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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: AN UNFORTUNATE TITLE

There is much that is interesting and worth discussing in Randy Barnett's new book, *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People.*[3] However, the title of his book, especially for academic readers, greatly disserves the argument he is making and unnecessarily provokes peripheral objections, perhaps including this one. As a matter of fact, Barnett's book is a worthy complement to Richard Epstein's 2014 magnum opus, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government.*[4] Whatever one thinks of Epstein's substantive ideas—and I assume they are largely congruent with Barnett's own—there is no doubt that Epstein gives the reader an absolutely accurate guide as to where he is coming from and where he is going. Where he is coming from,

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2. W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin. An earlier version of this essay was prepared for an excellent conference on *The Republican Constitution*, co-organized by Larry Solum and Kurt Lash and held at the University of Illinois on March 18, 2016. I am very grateful for the hospitality and intellectual stimulation received on that occasion, at least some of which is reflected in the differences between that version and these published comments. I also appreciate the incisive suggestions offered by Jill Hasday.

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

4. RICHARD EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT (2014).

briefly, is what he accurately defined as the central *liberal* tradition associated with such philosophers as "Hobbes, Locke, Hume, Madison, and Montesquieu" (p. xi). One might also include, of course, such later philosophers as John Stuart Mill, whose principal book is titled, after all, *On Liberty,* and the late Robert Nozick, whose *Anarchy, State, and Utopia* offers what I assume Barnett finds a sympathetic account of the minimalist state that even libertarians should accept. Epstein was obviously writing for a sophisticated academic audience, which presumably would be aware of the difference between "classical liberalism" and the "liberalism" linked to the contemporary Democratic Party. Barnett, on the other hand, is publishing what is very much a trade book designed for a wider audience, and perhaps he believed that too many potential readers would be scared off or otherwise alienated by the very idea that they were being asked to agree with anything meriting the label "liberal." To the extent this is true, it is an unfortunate commentary on the assumptions about the political illiteracy of contemporary Americans. In any event, it might help to explain why Barnett prefers the confusing term "Republican Constitution."

To be sure, Barnett (like Epstein before him) notes that members of the founding generation were more than a bit skeptical about democracy and frequently used the term "republican" as the alternative to that view. To put it mildly, that term is highly problematic with regard to providing any specific definition. "There is not," former President John Adams wrote in 1807, "a more unintelligible word in the English language than republicanism."[5] That being said, it is hard to escape the widespread use of the term both in American discourse and, just as importantly, the analyses of American historians especially over the past half-century.[6] In his magisterial overview of the latter, Daniel Rodgers, focusing on the use of the term particularly by legal academics such as Frank Michelman, Cass Sunstein, and Morton Horwitz, summarized its importance as follows:

> "[R]epublicanism" was swept up as shorthand for everything liberalism was not: commitment to an active civic life (contra liberalism's obsession with immunities and rights), to explicit

5. *Quoted in* Daniel T. Rodgers, *Republicanism: The Career of a Concept,* 79 J. AM. HIST. 11, 38 (1992).

6. *See generally id*.

> value commitments and deliberative justice (as opposed to liberalism's procedural neutrality), to public, common purposes (contras liberalism's inability to imagine politics as anything other than interest group pluralism).[7]

It is not surprising, then, that Epstein noted that the framers he (and Barnett) choose to focus on "did not embrace the now fashionable 'republicanism' that allows the government to demand personal sacrifice or even individual valor in the service of some higher, overriding vision of community good."[8] And, it is important to emphasize, "community good" in this context means more than extraction of taxes to pay for what economists refer to as "public goods," i.e., goods like national defense, dams to protect against the flooding of rivers, and the like. They require public funding precisely because their benefits cannot be limited only to those who are willing to pay for them through a market. *All* of us can "free ride" on the general protection provided by missiles and submarines or the specific protection against floods or other natural disasters. Thus, only coercive taxation will provide the funds necessary to procure the general benefits, and it is completely legitimate to make persons pay for goods that they clearly and unequivocally benefit from.

This is very different, obviously, from providing public funding for goods that *can* reasonably be sold through a market and limited only to those who can afford to pay for them (such as medical care, housing, food, or education, for starters). Defense of the latter, including the inevitable redistribution involved in taxing the haves to pay for benefits that will flow to the have-nots, requires moving beyond "classical liberalism." After all, a classic trope in American thought condemns as a paradigm case of injustice "tak[ing] property from A, and giv[ing] it to B."[9] Antagonism to such redistribution is at the heart of Epstein's classic book *Takings*.[10] "Property" in this context applies to far more than real estate; libertarians view much taxation as the equivalent of theft inasmuch as it is taken by the state from (have?) A's to give to have-not (or, at least, politically well-situated) B's.

7. *Id*. at 33.
8. *Id*. at 25.
9. *See* Calder v. Bull, 3 U.S. 386, 388 (1798) (opinion of Chase, J.).
10. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

It is not clear how much Barnett's "Republican Constitution" is truly receptive to such redistribution. None of the cases he applauds involves B's receipt of funds from A. This may, however, simply reflect the fact that the Randy Barnett who is the leading academic voice for a systematically libertarian perspective—as revealed in his earlier distinguished writings[11]—has written a considerably different book, in both tone and substance, for more general readers. So be it, though I suspect that other academic readers like myself will rue his decision. In any event, any reader who expects any discussion of the "republican" basis of the Constitution (as distinguished from a more "liberal" one) will be disappointed.

Perhaps similar market considerations counseled against simply titling the book *The Anti-Democratic Constitution,* although that, too, would be accurate. He pays me the tribute of noting my own book *Our Undemocratic Constitution,*[12] which argues that our Constitution, even as amended after 1787, does not survive serious analysis under twenty-first century understandings of democratic political theory. Moreover, both of us agree that those who framed the document in 1787 scarcely described themselves as sympathetic to "democracy." Elbridge Gerry undoubtedly spoke for many of his fellow delegates in Philadelphia when he proclaimed that "[t]he evils we experience flow from the excess of democracy," as did Virginia Governor Edmund Randolph when he similarly traced "the evils under which the U.S. laboured" to their origins "in the turbulence and follies of democracy" (p. 57). If that is the diagnosis of our political illness, then one surely would not expect "democracy" as such to be adopted as the treatment. And, of course, it was not. What I regard as a bug, though, Barnett accepts as an attractive feature.

Barnett is thus similar to the many critics of my own book who reminded me, as they almost certainly unintentionally quoted the slogan of the John Birch Society, that the Framers adopted a "republic and not a democracy, and we should keep it that way." In this context, a "republican" government is not

11. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2d ed. 2015); RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (2d ed. 2014).

12. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2008).

meant to contrast with "liberal," as was the case with the historians whose work was assessed by Daniel Rodgers, but, instead, to contrast with "democratic." Barnett does not seem to disagree with my descriptive analysis. Indeed, he adopts with characteristic exuberance a consistently anti-democratic posture, expressing general contempt for the idea of collective consent of the governed even as he privileges what he calls the sovereignty of each and every individual, about which more anon.

Whatever title he wishes to give it, his argument is certainly an important one, which should be grappled with, though it is important to be clear about what embracing "democracy" entails. If, for example, "democracy" is identified with support of unfettered majority rule, there are in fact few devotees. Perhaps Jeremy Waldron fills that niche, but, for better or worse, he has few allies in his insistent attacks on judicial review and the protection of vested rights (and, even more, creation of new rights) ostensibly linked to such review. For better or worse, most contemporary "democrats" are "liberal democrats" of one kind or another who, as do Barnett and Ronald Dworkin, "take rights seriously" even as they also generally support governance by the majoritarian "consent of the governed." To put it mildly, these dual commitments may sometimes be in tension with one another, but that simply underscores the complexity of intellectual life. As Waldron notes in his recent collection of essays, classical republican thought does not emphasize the necessity that rulers be directly accountable to the community in any systematic way, though, on the other hand, they should be motivated by a concern for the general communal welfare.[13] Modern liberal constitutionalism, on the other hand, places much more reliance on elections as mechanisms for disciplining "representative" agents and providing the basis for legislation that reflects the preferences of majorities, even if there are constitutional limits on the extent to which those preferences should always be honored.

Since the title cannot possibly be justified in terms of its fidelity to the explicitly "republican" tradition of Western, or even Anglo-American political thought, save for the sound-bite references to framers who indeed used the word "republican" to

13. *See* Jeremy Waldron, *Accountability and Insolence, in* POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS 176–77 (2016).

distinguish themselves from "democrats,"[14] one is tempted to think that it has to do with Barnett's desire to discomfort adherents of the Democratic Party. He suggests that the Republican Party, at least from the time of Lincoln but substantially going back to the Federalists who hated Jeffersonian democracy, instantiates a basically libertarian (or, at least, anti-democratic) view of constitutional propriety. Perhaps it is true as an empirical matter that more Republicans than Democrats over time have embraced such a vision, though it might take a considerable effort to demonstrate this when looking at a broad range of issues that might be subsumed under "devotion to liberty." After all, it is contemporary Democrats who are generally committed to the norm of "reproductive choice," a topic notably ignored by Barnett, who prefers to discuss admittedly outrageous regulation of would-be florists. Barnett made a fair point in the symposium at which an earlier version of this essay was originally presented: one's views on abortion are inevitably linked to the extent that one views a fetus as a full human being entitled to the panoply of "natural rights" attached to that status. So perhaps one can understand his dodging that question in this book. However, there are obviously other questions linked to sexuality, sexual freedom, and sexual identity. One's views on what has come to be identified as GLBT issues require no decision as to when one becomes entitled to full recognition as a human being. It is obvious, though, that contemporary Democrats are far more likely than their Republican counterparts to adopt what might be viewed as libertarian positions with regard to the legal (and social) treatment of GLBTs.

But Barnett is not really offering an argument based on the actual history or current positions of the American political parties. His version of the Republican Party—and, therefore, a constitution ostensibly identified with that Party—requires that he ruthlessly ignore or dismiss not only a number of contemporary differences between the two parties with regard to the liberties they emphasize (or choose to ignore), but also the views of many officials elected over time under the Republican banner. It is one thing to deny the appellation "Republican" to the 2016 nominee of the Republican Party (whose election to the presidency Barnett opposes) Donald J. Trump, though that scarcely stills any

14. *See especially* THE FEDERALIST NO. 10 (James Madison), *the locus classicus* of this opposition.

questions one may have about the support Trump is receiving from, say, Speaker of the House Paul Ryan or Senate Majority Leader Mitch McConnell or, for that matter, Barnett's original choice for the nomination, Rand Paul. But let that pass. It is surely more problematic to be similarly dismissive of, say, Theodore Roosevelt or, dare one suggest, Richard Nixon, both major architects, albeit separated by many decades, of the modern administrative and highly regulatory state.

Consider, though, two of Barnett's central historical villains, Woodrow Wilson and Theodore Roosevelt. That is surely no surprise, given recent demonization by right-wing constitutionalists of the Progressive Era. Epstein shares that animus. Wilson, of course, was a Democrat (with a truly regrettable deep vein of racism), and Roosevelt famously broke with the GOP in the 1912 election and thus guaranteed Wilson's election over the Republican stalwart William Howard Taft. So we are invited basically to read TR out of the Republican Party, as I suspect Barnett might think it is true as well for the 1916 Party nominee, Charles Evans Hughes. But even Taft presents problems. Put to one side some of the "progressive" aspects of his Presidency. More to the point, perhaps, one would literally never know from reading *The Republican Constitution* that Taft himself, like the detested Oliver Wendell Holmes, dissented from the Court's 1923 invalidation of a federal minimum wage law in *Adkins v. Children's Hospital.*[15] "The right of the Legislature under the Fifth and Fourteenth Amendments to limit the hours of employment on the score of the health of the employee, it seems to me," wrote the former President and now Chief Justice, "has been firmly established."[16]

Some readers may be surprised to discover that Herbert Hoover was also a dangerous progressive. There is certainly a case to be made for that proposition; Amity Schlaes, in her admiring biography of Calvin Coolidge and his commitment to conservative verities,[17] certainly has little good to say about that president's Secretary of Commerce. There was a reason, after all, that FDR expressed regret in 1920 that Hoover would not run for the presidency as a Democrat. And Hoover as president

15. Adkins v. Children's Hosp. of the D.C., 261 U.S. 525 (1923) (Taft, C.J., dissenting).

16. *Id*. at 563.

17. AMITY SHLAES, COOLIDGE (2013).

appointed both Hughes to succeed Taft and then the New York Democrat (and Jew) Benjamin Cardozo to succeed Holmes. One can certainly argue that he has been unfairly typecast as a simple-mindedly reactionary villain jousting against the heroic Franklin Roosevelt and his New Deal. But then one has to ask why the Republican Party even during the era of Calvin Coolidge would be so attracted to a genuine progressive.

When discussing (and praising) Earl Warren for *Brown v. Board of Education,* Barnett tendentiously identifies him a Republican—presumably because he ran for the vice-presidency in 1948 as Thomas Dewey's running mate, though he had in fact received the nominations of both parties when running for re-election as governor of California. Unmentioned is the fact that as California's Attorney General, Warren was a zealous supporter of the ethnic cleansing of Japanese-Americans and their Japanese-national parents (who by U.S. law were barred from becoming citizens) and relocation to what Justice Roberts described as "concentration camps." Nor does Barnett exhibit equal pride in other decisions identified with the "Warren Court."

