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We, the people – whoever *that* is

BY GLENN HARLAN REYNOLDS

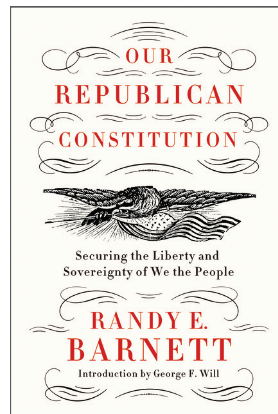
On February 22, *The Washington Post* added a sub-banner to its front page. Beneath the words "Washington Post" was the phrase, "Democracy Dies In Darkness." This generated a predictable degree of internet snark, including a comparison to a famous "Star Wars" line about the fall of the Galactic Republic.[1]

But what does it mean when we talk about "democracy" in the United States? Or, for that matter, when we talk about our (not galactic yet) Republic?

Those are the questions addressed in Randy Barnett's new book, *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People.*[2] And, despite *The Washington Post's* melodrama, they are questions that seem particularly salient just now.

The Framers, of course, famously disdained democracy in its pure form, and thus probably would have been unmoved by the *Post's* banner. (And, sometimes, they disdained newspapers, too.)[3] They also created a structure of government that departed considerably from pure democracy, but that nonetheless retained important democratic elements. Reconciling these elements has been a major problem for constitutional lawyers, and theorists, ever since.

In Barnett's account, though we have only one Constitution, we have had, in effect, two: What he calls a *democratic constitution*, in which the sentiments of the majority are determinative, and what he calls a *republican constitution*, in which structure and limitations on what the majority can do are much more important. One should not confuse either of these with the modern Democratic and Republican parties, whose fidelity to either conception has been limited at best, with political opportunism generally trumping constitutional fidelity.[4]



Our Republican Constitution:
Securing the Liberty and Sovereignty of We the People

BY RANDY BARNETT
Broadside Books / HarperCollins (2016)

As Barnett puts it, "At its core, this debate is about the meaning of the first three words of the Constitution: 'We the People.' Those who favor the Democratic Constitution view We the People as a group, as a body, as a collective entity. Those who favor the Republican Constitution view We the People as individuals. This choice of visions has enormous real-world consequences."[5]

The Supreme Court has issued important decisions following both approaches. Though the "democratic constitution" is identified with the causes of progressives, the Supreme Court sometimes applied the "democratic" principle and sometimes applied the republican approach during the Progressive Era.

Among the latter cases were decisions like *Buchanan v. Warley,*[6] which struck down a racial zoning law in Kentucky, even though the law had been approved by a majority. Regardless of majorities, the Court held, the law infringed "those fundamental rights of property which it was intended to secure upon the same terms to citizens of every race and color."[7] The Court so held even though a local majority, in the exercise of the state's police power, favored such restrictions, and even though the Court "had recently expressed sympathy for nonracial zoning, based on progressive precepts that could also be applied to racial zoning."[8]

Likewise, in *Bailey v. Alabama,*[9] the majority (over a dissent from Justice Oliver Wendell Holmes) barred enforcement of labor contracts for black people that, in reality, amounted to involuntary servitude. Whatever the formalities, the reality was that these contracts were an attempt (largely successful) to bind black workers to labor in a way strongly reminiscent of the antebellum South.[10]

And, of course, in the famous (infamous?) case of *Lochner v. New York,*[11] the Court found that state laws regulating the hours of bakers — which were really about discrimination against family-run bakeshops operated by immigrants — violated

a fundamental right to employment. The state's justifications for the law were sufficiently "tenuous" to give rise to "at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare." That motive was, as Barnett notes, helping large corporate bakeries and the union labor that they employed avoid competition with smaller, leaner family-run businesses.[12]

When the "democratic constitution" was applied, however, the result was to dramatically extend state power over individuals. Under the democratic approach, as exemplified by scholar James Bradley Thayer's theories of judicial restraint, courts were to uphold majority decisions except in cases of "clear mistake."

