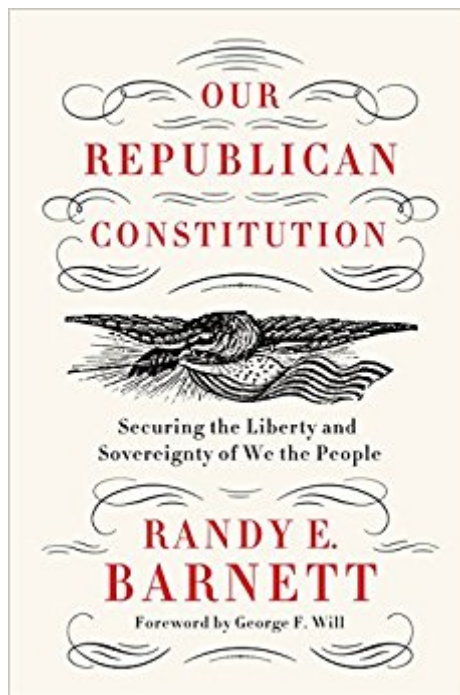




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# **Our Republican Constitution: Securing The Liberty And Sovereignty Of We The People**



## Synopsis

A concise history of the long struggle between two fundamentally opposing constitutional traditions, from one of the nation's leading constitutional scholars—a manifesto for renewing our constitutional republic. The Constitution of the United States begins with the words: “We the People.” But from the earliest days of the American republic, there have been two competing notions of “the People,” which lead to two very different visions of the Constitution. Those who view “We the People” collectively think popular sovereignty resides in the people as a group, which leads them to favor a “democratic” constitution that allows the “will of the people” to be expressed by majority rule. In contrast, those who think popular sovereignty resides in the people as individuals contend that a “republican” constitution is needed to secure the pre-existing inalienable rights of “We the People,” each and every one, against abuses by the majority. In *Our Republican Constitution*, renowned legal scholar Randy E. Barnett tells the fascinating story of how this debate arose shortly after the Revolution, leading to the adoption of a new and innovative “republican” constitution; and how the struggle over slavery led to its completion by a newly formed Republican Party. Yet soon thereafter, progressive academics and activists urged the courts to remake our Republican Constitution into a democratic one by ignoring key passages of its text. Eventually, the courts complied. Drawing from his deep knowledge of constitutional law and history, as well as his experience litigating on behalf of medical marijuana and against Obamacare, Barnett explains why “We the People” would greatly benefit from the renewal of our Republican Constitution, and how this can be accomplished in the courts and the political arena.

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## Customer Reviews

“Liberty is an old story and every generation has found advocates to retell it. Randy Barnett offers a succinct, informed, and compelling version of one of the best such stories.” (Claremont Review of Books)

“Barnett has a gift for the clear exposition of complicated ideas, and curious, intelligent, but non-expert readers will learn much about the battle for the soul of the Constitution from this book.” (the Washington Free Beacon)

“Our Republican Constitution is simultaneously intellectually rigorous and a real page-turner, filled with dramatic anecdotes that illustrate Barnett’s powerful and provocative argument that routine deference to elected legislators is the wrong way to interpret the Constitution or create a rich and flourishing society.” (Reason.com)

Barnett is not only one of the most important constitutional scholars of our time, but he advocates brilliantly for the restoration of our Republic by embracing our Constitution and defending individual sovereignty. This is a very important book for constitutional conservatives and all Americans who love liberty and the country. (Mark R. Levin, lawyer, radio host and author of *Plunder and Deceit* and *The Liberty Amendments*.)

“You don’t have to be in agreement with Randy Barnett to respect his scholarship, enjoy his writing, and learn from his arguments. But--trigger warning!-- after reading this book, I predict you’ll find yourself more persuaded than you expected to be of the urgent case for reclaiming our Republican Constitution.” (William Kristol, Editor, *The Weekly Standard*)

Randy Barnett is one of the country’s most important and creative constitutional thinkers. In *Our Republican Constitution* he revives and restates the natural rights tradition in American constitutional thought, explaining why our system of government is based on respect for the individual sovereignty of each and every one of us. (Jack M. Balkin, Yale Law School)

The nation’s leading libertarian legal scholar tells the riveting story of the long struggle between two fundamentally opposing constitutional traditions and explains that beneath every passionate debate between conservatives and liberals lies a deep disagreement about our founding document. Americans today are deeply divided—politically, ideologically, and culturally. Some of us live in blue states and watch CNN; others live in red states and watch Fox News. Some Americans want more government, others less. We engage in passionate debate over issues like