The Republican President who appointed Warren to the Court also appointed William J. Brennan, Potter Stewart, and John Marshall Harlan (as well as the ill-fated Charles Whittaker, who resigned after five years because of the unbearable tensions attached to the role of Supreme Court justice). But would even Stewart and Harlan meet Barnett's criteria of "true Republicans"? I think not, because they often (but not always) presented themselves as devotees of "judicial restraint" against their colleagues' innovative decisions.

Indeed, as he notes, flesh-and-blood Republican Party leaders and their nominees to the judiciary usually embraced the slogan of "judicial restraint." Of no one was this more true than Robert Bork, President Reagan's ill-fated nominee for a position on the Supreme Court. Yet his teachings are now being subjected to full-scale revision by persons who, like Barnett, wish to endorse "judicial engagement" as a substitute for "judicial restraint," even if "judicial engagement" is thought to be a far more palatable slogan than "judicial activism." Bork was *so* twentieth century inasmuch as he endorsed Holmes's dissent in *Lochner* denouncing the majority for invalidating New York's law limiting the hours that bakers could work. Holmes famously acknowledged that some people might view the New York law as "tyrannical," but it

did not matter: legislative majorities should be deferred to, and Bork enthusiastically agreed. He objected only to Holmes's leaving some space available for reference to unenumerated "fundamental principles" as a source of judicial power.

Barnett cannot be pleased with the fact that both William Rehnquist and, more recently, his successor Chief Justice John Roberts, went equally out of their way to praise Holmes's dissent. The latter happily cited Holmes in his *Obergefell* dissent by way of denouncing the majority for deviating from the correct posture of "judicial restraint" in a society that, as Holmes insisted, consists of people with "fundamentally different views" about the (im)propriety of same-sex marriage. Such differences might include what might count as "natural rights" or even whether there are any such entities at all. (Holmes certainly had no such beliefs.)

Again, one can certainly debate the merits of Barnett's substantive notions, which are consistently interesting whether one accepts them or not. I would have no hesitation to recommend the book to students and other laypeople interested in a brisk and interesting argument about how one might understand the Constitution as tilting very much in a libertarian direction. But his title disserves his own argument inasmuch as it generates far more heat than light.

Having gotten my unhappiness over his title off my chest, let me address what is far more important, the actual content of his arguments and their merits. I will first address his revisionist understanding of "popular sovereignty," which is genuinely interesting and worth arguing about. Rejecting the common notion that the term refers to the collective "people," Barnett instead adopts a radically individualist conception. It is, to be sure, based on fascinating views developed in perhaps the first great opinion of the United States Supreme Court, *Chisholm v. Georgia*,[18] but its distinguished provenance does not overcome the difficulties presented by such an argument.

I will then turn to his insistence that the fall from a prior constitutional Eden occurs only in the hated Progressive Era. Instead, I will argue that Barnett's real enemy must be "the Great Chief Justice" John Marshall, whose principal contributions to American constitutionalism are given a quite distorted reading in

18. Chisholm v. Georgia, 2 U.S. 419 (1793).

order to fit into Barnett's own argument. Marshall certainly need not be accepted as the last word on constitutional meaning. Perhaps *McCulloch* and *Gibbons* are ripe for overruling or, at least, significant modification. But one must ignore quite a bit of Marshall's handiwork in order to enlist him into Barnett's version of the "Republican constitution."

Finally, I will offer some observations about Barnett's systematic dismissal of what is ordinarily meant as "democracy." He does this in two quite different ways. The first is to express disdain for the actual abilities of Americans to engage in the kind of "reflection and choice"[19] that underpins any truly serious democratic theory. The second is to promote a strong notion of "judicial engagement" that would in fact empower the judiciary to invalidate at least some significant number of statutes or administrative regulations that under Barnett's views would be deemed "arbitrary" or otherwise in violation of the rights protected by a strong notion of individual sovereignty.

ON SOVEREIGNTY, NATURAL RIGHTS, AND WELFARE RIGHTS

There is probably no trickier notion in political theory than that of "sovereignty" in general and "popular sovereignty" in particular.[20] Does, for example, "sovereignty" just mean the right/ability to rule (without limits) and never to be ruled in turn? That notion almost certainly derives from concepts surrounding Divine sovereignty. It is indeed difficult (though not impossible) to imagine a God who is a "constitutional sovereign," limited in power not by other gods in a polytheistic universe, but, rather, by notions of morality that are God-independent.[21] And, of course, if we credit the ontological notion of a divine sovereign and believe there are epistemological means of discerning the commands of that sovereign, then we are presented squarely with the claims of those who resist obedience to undoubtedly otherwise valid legal

19. *See* THE FEDERALIST NO. 1 (Alexander Hamilton), *discussed in* SANFORD LEVINSON, AN ARGUMENT OPEN TO ALL: READING *THE FEDERALIST* IN THE 21ST CENTURY (2015).

20. *See* Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 YALE L.J. 2644 (2014).

21. *See obviously* PLATO, EUTHYPHRO (399-395 BCE), for a classic statement of this issue.

commands in the name of their overriding duty to the true Sovereign of the Universe.[22]

One can view the development of what political theorists call "modern" political theory in the sixteenth and seventeenth centuries as instantiating the displacement of God as the sovereign in favor of a state that itself takes on the appurtenances of sovereignty, whatever exactly that term is thought to mean. For a while, of course, sovereignty was placed in a monarch who was thought to be magistrate chosen by God and thus entitled to the same level of obedience.[23] The divine right of kings did not survive the seventeenth century, let alone the eighteenth century that saw both the American and French Revolutions and then the establishment of their respective constitutions. Instead, the notion of "popular sovereignty" emerged front and center. It is *that* notion that elicits Barnett's interest.

An old maxim, "the voice of the people is the voice of God," denounced in a 798 letter from Aucoin to Charlemagne, took on a much more affirmative valence.[24] Some might interpret this as simply an assertion that God in fact speaks through the voice of the majority; others, less sectarian, might suggest that we can have no real idea what God might desire (or even if there is a God) and that the authority once assigned to God should instead be given to the "voice of the people." Quite obviously, in either case we may have significant difficulties in identifying "the people" who count as authoritative. Does this refer, for example, only to a *unanimous* declaration by the relevant "people" as to some proposition, with even one dissent making any claim of overriding authority invalid? Or, on the other hand, do we accept some notion of majority (or super-majority) rule even at the price of overriding the good-faith objections of those who dissent?[25] We know beyond shadow of a doubt that those who framed the Constitution, "ordained" in the name of "We the People," were indifferent to the inevitable reality of disagreement, so long as it didn't become large enough to capture control of a given

22. *See* Sanford Levinson, *Divided Loyalties: The Problem of "Dual Sovereignty" and Constitutional Faith*, 29 TOURO L. REV. 241 (2013).