Such restraint, says Barnett, led directly to such judicial abdications as the Supreme Court's decisions in *Plessy v. Ferguson*, upholding racial segregation,[13] and *Bradwell v. Illinois*, upholding the exclusion of women from law practice.[14] As Barnett writes, "It is plain that *Plessy v. Ferguson*, decided three years after Thayer's article appeared in the *Harvard Law Review*, was the embodiment of this deferential approach. As Justice [Henry Billings] Brown wrote, 'We cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable.'"[15]

And this question of deference, or not, to the decisions of legislative majorities is at the core of Barnett's distinction between democratic and republican constitutions. Under the democratic constitution, courts will (at most) protect individuals from concrete violations of specifically protected rights (such as free speech). Generally speaking, minorities will lose:

> True, *Bailey v. Alabama* and *Buchanan v. Worley* can be considered outliers during a period in which the civil rights of blacks were being trampled. Nevertheless, they reveal that a general across-the-board stance of skepticism toward restrictions of liberty can help an "out group" *before* it is politically powerful or appealing enough to demand special judicial protection. In contrast, a Thayerian-Holmesian across-the-board formal rule of deference to legislative majorities *guarantees that challenges by outgroups will fail*, as did Myra Bradwell's and Homer Plessy's.[16]

Under the republican constitution, courts will inquire further into the legislature's power to act and the legitimacy of

For several decades, no doubt in response to the rather expansive jurisprudence of the Warren Court, quite a few conservative theorists embraced Thayer's approach. Thayer's judicial minimalism was popular among conservative critics of the Warren Court's expansive approach to judicial review; set against a Supreme Court willing to enter into political thickets that earlier courts had feared to part, it seemed appealingly humble.

the interests the legislature is advancing.

That, of course, is a highly relevant question for today's constitutional theorists on the right. For several decades, no doubt in response to the rather expansive jurisprudence of the Warren Court, quite a few conservative theorists embraced Thayer's approach. Thayer's judicial minimalism was popular among conservative critics of the Warren Court's expansive approach to judicial review; set against a Supreme Court willing to enter into political thickets that earlier courts had feared to part, it seemed appealingly humble.

Conservative Thayerism probably reached its peak — on the Court at least — with Chief Justice John Roberts' opinion in *NFIB v. Sebelius.*[17] In terms echoing Thayer, Roberts wrote:

> Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation's elected leaders. "Proper respect for a coordinate branch of the government" requires that we strike down an Act of Congress only if "the lack of constitutional authority to pass [the] act in question is clearly demonstrated." Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. *It is not our job to protect the people from the consequences of their political choices.*[18]

Yet, however understandable Thayerism might be as a reaction to the enthusiasms of the Warren Court, it is rather unsatisfactory as a judicial philosophy. When judges "defer" rather than doing their jobs, liberty suffers. *Plessy*, after all, is hardly a high-water mark for the Court. (Neither, for that matter, is *Sebelius*.)

If we are to have a written constitution that serves to limit the actions of the legislature, the executive, and state governments — a notion that, for some reason or another, seems to have become more popular since the 2016 elections — then that constitution must have a clear meaning and be enforced reliably by the third branch. Viewed from that perspective — and that is very much Barnett's perspective — such "deference" looks a lot more like buck-passing, if not outright cowardice. There's nothing about deference in Article III, after all.

As Barnett notes, scholars and justices in the Thayer/*Plessy* era made a telling shift, from talking about the "duty" —

however reluctantly performed — of courts to strike down unconstitutional legislation, to talking about the "power" of courts to do so. This shift transformed failure to police governmental overreach (previously a failure to perform a duty, and thus a dereliction) into a decision not to exercise a power, which could thus be characterized as an admirable act of self-restraint, rather than a refusal to perform.

