

## **The Constitution and Consent**

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## The Constitution and Consent

The Constitution holds a lot of controversy to many. Among these controversies includes the argument of the consent governed. Lysander Spooner believes that the Constitution holds no grounds to generations after those who were alive when it was ratified. Randy Barnett on the contrary believes that the Constitution is still as legitimate as when it was created. Barnett refutes Spooner's claims under his own argument of consent and strengthens this argument using evidence regarding judicial review, the ninth amendment, and the presumption of Liberty.

Lysander Spooner in no way holds back in his essay "*No Treason*". He makes his stance very clear in the first sentence claiming that "The Constitution has no inherent authority or obligation." This is a bold statement, and his reasoning is interesting. Spooner exclaims that the Constitution would only hold contracts to persons living 80 years ago.

Throughout the beginning of his essay Spooner strongly stays tied to the word "posterity". Spooner declares on multiple occasions that the Constitution only applied to people living while the Constitution was created because they were the ones who voted for this document. Although the Constitution clearly uses this word in context as it should be, Spooner holds the opinion that the phrasing in this document "is plain, in the first place, that this language, *as an agreement*, purports to be only what it at most really was, viz., a contract between the people then existing; and, of necessity, binding, as a contract, only upon those *then existing*." His evidence to support this claim is that there was no binding regarding the contract described in the document. This is Spooner's first major concern with the Constitution.

His next major concern can be summarized as voting and tax paying. His first concern regarding voting falls under the argument of the population. Spooner raises the point that "during the first twenty or thirty years under the Constitution, not more than one-tenth, fifteenth, or

perhaps twentieth of the whole population (black and white, men, women, and minors) were permitted to vote.” This is factual, however Spooner finds himself in a contradictory stance when he claims that, “At the present time, it is probable that not more than one-sixth of the whole population are permitted to vote. Consequently, so far as voting is concerned, the other five-sixths can have given no pledge that they will support the Constitution.” This can raise questions when pursuing the truth in question. There is a problem with this statement in terms that Spooner is using past references of the population to try and further his argument that the population today would not agree with back then. This can be asserted as problematic because whenever you look at terms such as population regarding race, or number there is always going to be a disconnect no matter what country is in question.

The second half of his second argument is the payment of taxes. Spooner bases his argument on a theory of the Constitution. He claims that the Constitution in “theory” claims that:

“All taxes are paid voluntarily; that our government is a mutual insurance company, voluntarily entered into by the people with each other; that that each man makes a free and purely voluntary contract with all others who are parties to the Constitution, to pay so much money for so much protection, the same as he does with any other insurance company; and that he is just as free not to be protected, and not to pay tax, as he is to pay a tax, and be protected.”

Here Spooner is arguing that the Constitution doesn’t state, but therefore implies that citizens are not by law obligated to pay taxes nor adhere to the Constitution.

The final point that I find succinctly articulated in Spooner’s essay is his argument regarding slavery. Spooner believes that if the founders wanted to abolish slavery or every

intended for it to be abolished, they should have done it in the first place and saved us from the revolutionary war. He describes that if their “object had really been to abolish slavery, or maintain liberty or justice generally, they had only to say: All, whether white or black, who want the protection of this government, shall have it; and all who do not want it, will be left in peace, so long as they leave us in peace.” This argument holds a lot of weight in present day debates and is regarded as one of the main reasons individuals believe that the Constitution holds no ground.

Randy Barnett holds a different opinion regarding the Constitution’s legitimacy. Barnett first proposes the idea that the Constitution is not a binding document to its citizens, but a document that’s primary cause is to bind the government and its officials.

In chapter 1, Barnett targets the argument of whether the Constitution holds any legitimacy on the grounds of consent. He raises two questions, the first being whether citizens are consenting to the use of the Constitution because they are refusing to revolt, which is a Constitutional right granted. Or two, in the case that US citizens choose not to vote are they exempt from the laws elected? Barnett says no, every citizen is given the right to vote therefore has no right to “complain” when they must obey the laws created.

Barnett makes it very clear throughout the first few chapters why citizens and governing officials must abide by the Constitution. To overall summarize Barnett’s thesis on consent throughout the first few chapters is as follows. This “obedience” to the Constitution occurs if there is true majority consent to the lawmaker’s authority or, in the absence of such consent, laws are produced through methods that ensure that they are not unjust. A written Constitution should be evaluated as one component of a legal system in the absence of majority consensus. A

Constitution is lawful despite if it has not been approved by the people to the degree that it sets lawmaking systems that effectively ensure the fairness of said elected laws.

In part 2 of “Restoring the Lost Constitution”, Barnett refutes any notion that judicial review was established in *Marbury v. Madison*. He goes on to prove this not by trying to understand the founders' vague and sometimes complicated phrasing, but by presenting as thoroughly as possible what the founders really expressed during the Constitutional convention, and state ratification conventions. Taken in context together, these declarations provided no doubt that the founders considered judicial nullification of laws adopted by the states and Congress. Barnett, furthermore, uses Article III of the Constitution to demonstrate that the original meaning of “judicial power” also incorporated the power of judicial nullification. This includes the thesis of consent that Barnett covers earlier.

Barnett states that he struggled at first with understanding why the ninth amendment is so important. He thought that it wasn't that important until he started to dig a little deeper. Barnett claims that the ninth amendment was “inextricably linked to the other clauses the Supreme Court had redacted from the text: the Necessary and Proper Clause, the Commerce Clause, the Privileges or Immunities Clause, and the Tenth Amendment.” Barnett also mentions a counter argument to the meaning of the ninth amendment saying, “only natural rights that may be protected by courts are those that were specifically enumerated in the Constitution.” The original importance of the ninth amendment was the purpose of granting certain liberties that were not stated directly in the Bill of Rights. The idea of the Bill of Rights was quickly shut down because there was no way that the founders could list every single right granted to the American people; the ninth amendment was the solution to this debate. Now according to Barnett, the ninth amendment is taken out of context frequently and most importantly not understood correctly.

Barnett stands firmly that the ninth amendment “mandates that unenumerated rights be treated the same as those that are listed.” Barnett continues to solidify this suggestion that, while an all-or-nothing presumption of validity would satisfy this formal standard, not even the New Deal Supreme Court took such a different approach, which would contradict the textual provisions that call for judicial review.

What Barnett considers presumption of Liberty is a construction that could be used in his words as “provide a practical way to restore the lost Constitution.” Revisiting Barnett’s thesis that “whether the U.S. Constitution—either as written or as actually applied—is in fact legitimate”, we can look and see intellectual honesty demands admitting that no Constitution without universal approval can establish laws that bind in “conscience.”

He goes a step further in chapter 10 and explains that “in short, laws that are necessary to prohibit wrongful or regulate rightful activity would satisfy the Presumption of Liberty. Laws that prohibit or unnecessarily regulate rightful behavior would not.” Barnett ties in the ninth amendment stating that it pursues and elects the idea that in pursuit of happiness, people are free to do anything that is not justly deemed illegal. This affirmation is what Barnett considers the Presumption of Liberty.

In conclusion we can see that Lysander Spooner holds the opinion that the Constitution is no longer legitimate today. In contrast Randy Barnett pushes back and stands ground on why the Constitution is still legitimate using evidence regarding judicial review, the ninth amendment, and the presumption of Liberty.