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Written by **Steve Byas** on June 6, 2016

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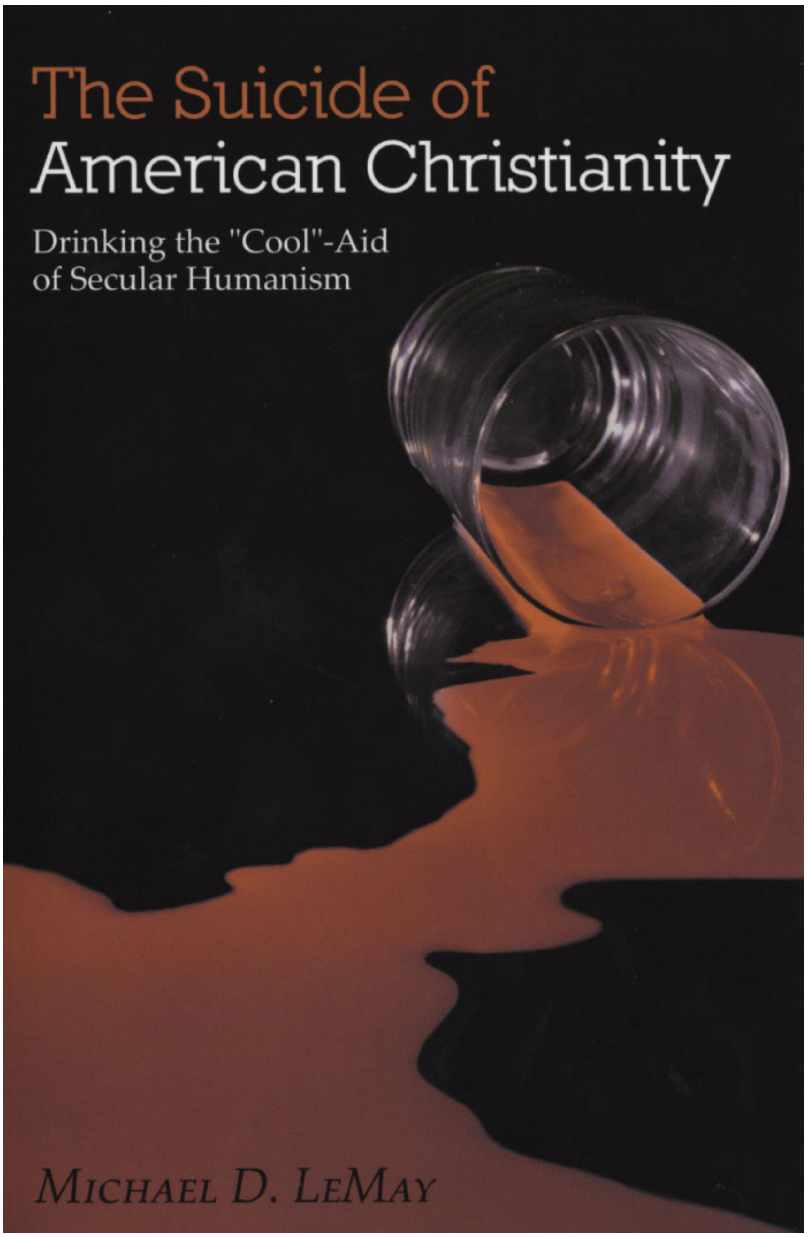
Securing the Blessings of Liberty



Our Republican Constitution: Securing the Liberty and Sovereignty of We the People, by Randy Barnett, Northampton, Massachusetts: Broadside Books, 2016, 320 pages, hardcover.

"The only living constitution is one that is followed; a constitution whose text is ignored is a dead one." With that, Georgetown constitutional law professor Randy Barnett challenges the dogma of those who argue that the U.S. Constitution should allow ever-increasing grants of power to government officials, and the contraction of our liberties.

Barnett was the attorney for the National Federation of Independent Business (NFIB) in its Supreme Court challenge to the constitutionality of ObamaCare. Although then-House Speaker Nancy Pelosi cackled, "Is that a serious question?" when someone asked her about the constitutionality of the Affordable Care Act, the NFIB's challenge almost succeeded, losing 5-4. And it would have succeeded had the chief justice, John Roberts, not adopted the position of judicial deference to the legislative branch of the federal government.

"I do not favor judicial activism," Barnett told *Reason* magazine. "But I do favor what's called 'judicial engagement,' which means that judges should not be passive and should not be upholding laws that are unconstitutional." The heart of Barnett's book is that the modern acceptance by "conservatives" that judges should exercise "judicial restraint," and defer to the right of Congress to enact any law it wishes, is the major reason the case of *NFIB v. Sebelius* was lost. Barnett argues that many conservatives miss the point of the role of

the judiciary: If judges such as Chief Justice John Roberts would respect the Constitution more so than they do the will of Congress, ObamaCare should have been declared unconstitutional. Barnett explains that the Constitution states that "all legislative power *herein granted*" is all the law-making power Congress has, yet federal judges are reluctant to hold Congress to within the bounds of the Constitution.

The government's argument in its defense of ObamaCare was predicated on the idea that, under the Commerce Clause, Congress was granted the power to mandate the purchase of private health insurance. A majority of the court, led by Roberts, rejected that idea. "The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause. That clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it."

Roberts added, "Congress could address the diet problem by ordering everyone to buy vegetables.… Accepting the Government's theory would give Congress the same license to regulate what we do not do."