But it is not "restraint" to ignore one's core function. And that brings us to Barnett's message. The way to "securing the liberty and sovereignty of We the People," as his subtitle puts it, is essentially for courts to grow more aggressive — or less timid and lazy — about policing the boundaries of federal and state power. As Barnett writes:

- Increasingly, people are recognizing that under the separation of powers, judges too are servants of the people;
- As our servants, their most important responsibility is assessing the constitutionality of measures enacted by the more "popular" branches; [and]
- No longer should the servants or agents of the people who are designated "legislators" be the exclusive judge of the scope of their own powers.[19]

But how do we get there? In part, says Barnett, through education. Voters need to understand our constitutional heritage. But more directly, we need to select judges who will not be afraid to do their jobs.

This isn't easy. Chief Justice Roberts was a shining star of the Federalist Society, but when he faced one of the greatest legislative power-grabs of all time, he blinked. Faced with a bullying op-ed campaign by supporters of ObamaCare, he switched position, and bent over backwards to sustain the Affordable Care Act mandate on the rather flimsy ground that it was a tax, not a penalty.[20]

If we are to maintain the republican constitution, we will need justices who are made of sterner stuff. After all, if the Court is to stand up to the political branches when they overreach, it will need to be able to withstand political assaults, since that is where the political branches' power and expertise lie. Do such potential justices exist?

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Well, yes. I find it hard to imagine Barnett, for example, succumbing to pundits' bullying or to the "Greenhouse Effect."[21] But if we want our Supreme Court justices to be made of sterner stuff than we have seen lately, perhaps we need to look somewhere other than where we've been looking lately.

Traditionally, the Supreme Court contained many former politicians (like Justice Robert Jackson, Chief Justice Earl Warren, or, for that matter, Chief Justice John Marshall). More recently, however, the Supreme Court has been entirely made up of Ivy Leaguers, mostly with backgrounds in academia or the appellate courts. (Every justice graduated from Harvard or Yale except for Ruth Bader Ginsburg, who got her law degree from that scrappy Ivy League upstart, Columbia University.) As Dahlia Lithwick recently wrote, "Eight once sat on a federal appellate court; five have done stints as full-time law school professors. There is not a single justice 'from the heartland,' as Clarence Thomas has complained. There are no war veterans (like John Paul Stevens), former Cabinet officials (like Robert Jackson), or capital defense attorneys. The Supreme Court that decided *Brown v. Board of Education* had five members who had served in elected office. The Roberts Court has none. What we have instead are nine perfect judicial thoroughbreds who have spent their entire adulthoods on the same lofty, narrow trajectory."[22] Such people may be admirable, but are they able to stand up against ruling-class groupthink? To the (limited) extent that they are, it is in spite of their backgrounds, rather than because of them.

Beyond the Supreme Court, of course, the ultimate check on governmental overreach — though one that has, so far, been entirely notional — is a Constitutional amending convention precipitated by "We the People." The amendments proposed by such a convention, if ratified by three quarters of the states, could restore a less majoritarian, more "small-r" republican constitution.

There is room for doubt here. If our first Constitution did not restrain judges and legislatures, why would a new one do better? Simply by emphasis? (On the 200th anniversary of the Bill of Rights, I entered an amendment contest by proposing that the Ninth Amendment be altered by adding "And we really mean it!")

Of course, the value of the sword of Damocles is that it hangs, not that it falls. A credible threat of such a convention, or the existence of such a convention with proposed amendments circulating among state legislatures, would probably have a salutary effect.

In the end, however, we will keep neither a republican constitution nor a democratic one unless the electorate as a whole wants it. If the public understands the Constitution as a powerful check on political overreach and a protection for freedom and civil society, then no special measures will be required. If the public fails to understand the Constitution, and sees the Supreme Court as essentially just another political branch, then the Constitution will cease to matter much. I leave it as an exercise for the reader to determine where we stand now.