gun control, health care, same-sex marriage, immigration, and the war on terrorism. But above all, says renowned legal scholar Randy E. Barnett, we are in fundamental disagreement about the Constitution. From the early days of the American republic, the nature of government “of the people, by the people, for the people” has been disputed. This is because there are not one but two very different notions of “We the People” and popular sovereignty, which yield competing schools of constitutional thought. The democrats view We the People collectively and think popular sovereignty resides in the people as a group. They view the Constitution as a living document and contend that today’s majority should not be governed by the dead hand of past majorities. The republicans view We the People as a collection of individuals. Their vision of government is that it should not reflect the will of the majority but rather secure the preexisting rights of each and every person to life, liberty, and the pursuit of happiness. This fundamental disagreement lies at the heart of our current national divide. In *Our Republican Constitution*, Barnett tells the fascinating story of how this conflict arose shortly after the Revolution, leading to the adoption of a new and innovative republican constitution; and how the struggle and eventual victory over slavery led to its improvement by a newly formed Republican Party. Yet soon after, progressive academics and activists urged the courts to remake it into a democratic constitution by ignoring key passages of its text. And eventually the courts complied. Luckily, this debate is far from over. Drawing from his deep knowledge of constitutional law and history—as well as his experience litigating on behalf of medical marijuana and against Obamacare—Barnett explains why We the People would benefit greatly from the renewal of our Republican Constitution, and how this can be accomplished in the courts and political arena.

**Advance Praise For *Our Republican Constitution***

“Georgetown law professor Randy Barnett is a rarity in academia. He is not only one of the most important constitutional scholars of our time, but a brilliant advocate for the restoration of our republic by embracing the Constitution and defending individual sovereignty. This is a very important book for constitutional conservatives and all Americans who love liberty and country.” —Mark R. Levin, lawyer, radio host, and author of *Plunder and Deceit* and *The Liberty Amendments*

“You don’t have to be in agreement with Randy Barnett to respect his scholarship, enjoy his writing, and learn from his arguments. But—trigger warning!—after reading this book, I predict you’ll find yourself more persuaded than you expected to be of the urgent case for reclaiming our Republican Constitution.” —William Kristol, editor of *The Weekly Standard*

“Randy Barnett is one of the country’s most important and creative constitutional thinkers. In *Our Republican Constitution*, he revives and restates the natural rights

tradition in American constitutional thought for our time, explaining why our system of government is based on the primacy of rights and respect for the individual sovereignty of each and every one of us. — Jack M. Balkin, Yale Law School — “Randy Barnett has given us the book that will help every American develop a greater understanding of the Constitution. But Barnett does so much more than help us recall our constitutional heritage and the power of the courts to protect the rights of the people; he also points to a path forward for constitutional conservatives. This is essential reading for anyone interested in the future of our Constitution, from one of the most insightful constitutional scholars and political philosophers of his generation, and one of the leaders in our shared effort to restore the Constitution’s commitment to individual liberty.” — MIKE LEE, U.S. SENATOR FOR UTAH

Despite the title, Randy Barnett’s *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People* has almost nothing to do with Republicans or Democrats. Actually, in this tale, neither political party covers themselves in glory. Similarly, it has very little to do with liberals or conservatives, except that both groups are often guilty of alternately embracing or rejecting constitutional principles as a means to their desired ends. Instead, the book is an examination of the fundamental duality of *We the People* — Do the Constitution and our political systems reflect the will of the people collectively, a majoritarian view, or do they fundamentally reflect the rights and sovereignty of people as individuals, a libertarian view? Does the Constitution merely provide a vehicle for minimally impeded majority rule, which may run roughshod over the rights of the individuals who happen to be in the minority, or does it require and empower the government to protect the rights of the individuals? Does Robert Bork’s dismissive statement *“Being at the mercy of legislative majorities”* is merely another way of describing the basic American plan: representative democracy — accurately reflect the reality of the American political system, or does Princeton Political Scientist Stephen Macedo more accurately characterize it in his rejoinder that , “When conservatives like Bork treat rights as islands surrounded by a sea of government powers, they precisely reverse the view of the Founders as enshrined in the Constitution, wherein government powers are limited and specified and rendered as islands surrounded by a sea of individual rights.” Barnett, a professor at Georgetown, is probably the leading libertarian legal scholar alive today, so it is not hard to guess which side he comes out on. He played a lead role in both *Gonzales v Raich* (home grown medical marijuana) and *NFIB v Sebelius* (Obamacare mandate) making him technically 0 for 2 before the Supreme Court. He compellingly argues in the first chapter