23. *See, e.g.*, *Romans* 13:1 (King James) ("Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God.").

24. *See, e.g.*, *Vox Populi, Vox Dei*, WIKIPEDIA, https://en.wikipedia.org/wiki/Vox_Populi,_Vox_Dei (last visited May 10, 2016).

25. *See, e.g.*, MELISSA SCHWARTZBERG, COUNTING THE MANY: THE ORIGINS AND LIMITS OF SUPERMAJORITY RULE (2013).

convention charged with ratifying the Constitution. After all, there was not a hint of a suggestion that the 30-27 vote in New York, for example, rendered illegitimate that state's ratification of the Constitution. To be sure, neither Rhode Island nor North Carolina was in the Union when George Washington was inaugurated on April 30, 1789; that is evidence, though, only for the proposition that each state *did* have to assent, as a corporate entity, before being bound by the new Constitution. But anti-Federalist minorities within the states were out of luck.

None of this supports Barnett's interesting and important argument, based largely on a debatable reading of the Declaration of Independence and a more plausible reading of the opinions of Chief Justice Jay and Justice James Wilson in *Chisholm v. Georgia,*[26] which unequivocally rejected "state sovereignty" in behalf of individual sovereignty, where "the people" means what Barnett repeatedly refers to as "the people as individuals, each and every one" (p. 68). As to the Declaration, Barnett, like many Americans, focuses almost exclusively on the notion that each individual has an equal and inalienable right to "life, liberty, and the pursuit of happiness" that, by definition, cannot be abridged by the state. Indeed, it might even comprise "tyranny" for the state to do so. This reading is used to support Barnett's strong insistence on the ontological existence of "natural rights" (and, of course, our epistemological abilities to discern exactly what they are), though he does not seem to ground those rights on a Creator instead of, say, an Aristotelian capacity to engage in "right reason." In any event, Barnett's version of the Declaration leads to a radically individualist account that, among other things, requires a quite radical revision of what the Declaration at its beginning might mean by reference to "the one people." It is, after all, this collective entity who seceded from the British Empire and who in doing so, it must be added, were decidedly non-unanimous, given the plethora of Loyalists who opposed secession. There are more than a few overtones in Barnett's approach of Margaret Thatcher's famous statement that "there is no such thing as society. There are individual men and women, and there are families."[27] (I will presently turn to the implication

26. *Chisholm*, 2 U.S. 419 (1793).

27. *See* Margaret Thatcher, *Epitaph for the eighties? "there is no such thing as society,"* THE SUNDAY TIMES (Oct. 31, 1987), http://briandeer.com/social/thatcher-society.htm.

of the fact that "there are families," which raises problems for radical individualism.)

Barnett confusingly suggests that his "modern" opponents "locate[] popular sovereignty in Congress or state governments, which supposedly represent the 'will of the people'" (p. 72). It is certainly true that the central arguments in behalf of the legitimacy of institutions of representative government all involve some notion that they reflect the "will of the people." This argument can be found in *The Federalist* itself and its embrace of what Publius calls "republican government." But many "moderns" support various mechanisms of "direct democracy," including initiative and referenda. That itself demonstrates that merely "representative government" is open to significant criticism as not being sufficiently reflective of popular "will," whether because of inherent limitations attached to the idea of "representation" or, more ominously, to the specter of corruption and the capture of representative institutions by factional interests. This, after all, was the basis of the turn toward direct democracy in the western American states at the turn of the 20th century.[28] One finds a growing mistrust of institutions of representative government on the part of both the contemporary right and left alike. To cite a contemporary phrase, these institutions are perceived as "rigged" in favor of the rich and powerful—or, if one wishes, of "progressive" cosmopolitan and liberal elites who are indifferent to the plight of Joe Sixpack—and something drastic should be done about this.

But this may be only a relatively minor caveat, for key is surely Barnett's emphasis on individual sovereignty. What the Declaration calls "the consent of the governed" apparently requires that "*all* these sovereign individuals" give their consent (p. 78, emphasis in original). This doesn't mean that they must empirically agree, which is obviously impossible as a practical possibility. Instead, truly legitimate governmental commands must be those that *would* receive the consent of all rational individuals aware of their natural rights. This might be termed as a form of "ideal contractualism" run riot, though, of course, there are distinguished antecedents for such views.

28. *See, e.g.*, STEPHEN GRIFFIN, BROKEN TRUST: DYSFUNCTIONAL GOVERNMENT AND CONSTITUTIONAL REFORM (2015).

The problem of tyrannizing even a single holdout is a real one; it can be said to be the basis of a work that Barnett does not rely on, John Rawls, *A Theory of Justice,* inasmuch as one must imagine, in the "original position" behind a "veil of ignorance," that one could occupy just any position in the society; therefore, basic constitutive rules should be designed to assure that even the person least well off will accept the constitutional order that places him in an inferior position as having been designed in a completely "fair" process.

Barnett forces us to ask whether one can take truly seriously such a radical theory of individual sovereignty. Is it really the case—or in what sense could it possibly be the case—that "I am the master of my fate/ I am the captain of my soul"?[29] Are we really never obliged to follow the orders of others who claim rights of "mastery" or "captaincy," perhaps by capturing control of law-making institutions that compel us to behave in ways that we would prefer not to or even plausibly believe violate our rights, natural or otherwise? I do not mean these as "knockdown" questions. Who among us has not been tempted, at one point or another, to assert our own individual sovereignty over the rest of the world, even as modified by the necessity to recognize the equal claims of others with regard to our common "natural rights"? But such arguments do seem ultimately to lead to a basically anarchic view of the world; taken seriously, they serve to invalidate the legitimacy of every single existing government that can be shown to violate some set of rights under one or another extant theory of "natural rights." Any and all theories of political obligation become vulnerable, perhaps fatally.[30]

I should emphasize that this does not in itself invalidate Barnett's arguments. Perhaps every single existing government *is* illegitimate in some profound sense. To the extent that I take my own arguments seriously in *Our Undemocratic Constitution,* it is entailed that I do not view the present U.S. government organized under that Constitution as wholly legitimate. But neither Barnett nor I offer a full explanation of what follows from any such perception. Does it simply validate reformist politics designed to overcome the defects that surely exist, or can it justify armed

29. William Ernest Henley, *Invictus*, THE POETRY FOUNDATION, http://www.poetryfoundation.org/poem/182194 (last visited May 10, 2016).

30. *See* ABNER S. GREENE, AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY (2012).

overthrow of a presumptively illegitimate state? The question takes on added weight inasmuch as both Barnett and I share a deep interest in the existence of the Second Amendment within our Constitution and the extent to which it implicitly speaks to the potential of armed overthrow of an oppressive government by an aroused and self-regulated "people."

