vindicate their own rights are not boxed in by stingy rulings of the past. Perhaps, too, only the party to a case would benefit from a favorable rights-based ruling so that courts are incentivized to protect liberty vigorously without fear of unanticipated consequences. Changes like these, however, would entail a far more radical overhaul of the judicial system than Barnett himself envisages. Such reforms would also surely exceed the capacities of the existing constitutional arrangements. Success, if it were to come, would thus mean a Constitution that serves Me the People but that—whether deemed Republican, Democratic, or something else—would not be Our Constitution as we know it.