Our Republican Constitution: Securing the Liberty and Sovereignty of We the People, by Randy Barnett

Reviewed by Ilya Somin

Note from the Editor:

This article favorably reviews Randy Barnett's new book about the Constitution.

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• Jack M. Balkin, *Randy Barnett's Republican Constitution*, Balkinization (April 14, 2016), *available at* http://balkin.blogspot.com/2016/04/randy-barnetts-republican-constitution.html.

• Jack M. Balkin, *Which Republican Constitution?*, Constitutional Commentary (*forthcoming*) (April 9, 2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2761513.

• Eric J. Segall, *The Constitution Means What the Supreme Court Says It Means*, Harvard Law Review Forum (Feb. 10, 2016), *available at* http://harvardlawreview.org/2016/02/the-constitution-means-what-the-supreme-court-says-it-means/.

• Ed Whelan, *George Will's Mistaken Critique of Judicial Restraint*, National Review Online (Oct. 22, 2015), *available at* http://www.nationalreview.com/bench-memos/425927/george-wills-mistaken-critique-judicial-restraint-ed-whelan.

• Ian Millhiser, *The Plan To Build The Yuugest, Classiest, Most Luxurious Constitution You've Ever Seen*, Think Progress (April 28, 2016), *available at* http://thinkprogress.org/justice/2016/04/28/3772953/the-plan-to-build-the-yuugest-classiest-most-luxurious-constitution-youve-ever-seen/.

Purchase this book at https://www.amazon.com/Our-Republican-Constitution-Securing-Sovereignty/dp/0062412280.

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Randy Barnett is one of America's leading constitutional scholars. His new book, *Our Republican Constitution*, is a major contribution to the ongoing debate over the appropriate role of judicial review in our constitutional system. For decades, one of the main arguments against strong judicial review has been the claim that it is antidemocratic and thus goes against the sovereign will of the people. Barnett's book turns this claim on its head by explaining how judicial review can actually promote popular sovereignty, understood in an individual rather than a collective sense.

I. Competing Approaches to Popular Sovereignty

The conventional understanding of popular sovereignty in constitutional law centers on the idea that the will of the people is represented by majoritarian democratic processes: elections, referenda, and legislative enactments. Barnett calls this approach the "Democratic Constitution." But, as he emphasizes, democratic political processes at best represent only the will of electoral majorities, and often only that of influential minority lobbies and interest groups. Moreover, Barnett notes, "We the People as a whole never govern" (23); rather, power is delegated to a subset of government officials. The people as a whole are never truly sovereign except insofar as each individual has a sphere of liberty within which the power of government (and other individuals) cannot intrude. Only in that sense can all of the people be truly sovereign. Barnett calls this variant of constitutional theory the "Republican Constitution." As he defines it, the Republican Constitution is based on the principle of individual sovereignty, protected by strict limits on government power. It is the rival of the Democratic Constitution's emphasis on electoral majoritarianism.

The importance of individual sovereignty, Barnett powerfully argues, strengthens the case for aggressive judicial review. A strong judiciary limits the power of government officials, and thereby vindicates the sovereignty of all the people as individuals, as opposed to merely the powers wielded by temporary political majorities, influential interest groups, and political leaders.

Barnett's argument is distinct from the traditional defense of judicial review which argues that it can actually facilitate majoritarian democracy by, for example, defending freedom of political speech and the right to vote.[1] Such "representation-reinforcement" arguments justify judicial protection of individual rights only in so far as those rights help make majoritarian political processes possible. By contrast, Barnett seeks to impose strict limits on democratic majorities in order to protect individuals as sovereigns.

Barnett's theory of individual sovereignty implies strong judicial protection for a wide range of individual freedoms, both economic and non-economic (chs. 3, 8). While modern judicial orthodoxy emphasizes the need to protect "personal" liberties such as freedom of speech and privacy, Barnett emphasizes that economic freedom is often just as important to individual liberty and just as threatened by unconstrained majoritarianism.

Barnett also explains how judicial protection of federalism—by enforcement of structural limits on federal power—can

1 For the most famous work along these lines see John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

promote individual sovereignty (chs. 6-7). When political power is decentralized, individuals can "vote with their feet" for policies they prefer, and against those that harm or oppress them (176-77). Individual foot voters often have much greater opportunity to make meaningful political choices than individual ballot box voters do. Whereas the latter have only an infinitesimal chance of actually changing an electoral outcome, the former can make individually decisive choices about what policies they will live under.[2] Citizens have more opportunity to vote with their feet when federal government power is more limited and policy decisions are made at the state and local level.