But, more than ever, any such views must rely on a well-developed theory of how we tell the difference between legitimate and oppressive governance. What, for example, constitutes government in the "general welfare," as against illegitimate rent seeking by well-placed factions who have captured government for their nefarious private purposes? One simply does not get enough of a solid sense of what the "general welfare" means to Barnett beyond the provision of certain "public goods" that, by definition, would not be created without coercive taxation because of the ability of "free riders" to share in the goods without having to purchase them via a market. But modern government obviously involves massive redistributions from one set of taxpayers to others. All of us, whatever our place on the political spectrum, can no doubt think of examples that we detest, even if our lists might not overlap. The real question, though, is the extent to which our lists of permitted "general welfare" expenditures or "public goods" would in fact overlap.

As is common especially in books written for general audiences, Barnett is very effective in selecting cases that might make our collective blood simmer, even if not boil. I have no brief for ridiculous requirements imposed on would-be floral designers, and I happily ridicule the purported Oklahoma state interest asserted in *Williamson v. Lee Optical Co.*[31] as a justification for compelling hapless glasses-wearers to pay rents to optometrists or opthamologists should they wish to have their glasses duplicated. I have no hesitation in teaching my students that no plausible explanation for the actual passage of the legislation can ignore the likely presence of campaign contributions directed at state representatives who are participating in a de facto auction market relative to their votes. No attractive world would come to an end if courts were more inclined to monitor such patent rent seeking in circumstances where the assertion of a public purpose is implausible (even if not outright "lunatic" as presumably required

31. Williamson v. Lee Optical of Oklahoma Inc., 348 U.S. 483 (1955).

by the most austere version of "minimum rationality"). But, at the end of the day, imposition of what is sometimes called "minimum rationality with bite" would not require invalidation of more than a small fraction of regulatory laws. Is it really the case that Barnett would be satisfied to stop with the invalidation of ridiculous laws limiting the liberty interests of would-be florists or opticians devoted to reducing the prices of duplicate glasses?

Barnett might complain that I am overestimating the degree to which he is a radical individualist. After all, in discussing "our duties" even in a system of "natural rights," he emphasizes the "duties to our children" (p. 126). To put it mildly, though, there is no discussion either precisely what these duties are or where exactly they come from. At the very least, they are obviously "positive" duties rather than any general duty simply to let the child "alone" so that he/she can develop without our interference. Presumably we are called upon to provide food, clothing, shelter, medical care (unless we are Christian Scientists), and education (for starters).

A given family can be viewed as a mini-welfare state, with redistribution flowing from better off parents to decidedly vulnerable children. The obvious question, at least to contemporary liberals (if not libertarians) is what happens if, say, the parents die. Does the state have a duty to provide a variety of welfare goods to the child—and, if so, for how long? Must the state make sure that the child receives food, clothing, shelter, medical care, and an adequate level of education? Consider, in this context, such canonical cases as *DeShaney* or *Rodriguez*. The first, of course, left "Poor Joshua" to his extraordinarily sad fate unless the state could be sufficiently implicated in it, which, according to Chief Justice Rehnquist, was not the case. The second almost insouciantly announced that education, unlike reproductive choice, did not constitute the kind of "fundamental right" or "interest" that justified judicial intervention in the name of the Constitution. A footnote did leave open the possibility, however, that the case would have come out differently had Texas offered *no* education at all. One might believe that Justice Powell was sincere in writing this footnote given his later vote in *Plyler v. Doe,*[32] which invalidated the state's refusal to supply any education at all to undocumented children (also called, of course,

32. Plyler v. Doe, 457 U.S. 202 (1982).

"illegal aliens"). Quite obviously, different questions are raised as children make the transition into full-scale adulthood, but I am left curious how much Barnett's notion of individual sovereignty and natural rights allows for a redistributionist state that takes from adult haves to transfer to have-not children. These children may, of course, be orphans, but, more likely, they have parents who simply cannot afford to purchase through the market the kinds of goods that are necessary to their flourishing in the society in which they are growing up.

In the symposium on his book, Barnett suggested that I, like all too many latter-day political liberals affiliated with the Democratic Party, want to treat adults as if they were children. To some extent this is true, though not, I think, in the paternalistic way that Barnett is suggesting. That is, what is central with regard to providing many services to children is their essential vulnerability. A sick child may well realize the need for medical services, just as a hungry child knows that she needs food. One is not foisting these goods on a recalcitrant child who loves feeling sick, hungry, or exposed to the elements. Paternalism arises when the child would prefer to eat potato chips instead of broccoli, not in the provision of food itself.

The most fundamental questions of the redistributive welfare state arise with regard to attributing responsibility for the sufferings of vulnerable adults. Are adults suffering from the consequences of a natural disaster or the vagaries of structural changes in the economy to be treated as "child-like" at least with regard to being free of fault for their dreadful situations, or is it fair instead to say that as captains of their fate they are responsible for the shoals they run into and the possibility of seeking into the depths? As Michele Dauber Landis demonstrated in *The Sympathetic State,* much of the defense of the New Deal welfare state was predicated on analogizing the unemployment of that period to other "natural disasters" that had elicited legislative responses under the rubric of "disaster relief," all of which involved redistribution, of money, goods, or services to those without resources to purchase them contractually in private markets. *All* of us are subject to returning to the social reality of vulnerability most obvious in childhood.[33] One need not demean

33. *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008).

suffering adults when comparing them to children along this singular dimension of vulnerability and lack of fault for their predicament. Even if they are, in some sense at fault, as with the alcohol-abuser who develops liver disease, we are left with profound questions about whether even they should be left to die in the street. The modern welfare state denies us the luxury of dismissing the plight of the vulnerable as their own fault.

Perhaps it is unfair, at least based on the four corners of this book, to attribute to Barnett a worked-out position with regard to the constitutional legitimacy of the contemporary welfare state. He is not willing to condemn taxation as theft, for example, and he scarcely presents us with a full-scale theory of the meaning of "general welfare," preferring instead to concentrate on particular examples, such as the regulation of florists or opticians, that seem to be far away from vindicating "general welfare" interests. However, he does devote his first chapter to railing against the abominations of Obamacare, and he is probably the primary architect of the argument that the Affordable Care Act represented overreaching by Congress inasmuch as it was based on the Commerce Clause. However, he is strangely silent on whether Romneycare, the Massachusetts program passed under the leadership of then-Governor Mitt Romney, a central feature of which was a similarly coercive mandate to purchase insurance.