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[1] Tweet from Alex Griswold, February 22, 2016, 10:56 a.m. "The Washington Post's new slogan is almost as good as George Lucas dialogue. Reflect on that." Available at https://twitter.com/HashtagGriswold/status/834431665678200832.

[2] Randy E. Barnett, Our Republican Constitution: Securing the Liberty and Sovereignty of We the People (2016).

[3] *See, e.g., Letter of Thomas Jefferson to John Norvell* (June 11, 1807), https://www.loc.gov/resource/mtj1.038_0592_0594/?sp=2&st=text. "To your request of my opinion of the manner in which a newspaper should be conducted, so as to be most useful, I should answer, "by restraining it to true facts & sound principles only." Yet I fear such a paper would find few subscribers. It is a melancholy truth, that a suppression of the press could not more compleatly deprive the nation of it's benefits, than is done by it's abandoned prostitution to falsehood. Nothing can now be believed which is seen in a newspaper. Truth itself becomes suspicious by being put into that polluted vehicle. The real extent of this state of misinformation is known only to those who are in situations to confront facts within their knowledge with the lies of the day. I really look with commiseration over the great body of my fellow citizens, who, reading newspapers, live & die in the belief, that they have known something of what has been passing in the world in their time." Available at https://www.loc.gov/resource/mtj1.038_0592_0594/?sp=2&st=text.

[4] As Barnett notes, "Modern-day Republicans can be just as opportunistic about republicanism as Democrats are about democracy." Barnett, *supra* note 2 at 221. And vice versa, I'd say.

[5] *Id.* at 19.

[6] *Buchanan v. Warley*, 245 U.S. 60 (1917).

[7] Barnett, *supra note 2 at 141.*

[8] *Id.* at 142.

[9] *Bailey v. Alabama*, 219 U.S. 219 (1911).

[10] Barnett, *supra* note 2 at 139–140.

[11] *Lochner v. New York, 198 U.S. 45 (1905).*

[12] Barnett, *supra* note 2 at 138.

[13] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[14] *Bradwell v. Illinois*, 83 U.S. 130 (1873).

[15] Barnett, *supra* note 2 at 128–29.

[16] *Id.* at 144.

[17] *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S.Ct. 2566 (2012).

[18] 132 S.Ct. at 2579 (2012) (emphasis added). *See also* Glenn H. Reynolds & Brannon P. Denning, *National Federation of Independent Business v. Sebelius: Five Takes,* 40 Hastings Const. L.Q. 824–28 (2013). ("Roberts comes from a generation of Federalist Society members who were heavily exposed to such theories of judicial restraint, via thinkers such as Robert Bork and Alexander Bickel. It seems quite likely that the echo of Thayer in his opinion was entirely conscious and intentional.")

[19] Barnett, *supra* note 2 at 249.

[20] *See* Reynolds & Denning, *supra* note 13 at 819–822. ("The opinion's odd construction, and the curious refusal of the dissenters to sign on to the Commerce Clause portion of the Chief Justice's opinion, among other things, suggested some last minute, behind-the-scenes maneuvering. On cue, the opinion's release was immediately followed by a flood of stories that the Chief Justice had changed his vote after initially siding with conservatives to strike it down. Moreover, the story broken by Jan Crawford alleged Roberts did so in response to the mounting pressure on the Court to uphold the Act. The allegations outraged conservatives and contributed to the debate over the meaning of the recent decline in the Court's public approval ratings.")

[21] The reference is to the powerful effect that coverage by *The New York Times'* Supreme Court reporter, Linda Greenhouse, had in moving conservative justices toward liberal views. Greenhouse has retired, but the term has lived on to reference the general ability of a left-leaning press to exercise influence on (at least initially) right-leaning justices.

[22] Dahlia Lithwick, *Yale, Harvard, Yale, Harvard, Yale, Harvard, Harvard, Harvard, Columbia*, The New Republic, Nov. 13, 2014, https://newrepublic.com/article/120173/2014-supreme-court-ivy-league-clan-disconnected-reality.

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