II. Popular Sovereignty and Constitutional History

Barnett traces the history of the Democratic and Republican Constitutions through different periods of American history. He argues that the Founders imposed a republican vision on the federal government, including tight constraints on federal power and a strong Bill of Rights (chs. 2-3). But the original Constitution imposed few limits on state government power.

In perhaps the most insightful and original part of the book (ch. 4), Barnett explains how the flaws in the original Constitution were made manifest by the growing controversy over slavery during the last several decades before the Civil War. State governments committed to protecting slavery not only oppressed the slaves themselves, but also free blacks and white opponents of slavery. In reaction, the antislavery movement advocated the imposition of tighter restrictions on state power in order to protect individual liberty. They ultimately triumphed with the enactment of the Thirteenth and Fourteenth Amendments after the Civil War. As Barnett explains, while these amendments were inspired by the history of slavery and racial oppression, they were also part of a much broader ideology of individual liberty that sought to prevent states from infringing on individuals' rights in a variety of different ways, including by protecting economic liberties and property rights.

Barnett then traces the history of the conflict between the republican and democratic views to the present day. Progressive and New Deal-era liberals sought to curb judicial review in order to strengthen legislative and executive power—especially, but not exclusively, over the economy. Beginning in the 1950s and 1960s, under the influence of the civil rights movements, modern liberals partially abandoned Progressive-era "judicial restraint" in order to combat racial and gender discrimination and protect various civil liberties. Ironically (and in Barnett's view, mistakenly), judicial conservatives reacted to the real and imagined excesses of the Warren and Burger Courts by embracing the doctrine of judicial restraint associated with the Democratic Constitution earlier advocated by early twentieth century Progressives. Barnett argues that conservatives should instead embrace the "judicial engagement" associated with the Republican Constitution, as some have begun to do in recent years.

Not every aspect of Barnett's historical account is fully persuasive. In particular, some of the historical conflicts over constitutional law covered in the book do not fall as clearly along the democratic v. republican divide as Barnett suggests. For example, he contends that the pre-Civil War Democratic Party largely favored the Democratic Constitution (87-88). This is true to some extent, especially when it came to white democratic majorities' power to control the fate of slaves, free blacks, and other non-whites. But Jacksonian Democrats also articulated a relatively narrow view of federal power backed by judicial enforcement of those limits, and advocated considerable judicial protection for economic liberties and property rights,[3] particularly under state constitutions. They were highly critical of the Supreme Court's famous decision in *McCulloch v. Maryland*,[4] which upheld the constitutionality of the Bank of the United States, believing that it gave too much scope to federal power.[5]

Barnett is on firmer ground in describing early twentieth century Progressives and New Dealers as champions of the Democratic Constitution. They did indeed take a narrow view of the appropriate scope of judicial review across a wide range of issues. But, as he recognizes, more recent left-liberal jurisprudence does not fit the framework quite as well—a tendency that began to emerge as early as the latter years of the New Deal period itself.

While exalting democracy on some issues—particularly federalism and economic regulation—modern liberal judges and legal scholars advocate robust judicial intervention on many others, most notably race and sex discrimination, the rights of gays and lesbians, protecting criminal defendants, and other such causes. As Barnett puts it, "[c]onfronted with the majoritarian implications of the Democratic Constitution with respect to the civil and personal rights they favored….progressives retreated to a watered-down form of the Republican Constitution" (162). Most modern liberal legal thought is, in Barnett's terms, an uneasy mix of the Democratic and Republican Constitutions.

Recent conservative legal thought does not fully fit the framework either. Barnett is right to argue that "judicial restraint," often defined as deference to democratic legislatures, was a major element in the conservative critique of the "judicial activist" left. But, from early on, many conservatives also argued for strong judicial enforcement of the original meaning of the Constitution, even in cases where doing so meant invalidating a variety of democratically enacted laws. As far back as the 1970s, conservative Supreme Court Justice William Rehnquist wrote a series of important opinions advocating stronger judicial enforcement of limits on federal power, and constitutional property rights.[6] Judge Robert Bork, perhaps the best-known conservative advocate of judicial deference to democratic decision-making of his era,

2 I discuss the significance of this difference in greater detail in Ilya Somin, *Foot Voting, Federalism, and Political Freedom,* in Nomos: Federalism and Subsidiarity (John Fleming & Jacob S. Levy, eds. 2014); and Ilya Somin, Democracy and Political Ignorance: Why Smaller Government is Smarter, ch. 5 (2nd ed. 2016).