There is much in the book expressing a regard for federalism, but, quite obviously, it is unclear why locally-based limitations on natural rights is more tolerable than that emanating from Congress. Certainly James Madison in *The Federalist No.10* offered no reason to feel particularly admiring of state-level governments, which were presented largely as cesspools of "factions" eager to capture governments for their own selfish purposes. Far more to the point, perhaps, is the fact that he has never publicly suggested that a federal tax-financed single-payer system would violate any constitutional norms even if, as a practical matter, it would be at least as coercive and redistributive as the Affordable Care Act and its reliance on private insurance companies to provide coverage instead of the national government.

IS THE REAL ENEMY JOHN MARSHALL?

Barnett, like many contemporary conservatives, exhibits remarkable disdain for Progressives and Progressivism. I am

surprised, frankly, that he did not choose, when distinguishing his book from mine, to note, with suitable criticism, the fact that I bookend the text first with a well-known text by Thomas Jefferson on the desirability of constitutional change and then, at the end, and perhaps more importantly, with a long excerpt from Woodrow Wilson explicitly adopting a Darwinian view of constitutional evolution. Both of these worthies were certainly disdainful of the views associated with the late Antonin Scalia, who proudly rejected any notion of a "living constitution" in favor of one that has long-since been dead, perhaps even mummified in 1787 or 1791.[34] As a committed originalist, Barnett has argued eloquently in favor of Scalia's vision, criticizing him only for his "faint-heartedness" in enforcing it when presented, say, with the fact that federal drug control laws were decidedly oppressive when enforced against persons with painful and even terminal diseases.[35]

Woodrow Wilson has relatively few defenders these days, and I will not take it upon myself to embark on such a defense here (though I certainly do not recant my quotation from him in *Our Undemocratic Constitution*). The reason is that the "living Constitution," in reality if not necessarily in name, emerges well before the Progressive Era. It is a part of our basic constitutional DNA. Originalists, including Barnett, have a significant, perhaps fatal, problem handling precedent and the inevitable extent to which precedents, if respected, serve to amend the Constitution decidedly outside Article V.

To be sure, Barnett protested, at the conference on his book, that *The Republican Constitution* is not intended to be an originalist tract. As Jack Balkin notes in his own contribution, inasmuch as Barnett emphasizes a single approach—or what my sometime colleague Philip Bobbitt calls a "modality"—to constitutional interpretation, it is that of "ethos," i.e., drawing on the implicit premises of American political culture to discern basic constitutional limits. This is surely not surprising inasmuch as Barnett is identified with the revival of interest in what had been "the forgotten Ninth Amendment" and its seeming allusion to unenumerated rights. That still, however, does not account for his

34. *See, e.g.*, Bruce Allen Murphy, *Justice Antonin Scalia and the 'Dead' Constitution*, N.Y. TIMES (Feb. 14, 2016), http://www.nytimes.com/2016/02/15/opinion/justice-antonin-scalia-and-the-dead-constitution.html?_r=0.

35. *See* Gonzales v. Raich, 545 U.S. 1, (2005).

argument that the downfall of American constitutionalism awaited the Progressive Era.

Why should not a chief villain in Barnett's universe be "the Great Chief Justice" himself, John Marshall? Although it may be safer, for a variety of reasons, to attack Progressives, including Wilson and Teddy Roosevelt, as radical deviants from well-entrenched American constitutional tradition, that is, for better or worse, incorrect. Just as the snake was a key inhabitant of the Garden of Eden, so was "living constitutionalism" present near the creation itself.

Consider what is undoubtedly the greatest of all of Marshall's opinions, *McCulloch v. Maryland*,[36] which famously upheld congressional chartering of a Bank of the United States in spite of the fact that no explicit authority to issue corporate charters is included within the list of enumerated powers set out in Article I, Section 8. Given that I have spent an entire twelve-hour reading course at the Harvard Law School engaging in a sentence-by-sentence exegesis, I will certainly not take the time to write a truly extensive piece on every aspect of Marshall's innovations in that decision. I will, though, look at some of the most important (and relevant) arguments—or raw assertions—found in Marshall's state paper, which might be viewed as a remarkable example of the "judicial engagement" sought by Barnett.

By 1819, most political elites had seemingly accommodated themselves to the constitutionality of the Bank of the United States. After all, James Madison, who had resolutely attacked the constitutionality of the Bank in a 1791 speech to his colleagues in the House of Representatives, signed the Bank renewal bill in 1816. Moreover, he had in 1815

> …[W]aiv[ed] the question of the constitutional authority of the Legislature to establish an incorporated bank, as being precluded, in my judgment, by the repeated recognitions under varied circumstances of the validity of such an institution, in acts of the Legislative, Executive, and Judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation.[37]

36. McCulloch v. Maryland, 17 U.S. 316 (1819).

37. *Quoted in* BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 233 (1957). The general story of the renewal is told at 227-233.

At the very least, he never formally recanted his earlier speech and said, for example, that he was wrong (and Hamilton was in fact correct). What makes most sense is that Madison conceded that we had a "living Constitution" *avant le lettre* that is amenable to change, whatever the "original meaning," however defined might be, because of a mixture of practice and the sheer recognition of the value of the policy at issue. So if one views Madison, altogether dubiously, as a privileged "father of the Constitution," it is clear that he was willing to watch his child develop in ways that he might not have predicted and earlier actively disapproved of.

But then we turn to *McCulloch* itself. Upholding the constitutionality of the Bank in fact posed no difficulty. Three paths were available. One would have had the Court itself, after engaging in what we would today call "strict scrutiny," hold that the Bank was really-and-truly "necessary" under a quite rigorous definition of the term. A second would have looked carefully at the process by which the Bank was approved by Congress and determined that they applied the correct standard of "necessity" and that the Court would defer to the obviously rigorous process even if perchance the justices were not themselves convinced of the Bank's true "necessity." Quite obviously, neither of these comes remotely close to describing the reality of Marshall's decision. Instead, the Court both adopted a decidedly unrigorous definition of "necessary" (and "proper" as well) and gave almost absolute deference to Congress's judgment that the Bank was "useful" or "convenient." All of this eventuated, of course, in one of the most famous, and influential, paragraphs in the entire canon of American constitutional law:

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but

> consist with the letter and spirit of the constitution, are constitutional.[38]

Barnett may draw some consolation from the first sentence about "limited" government. Marshall *did* write it, and there is at least one recent article by Professor David Schwartz that insists that the conventional reading of *McCulloch* exaggerates the deference that Marshall gave to Congress.[39] But, surely, as Schwartz himself recognizes, this is not in fact the message that has been drawn from the case over its now almost-200-year history. It is not that one *cannot* read *McCulloch* more restrictively. As someone who has throughout his career emphasized the indeterminacy of what I have labeled "The Constitution of Conversation,"[40] I would hesitate to assert that *McCulloch* is capable of one and only one possible reading. Thus, one should read Professor Schwartz's long and valiant attempt to overturn the conventional wisdom. Yet, I remain quite confident that it is idiosyncratic in the extreme to read *McCulloch* as a case whose central meaning is in fact the limitations on the powers of the national government.