of the book that *NFIB v Sebelius* was a partial victory - the court soundly rejected the administration's constitutional argument, but Chief Justice Roberts conjured an amalgam of judicial deference and logical contortionism to nonetheless declare Obamacare constitutional. (Raich was just disappointingly bizarre| an example of this is your jurisprudence on drugs) The book then proceeds to take a lively tour through the Declaration of Independence, the Constitution and the antecedents to both - a soupcon of Locke, a pinch of Hobbes, a dash of Rousseau etc. Once the constitutional framework was in place, the book looks at how it was interpreted. Not surprisingly, during the history of the American Republic, whoever held the majority at a given time tended to take a dismissive view of the limitations imposed by the Constitution. Sometimes the courts were an effective counterbalance for the legislature and the executive, sometimes the judiciary bent over backwards to rubber stamp the other two branches attempts to expand their powers. The book spends quite a bit of time in the late 19th and early 20th centuries, when a progressive majority, enamored of the potential for government to remake society if only the courts would get out of the way, found common ground with legal scholars and judges such as Thayer and Oliver Wendell Holmes who advocated for judicial deference. The progressive era has been given a bit of a free pass by historians, and this book is a bit of a corrective - in particular one appreciates how intertwined Jim Crow and progressivism were and how little progressives cared about protecting the rights of the minority. By the end of the chapter, I found myself lamenting Princeton's decision to retain Woodrow Wilson's name on its School of International Affairs and regretting that Teddy Roosevelt wasn't replaced on Mount Rushmore by a more worthy president, i.e. pretty much any of the others. So, in sum, the book is an enjoyable read, provides a good and generally even-handed overview of the topic, and is certainly thought provoking. Now for the negatives| The semantic construction of a Republican Constitution vs a Democratic Constitution may or may not be accurate, but it is a terrible idea for a book aimed at a popular audience. The reader finds himself continually confused about whether Barnett is talking about republican principles or Republican principles, and indeed the capitalization sometimes seems random. It's like when economists use jargon like "rent seeker" or social scientists use terms like "significant" - the popular connotations of the terms are inconsistent with the technical meanings and muddle the message. The second problem is that the book starts with a thesis about two competing views, but then veers into discussions about the decline of

federalism and the rise of the administrative state. Both of these discussions are insightful, but they don't really link back to the two views thesis - they are really more about the natural decay of democratic institutions. While they are undoubtedly strong arguments for fidelity to the constitution and against judicial deference, they would fit better if the thesis had appeared to anticipate their inclusion. Finally, I found Barnett's final chapter of proposed solutions to be somewhat of a non-sequitur - it felt like a previously composed political wishlist that wasn't fully foreshadowed by his analysis of the problem. Then again, I read the book in one sitting, so what I perceive as editorial deference may be political science fatigue. But my frustration that this wasn't a better or more compelling book should not overshadow the fact that this is nonetheless a good and useful book that will provoke your thoughts and expand your knowledge. I recommend it.

I read this immediately after finishing Barnett's previous book, "Restoring the Lost Constitution." There's a lot of overlap, but it served as a nice "refresher course" of that longer, denser work. It emphasizes two things that RTLC hit on rather lightly: (1) how the structure of the Constitution is intended to protect the rights of the individual against the will of the majority, and (2) the role that judges play in upholding this priority of individual rights over "majority will." A host of accumulated, judge-made legal doctrines and presumptions act together to cause today's judges to shirk this responsibility. Indeed, the citizen whose rights are violated by a law passed either by Congress or a state (or by an administrative rule) is a virtual David versus Goliath when challenging the enactment in court, because the scales have been tipped in advance so far in favor of the government. I particularly liked the metaphor of an ocean liner. It's designed not to sink, but there are lifeboats just in case. If you're needing to use the lifeboats, well, it's good that they're there, but you're already in trouble. So it is with the Constitution. The overall structure *should* have been enough to vigorously protect individual rights against governmental intrusion, but the Bill of Rights added later provided the lifeboats, just in case that failed. Because of how judges generally--and the Supreme Court specifically--have misread and misapplied the fundamental principles of the Constitution, we've lost the great structural protections, and we're in the lifeboats, with only the text of a few specifically enumerated rights to protect us. (Barnett doesn't say this, but I'd even add that the lifeboats have holes in them, when the courts can shrug and authorize things like mass surveillance of our communications, allegedly for our own protection.) I filled my Kindle edition with highlighting. My two favorites both come from near the end of the book: "Crucially, the 'due process of law' requires that the magistrate or judge hearing such a challenge be impartial. If

the judge hearing a challenge simply "presumes" that the legislature is acting properly, or "defers" to the legislature's own assessment of its powers, then that judge is not acting impartially. Even worse, if the "presumption" in favor of legislation is irrebuttable, then the person dressed in a black robe is not acting as a judge at all." "The only "living constitution" is one that is followed; a constitution whose text is ignored is a dead one."

Another very clear and concise presentation of the failure of the Government to uphold the principles of the American Revolution and the Constitution. More importantly it presents a method (Article 5/US Constitution) whereby the People can reclaim their Rights from the State. The book leaves much unsaid in this area; however, there are many other groups the reader may find online who support a Convention of States under Article 5 of the Constitution. I believe this 2nd American Revolution is the only way to restore our Liberties and Freedom from a Government who views the People of the United States as its "Property" to be controlled and managed from birth until death.

This book provides an excellent tutorial on the meaning of the philosophies that the USA was founded upon. It also provides a history on how Progressives perverted those ideas and tried to establish a tyranny of the majority. Finally, the author details a method to restore the rights that "We the People" each and every one are born with.

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