Despite rightly holding the individual mandate unconstitutional under the Commerce Clause, Roberts saved the law by changing the statute so it was no longer an unconstitutional mandate. He rewrote the law in the name of "deference" to Congress, by interpreting the mandate as a tax. "Granting the Act *the full measure of deference* owed to federal statutes, it can be so read," Roberts opined.

Roberts defended his action by saying it was not the court's "job to protect the people from the consequences of their political choices."

Thus ObamaCare was upheld as constitutional, not under an expansion of the Commerce Clause, but because "the chickens of the conservative commitment to judicial restraint had come home to roost.… As Chief Justice Roberts' ruling shows, we also need to debate *the proper role of judges* in enforcing that meaning."

In his present book, Barnett posits that there are two "divergent visions" of the Constitution — the "Democratic Constitution" and the "Republican Constitution." He is quick to add that he does not use the terms in a partisan way. He contends that those who favor a Democratic Constitution view "We the People" as a group, as a body, as a collective entity, and those who favor the Republican Constitution view "We the People" as individuals. For those who side with the Democratic Constitution concept, the role of the Constitution is primarily to make sure the will of the majority prevails. Those who take the Republican Constitution side see the "people" mentioned in the Constitution as referring to individuals, not a collective.

According to Barnett, under a Republican Constitution (which is what the Framers intended), our inalienable rights preceded the formation of governments, "so first come rights and then comes government." And because of that, the Constitution is the law that governs those that govern us. Citing the Declaration of Independence, Barnett contends that it is quite clear that the Founding Fathers saw the purpose of government as to secure liberty. "But read carefully," Barnett notes, "one sees that in

this passage the Declaration speaks of 'just powers,' suggesting that only *some* powers are 'justly' held by government, while others are beyond its proper authority."

Because of this, Barnett argues, "Under a Republican Constitution, a completely different picture of judges emerges. Like legislators, judges too are servants of the people, and their primary duty is to adhere to the law of the Constitution above any statute enacted by Congress."

After making the case that the Framers founded a republic, and not a democracy, citing James Madison, Benjamin Franklin, and others, Barnett applies this to the *duty* of judges. In *The Federalist*, No. 78, Alexander Hamilton explained that "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." Hamilton argued that this was the "duty" of the courts. Barnett noted that nowhere in *The Federalist*, No. 78 did Hamilton speak of a "*power* of judicial review." Instead, Barnett said, Hamilton referred to "courts of justice, whose *duty* it must be to declare all acts contrary to the manifest tenor of the Constitution void," adding that Hamilton used the word *duty*, but not power, five times.

In the famous case of *Marbury v. Madison*, known as the case that supposedly established the Supreme Court power of judicial review, Chief Justice John Marshall used Hamilton's argument from *The Federalist*, No. 78 in favor of judicial nullification of unconstitutional laws, but Barnett said Marshall never used the expression "power of judicial review," instead employing the term duty. Duty means the *duty* to follow the dictates of the Constitution, rather than the power to subvert it. And that duty comes from judges taking an oath to uphold the Constitution of the United States. They do not take an oath to uphold the actions of either Congress or the executive branch. The expression "the power of judicial review" is a modern one, and not used by the Founders, or even by Marshall himself.

The assumption that "first come rights and then comes government," in Barnett's words, "pervades the document." To prove this point, he points to the Ninth Amendment, where it is explicit: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Since the Framers used the word *retained*, Barnett concludes that it is quite clear that rights preceded the adoption of any enumeration or listing of rights, "whether in the original Constitution or in any of its later amendments." And, since the enumerated rights such as freedom of speech and the free exercise of religion are clearly individual rights, one can surmise that the "other" unenumerated rights belong to individuals, too. This, of course, would pertain to the right of *the people* to keep and bear arms as being a retained *individual* right.

Barnett insists that it was progressives who sold us on the idea of "judicial restraint" and "deference" to the majoritarian branches, along with the concept of a living constitution. In practice, what has happened is that each branch defers to the other branches in allowing the expansion of government and contraction of liberty. According to Barnett, this is what he calls "double deference." The judge defers to the legislative branch, and the legislator does not worry about a proposed statute's constitutionality because the courts will decide that. (And presidents often defer to the courts and Congress when it comes to the expansion of government power. One might recall when President George W. Bush said he thought the McCain-Feingold bill, limiting political speech, was unconstitutional, but he was going to sign it anyway and let the courts decide. Then, of course, the courts deferred to Congress and the president.)

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Woodrow Wilson told his students at Wesleyan University that the Constitution "was not merely a document written down on paper but is a living and organic thing," leading him as president to appoint progressive judges inclined to uphold laws that expanded the power of government at the expense of individual liberty. Indeed, Wilson favored "England's form of government instead of the miserable delusion of a republic. A republic too founded upon the notion of abstract liberty!"

This was the progressive conception of government Wilson and his ilk promoted.

Barnett's book would be a valuable addition to the library of any person who favors constitutional liberty. Unfortunately, he pushes for a "Convention of the States," arguing for "structural" changes to the Constitution that would be "self-enforcing, rather than substantive ones that require judicial enforcement." This push mars an otherwise fine book. Such a convention might very well make changes to our Constitution that would be detrimental to individual liberty. After all, few Madisons could be expected to attend any such modern convention.

But, if one can overlook those two pages out of a 261-page book, this is a book well worth reading.

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