But wait, there is more than simply the canonical paragraph quoted above. There is also the famous sentence, described by Justice Frankfurter as the single most important sentence in all the constitutional corpus: "we must never forget, that it is *a constitution* we are expounding."[41] I have explained elsewhere my perplexity at Frankfurter's comment, since, after all, the sentence is a tautology at a formal level. But then, at long last, I combined the reminder at the conclusion of paragraph sixteen with the statements in paragraph twenty-seven:

> This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules,

38. *McCulloch*, 17 U.S. at 421.

39. *See* David S. Schwartz, *Misreading* McCulloch v. Maryland, 18 U. PA. J. CONST. L. 1 (2015).

40. *See* SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE (2012).

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

> for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.[42]

That is, the Constitution is designed, in outline form, to provide the basis for a nation through vast reaches of time, including, for what it is worth, the expansion of the original Atlantic-coast nation to the shores of the Pacific and even beyond. It will, inevitably and properly, require *adaptation* when, as will inevitably be the case, "*crises"* (italics in original) and "exigencies" require that government act, even in what might be unprecedented ways. One can be confident, for what it is worth, that Marshall's notion of "crisis" was as latitudinarian as his notion of "necessity." If, for example, a future generation believed that the roughly one-seventh of the U.S. economy devoted to our medical services industry presented a genuine problem to American society, Congress could legitimately respond to this "exigency" by requiring that Americans be prohibited from their preferred posture of free-riding in favor of the required purchase of insurance policy from private insurers. Is this the "best" means to a worthwhile end? No. I would have preferred some single-payer system financed entirely through taxes, which Barnett appears to concede would be completely unproblematic as a "tax and spend" measure. But Obamacare is surely no worse than Romneycare, unless one distinguishes it only on the formal basis that the latter manifests the state's "police power," however coercive it may be, while the former is not allowed as an act of Congress.

At least with regard to something like Romneycare (though not regulation of opticians or florists), Barnett seems to rely less on engaged judiciaries and more on what Ilya Somin calls "foot voting," i.e., the ability of someone who does not like a given state's regulation because of a (justified?) belief that it violates natural rights to pick up and leave (p. 175). He contrasts the ability to move from Massachusetts, say, to Texas with the presumably far greater burden of moving from Massachusetts to Canada; one should not be forced to leave the country for another one with a better mix of policies. But why? Business corporations relocate all the time, seeking the most favorable tax treatment for their profits. Why should we not expect similar flexibility from individuals?

42. *Id*. at 415.

The answer, if there is one, presumably involves the exorbitant personal costs of tearing up one's roots and transferring one's loyalties from our common country and emigrating abroad. But are there no such similar costs to moving from Massachusetts to Texas or, perhaps, even to New Hampshire or Maine? To put it mildly, being told that one can engage in "foot-voting," even if it does serve as a certain kind of safety valve, seems almost pathetic as a true response to someone who has roots in a given state and would find moving out of it almost as costly as moving to a truly foreign country.

Actually, to his credit, Barnett recognizes that "the policies of state government" can often be described, in Clint Bolick's vivid term, as "grassroots tyranny."[43] We must take essentially on faith that this capacity for tyranny will be adequately limited by the fact that states can compete with one another and that relatively random individuals can engage in their right to "foot-vote" by declaring they are mad as hell and will not take it anymore as they move to a more compatible state.

The second great "consolidationist" decision of Marshall, of course, is *Gibbons v. Ogden*,[44] which became the basis for much of the New Deal expansion of congressional power so disdained by Barnett. Perhaps imitating Marshall, himself a master of selective quotation, Barnett cites only the passages from *Gibbons* that support Barnett's argument (p. 173). It is true that Marshall wrote that "no direct general power over [a variety of objects] is granted to Congress; and consequently, they remain subject to State legislation." Just as with his assurances in *McCulloch* about the national government being one of "limited powers," one can doubt the degree to which Marshall truly agreed with critics of what persons like Patrick Henry and Brutus termed as "consolidated" government.[45] What is missing in Barnett's account is the (in)famous paragraph that has been widely

43. *Id.* at 180.

44. Gibbons v. Ogden, 22 U.S. 1 (1824).

45. It is interesting that Greg Abbott, the governor of Texas who supports a new constitutional convention to propose a number of amendments gathered together under the rubric of "The Texas Plan," and who draws quite explicitly on Barnett's advocacy of "the Repeal Amendment" that would allow de facto nullification of federal laws, avidly quotes Brutus and other anti-Federalist critics of the Constitution. The problem, of course, is that, as with many dissenters, their altogether cogent critiques simply reinforce the view that the Constitution, correctly interpreted, did indeed work to centralize power far more than they (and Barnett) would prefer.

interpreted as Marshall giving away the store with regard to the congressional power and, just as importantly, the irrelevance of "engaged courts" to serve as monitors over any overreaching that might occur:

> The subject, . . . is . . . commerce, "among the several states." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say, that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or *affect* other states. Such a power would be inconvenient, and is certainly unnecessary. *Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one*. . . . The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not *affect* other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then may be considered as reserved for the state itself (emphasis added).[46]
>
> . . . . This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. *The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must*

46. Gibbons, 22 U.S. at 194–95.

> *often rely solely, in all representative governments*…. (emphasis added).[47]

I certainly do not present Marshall as the last word on constitutional interpretation. One is surely free to denounce him as an unfaithful agent and, indeed, betrayer of his oath of fidelity to the Constitution. But, obviously, it is harder, in terms of making a credible argument within America's constitutional culture, to denounce "the Great Chief Justice" in the same terms directed by the late Antonin Scalia at his adversaries. Better to construct a fictitious history of unbroken constitutional fidelity—save for the rampages first of Justice Story in *Prigg*[48] and then Chief Justice Taney in *Dred Scot*[49]—than to recognize the responsibility of Marshall himself for the constitutional vision, whatever we wish to call it, that Marshall instantiated.