3 For an overview, see David Currie, The Constitution in Congress: Democrats and Whigs, 1829-61 (1985).

4 15 U.S. (4. Wheat.) 316 (1819).

5 Currie, *supra* note 3 at ch. 3.

6 *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976), overruling Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) (Rehnquist, J., dissenting).

also often wrote of the need to vigorously enforce the original meaning of the Constitution, and denounced the New Deal Supreme Court's acquiescence to a vast expansion of federal power as "judicial activism."[7] Focused as they were on what they saw as the activist sins of the Warren Court, many judicial conservatives at first simply ignored or swept under the rug the potential contradictions between their commitment to judicial deference on the one hand, and their advocacy of originalism and judicial enforcement of federalism and property rights on the other.

These complications by no means invalidate the usefulness of Barnett's framework. The democratic and republican models he outlines are extremely valuable archetypes for capturing one type of recurring tension in debates over judicial review. But alongside this conflict are other debates that focus not on democracy v. individual rights generally, but rather on conflicts over which individual rights are important and why, and debates over interpretive methodology.

III. Originalism and the Republican Constitution

This brings us to the interesting question of the relationship between Barnett's defense of the Republican Constitution in this book and his powerful—and highly influential—defense of originalism in his previous scholarship.[8] Neither originalism nor any other interpretive theory plays a major role in *Our Republican Constitution*. In principle, the individual sovereignty outlined by Barnett might be compatible with originalism, some version of living constitutionalism, or a hybrid theory combining elements of both. In my view, however, there is a strong potential connection between originalism and individual sovereignty: the latter can help justify the former.

Originalism cannot be self-justifying. Why do we today have an obligation to obey words set on paper centuries ago by people who have long been dead? It cannot be because we have consented to it. Barnett rightly rejects the view that we must obey because the Framers enacted the Constitution through a democratic process; if left unconstrained, such a process can easily destroy individual freedom and individual sovereignty along with it. Moreover, as left-wing critics of the Constitution correctly point out, the process of enactment was actually undemocratic in important ways, leaving out nearly all women and most non-whites, among others.

The theory of individual sovereignty advanced by Barnett offers an alternative potential justification for originalism: given the many liberty-enhancing aspects of the original Constitution, as amended after the Civil War,[9] adhering to the original meaning offers a greater likelihood of effectively protecting individual sovereignty than any other realistically available option.[10] This is a more contingent defense of originalism than those offered by advocates who claim that originalism is intrinsically superior to other modes of judicial interpretation, regardless of consequences. It leaves open the possibility that originalism may *not* be the best approach to judicial review in all conceivable times and places. But it may give a more compelling answer to the age-old question of why modern American judges should adhere to the terms of a centuries-old document.

IV. The Republican Party and the Republican Constitution

In addition to his theoretical and historical analysis, Barnett also has a political coalition-building project in mind: he hopes that the modern Republican Party will embrace the Republican Constitution (251-57) by appointing judges who will enforce it, and perhaps even by passing constitutional amendments to further limit federal power. There is indeed important common ground between Barnett's project and the views of many conservatives. Both he and they favor stronger judicial enforcement of federalism and increased enforcement of constitutional protections for some individual rights, particularly property rights and the Second Amendment right to bear arms.

Nonetheless, the prospects for a conservative-libertarian coalition to reinvigorate the Republican Constitution within the Republican Party remain uncertain at best. The GOP is in a state of ideological upheaval. The outcome of this process is difficult to predict. But the resulting party could potentially turn out be much more hostile to Barnett's vision than the pre-2016 party was.