BARNETT'S DISDAIN FOR DEMOCRACY ITSELF

It is not surprising, nor necessarily a cause for criticism, that Barnett is explicitly anti-democratic. After all, "taking rights seriously," which is Barnett's theme every bit as much as it was Ronald Dworkin's, whatever some obvious differences in their respective positions, entails feeling entitled to disregard presumptively majoritarian preferences in favor of honoring the rights that are possessed by individual members (or, on occasion, groups) of the constitutional order. The more one insists on "limited government," the more, by definition, one is disinclined to honor the choices made by government, even if based on popular (but not unanimous) consent. That would be true, of course, even if one were inclined to view public officials as honorable Publian persons who always kept front and center their commitment to the public good and not, for example, panderers to the demands of rent-seeking politically powerful interest groups. As Dworkin insisted, even public-serving policy goals took second place to individual rights or, as Barnett would emphasize, the limitations on government. Presumably he would applaud what was literally the final act of James Madison as President, the veto of a public improvements act that obviously

47. Gibbons, 22 U.S. at 196–97.
48. Prigg v. Pennsylvania, 41 U.S. 539 (1842).
49. Dred Scott v. Sandford, 60 U.S. 393 (1856), superseded (1868).

gained the approval of both houses of Congress.[50] "I am not unaware," Madison wrote, "of the great importance of roads and canals and the improved navigation of water courses, and that a power in the National Legislature to provide for them might be exercised with signal advantage to the general prosperity."[51] So what's the problem? "[S]uch a power is not expressly given by the Constitution, and believing that it cannot be deduced from any part of it without an inadmissible latitude of construction," he felt under a duty to veto the legislation.[52] Obviously, Marshall had not yet published his opinion in *McCulloch v. Maryland,* but one doubts that Madison would necessarily have changed his mind. After all, he wrote a denunciatory letter to Virginia Chief Justice Spencer Roane suggesting that Marshall's opinion, had it been available in 1788, would have led to the rejection of the Constitution by delegates to the ratifying convention.[53] Taking rights and limitations seriously just means that commitments to "establishing justice" or achieving the "general welfare" will be subordinated to the "blessings of liberty," whatever the wishes of a benighted public might be.

But Barnett appears to believe that it is foolish to assume that legislators will necessarily be wise with regard to their judgments about justice or welfare, in part because in no serious sense will their feet be held to the fire by electorates themselves competent to make such general judgments. Barnett cites Ilya Somin[54] as "explain[ing]" that "[b]ecause one's vote in an election is swamped by the ballots of millions of others, it is simply irrational for most persons to invest too heavily in the time and resources to learn what it takes to vote wisely"[55] The typical voter, therefore, is decidedly ignorant, even if we concede that with regard to matters where their choices *do* matter, they might be quite intelligent (and well-informed). Moreover, with rare exceptions—and none at the national level—we can vote only for ostensible

50. *See* 1 MESSAGES AND PAPERS OF THE PRESIDENTS 584–585 (James Richardson ed., 1897), http://onlinebooks.library.upenn.edu/webbin/metabook?id=mppresidents.

51. James Madison, *Veto of federal public works bill* (March 3, 1817), http://constitution.org/jm/18170303_veto.txt.

52. *Id*.

53. *Letter No. CCCXXXI from James Madison to Judge Roane (Sept. 2, 1819)*, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 435 (Max Farrand ed., 1911).

54. *See* ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER (2013).

55. BARNETT, *supra* note 11, at 176.

"representatives" and not on specific policies themselves. We necessarily must choose, when voting for a particular "representative," a "complex package of economic and social policies that voters are not allowed to disaggregate. You must vote for one of the packages, or not vote at all."[56] What this leads to is the quite thundering declaration that "a system of voting does not allow the sovereign people to 'rule,' and it is a pernicious myth to claim that they do."[57] It is, therefore, a happy accident if Congress (or perhaps any other legislative assembly) actually gets it right with regard to serving the general welfare. Such views hardly lead one to view the national government—or perhaps any significantly large government—as truly legitimate or even likely to make normatively desirable decisions.

Perhaps this helps to explain Barnett's seeming opposition to the Seventeenth Amendment, adopted in 1913 to transfer selection of senators from state legislatures to the general electorate.[58] Interestingly enough, like Texas Governor Greg Abbott in his recent proclamation of a Texas Plan of proposed amendments to the Constitution, Barnett does not call for the repeal of the Amendment, perhaps because it is almost unthinkable that an empowered electorate would in fact acquiesce to its neutering. Instead, he endorses a de-facto nullification procedure that would lodge the power in "a majority of state legislatures representing a majority of the population to repeal *any* federal law or regulation."[59] I presume that he rejects Steve Griffin's call for a procedure for national referenda because that would lodge entirely too much power in the decidedly unreliable collective "people" themselves.

As a matter of fact, there is genuine force to Somin's and Barnett's critiques, even if one finds them, Somin's especially, to be a bit exaggerated. Both Barnett and I, in contributions to a symposium at Yale on Bruce Ackerman's work, independently cited a powerful statement by the late Yale Professor of History Edmund Morgan, from his book *We the People.* "Government," wrote Morgan, "requires make believe." The "fiction" of popular sovereignty is precisely the assertion that "the few" can legitimately "govern the many" because of their ostensible

56. *Id*. at 177.
57. *Id*.
58. *See id*. at 247–48.
59. *Id.* at 255 (emphasis added).

accountability to the many through mechanisms of election and the like.[60] To the extent that one adopts the description of this as a "fiction," perhaps akin to a Platonic "royal lie," useful only to loll the masses into unmerited acceptance of a status quo, then the foundations of a system ostensibly predicated on rule by "We the People" seem quite fragile.

In any event, one reason that Barnett rejects a "democratic Constitution"—or critiques based on the premise that the present Constitution is insufficiently democratic—is that he has no real regard for the very idea of democracy, defined as the only somewhat constrained ability of "the people" to control their own collective futures, whatever his genuine regard for individuals who feel beset upon by the demands of the modern regulatory state. I wish that one could simply dismiss his concerns about democracy as baseless. Who, however, not only looking at the general history of the 20th century, but also at the current spectacle in the autumn of 2016 of what passes for political campaigning in the United States, can deny the force of the critique of democracy in the name of other values?[61]

CONCLUSION

One must recognize, however ruefully, that Barnett sets out a powerful bill of particulars, even if one is disinclined, either on ontological or epistemological grounds, to join his embrace of "natural rights." Nor does it help that his particular brand of "classical liberalism" seems to leave little room for a flourishing notion of communal self-governance and a commitment to the importance of such elements of social justice and general welfare as require the aid of a coercive government that requires the transfer of resources from haves to have-nots.

Barnett's book will undoubtedly spark many arguments of the type set out in this symposium. But perhaps the real test of its

60. *See* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 13–14 (1988).

61. This review was obviously written before the astounding (and catastrophic) election of Donald Trump as president. It is hard to deny that the campaign in general, and then the result, might legitimately test one's faith in the democratic experiment. Should in fact one reject the foundational belief in the capacity of Americans to manifest an acceptable degree of "reflection and choice" about how to manage our necessarily intertwined lives, we must basically return to Ground Zero with regard to imagining a constitution adequate to such a reality.

thesis will be less its impact on the academic community, who may not be the truly target audience, and more the degree to which it is embraced by self-identified members of the modern Republican Party. If, on the other hand, it is most enthusiastically received by adherents of the Libertarian Party, then it will be harder than ever to identify Barnett's Constitution, whether or not one finds it attractive, with "the Republican Constitution."