Even if conventional conservatives retain control of the Republican Party and little changes in its ideology over the next few years, there will still be some important tensions between the conventional GOP worldview and Barnett's vision. As articulated by Barnett, the Republican Constitution implies strong protection for a wide range of personal liberties, as well as "economic" ones. Some of the former are likely to be inimical to social conservatives. For example, most, if not all, of the federal War on Drugs is likely unconstitutional under Barnett's approach to federal power under the Commerce Clause.[11]

The same, perhaps, goes for many state-level morals regulations. For example, Barnett has forcefully defended the Supreme Court's 2003 decision in *Lawrence v. Texas*,[12] which struck down anti-sodomy laws, a decision he considers to be based on a more broadly libertarian vision of the Constitution and judicial review.[13] While very few conservatives seek to revive anti-sodomy laws today, many view *Lawrence* with great suspicion due to its implications for other types of morals regulation. More recently, conservative-libertarian tensions over such issues have

7 For a discussion of these tensions in Bork's thought, see Ilya Somin, *The Borkean Dilemma: Robert Bork and the Tension between Originalism and Democracy*, 80 University of Chicago Law Review Dialogue 243 (2013).

8 *See especially* Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (2d ed. 2014).

9 Barnett discusses the Constitution's many protections for liberty in detail in *Our Republican Constitution* (e.g., chs. 3-4, 8).

10 For a somewhat more extensive, but still very preliminary, discussion of this idea, see Ilya Somin, *How Constitutional Originalism Protects Liberty,* Liberty Law Blog (June 1, 2015), *available at* http://www.libertylawsite.org/liberty-forum/how-constitutional-originalism-promotes-liberty/. Obviously, the issue deserves additional exploration.

11 *See, e.g.*, Barnett, Restoring the Lost Constitution, ch. 11 (outlining a narrow interpretation of the federal Commerce Clause power, on which the War on Drugs is based).

12 539 U.S. 558 (2003).

13 *See* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas,* 2002-2003 Cato Supreme Court Rev. 21.

been heightened by the Supreme Court's 2015 decision striking down state laws banning same-sex marriage, a result supported by most libertarians, but anathema to most social conservatives.[14]

In *Our Republican Constitution*, Barnett suggests that such differences over "social issues" can be minimized by keeping them local (178-81). If we enforce constitutional limits on federal power over such matters, liberals and conservatives (and perhaps also libertarians and conservatives) might be able to agree to disagree on many hot-button "culture war" issues, by decentralizing them to a local level where each group can have some jurisdictions that adopt its preferred policies.

This is, in many ways, an attractive vision. But there is some tension between it and Barnett's advocacy of strong judicial protection for economic liberties and property rights, even as against state and local governments. Why is "social" freedom less deserving of such protection? There are ways to differentiate the two, but Barnett does not pursue the issue in detail.

Barnett's approach does not imply a categorical ban on government regulation. The laws in question need only have a "proper" purpose (which excludes mere efforts to impose majority preferences or help some interest groups at the expense of others) and have "some degree of means-end" fit with that purpose (231-32). But if applied in a nondeferential way across the board, this approach would lead to the invalidation of many social regulations, as well as economic ones.

In the medium to long term, the tension between Barnett's position and that espoused by conservative Republicans may be partly dissipated not by federalism, but by generational change. Survey data suggests that younger Republicans are far more sympathetic to social freedom than their elders. Most tend to support marijuana legalization and same-sex marriage, for example, and are more open to immigration than their elders.[15] Most young Republicans are not full-blown libertarians, but they lean more in that direction than previous generations. The Republican Party might, over time, become a more hospitable home for the Republican Constitution. But that may not happen for some time to come, if at all.

Ultimately, however, constitutional theories should be judged not by their immediate political prospects, but by their contribution to public discourse over important political and legal issues. By that metric, *Our Republican Constitution* is a significant success. It outlines a valuable new framework for understanding historical and contemporary disputes over judicial power. It also offers a powerful account of popular sovereignty and its connection to judicial power that stands as an important challenge to the conventional wisdom on the subject. Whether or not Barnett's ideas ultimately meet with success in the political arena, they deserve serious consideration from anyone interested in the past, present, and future of the Republican Constitution.

14 Obergefell v. Hodges, 135 S.Ct. 2071 (2015).

15 *See, e.g.*, Jocelyn Kiley and Michael Dimock, *The GOP's Millennial Problem Runs Deep*, Pew Research Center (Sept. 25, 2014), *available at* http://www.pewresearch.org/fact-tank/2014/09/25/the-gops-millennial-problem-runs-deep/; George Gao, *63% of Republican Millenials Favor Marijuana Legalization*, Pew Research Center (Feb. 27, 2015), *available at* http://www.pewresearch.org/fact-tank/2015/02/27/63-of-republican-millennials-favor-marijuana-legalization/.